

FIDUCIARIES IN A COMMERCIAL CONTEXT

by

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Abstract

At present the law of fiduciary obligations is at a crossroads in Canada. An expansionist approach advocates recourse to this doctrine whenever a remedy is desired. The opposing argument, which perceives the fiduciary obligation in a traditional way, suggests that the fiduciary relationship is only the highest in a series of ever increasing standards of honesty required between parties. A brief examination of these contending positions will lead to the important question of permitting this equitable doctrine to operate within the parameters of a commercial context.

The courts have traditionally been reluctant to extend general equitable doctrines into the commercial world. The underlying reasons for this disinclination will be sought. If any of these reasons are found to contain any justifiable concerns, alternatives to the total exclusion of the fiduciary relationship will be sought.

The methodology for this thesis is clear; it is the close analytical examination of cases to decide in which direction the law should develop and what have been the points of departure for this area of law. This emphasis upon the past and future of the law of fiduciaries within the commercial context must be complemented with a detailed examination of the present Australian and Canadian legal positions. Particular attention must be paid to any test

suggested by the recent caselaw for the determination of the presence of a fiduciary relationship.

Finally the various remedies available to the court upon the determination that a fiduciary duty has been breached needs to be examined, as the various remedies which may be ordered can have differing consequences, particularly upon third parties, especially when the fiduciary relationship is within a commercial context.

Table of Contents

Abstract	ii
Table of Contents	iv
CHAPTER I	
INTRODUCTION	1
1. Introduction	1
2. The Fiduciary Concept	2
3. The Function of the Fiduciary Obligation	8
CHAPTER II	
THE EXTENSION OF FIDUCIARY OBLIGATIONS INTO A COMMERCIAL SETTING	16
1. Introduction	16
2. Recent Caselaw Involving the Application of Fiduciary Principles to a Commercial Environment	25
3. Conclusion	101
CHAPTER III	
THE DEVELOPMENT OF AN AUSTRALIAN COMMERCIAL OPPORTUNITY DOCTRINE	103
1. Introduction	103
2. Authority for an Australian Commercial Opportunity Doctrine	107
a. Introduction	107
b. Rule against Misappropriation of Assets	108
c. The Conflict Rule	110
d. The Profit Rule	116
e. Fulfillment of the Commercial Opportunity Doctrine	139
f. Conclusion	142
3. Scope of the Proposed Doctrine	144
a. Introduction	144
b. What Businesses Would be Covered by the Doctrine?	145
c. Who Is a Commercial Fiduciary?	151
4. Defences	155
a. Introduction	155
b. Resignation	156
c. Inability to Take the Opportunity and No Damage Suffered	158
d. Ratification	163
5. Conclusion	166

CHAPTER IV	
REMEDIES FOR A BREACH OF A	
FIDUCIARY OBLIGATION IN A COMMERCIAL CONTEXT	
	168
1.	Introduction
	168
2.	Quantification of the Gain of the Defaulting
	Fiduciary.
	170
3.	Remedies
	186
a.	Introduction
	186
b.	Types of Remedies
	190
4.	Conclusion
	209
CHAPTER V	
CONCLUSION	
	212
BIBLIOGRAPHY	
	215
TABLE OF CASES	
	220

Chapter I

Introduction

1. Introduction.

Referring to the law of fiduciary obligations Sir Anthony Mason, Chief Justice of the High Court of Australia, recently stated that

"... this rich ore body has been almost fully explored"¹

If this statement means that the fiduciary law concept is settled, then it is arguably accurate in terms of the Australian jurisdiction. But, it is certainly inaccurate in the Canadian context, where the struggle to determine the essence of the fiduciary obligation is an ongoing one. The great modern theme of the law, the movement from "contract to status," reversing Sir Henry Maine's famous dictum,² is reflected in the law pertaining to the fiduciary obligation. One particular battleground within this general area is that of the relevance of the fiduciary rubric to the commercial environment. It is to this question that this thesis will direct its attention.

¹"Foreword" (1989) 12 UNSWLJ 1 at 1.

²see Friedmann Law in a Changing Society 2nd Edition (New York: Columbia University Press, 1972) at pp.119-20 and 498.

2. The Fiduciary Concept

It is essential to commence an examination of the appropriateness of the fiduciary obligation to commercial relationships by grasping what is meant by the term fiduciary. Within the parameters of the commercial sphere it is doubly important to define the term fiduciary because the traditional categories of fiduciaries, such as trustee-beneficiary and solicitor-client, do not contain the novel and often sui generis relationships constantly being spawned by the commercial world.

Generally, a fiduciary is a person who must put another's interests above or equal to his or her own. Unfortunately, uncertainty pervades the entire area of the law of fiduciaries. As Sir Anthony Mason has stated;

"The fiduciary relationship is a concept in search of a principle."³

This lack of a unifying principle, tying together the law of fiduciaries, was expressly recognized by Professor Paul Finn in his seminal work Fiduciary Obligations,⁴ in which he concluded that there was no central pivotal concept, but a collection of unrelated rules, linked only by the generic title of fiduciary obligations.⁵ This open-endedness of

³"Themes and Prospects" in Essays in Equity ed. by P.Finn (Sydney: Law Book Co. 1985).

⁴(Sydney: The Law Book Co. 1977).

⁵Ibid pp.1-2.

the fiduciary concept has been explicitly recognized by the courts⁶ and by academics.⁷ Shepherd explains this difficulty in locating the key notion by pointing to historical problems, the diverse range of social relationships to which the law of fiduciaries has been applied and the varied content of the duty imposed once the fiduciary relationship has been identified.⁸ However, these difficulties have not prevented persons from attempting to isolate the common element of fiduciary relationships.

A Canadian writer, Shepherd, has argued⁹ that the fiduciary principle is property-based. He states that

"A fiduciary relationship exists whenever any person acquires a power of any type on condition that he also receives with it a duty to exercise that power in the best interests of another, and the recipient of the power exercises that power."¹⁰

The author describes this as the theory of encumbered power. The power, which may be a legal power, such as a power of

⁶for example, Canadian Aero Services Ltd. v. O'Malley (1984) 40 DLR (3d) 371 at 383, Tufton v. Sporni [1952] 2 TLR 516 at 522, English v. Dedham Vale Properties [1978] 1 All ER 382 at 392.

⁷for example, Goff and Jones The Law of Restitution 3rd Edition, (London: Sweet and Maxwell, 1989) at 632-634.

⁸Law of Fiduciaries (Toronto: Carswell, 1981) at p.7.

⁹Ibid and "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 LQR 51.

¹⁰Supra Note 8 at 96.

appointment, or a practical power, is not simply analogous to, but actually is, property. The transferee, or recipient, is the legal owner and the transferor the beneficial owner. However, this approach by Shepherd has been convincingly criticised by Lehane,¹¹ and Finn¹² and Weinberg¹³ because of the somewhat bizarre notion of property that it is forced to utilize.

Vinter has pinpointed the unifying notion as undue influence,¹⁴ but it is open to serious question whether this approach can adequately deal with cases where the fiduciary acts without any interaction with the beneficiary and without any detriment to what person. Gareth Jones in an influential article¹⁵ advanced the argument that the notion of unjust enrichment is at the centre of the fiduciary principle. The obvious difficulty with this is that it is circular in reasoning. A person is not permitted to retain a gain that he or she has made from a particular transaction because he or she is a fiduciary, and the reason why he or she is a fiduciary is because it would be unjust

¹¹"Book Reviews" UNSWLJ 7 (1984) 396.

¹²Supra Note 4 at 131-132.

¹³"The Fiduciary Obligation" (1975) 25 U. of T L.J. 1 at 11.

¹⁴A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts 3rd Ed. (London: Butterworths, 1955).

¹⁵"Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 L.Q. Rev. 472.

for that person to retain that gain. Another approach has been suggested by Flannigan.¹⁶ He defines a fiduciary as one who has, or is assumed to have, access to the assets of a trusting party. However, as Chief Justice Gibbs pointed out in Hospital Products Ltd v. United States Surgical Corporation¹⁷ subjective trust is not a necessary ingredient in traditional category cases.

Certainly one of the most popular and recent nominations for the underlying principle of the fiduciary obligation has been the notion of vulnerability. This concept was given judicial force recently when it was articulated by Madame Justice Wilson in Frame v. Smith,¹⁸ and this was subsequently endorsed in LAC Minerals Ltd v. International Corona Resources Ltd.¹⁹ Wilson J. held that

" (1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."²⁰

¹⁶"The Fiduciary Obligation" (1989) 9 OJLS 285.

¹⁷(1984) 55 ALR 417 at 433.

¹⁸(1988) 42 DLR (4th) 81 at 99.

¹⁹(1989) 61 DLR (4th) 14.

²⁰Supra Note 18 at 99.

In the Supreme Court of Canada's decision in LAC Minerals the majority²¹ held that

"It is possible for a fiduciary relationship to be found through not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.

The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability."²²

However tempting this may at first glance seem to be, on reflection, on its own vulnerability is inadequate to catch all the traditional relationships designated as fiduciary. Of even greater concern is that if vulnerability is the sole criterion many relationships not considered to be fiduciary will be so designated. An obvious example is a mortgagee when he or she is exercising the power of sale under the mortgage. The mortgagor is clearly vulnerable to the mortgagee but this relationship has never been characterized as fiduciary. Another illustration of the inadequacy of the vulnerability approach is the relationship between professor and student. The student is tremendously vulnerable to the professor's actions but, once again, this relationship has never been considered as fiduciary in nature. Although vulnerability of itself does not create a

²¹Sopinka, Lamer and McIntyre J.J.

²²Supra Note 19 at 63.

fiduciary relationship it is one of the two constituent elements of the fundamental principle that underlies the fiduciary principle.

Professor Finn in two recent articles²³ convincingly argues that the second hallmark of a fiduciary relationship, the first being vulnerability, is that the relationship entitles the purported beneficiary to expect that that capacity should be utilized only in the beneficiary's interest, or, rarely, in their joint interests.²⁴ This entitlement arises from one of two sources; first, the legal character of a relationship and the respective roles of each party to it²⁵ or, secondly, the factual matrix of the relationship, whose elements such as trust, confidence, influence and dependence are present.

By the application of this two fold approach the decided cases on fiduciary law are included. Additionally, it maintains the accuracy of Dickson J.'s (as he then was) statement in Guerin v. The Queen where his Lordship held that

²³"The Fiduciary Principle" in Equity, Fiduciaries and Trusts Ed. by T. Youdan (Toronto Carswell, 1989) and "Good Faith, Fair Dealing and Fiduciary Law in Canada" in Fiduciary Obligations - materials prepared for the Continuing Legal Education Society of B.C. April 1989.

²⁴as is the case in a partnership.

²⁵this is analogous to the categories approach, that is, certain categories of relationships, for example, trustee-beneficiary and solicitor-client, are presumptively fiduciary.

"It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed."²⁶

3. The Function of the Fiduciary Obligation

"I listen to the evidence and if I figure one of the parties was taken advantage of, I look for means to redress the wrong ... and this fiduciary thing gives a lot of scope."²⁷

These observations clearly highlight a recent tendency in fiduciary law: the utilization of the fiduciary obligation in factual situations that would not have been expected to have been appropriate to examine by application of the fiduciary principle. Indeed, McCamus in his recent article on the expansion of the fiduciary obligation²⁸ begins by looking at three novel situations which were

²⁶(1984) 13 DLR (4th) 321.

²⁷cited by J.L. McDougall in "The New Fiduciary Duty", paper to the CBA (Ontario), March 1989 quoted by Finn in "Good Faith, Fair Dealing and Fiduciary Law in Canada" Supra Note 23 at 2.1.05.

²⁸"The Recent Expansion of Fiduciary Obligation" (1987) 23 ETR 301.

analysed by using the fiduciary concept,²⁹ then asks how many members of the legal profession would have initially perceived the case in fiduciary terms, and concludes by saying that the fiduciary concept is being relied upon in a greater range of cases than would have previously been thought proper. Frankel in his current exposition on the law of fiduciaries has a sub-chapter heading titled "Fiduciary Law and Social Change."³⁰ The obvious question is what is driving this expansion of the territory of the fiduciary obligation? The answer to this is historical in nature and is wider than simply fiduciary law. Equity, as a whole, is undergoing a substantial revision. This revision manifests itself in fiduciary law.

Professor Waters succinctly states that

"The historic justification for the Chancellor's intervention in the work of the common law courts was to assist the process in the procurement of fairness and justice in the individual case."³¹

In this way the Court of Equity could fulfill its role as the court of conscience. During the period of the reign of

²⁹the cases are Szarfer v. Chodos (1986) 54 OR (2d) 663; 27 DLR (4th) 388 (Ont. H.C.), International Corona Resources Ltd v. LAC Minerals 25 DLR (4th) 504 (Ont. H.C.) and Standard Investments Ltd. v. CIBC 5 DLR (4th) 452 (Ont. H.C.).

³⁰in "Fiduciary Law" (1983) 71 Cal. L.R. 795 at 802.

³¹(1990) 69 Can. Bar Rev. 455 at 479; see also Meagher, Gummow and Lehane. Equity 2nd Edition (Sydney: Butterworths, 1984) Ch 1; Pettit Equity and the Law of Trusts 6th Edition (London: Butterworths, 1989) Ch.1.

the Tudors and Stuarts down to 1873 four Lord Chancellors, Lord Nottingham (1673-82), Lord Hardwicke (1736-56), Lord Thurlow (1778-83; 1783-92) and most famously Lord Eldon (1801-06; 1807-27) encouraged the systematization of equity.³² During this period equity developed rules. In an approximate way equity came to resemble the common law as the rules became more important than the equitable doctrines which underlay them. However, this rigidity has been challenged.³³

Professor Finn argues convincingly that there has been an increased push for the legal system generally to reflect reasonable community stands. Thus, the central question to be asked, according to Lambert J.A. in Harry v. Kreutzinger is whether

"... a transaction is sufficiently divergent from community standards of commercial morality that it should be rescinded."³⁴

This new moral imperative, referred to by Finn as "good faith and fair dealing" has manifested itself in estoppel,³⁵ catching bargains,³⁶ unconscionable dealing³⁷

³²see Meagher Gummow and Lehane Ibid pp.7-9; Pettit Ibid at pp.4-5.

³³Stone and Rossiter "The Chancellor's New Shoe" (1988) 11 UNSWLJ 11.

³⁴(1978) 9 BCLR 166 at 177.

³⁵eg. Waltons Store v. Maher (1989) 164 CLR 387.

and the appropriateness of the constructive trust.³⁸ These representative cases are loaded with moral statements, and it is this newly enunciated morality that explains the new principles of each case. The law of fiduciary obligations has been likewise altered by this new morality. This current morality manifests itself in the fiduciary law, as the above quote from the Ontario judge indicates, by utilizing this doctrine to fill areas where it is perceived that a certain result is desirable in the name of justice but no appropriate doctrine exists to generate that desired outcome. The fiduciary obligation is therefore introduced to achieve that result. An example of this tendency, according to Professor Waters³⁹ and Professor Finn,⁴⁰ was the decision of the Supreme Court of Ontario in Standard Investment Ltd v. CIBC.⁴¹

³⁶eg. Commercial Bank of Australia Ltd v. Amadio (1983) 46 ALR 402, and see generally Cope "Review of Unconscionable Bargains in Equity" (1983) 57 ALJ 279.

³⁷eg. Dusik v. Newton (1985) 62 BCLR 1; Doan v. Insurance Corporation of British Columbia (1987) 18 BCLR (2d) 286.

³⁸eg. Baumgartner v. Baumgartner (1989) 164 CLR 251.

³⁹"LAC Minerals Ltd. v. International Corona Resources Ltd." (1990) 69 Can. Bar Rev. 455 at 469.

⁴⁰"Good Faith, Fair Dealing and Fiduciary Law in Canada" in Fiduciary Obligations - materials prepared for the Continuing Legal Education Society of B.C. April 1989 at 2.1.01.

⁴¹(1985) 22 DLR (4th) 410.

The result of this tendency is that the law of fiduciary obligations is used as an ever-available gateway through which passage means reaching the rich array of remedies available on the breach of a fiduciary duty. This broad and sweeping approach is favoured in some Canadian provinces, particularly Ontario,⁴² but certainly is not universally approved of. The courts in British Columbia have been particularly reluctant to accept this all-embracing approach to the fiduciary obligation. In Burns v. Kelly Peters & Associates Lambert J.A., in dissent, pointed out that often the motive for adopting this new approach was for the small investor to pass along a loss to a financial consultant, and this being analogous to the "deep pocket" notion in tort law.⁴³ Likewise in Litwin Construction (1973) Ltd v. Kiss⁴⁴ the British Columbia Court of Appeal implicitly rejected this broad approach by adopting the graduated scale of standards of extra honesty propounded by Finn. The learned author perceives extra-honesty obligations as falling into four categories.⁴⁵ Superior to the basic obligation of due care and simple honesty there is the condemnation of unconscionable behaviour in contract,

⁴²eg. the decision in L/C (1987) 44 DLR 592 (Ont C.A.).

⁴³see Friedmann Supra Note 2 Chapter "Tort and Insurance".

⁴⁴(1988) 29 BCLR (2nd) 88.

⁴⁵Supra Note 23.

the next step up is of good faith and fair dealing - which Waters suggests is the true step for the enforcement of reasonable expectations in contract and serious negotiations, uberrima fides is the penultimate step, and finally there is the fiduciary duty. By its acceptance of this graduated approach the Court of Appeal in Litwin maintained a restrictive utilization of the fiduciary obligation. Macdonald J. in Revell v. O'Brian Financial Corporation⁴⁶ also accepted this narrow approach. In Trimac Ltd v. C.I.L. Inc.,⁴⁷ the Alberta Supreme Court also accepted the graduated steps notion of the fiduciary obligation.

At this base of Finn's graduated steps thesis is an attempt to prevent the debasement of the fiduciary obligation, which would cause it to become an empty shell which would be available whenever a judge wanted a particular result but could not perceive any legal doctrine to achieve that result. Fundamentally, for Professor Finn the fiduciary obligation is "inappropriate, as a rule, to enforce fair dealing."⁴⁸

Thus, we are confronted by conflicting positions, the expansionist approach best represented by the Ontario Court of Appeal and the restrictive stance to the nature of the

⁴⁶(1989) 30 BCLR 330.

⁴⁷(1990) 99 AR 30 at 55.

⁴⁸Supra Note 40 at 2.1.05.

fiduciary obligation, as represented by the British Columbia Court of Appeal. The Supreme Court of Canada did not definitely decide this matter when it had the opportunity in LAC Minerals Ltd v. International Corona⁴⁹ and so the choice remains open. On balance the restrictive approach appears preferable. This is for two reasons. First, to employ the term fiduciary merely to obtain a remedy debases those areas that are already covered by that name. By the expansion of the range of the title the substance of the doctrine is diluted. If the expansion continued the various graduations of extra-honesty would disappear. One purpose, to make remedies available, is served by the approach, but another purpose, to require certain persons to act in an exceptionally selfless way, is defeated. And this introduces the second reason favouring the maintenance of the traditional approach and that is the availability of another doctrine which will permit the purpose of making available a remedy to be attained without the destruction of the traditional notions of fiduciary law and this is the unconscionability principle.⁵⁰

⁴⁹(1989) 61 DLR (4th) 14.

⁵⁰Supra Note 40 at 2.1.01; Black "Baumgartner v. Baumgartner, The Constructive Trust and the Expanding Scope of Unconscionability" (1983) 11 UNSWLJ 117; Mason "Themes and Prospects" in Essays in Equity Edited by Finn supra Note 3; Austin "The Melting Down of the Remedial Trust" (1988) 11 UNSWLJ 66.

Following on from this conclusion that is desirable to maintain the fiduciary obligation as the highest degree of selfless conduct that can be required of a person this thesis will examine how this traditional formulation of the fiduciary relationship impacts upon the commercial world, and where necessary it will make suggestions towards both a more principled and pragmatic approach to this issue.

Chapter II
The Extension of Fiduciary Obligations
Into A Commercial Setting

1. Introduction

The applicability of equity to the commercial world has always been controversial. Bramwell L.J. in New Zealand & Australian Land Co v. Watson¹ stated

"Now, I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions, and an agent in a commercial case turned into a trustee with all the troubles that attend that relation."

Lindley L.J. held in Manchester Trust v. Furness.² that

"as regards the extension of the equitable doctrines ... to commercial transactions, the courts have always set their faces resolutely against it."³

Finally, in the seminal decision of Barnes v. Addy⁴ Lord Selborne L.C. found that

"It is equally important to maintain the doctrine of trusts which is established in this court, and

¹(1881) 7 QBD 374.

²[1895] 2 QB 539.

³Ibid. at p.545.

⁴(1874) 9 Ch App 244.

not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them."⁵

These judicial pronouncements which clearly indicate a definite reluctance to extent equitable doctrines generally, and in particular the equitable doctrine of the fiduciary relationship, can still be heard. Indeed, it is a central tenet of this thesis that this basic desire to prevent the spread of the fiduciary relationship into the commercial sphere underlies many of the recent judicial decisions dealing with this matter. It is therefore imperative, in determining whether the fiduciary relationship may be found to exist within a commercial environment, to examine and consider critically the reasons for this judicial reluctance.⁶

Although the reluctance is often shrouded in rhetoric and the expression of vague fears, the criticism of the expansion of equitable doctrines can be divided into several distinct arguments. The first is identified by Professor

⁵Ibid at 251.

⁶This reluctance is not simply limited to the judiciary. Of late academic writers have been critical of this expansion; for example, McCamus "The Recent Expansion of Fiduciary Obligation" (1987) 23 ETR 301; Klinck "The Rise of the 'Remedial' Fiduciary Relationship: A Comment on International Corona Resources Ltd v. LAC Minerals Ltd" (1988) 33 McGill L.J. 600

Austin.⁷ The argument is contained in a monograph by Dr. L.S. Sealy called Company Law and Commercial Reality.⁸ The contention that Dr. Sealy makes against the increased role of equity deals with the legal personal qualities that he perceives in the advocates and judges who are literate in the doctrines of equity. This shall be labelled the personnel argument. The Sealy book lays the responsibility for the present convoluted state of English company law squarely at the feet of Chancery judges. Dr. Sealy states

"Now in the 1880's, when the judges of the chancery courts were not dealing with partnerships and companies, they were handling questions to do with trusts and settlements, deceased estates, conveyances of real property, mortgages and leases and deeds. Nobody would claim that the approach of these judges to their cases in those days was brisk; even after the worse excesses immortalized by Dickens in Bleak House had been eliminated by much-needed reforms, chancery matters were dealt with thoroughly, cautiously and elaborately. And our chancery judges today are still very much concerned with trusts and settlements, with deeds and conveyances, with rights and interests in land; all of it a world away from the cut and thrust of commerce and the risks and rapid fluctuations of the market place."⁹

The fundamental thrust of this is that equity lawyers and judges are inappropriate to deal with commercial matters.

⁷"Commerce and Equity-Fiduciary Duty and Constructive Trust" (1986) 6 OJLS 444.

⁸(London: Sweet & Maxwell Centre for Commercial Law Studies, 1984). See review of this book in (1986) 11 Can Bus L.J. 493.

⁹Ibid. at p.37.

This personnel argument, as embodied by Dr. Sealy's statement, is flawed on two grounds. First, as Professor Austin implicitly indicates the above quotation from Dr. Sealy is a dangerous oversimplification. The reason for this is that it is difficult, if not impossible, to pinpoint any development in company law that did not involve judges with Common Law backgrounds. There exists no branch of this area of law that is not partly the creature of Common Law judges.

The other flaw in the personnel argument is related to a questionable contention made by Dr. Sealy. That contention is that equity lawyers are somehow quarantined from the commercial world and so do not understand its nature nor its necessity for speed. It should be noted that whilst this argument deals with equity practitioners generally it is equally applicable to Chancery or Equity division judges who are drawn from these very ranks. This notion that equity lawyers are not familiar with the business world must, with the greatest respect to the learned author, be considered wrong. As a consequence of the successful intrusion of equity into commerce, by the introduction of such equitable notions as floating charges, trading trusts and equitable mortgages, members of the equity bar have an excellent exposure to the financial world. Indeed, the equity bar and the commercial bar are

often almost co-extensive in jurisdictions where separate bars even exist.

As a final note on the personnel argument it is of interest that Dr. Sealy's chief criticism of the intrusion of equity personnel into a commercial sphere, apart from their alleged inexperience, is that the Chancery judges dealt with, and continue to deal with cases "thoroughly, cautiously and elaborately." The learned author, by implication, criticizes these qualities. But does not the legal world, as well as the population at large, expect judges to be thorough, cautious and elaborate? Of course there are situations where the utmost speed is called for. An application for an interlocutory injunction is a clear example of this. It is interesting to note that the injunction is an equitable remedy and must often be sought from judges with an equity background. However, within the fabric of the judicial structure the thorough, cautious and elaborate approach is the norm and is applied by judges regardless of their legal background. The expedited matter stands as an exception to this, but the judicial figures who are involved in it attempt, as far as possible, to be thorough, cautious and elaborate.

Thus, Dr. Sealy's points pertaining to both approach and experience of the chancery personnel may be seen, with all due respect, to be empty and the personnel argument does not provide substantial support to the proposition that

equitable doctrines, such as the fiduciary relationship, should not be extended to the commercial sphere.

A second argument against the extension of the doctrines designated as equitable in nature is identified by Kennedy J.¹⁰ This is the demand by business for certainty. This criticism is premised upon two factors. The first is the inherent flexibility of equity. The second factor is the unstated assumption that common law doctrine is itself certain. Mr. Justice Kennedy indicates¹¹ why this first factor cannot be considered to be completely accurate. Equity has, over the centuries, undergone a process of systematization. From the time of Lord Eldon equity shed its ex tempore characteristics and developed a body of principles, similar to the common law rules.¹² Therefore, equity is not as uncertain as it is often depicted. However, it must be admitted that equity is the manifestation of discretion and as such this can produce uncertainty. This is most apparent in the field of fiduciaries operating within the business structure of their beneficiary. The classic example of this is the company director. For this reason a highly certain fiduciary

¹⁰"Equity in a Commercial Context" in Equity and Commercial Relationships Edited by Finn (Sydney: The Law Book Company 1987).

¹¹Ibid Note 10 at pp.5-8.

¹²see Meagher Gummow and Lehane Equity: Doctrines and Remedies 2nd Edition (Sydney: Butterworths, 1984) at p.7.

obligation is proposed for these commercial fiduciaries. This doctrine, called the Commercial Opportunity Doctrine, is dealt with in a succeeding chapter.

Mr. Justice Kennedy¹³ next explicitly attacks the notion that the Common Law is the guarantor of certainty. His Honour indicates that it is possible to alleviate or avoid various bargains by resort to common law doctrines. Such actions must be considered to generate uncertainty. The ways that the common law may be utilized to alleviate or avoid commercial expectations include the examination of the reality of the consent, often by application of concept of economic duress, by the implication of a term into a contract and by the application of various rules of construction such as *contra proferentem*. Whilst it is obvious that the intervention of Common Law doctrines is rare in comparison to the numerous appearances of the equitable concepts the Common Law does generate some uncertainty. Indeed, any legal system which does not want to be labelled monolithic and arbitrary must permit some degree of flexibility and hence uncertainty. This uncertainty (which it is contended not to be as great as many persons of the world of commerce portray it) is the price of possessing a legal system which attempts to achieve the goal of justice. The undesirability of complete certainty, with its attendant inflexibility, and the

¹³Supra Note 10 at p.5.

necessity of discretionary equitable doctrines was shown by Lord Ellersmere in the Earl of Oxford's Case. His Lordship held

"The Cause of why there is a Chancery is, for that Mens Actions are divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances."¹⁴

A final argument against the introduction of equitable doctrines into the business environment is that such doctrines are necessarily complex and hence interrupt the smooth flow of commerce.¹⁵ Unquestionably concepts such as the Romalpa clause¹⁶ do introduce difficult and complex notions. However, what must be remembered is that equitable notions have played a fundamental role in the development and operation of commercial life. Everyday business dealings are the products of equity. These include the floating charge¹⁷ and the equitable mortgage. Further, it must be remembered that prior to 1844 equity provided a basis for large scale business ventures to be established by the creation of unincorporated companies by deeds of

¹⁴(1615) 1 Chan. Rep. 1 at 6-7; 21 ER 485 at 486.

¹⁵see Kennedy note 10 at p.8.

¹⁶see Aluminium Industrie Vaassen BV v. Romalpa [1976] 1 WLR 676.

¹⁷see Gough "The Floating Charge: Traditional Themes and New Directions" in Equity and Commercial Relationships Edited by Finn (Sydney: Law Book Company, 1987).

settlement made between the various shareholders and a trustee or trustees. Thus, the argument that equitable doctrines should not be permitted into the realm of the commercial world can be turned on its ear to show just how vital the operation of equity has been to the world of commerce.

All in all the arguments against extending equitable doctrines generally, and the fiduciary relationship in particular, are less than convincing. The correct approach would appear to be to permit the fiduciary relationship to function within the parameters of the commercial environment but to delineate clearly the remedies available in particular the remedies which are proprietary in nature. The explanation for this is simple, proprietary remedies have the most severe and extreme consequences, and as such are the most disruptive to business.¹⁸ The most obvious remedy of this nature is the constructive trust. This two-pronged approach, of permitting the existence of the fiduciary relationship but specifying and narrowing the remedies available, was that advocated by Mason J. (as he then was) in the Hospital Products case.¹⁹ However, as will become obvious the arguments against extending the

¹⁸Goodhart and Jones in "The Infiltration of Equitable Doctrine into English Commercial Law" (1980) 43 Mod LR 489 criticize strongly remedies which have proprietary consequences.

¹⁹Hospital Products Ltd v. United States Surgical Corporation (1984) 156 CLR 41.

fiduciary relationship into the world of business have received a warm reception from some judges both in Canada and in Australia. This will be shown by close examinations of several major recent decisions. In regards to the resistance of the extension of equitable doctrines, including the fiduciary relationship, to commercial matters the words of Sir Frederick Pollock still ring true:

"Reading the majority judgements [in Re Wait [1927] 1 Ch 606], a modern equity lawyer cannot but feel that he is walking in a shadow of archaic superstition. Old-fashioned common law pleaders, on the principle of omne ignatum pro nigromatico, deemed all equitable notions a kind of unholy juggling, to be tolerated at need, but if possible discouraged. Their Chancery rivals rather liked a screen of mystery and were at no pains to undeceive them. Selden, indeed, might plausibly call equity a roguish thing when the Chancellor's court had no settled rules and the Chancellor or Lord Keeper was not sure to be impartial or even learned. It was left for Blackstone to explain at some length that such terms were not applicable to the systematic equity doctrine of the 18th century."²⁰

2. Recent Caselaw Involving the Application of Fiduciary Principles to a Commercial Environment

In the early 1980's Australian courts examined the role of fiduciary duties operating within a commercial context. Canadian courts, drawing largely upon the Australian decisions, have likewise turned their attention towards this question.

²⁰"Notes" (1927) 43 LQR 293 at 295.

The first recent major discussion relating to the imposition of fiduciary duties within a commercial setting was the Hospital Products Ltd v. United States Surgical Corporation²¹ case. The facts here were relatively straightforward. Blackman (B) was appointed the exclusive distributor of the USSC products in Australia. As B purchased the products from USSC it was not an agency. Part of the distributor contract was oral. B established his business as distributor. By novation Hospital Products International (HPI), which B controlled, took over the distributorship. During this time B and HPI were secretly "reverse engineering" to copy USSC's products. By misleading USSC's Australian customers he directed much business away from USSC products towards his own. The distributorship was terminated but by this time HPI had a large business, founded upon the custom of one-time USSC clients. HPI was then taken over by Hospital Products Ltd. USSC sought damages for breach of contract, and also proprietary remedies for breach of fiduciary duty.

At first instance McLelland J. held that HPI owed a limited fiduciary duty and could be held accountable on a "head start" approach for the profits which it would not have made had it started a competing business after the termination of the distributorship.

²¹(1984) 58 ALJR 587.

The New South Wales Court of Appeal held that HPI owed a more extensive fiduciary duty. There was a duty to run the entire distributorship business in the joint interests of itself and USSC. The court based this duty on its finding of fact. The Court held:

"But we must repeat that it was fundamental to B's attempt on the Australian distributorship, which as springboard and cover was vital to his plan, that it should persuade USSC to provide for more than any other distributor could furnish. He was putting into the scale not only specialist experience and technique that were, in effect, unmatched but also the benefits to be derived from an association that had already engendered not only business understanding but trust and confidence as well. He was therefore offering not only commercial thrust and acumen but protection too; and thus a deal whose key-note was mutuality."

A further finding of fact made by the Court of Appeal was that the distributorship contract was not a conventional contract. This finding was based upon the fact that the contract gave the distributor much freedom to consult its own interests.²² The New South Wales court held²³ that a mere power to affect the interests of another does not give rise to a fiduciary duty. For that to occur, according to the court, there must be a "representative" element, which arises when

²²Lehane in "Fiduciaries in a Commercial Context" at p.100 in Equity and Commercial Relationships Ed. by Finn (Sydney: Law Book Co., 1987) disagrees that this was not conventional in an exclusive distributorship contract.

²³[1983] 2 NSWLR 157 at 207.

"a person has undertaken to act in the interests of another and not in his own"²⁴

The court then held

"These aspects of Blackman's offer found expression in the provisions of the agreement in the express terms by which Blackman promised to work for the common benefit and not to deal in competitive products, and in the implied terms by which he bound himself not to do anything inimical to USSC's market in Australia. All these terms were designed to protect USSC's opportunity to sell in this country and imposed restrictions upon Blackman's freedom of decision."²⁵

With this finding of fact the New South Wales Court of Appeal held that there was a fiduciary relationship.

The importance of the Court of Appeal's analysis is that it determined that a fiduciary relationship will exist where a person has undertaken to act in the interests of another and not in his or her own. Fundamentally, it is this concept of an undertaking that formed the pivot of the court's construction of a relationship possessing the stamp of the equitable doctrine. Basically, no undertaking means no fiduciary relationship. Further, the undertaking manifests itself in the "representative" elements. In the appeal to the High Court Chief Justice Gibbs effectively destroyed this "undertaking" approach to the determination of the existence of a fiduciary relationship.

²⁴[1983] 2 NSWLR 157 at 208.

²⁵Ibid. at 208-209.

The remedy decreed by the Court of Appeal was that HPI was a constructive trustee of all of its business assets because its gain from misusing its fiduciary position was its whole business. To achieve this sweeping result the court returned to elementary principles. The bench held that a defaulting fiduciary is liable for all of the gain that he or she obtained by the breach. By and large this interpretation of the underlying motivation of the remedy accorded with that of McLelland J. at first instance. Where the trial judge and the Court of Appeal differed was in their views of what constituted the gain that Hospital Products International had secured by its unfaithfulness to the beneficiary. McLelland J. found that the gain consisted of the "headstart" that the defendant achieved by utilizing its fiduciary position to catapult itself into the Australian market. The Court of Appeal rejected this limited finding of fact. It held that not just a "headstart" has been obtained by its breach, but the gain to the defaulting fiduciary was the entire manufacturing and retailing operation. Without the fiduciary relationship there would have been no commercial entity known as Hospital Products International. Thus, the court awarded a far-reaching constructive trust. The importance of the New South Wales Court of Appeal's decision largely is dependent upon this breath-taking remedy, but, in reality, it was merely the embodiment of the basic principle of fiduciary

liability. From an academic point of view the true interest of the judgement revolved around the characterisation of the fiduciary relationship as being premised upon the notion of an undertaking. The appeal to the High Court was therefore of great interest.

The High Court of Australia, by a majority,²⁶ ordered that relief be limited to damages for breach of contract. This remedy sprang from their Honours' finding that there was no fiduciary duty. Mason J. dissenting, found a limited fiduciary duty and the remedy that this entailed was that of the trial judge. Deane J. held that USSC was entitled to equitable relief based on the particular circumstances of the case, but additionally held that no fiduciary relationship existed.²⁷

Professor Austin²⁸ finds general agreement in the High Court of Australia on four points pertaining to broad equitable principle. The first of these²⁹ is that there could be no universal, all-purpose definition of the fiduciary relationship.³⁰ It is, as Hodgekiss suggests,³¹

²⁶Gibbs C.J., Wilson and Dawson J.J.

²⁷Supra Note 21 at 620-21.

²⁸"Commerce and Equity-Fiduciary Duty and Constructive Trust" (1986) 6 OJLS 444 at 445.

²⁹Ibid at pp.445-446.

³⁰(1984) 55 ALR 417 at 432-3 per Gibbs CJ; 458 - 9 per Mason J., 488 per Dawson J.

³¹(1985) 59 ALJ 670 at 671.

a case by case approach advocated by the High Court. However, the High Court did deal with this matter at a level of abstraction higher than a case by case approach, by indicating that the facts before them involved an alleged breach of the conflict rule. Thus, the court approached the question of the existence of a fiduciary relationship by examining the conflict and profit rules. What the court decided in reference to this matter, therefore, should not automatically be applied to other rules connected to the fiduciary relationship.

The second area of general agreement³² is that within the confines of the conflict-profit area some general test could be stated. Gibbs C.J. considered the following as "not inappropriate in the circumstances":

"... there were two matters of importance in deciding when the court will recognize the existence of the relevant fiduciary duty. First, if one person is obliged, or undertakes, to act in relation to a particular matter in the interests of another and is entrusted with the power to affect those interests in a legal or practical sense, the situation is ... analogous to a trust. Secondly ... the reason for the principle lies in the special vulnerability of those whose interests are entrusted to the power of another to the abuse of that power."³³ [emphasis added]

If this suggested approach is compared to that adopted by the Court of Appeal it can be seen that the Chief Justice's

³²Supra Note 28 at 446.

³³Supra Note 30 at 432.

view is wider than that of the Court of Appeal. The NSW court required an undertaking for the creation of the fiduciary relationship. Gibbs C.J. perceived this as only one of the two possible ways to generate this relationship, the other is that the person is obliged to act for the benefit of the other. However, Mason J. adopted a stance similar to that of the Court of Appeal.

Mason J. formulated the test as

"... the fiduciary undertakes or agrees to act for or on behalf of or in the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."³⁴

It is difficult to decide if any statements regarding the basis of fiduciary obligations were made by Deane J. Dawson J. stressed the vulnerability aspect of a fiduciary relationship, but did not proffer a full test. His Honour held that

"It is usual - perhaps necessary - that in such a [fiduciary] relationship one party should repose substantial confidence in another in acting on his behalf or in his interest in some respect. But it is not in every case where that happens that there is a fiduciary relationship ... There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other

³⁴Supra Note 30 at 454.

and requires the protection of equity acting upon the conscience of that other."³⁵

Professor Austin argues³⁶ that the High Court of Australia is proposing the following test to determine whether B owes a fiduciary duty to A in an action for breach of the profit or conflict rules;

(i) B has undertaken to act in relation to a particular matter in the interests of A and not solely in his own interests; and

(ii) B has been entrusted with the power to affect A's interests in a legal or practical sense, so that A is in a position of vulnerability.

However, as has been earlier seen step (i) in this test was not all that was advocated by Gibbs C.J. Deane J. gave no real support to the exclusivity of the "undertaking" path to reach the core of this topic, vulnerability, and Dawson J. merely addressed the issue of vulnerability and did not discuss whether the vulnerability had to be the consequence of an undertaking. Reduced to its simplest then, there is Mason J. advancing the proposition that the necessary vulnerability must be the result of an undertaking, whilst the Chief Justice of Australia accepted this as one possible route, but provided an alternative, that being where the person is obliged to act in the interests of the others. In

³⁵Supra Note 30 at 454.

³⁶Supra Note 28 at 446.

reality there may be little difference between the Gibbs formulation and that of Mason J. However, the Gibbs' test is to be preferred as it is more precise in that often a person will not make an express undertaking to act in a fiduciary way but is obliged to because of the vulnerability that the beneficiary has been exposed to. The dominant flavour of the High Court's decision is the central importance of vulnerability, which was a critical shift of emphasis from that taken by the Court of Appeal. This focus upon vulnerability reappears in the LAC Minerals case.

Gibbs C.J. in his judgment also rejected another proposed approach to determining the existence of a fiduciary relationship. His Honour discussed whether it was a necessary element of the relationship that there exist subjective confidence. The Chief Justice dismissed this as an essential requirement by stating that

"... a trustee will stand in a fiduciary relationship to a beneficiary notwithstanding that the latter at no time reposed confidence in him, and on other hand an ordinary transaction for sale and purchase does not give rise to a fiduciary relationship simply because the purchaser trusted the vendor and the latter defrauded him."³⁷

One possible difficulty with the above two step "test"³⁸ is that the existence of a fiduciary relationship

³⁷Supra Note 30 at 433.

³⁸if the language of the Chief Justice, who refers to it as "not inappropriate in the circumstances", permits it to assume that title.

must depend on the breach alleged. This is the logical conclusion of the High Court declining the search for a universal all-purpose definition of what constitutes a fiduciary relationship. The test suggested here relates only to the conflict and profit rules. Thus, it would appear that the cause of the action must be framed prior to any determination of whether a fiduciary relationship existed. The approach would seem to portray the fiduciary relationship as remedial in nature. It is possible that the High Court has, largely unwittingly, established the ground for the argument that a fiduciary relationship must be found to exist only in relation to the breach alleged.

The above is one possible interpretation of the High Court's decision, another view is that all the High Court of Australia was attempting to do was to indicate that the fiduciary obligation is dependent upon the context in which it arises. On this view the judgement may be perceived as merely highlighting the fact that close attention must always be paid to the scope of the obligation. Thus, the fiduciary relationship is not "all or nothing", and this introduces the third point of general agreement.³⁹

This point is that a person may be in only a limited fiduciary relationship. The Chief Justice and Mason J.⁴⁰

³⁹Supra Note 28 at 446.

⁴⁰Supra Note 30 at 435, per Gibbs C.J.; and at 455 and 458, per Mason J.

both quoted the Privy Council decision in New Zealand Netherlands Society "Oranje" Incorporated v. Kuys⁴¹ where the Privy Council held that a person

"may be in a fiduciary position quoad a part of his activities and not quoad other parts."⁴²

Deane and Dawson J.J.⁴³ did not explicitly deal with whether a person may be a limited fiduciary but implicitly accepted the proposition by addressing an argument founded upon it.

The fourth of Professor Austin's generalizations⁴⁴ is premised upon a point dealt with only by Mason J. The learned author extrapolates the silences of the other members of the court to signify their agreement with the proposition. According to Mason J.⁴⁵ a relationship may be fiduciary in nature even though the fiduciary's duty is neither to exclude his personal interest entirely nor even to put the beneficiary's interest above his or her own. The duty may be to act in the fiduciary and beneficiary's joint interest. The example supporting this contention is that of a partnership.

⁴¹[1973] 1 WLR 1126.

⁴²Ibid. at 1130.

⁴³Supra Note 30 at 474, per Deane J.; and at 490, per Dawson J.

⁴⁴Supra Note 28 at 446-447.

⁴⁵Supra Note 30 at 456.

The High Court of Australia's decision in Hospital Products turned on the application of the first three generalizations of law to the specific facts of the case. The majority judges, Gibbs C.J., Wilson and Dawson J.J., perceived the facts as being that the only restriction on B's giving preference to his own interests was the contractual term of reasonableness, which was implied by the "best efforts" clause. Their Honours held there was no fiduciary obligation. Mason J. disagreed. His Honour found that the distributorship agreement gave B a substantial area of discretion in promoting USSC's Australian market. This discretion gave B a special opportunity to act to the detriment of that market. Mason J. held that the respondent, USSC, relied on B to protect and promote its Australian product good will.

The above findings of fact and their applicability to the law of fiduciaries were initially filtered through each judge's perception of the desirability of utilizing equitable doctrine within the commercial field. Wilson J. stated:

"In a commercial transaction of the kind under consideration, where the parties are dealing at arm's length and there is no credible suggestion of undue influence, I am reluctant to import a fiduciary obligation. The Courts have often expressed a cautionary note against the extension of equitable principles into the domain of

commercial relationships, so as not to strain [them] beyond [their] due and proper limits."⁴⁶

Dawson J. observed that

"To invoke the equitable remedies sought in this case would, in my view, be to distort the doctrine and weaken the principle upon which those realities are based. It would be to introduce confusion and uncertainty into the commercial dealings of those who occupy an equal bargaining position in place of the clear obligations which the law now improves upon them."⁴⁷

The judgments of Wilson and Dawson J.J. were manifestations of the traditional reluctance to extend equitable doctrines, in this case the doctrine of fiduciaries, to a commercial environment. Both judges explicitly acknowledged this reluctance. It is this declared aversion that coloured their Honours' approaches to the case before them. The judgment of Deane J. gave no support to any general proposition that fiduciary relationships cannot arise in commercial dealings, according to Lehane.⁴⁸

Mason J. takes an approach directly at odds with that assumed by Wilson and Dawson J.J. His Honour noted that

"... it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary régime as though in some way commercial transactions do not lend themselves to the creation of a relationship

⁴⁶Supra Note 30 at 470.

⁴⁷Supra Note 30 at 494.

⁴⁸Supra Note 22 at 103.

in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arm's length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship."⁴⁹

Mason J. went on to say

"The disadvantages of introducing equitable doctrine into the field of commerce, which may be less formidable than they were, now that the techniques of commerce are far more sophisticated, must be balanced against the need in appropriate cases to do justice by making available relief in specie through the constructive trust, the fiduciary relationship being a means to an end. If, in order to make relief in specie available in appropriate cases it is necessary to allow equitable doctrine to penetrate commercial transactions, then so be it: see for example, Barclays Bank Ltd v. Quistclose Investments Ltd [1970] AC 567 and Swiss Bank Corporation v. Lloyds Bank Ltd [1982] AC 584. A preferable approach to an artificial narrowing of the fiduciary relationship - the gateway to relief in specie - is to define and delimit more precisely the circumstances in which the remedy by way of constructive trust will be granted."⁵⁰

Mason J. adopted a tolerant stance towards the intrusion of equitable principles into a commercial environment. This position is endorsed as being both in accord with reality⁵¹ and doctrine, as the special

⁴⁹Supra Note 30. at 456.

⁵⁰Supra Note 30 at 457.

⁵¹Supra Note 31 at 671.

hallmarks of a fiduciary relationship may be present in a commercial relationship. Mason J. advocated taking a case involving an allegation of a fiduciary relationship in two stages; first, determine whether a fiduciary relationship does exist, and second, look to the appropriate remedy. Hodgekiss' statement⁵² commending the Mason approach is endorsed. The existence of a commercial transaction leading to a prohibition on the finding of a fiduciary relationship is a simplistic approach to a complex problem.

The next recent decision of the High Court of Australia relevant to the determination of whether a fiduciary relationship exists within a commercial context is United Dominions Corporation Ltd v. Brian Pty Ltd.⁵³ This case involved a joint venture, a commercial vehicle that reappeared in the LAC Minerals case.⁵⁴ In United Dominions three parties executed a "joint venture" agreement towards the end of July, 1974. The parties to this agreement were U.D.C., S.P.L. and Brian Pty Ltd. The joint venture related to the development of land. In October of 1973, after negotiations for the agreement had been completed but prior to the execution of any formal document, UDC took from SPL a

⁵²Supra Note 31 at 671.

⁵³(1985) 50 ALJR 676.

⁵⁴for a detailed analysis of the history of the law relating to joint ventures see the essay "Joint Ventures" by McPherson J. in Equity and Commercial Relationships Ed. by Finn ((Sydney: Law Book Co., 1987)).

mortgage over land that the joint venture was to develop. The money borrowed on this mortgage was to finance the venture. However, Brian was not aware of this mortgage and the joint venture agreement had required all borrowings be authorised only by the unanimous assent of the co-venturers. The mortgage also contained a "collateralization clause" which provided that the joint venture land was security for the repayment of any amounts advanced by UDC to SPL at any time and for any purpose. SPL was indebted to UDC in respect to other projects in which Brian had no interest at all. The land was developed and sold at a substantial profit. However, Brian received no money as UDC relied upon the "collateralization clause." Brian alleged that to the extent that the mortgage authorized UDC to retain the total joint venture profit, which would include Brian's share, the mortgage given by SPL and taken by UDC were in breach of a fiduciary duty owed by each of them to Brian.

The New South Wales Court of Appeal⁵⁵ upheld the appeal from Waddell J.'s judgment. The Court of Appeal⁵⁶ found that the mortgage, to the extent that it authorized UDC to retain Brian's share of the profit, was given by SPL and taken by UDC in breach of the fiduciary duty which each owned to Brian.

⁵⁵[1983] 1 NSWLR 490.

⁵⁶whose judgment preceded its own decision in the Hospital Products case.

Two members of the court held that participants in a joint venture have fiduciary obligations *inter se*.⁵⁷ Mahoney J.A. did not detail how such obligations arose, his Honour simply indicated that co-venturers did own such duties to each other and then proceeded to state that

"The question of difficulty in this case is not whether such obligations existed but the content of them and, in particular, the extent of the obligation upon UDC in its lending of money for the purposes of the joint venture."⁵⁸

With respect, this approach ignores the difficult question of how to determine the existence of a fiduciary relationship when it is not apparently one that is traditionally recognized as being fiduciary, and a joint venture has never been so recognized.

Mr. Justice Hutley⁵⁹ found that the joint venture produced fiduciary obligations analogous to those that partners at will have imposed upon them. His Honour seemed to support this conclusion by relying on the High Court of Australia's decision in Canny Gabriel Castle Jackson Advertising Pty Ltd v. Volume Sales (Finance) Pty Ltd.⁶⁰

⁵⁷Hutley, J.A. at 493 and Mahoney J.A. at 510.

⁵⁸Supra Note 53 at 510.

⁵⁹Supra Note 55 at 493.

⁶⁰(1974) 131 CLR 321.

Mr. Justice Samuels found also that a fiduciary relationship existed. His Honour did this by holding⁶¹ that joint venturers, whether or not they become partners at law, are in a fiduciary relationship. Samuels J.A. reached this conclusion by scrutinizing the historical development of the joint venture in the United States⁶² where some jurisdictions forbade corporations from becoming partners. This historical examination seemed to indicate that the American development of the joint venture, which then migrated overseas, was a de facto partnership.⁶³ At this point, Mr. Justice Samuels quoted⁶⁴ various cases and academic writers who contend that joint venturers owe a duty of good faith and loyalty. His Honour's conclusion was that:

"I am therefore of the opinion that joint venturers owe to one another the duty of utmost good faith due from every member of a partnership towards each other member."⁶⁵

⁶¹Supra Note 55 at 504 and 506-7.

⁶²Supra Note 55 at 505-506.

⁶³Ladbury in "Commentary" at p.37 in Equity and Commercial Relationships Edited by Finn Supra Note 4 argues that the typical joint venture is not fiduciary as the co-venturers carry on business severally and in common and they are not agents for each other.

⁶⁴Supra Note 55 at 506.

⁶⁵Supra Note 55 at 506.

It would appear that Samuels J.A. did not find that joint venturers were analogous to partners and therefore fiduciaries, but rather that they were in reality partners and hence fell under that traditionally category of fiduciary relationship.

The results that Hutley J.A. and Samuels J.A. reach are identical but the analyses which got them to that result differ. Hutley J.A. utilized analogy to create a new category of fiduciary relationship, whereas Samuels J.A. found that the joint venture was merely a de facto partnership.⁶⁶

The fact that the time the breaches of the fiduciary obligations took place was prior to the execution of the joint venture agreement posed no difficulty to the Court of Appeal. The court held that as the venture was well under way and the terms of the agreement reached when the mortgage was signed, the intending co-venturers owed each other fiduciary duties.

Professor Austin contends⁶⁷ that the approach of the New South Wales Court of Appeal was that the fiduciary relationship is a creature of set categories. If what is implied by this is that the court will not find a fiduciary

⁶⁶it should be noted that other reasons apart from various U.S. states prohibiting corporate partnerships assisted in the development of the joint venture. These other reasons include taxation and financing arrangements.

⁶⁷Supra Note 28 at 449.

relationship outside of the traditional categories, then the statement is obviously too wide. Certainly Samuels J.A. held that the relationship fell into a traditional category and did not need to consider whether it was fiduciary although not previously recognised as such. Hutley J.A. expressly created a new category of fiduciary relationship, that of the joint venture. His Honour achieved this by the use of analogy. Thus, of the two judges in the Court of Appeal who dealt with this question, one found the joint venture to be covered by the traditional category of partnership, whilst the other judge held that, by the use of analogy, a new category of fiduciary relations was created. Thus, a clear division in the characterisation of the joint venture was obvious in the New South Wales decision. The importance of this split is also obvious, as the Supreme Court of Canada had to address this issue in the IAC Minerals case. This highlights the importance of the High Court's decision in this case.

The High Court of Australia dismissed UDC's appeal. Gibbs C.J. held that the July 1974 agreement constituted a partnership between the parties. The Chief Justice found the joint venture involved here was used in

"the not uncommon sense of a partnership for one particular transaction."⁶⁸

⁶⁸(1985) 59 ALJR 676.

Gibbs C.J. alluded to the difficulties in defining the circumstances in which a fiduciary relationship will be held to exist and mentioned his judgment in the Hospital Products case.⁶⁹ The Chief Justice held that the in the circumstances before him

"a relationship between UDC and Brian based on mutual trust and confidence"⁷⁰

existed. Interestingly, these factors were held by Gibbs C.J. in Hospital Products not to be decisive of the question whether a fiduciary relationship existed or not. In United Dominions the Chief Justice held that an intending partner in the position of SPL in 1973 is subject to a duty of the utmost good faith. By this time the venture had already been embarked upon, and the execution of the agreement was a mere formality. Thus, the impact of the Gibbs approach in United Dominations upon the judgement he gave earlier in Hospital Products is unclear.

A joint majority judgment was given by Mason, Brennan and Deane J.J.⁷¹ McPherson J.⁷² correctly interprets the joint judgment as finding this relationship to be, in fact,

⁶⁹Supra Note 68 at 677.

⁷⁰Supra Note 68 at 678.

⁷¹the Chief Justice at 677 and Dawson J. at 681 agreed with the reasoning of the majority.

⁷²in "Joint Ventures" in Equity and Commercial Relationships Edited by Finn (Sydney: The Law Book Company, 1987).

a partnership and that Professor Austin's implication that the court applied some unspecified test to determine whether a fiduciary relationship outside of the traditional categories existed is inaccurate.⁷³

The joint judgement considered that "joint venture" was not a technical expression with a common law meaning. Their Honours held it was, rather, in everyday language used to connote a commercial undertaking aimed at the generation of profits for all the parties, which Mason, Brennan and Deane J.J. held

"will often be a partnership"⁷⁴

Their Honours then stated that

"If the joint venture takes the form of a partnership, the fact that it is confined to one joint undertaking as distinct from being a continuing relationship will not prevent the relationship between the joint venturers being a fiduciary one. In such a case, the joint ventures will be under fiduciary duties to one another, including fiduciary duties in relation to property the subject of the joint venture, which are the ordinary incidents of the partnership relationship, though these fiduciary duties will be moulded to the character of the particular relationship (see, generally, Birtchnell v. Equity Trustees, Executor's And Agency Co. Ltd. (1929) 42 CLR 384 at 407-91."⁷⁵

⁷³Supra Note 28 at 450.

⁷⁴Supra Note 68 at 679.

⁷⁵Supra Note 68 at 679.

Their Honours did not apply any general test to determine whether fiduciary obligations did exist; what the joint judgment did was to say that a joint venture is frequently a partnership, a partnership is fiduciary in nature, therefore to determine whether fiduciary obligations do exist, determine if a partnership exists. Mason, Brennan and Deane J.J. held that

"The most that can be said is that whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content or the obligations which the parties to it have undertaken."⁷⁶

In this way the majority avoided providing any guidance on how to determine the existence of a fiduciary relationship.

Their Honours rejected any general prohibition on prospective partners being fiduciaries.

"Indeed, in such circumstances, the mutual confidence and trust which underlie most consensual fiduciary relationships are likely to be more readily apparent than in the case where mutual rights and obligations have been expressly defined in some formal agreement. Likewise, the relationship between prospective partners or participants in a proposed partnership to carry out a single joint undertaking or endeavour will ordinarily be fiduciary if the prospective partners have reached an informal arrangement to assume such a relationship and have proceeded to take steps involved in its establishment or implementation."⁷⁷

⁷⁶Supra Note 68 at 679.

⁷⁷Supra Note 68 at 680.

Their Honours indicated that "mutual confidence and trust" exists in most consensual fiduciary relationship, but they failed to indicate whether this was a requirement for the generation of the relationship or merely a feature of the fiduciary relationship. Further, the heavy qualification of "most consensual" denies the statement any real import as providing adequate guidance to the determination of the question of the existence of such a relationship.

Dawson J., like Samuels J.A. in the New South Wales Court of Appeal, found that the "joint venture" business entity had arisen as a response to the prohibition on corporate partners.⁷⁸ His Honour held:

"Although the relationship between participants in a joint venture which is not a partnership will be governed by the particular contract rather than extrinsic principles of law, the relationship may nevertheless be a fiduciary one if the necessary confidence is reposed by the participants in one another. Of course, in a partnership, the parties are agents for each other and this may constitute a separate reason for the fiduciary character of a partnership. There may be no such agency between participants in a joint venture but, as Dixon J. pointed out in Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd (1929) 42 CLR 384 at 407-8, even in a partnership it is really the mutual confidence between partners which imposes fiduciary duties upon them and the same confidence may, in appropriate circumstances, be found to exist between participants in a joint venture."⁷⁹

⁷⁸Supra Note 68 at 681.

⁷⁹Supra Note 68 at 681.

The fundamental requirement that Dawson J. proposed for the fiduciary relationship was that of "mutual confidence". However, as Gibbs C.J. correctly pointed out in his learned judgment in Hospital Products not all fiduciary relationships possess such a subjective element, and what is required is vulnerability, which may or may not be related to the reposing of confidence.

The immediate result of the High Court's decision was that UDC was precluded from relying upon the benefit of the mortgage as it was obtained and retained in breach of the fiduciary obligation it owed to Brian. The larger jurisprudential impact of the UDC case is not the exposition of a test for a fiduciary relationship. This issue, unfortunately, was not addressed in any detailed way. The true importance of the High Court decision is that the majority held that a joint venture is often a partnership and a partnership is fiduciary in nature.

Professor Austin's conclusion pertaining to the UDC case, that the approach enunciated by Mason J. in Hospital Products has gained the ascendancy in Australia, is incorrect⁸⁰ if the learned author is taken to mean that UDC represented a shift in legal principle. The decision by the High Court of Australia was premised upon the finding that the joint venture was a partnership and thus fiduciary in nature. This was the application of a traditional approach

⁸⁰Supra Note 28 at 448.

to determining fiduciary obligations. The only judgment that dealt with non-partnership joint ventures possibly being fiduciaries is not addressed by Austin. The test in this situation to determine whether a fiduciary relationship exists, according to Dawson J., is that

"... the necessary confidence is reposed by participants in one another."⁸¹

This cannot be construed to be an adoption of the Mason approach.

However, what the UDC case does indicate is that possibly the High Court of Australia has moved towards a greater willingness to permit the existence of equitable doctrines in a commercial sphere.

It is at this junction that the most recent Canadian decisions upon the importation of fiduciary obligations into a commercial context begin. The first is the Ontario Court of Appeal decision in Standard Investments Ltd v. Canadian Imperial Bank of Commerce.⁸² The plaintiffs transferred their accounts to the Bank and sought, from the Bank's president, both advice and finance in regard to a possible take-over of Crown Trust. Whilst this was occurring the chairman of the Bank with one of its directors directed the Bank to buy shares in Crown Trust. The Bank acquired

⁸¹Supra Note 68 at 681.

⁸²(1985) 22 DLR (4th) 410, leave to appeal to S.C.C. refused 53 DR (2d) 663n.

approximately 10% of the shares in Crown Trust for \$18 per share. During this period the actions of the Bank's president and chairman were not known to each other. Later, when the president did discover what the chairman had directed the Bank to do, he only informed the plaintiffs that their proposed take-over would fail. During a 5 year period Standard Investments Ltd had continued to purchase Crown Trust shares. They accumulated about 32% of Crown Trust's shares. A director of the Bank acquired a 44% interest in Crown Trust, and this was achieved with the Bank's financial assistance. The director sold his shareholding, and the Bank sold off its 10% holding, to a third party. The consequence of this sale was that the market value of the plaintiffs shares fell by over 50%.

At first instance Griffiths J. held that the Bank owed a fiduciary duty to the plaintiff. His Honour held:

"I have no hesitation in holding that in 1972 a fiduciary relationship between the plaintiff and the Bank was created. All of the essential elements were present. Messrs. Cohen and Ellen reposed a trust and confidence in the Bank. On April 6, 1972, they came to the Bank. On April 6, 1972, they came to the Bank and confidentially outlined their plan for acquisition and control of Crown Trust to Mr. Wadsworth, the president of the Bank. The Bank undertook to advise them generally on the soundness of their plan and more importantly for their purposes, to effect an introduction to Mr. McDougald. The Bank then had not only a confidence reposed in it but it undertook to act on behalf of the plaintiffs in this limited way."⁸³

⁸³5 DLR (4th) 452 at 484.

The criteria that Griffiths J. applied to determine whether a fiduciary relationship existed was whether one party had confidence reposed in it and that party undertook to act on behalf of the other. This diverges from the approach of Gibbs C.J. in Hospital Products as here confidence must be reposed whereas the Chief Justice expressly rejected this as a necessary element.⁸⁴ Professor Austin⁸⁵ contends that these two judicial approaches are similar. The formulations are, however, only similar in that both are analyses premised upon two questions; and one of these questions is similar in wording. However, as Professor Austin points out this common question is actually addressed to different matters.⁸⁶ The High Court of Australia looks for an undertaking to act in the interests of another, whilst the trial judge in Standard Investment's looked to an undertaking to advise. It would be difficult to imagine that the Bank when first approached by the plaintiffs, had undertaken to act in the plaintiff's interests during the whole of the takeover struggle. Thus, on the High Court's criteria advocated in Hospital Products it would have been

⁸⁴Supra Note 30 at 433-4.

⁸⁵"Commentary: The Corporate Fiduciary: Standard Investments Ltd v. Canadian Imperial Bank of Commerce." (1986) 12 Can Bus L.J. 96 at 103.

⁸⁶Ibid at 103.

unlikely that the Bank would have been held to have owed the extensive fiduciary duties found at first instance.

Following his conclusion that the Bank did owe a fiduciary duty to the plaintiff Griffith J. held that no breach of that duty had taken place.⁸⁷ His Lordship's reasoning leading to this finding can be summarized thus: the Bank acted lawfully in buying its shareholding; that it could not make disclosure to Standard Investments without breaching a duty of confidentiality to Crown Trust; the confidential information that the Bank had received from the plaintiff at the initial meetings had ceased to be confidential and no further confidential information was given to the Bank at later dates; and finally, had Standard Investments known the Bank was buying 10% of the shares in Crown Trust it would have made no difference to it. Standard Investments appealed this decision.

The Ontario Court of Appeal upheld the trial judge's finding that there existed a fiduciary relationship.⁸⁸ The Court of Appeal attempted to buttress its findings of a fiduciary relationship by reference to Lloyd's Bank Ltd v. Bundy.⁸⁹ This is an unfortunate case to rely so heavily upon in the determination of the existence of a fiduciary

⁸⁷Supra Note 83 at 484.

⁸⁸Supra Note 82 at 426 & 434.

⁸⁹[1975] QB 326.

relationship. As Sir Eric Sachs states, his use of the phrase "fiduciary care" was

"to avoid confusion with the common law duty."⁹⁰

The explanation why his Lordship did not employ the term "fiduciary relationship" was that his lordship was not dealing with such an issue. The care involved an allegation of undue influence. Although undue influence involves persons who are in a fiduciary relationship it is not a necessary element in proving a case of undue influence.⁹¹ This explains why Lord Scarman in the House of Lords in the later case of National Westminster Bank v. Morgan⁹² clearly indicated that he would have preferred Sachs L.J. not to have used the language of confidentiality. The allegation in Standard Investments did not relate to undue influence, but to the conflict rule. The reliance upon Lloyd's Bank by the Court of Appeal was incorrect, as indicated above, but also unnecessary as there existed Canadian authority dealing with the fiduciary nature of a banker/client relationship.⁹³ However, the Ontario Court of Appeal

⁹⁰Ibid at 340.

⁹¹see, for example, Meagher Gummow and Lehane Equity: Doctrines and Remedies (Supra Note 31 of para 1519); Anson's Law of Contract Edited by Guest 26th Edition (London: Butterworths, 1987) at p.245.

⁹²[1985] AC 686.

⁹³for example Guertin v. Royal Bank of Canada (1983) 1 DLR (4th) 68, affirmed 12 DLR (4th) 640n.

appears to be moving towards a unified approach to cases involving conflict of interests rule and undue influence.⁹⁴ Unfortunately, the Court did not articulate this purpose.

It was when deciding the question of whether there had been a breach of fiduciary duty that the Court of Appeal differed with Griffiths J. The Court of Appeal's judgment on the question of breach was an effective demolition of the trial judge's reasoning. The Court of Appeal found⁹⁵ that the lawful nature of the Bank's actions was not material, the question to be asked was whether the Bank was entitled to put itself in a position of conflict.⁹⁶ The Bank could have avoided its position of conflict by refusing to advise or assist. If it had refused no problem of confidentiality would have been involved.⁹⁷ The fact that there was no longer any confidential information did not necessarily mean that there was no longer any fiduciary duty.⁹⁸ Finally, the Court of Appeal held that whilst it may have made a great difference to the plaintiffs had they known that the

⁹⁴see Hayward v. Bank of Nova Scotia (1985) 19 DLR (4th) 758.

⁹⁵Supra Note 82 at 405.

⁹⁶Supra Note 82 at 437.

⁹⁷Supra Note 82 at 436-8.

⁹⁸Supra Note 82 at 437.

Bank was purchasing a 10% shareholding, it was not significant to the question of conflict of interest.⁹⁹

At this point, the Court of Appeal had found a fiduciary duty did exist and had neutralized the trial judge's reasoning as to why this duty was not breached. Unfortunately, Professor Austin's comment¹⁰⁰ that the Court then failed to justify its conclusion that a breach had occurred must be agreed with. The Court held that

"The breach of duty on the part of the defendant's consisted in its failure to declare its conflict of interest at any time, its subsequent giving of assistance and advice, and its later sale of its shares (the acquisition of which and the purpose of such acquisition it had never revealed to the plaintiffs) for its own benefit and to the detriment of the plaintiffs."¹⁰¹

The scope of the duty, never addressed by the Court of Appeal, must have been extraordinary for a banker/client relationship and deserved great attention. Unfortunately, this attention was not paid.

With respect, the Court of Appeal appears to have adopted the wrong approach to the question of remedies. The court was correct in its finding that a breach of a fiduciary relationship does not necessarily give rise to a

⁹⁹Supra Note 82 at 440.

¹⁰⁰Supra Note 85 at 106.

¹⁰¹Supra Note 82 at 440.

trust.¹⁰² The Court awarded Standard Investments damages calculated as the cost of the shares which it had purchased, plus borrowing costs, and interests which would have been earned had the plaintiff's funds been invested, less dividends received and also less the proceeds of sale of the shares. As is obvious the court awarded damages assessed on the loss sustained by the beneficiary.¹⁰³ However, in the law of fiduciaries liability is not based upon the plaintiff's loss,¹⁰⁴ but rather the gain of the defaulting fiduciary.

One other aspect of the Court of Appeal decision needs to be addressed.¹⁰⁵ This is, when dealing with a non-natural entity, such as a corporation, who may enter into a fiduciary relationship which binds the corporate being? On the facts of this case the Court of Appeal held that both the Bank's chairman and president could, and did, bind the bank. The Court of Appeal determined this by finding the criminal law doctrine of "identification" which provides that the actions and thoughts of various officers and

¹⁰²Supra Note 82 at 443.

¹⁰³similar to the approach used to quantify damages in tort actions.

¹⁰⁴for example, Phipps v. Boardman [1967] 2 AC 46; Canadian Aero Services Ltd v. O'Malley [1974] SCR 592 per Laskin J. at 621-622; Keech v. Sandford [1726] Sel Cas t King 61; 25 ER223.

¹⁰⁵this has been the central focus of the numerous business articles concerning this case.

directors of the company are to be treated as the actions and thoughts of the company, was applicable to actions for breach of fiduciary duty.¹⁰⁶ The Court held that the task was to identify the "directing mind and will" of the company. After that, their actions had to be examined to gauge whether acts sufficient to constitute the creation of a fiduciary relationship had occurred. These actions would then be imputed to the company. The Court of Appeal then held

"... as a matter of law a corporation may have more than one directing mind operating within the same field of operations but I am of the further view that where such a state of affairs exists, a corporation cannot be found in law to have a split personality so that it can rely on the lack of knowledge on the part of one of its directing minds of the acts, intentions and knowledge on the part of one of its directing minds of the acts, intentions and knowledge of the other directing mind operating in the same sphere to protect it from liability for the actions of the first directing mind or the combined activities of both directing minds. At least, in civil cases, where the elements of mens rea is not applicable, where there are two or more directing minds operating within the same field assigned to both of them, the knowledge, intention and acts of each become together the total knowledge, intention and acts of each become together the total knowledge, intention and acts of the corporation which they represent."¹⁰⁷

¹⁰⁶Supra Note 82 at 429.

¹⁰⁷Supra Note 82 at 430-1.

As Professor Waters points out¹⁰⁸ this holding must cause great concern in large organizations which possess many persons sufficiently senior to be designated as the directing mind and will of it. Professor Waters notes that "Chinese Walls" may not be adequate to such organizations protection.¹⁰⁹ However, as Professor Austin indicates¹¹⁰ even if "Chinese Walls" continue to operate they may be largely irrelevant to a claim against a large corporation for breach of fiduciary duty where the breach is not caused by the flow of information.

The penultimate decision to be examined is that of the Ontario's Court of Appeal decision in International Corona Resources v. IAC Minerals Ltd.¹¹¹ The relevant facts of the case were the Corona owned mining leases on a parcel of land. After various tests and exploration Corona believed that there were valuable metal deposits on an adjacent parcel of land (known as the Williams property). A limited amount of this information had become public. IAC expressed an interest to Corona about joint development of the Williams property. Corona and IAC began negotiating towards a possible joint venture. In the course of the negotiations

¹⁰⁸"Banks, Fiduciary Obligations and Unconscionable Transactions" (1986) 65 Can. Bar Rev. 37.

¹⁰⁹Ibid at 56ff.

¹¹⁰Supra Note 85 at 108.

¹¹¹(1988) 44 DLR (4th) 592.

Corona gave LAC information acquired by its exploration. Corona attempted to gain the Williams property's mining right however LAC submitted a competing offer to the owner, and it was successful. LAC then developed, by itself, a successful gold mine on the land. It should be noted that this case had a superficial similarity to United Dominions Corporation v. Brian Pty Ltd,¹¹² as both cases involved situations moving towards a joint venture, and that that commercial vehicle had not been formalized when the alleged breach occurred. The important difference, however, was that in UDC the parties had reached verbal agreement and were acting upon that basis. That had not occurred here.

At first instance Holland J. held that LAC had committed a breach of confidence by misappropriating the information that Corona had given to it. Additionally, his Lordship held that there was a fiduciary relationship subsisting between Corona and LAC, and LAC also breached this. Be ordered that upon Corona paying LAC \$153,978,000 LAC had to transfer its interest in the mining rights to Corona. The \$153,978,000 order in LAC's favour was made upon s.37 (1) of the Conveyancing and Law of Property Act¹¹³ which permits such an order to be made when a person "makes lasting improvements on land under the belief that it is his

¹¹²Supra Note 68.

¹¹³R.S.O. 1980, c.90.

own." The award is "a lien upon it to the extent of the amount by which its value is enhanced by the improvements."

The Court of Appeal, in analysing this problem, divided it into four parts: 1. was there a fiduciary relationship? 2. what is the appropriate remedy? 3. was there a breach of confidence by LAC? 4. was LAC to be compensated for the improvements it had made to the property? By examining the Court's decision by utilizing its own schema it will be relatively straightforward to highlight any difficulties that emerge from the judgements.

a. Fiduciary Relationship

The initial problem that the Court of Appeal had to address was whether there was, or should be, a prohibition on extending the fiduciary doctrine into a situation where the parties involved are commercial entities of similar strength. The Court held

"We agree that the law of fiduciary relations does not ordinarily apply to parties who are involved in arm's length commercial transactions. Nevertheless, it appears to be clear that the law of fiduciary relations does apply in certain circumstances to persons dealing at arm's length in commercial transactions."¹¹⁴ (emphasis added by the Court).

¹¹⁴Supra Note 111 at 635.

The Court of Appeal held that it is a question of fact whether the relationship is fiduciary in nature.¹¹⁵

The Court recognised that here the parties were not in a traditional fiduciary category, and so a fact-based examination to determine the question was appropriate.¹¹⁶ The factors that the Court found led to the conclusion that a fiduciary relationship did exist here were that LAC had sought out Corona to participate in the joint venture, Corona divulged confidential information to LAC, that there was a practice within the mining industry that negotiating parties do not act to the detriment of each other and that between April and July of 1981 the parties seemed to possess a mutual understanding on a joint geochemical programme.¹¹⁷ The greatest emphasis was placed upon Holland J.'s finding that there existed within the mining industry a practice that negotiating parties do not act to the detriment of their negotiating counterparts. This fundamental finding, the centre-piece supporting the existence of the fiduciary relationship, is roundly and forcibly criticized by Gibbens."

¹¹⁵Supra Note 111 at 636.

¹¹⁶Supra Note 111 at 638.

¹¹⁷Supra Note 111 at 640-1.

¹¹⁸Commentary: "International Corona Resources v. LAC Minerals - Where Equity Rushes In" (1987-88) 13 Can Bus L.J. 489 at 494 n 20.

Gibbens damning critique of the primary pillar for the conclusion that there existed a fiduciary relationship unfortunately is not the only deficiency with the Court's reasoning. A fundamental flaw is that no test is cited for the determination of whether a fiduciary relationship exists or not. The case at bar involved an alleged breach of the profit rule.¹¹⁹

In the Hospital Products case the guidelines for perceiving whether a breach of the conflict or profit rules was laid down by Gibbs C.J.¹²⁰ That judicial approach, according to Professor Klinck,¹²¹ been adopted in Canada in Burns v. Kelly Peters & Associates Ltd.,¹²² in which Lambert J.A. formulated the test as

"(1) whether the defendants had undertaken with the plaintiffs to act in relation to the ... transaction, or transactions of that nature, in the interests of the plaintiffs;

(2) whether the defendants had been entrusted with power to affect the plaintiffs' interests in a legal or practical sense, so that the plaintiffs were in a position of vulnerability."¹²³

¹¹⁹Gibbens at p.495 refers to it as the "no collateral advantage" obligation.

¹²⁰Supra Note 30 at 435.

¹²¹"The Rise of the 'Remedial' Fiduciary Relationship: A Comment on International Corona Resources Ltd v. LAC Minerals" (1988) 30 McGill J. 600 at 622.

¹²²(1987) 16 BCLR (2d) 1 (BCCA).

¹²³Ibid at 27.

In reference to the first question the Court of Appeal in LAC Minerals held that the defendant, because of industry practice, had agreed not to act to the detriment of the plaintiff. However, as Klinck correctly indicates,¹²⁴ agreeing not to act to the detriment is not the same as undertaking to act in that party's interest.

Perhaps the most conceptually difficult point of this area is the connection between confidential information and the establishment of a fiduciary relationship. Confidence is frequently used when the fiduciary relationship *is* being discussed. However, confidence does possess another meaning and this pertains to **secrecy**.¹²⁵ The cause of action for breach of confidence depends on the definition of confidence that is **used**.¹²⁶

The test that Gurry¹²⁷ adopts utilizes the elements of "breach of confidence" detailed by Megarry J. in Coco v. A.N. Clark (Engineers) Ltd.¹²⁸ Megarry J. held

""Supra Note 122 at 623.

¹²⁵for example, "This information is given to you in the strictest confidence."

¹²⁶Klinck Supra Note 122 at 606 indicates that both **uses** can be utilized in the same sentence, for example, "X may give Y, 'confidential' (ie. secret) information, in the 'confidence' (ie. trust) that Y will not reveal it or misappropriate it."

¹²⁷Breach of Confidence (Oxford: Clarendon Press, 1984) at pp.3-4.

¹²⁸(1968) RPC 41 (Ch. D.).

"In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the Saltman case on page 215, must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted **in** circumstances importing **an** obligation of confidence. Thirdly, there must **be** an unauthorized use of that information to the detriment of the party communicating it."¹²⁹

Interestingly, the third point in Megarry J.'s structure indicates that the misuse of confidential information causes the confider some detriment. As Klinck indicates¹³⁰ this third point is a factor not required to be proved in an action for an alleged breach of fiduciary obligation. This is perhaps one point of divergence between an action for breach of confidence and an action for breach of a fiduciary duty. It is suggested that the Court of Appeal in LAC Minerals, stating as it did that the breach of confidence issue and the fiduciary issue are "intertwined", nearly came to grips with addressing the problem that the case before them could have been a breach of confidence case or a ~~breach~~ of fiduciary relationship case, with one main factor producing that fiduciary relationship was the **giving of the confidential information**. Unfortunately the Court **failed to** fully address this vital issue.

¹²⁹Ibid. at 47.

¹³⁰Supra Note 122 at 608.

A question that Klinck poses¹³¹ is how does the giving of confidential information create a fiduciary obligation? To establish this the Court must initially ask itself two questions: 1. who is the beneficiary of the fiduciary relationship?, and 2. what is the benefit contemplated? The Court of Appeal never addressed itself to these issues, and so the finding on this point must be seen as unsatisfactory.¹³²

In regard to the fiduciary relationship, and in particular to its connection to the notion of a breach of confidence, it is submitted the Court of Appeal in IAC Minerals relied upon poor and inadequate reasoning for its conclusion. Unfortunately, the Court continued with this haphazard judicial technique when dealing with other issues.

b. Remedies for Breach of The Fiduciary Duty

Holland J. had awarded Corona a constructive trust over the Williams property for the breach of the fiduciary duty by IAC. The Ontario Court of Appeal upheld this imposition of an equitable proprietary remedy. However, it should be noted that IAC was designated a constructive trustee of the

¹³¹Supra Note 122 at 616.

¹³²Klinck (Supra Note 122 at 617) suggests one way of analysing this situation is as a fiduciary relationship created by the confiding of information and information is regarded as property. However, after examining this possibility he, at 618, concludes that such a characterization is "rather artificial" and does not resolve the problem posed above.

entire property for Corona. If the remedy was for a breach of a fiduciary obligation created by negotiations for a joint venture why was only one party benefitted? Should not the constructive trust have been for both LAC and Corona? Gibbs C.J. in United Dominions Corp¹³³ interpreted Lord Lyndhurst in Fawcett v. Whitehouse,¹³⁴ a case which the Court of Appeal had cited as authority for the proposition that parties negotiating towards a partnership or joint venture may be **fiduciaries**,¹³⁵ as holding that a person negotiating for an intending partnership.

"... who clandestinely receives an advantage for himself must account for the advantage to the partnership."

Obviously, the partnership would include the delinquent fiduciary. So why did not LAC hold the Williams property on constructive trust for the parties to the possible joint venture, that is, Corona and itself? This problem is purely caused by the Court of Appeal not addressing the issue of who is the beneficiary of the fiduciary relationship.

c. Remedies for Breach of Confidence

The above problem would disappear if the case was analysed as a breach of confidence issue, and not as a

¹³³Supra Note 68 at 611.

¹³⁴(1829) Russ & M 132; 39 ER 51.

¹³⁵Supra Note 68 at 677.

fiduciary relationship dispute. Unfortunately, because the Court of Appeal found that the fiduciary relationship and the confidential information were "intertwined", which was surely the situation, the Court failed to investigate that matter in two distinct ways. As Gurry indicates¹³⁶ a case may involve a fiduciary relationship which pre-exists the imparting of confidential information, and the misuse of this confidential information may be the medium of the breach of the fiduciary obligation. Or, in a breach of confidence action the court's concern is for the protection of a confidence which has been created by the disclosure of confidential information. The court's attention is directed to the protection of the confidential information because it has been the cause of the creation of the relationship. The problem faced by the Court of Appeal was that on the facts found **by** it neither of these two alternatives presented by Gurry covered the case before them. One reason why the Court of Appeal found a fiduciary relationship to have existed was the giving of the confidential information. This case would appear, initially, to fit the second alternative of Gurry, that is, it was a "breach of confidence" case. But the passing of **confidential** information was not the only factor leading to the conclusion of a fiduciary relationship, and so that it would appear that it was not simply a breach of confidence case.

¹³⁶Supra Note 128 at 161.

However, as the confidential information was a factor in the creation of the fiduciary relationship the case could not have been designed as being covered could not have been designated as being covered by the first alternative posed by Gurry. Gurry's suggested typology of either a pre-existing fiduciary relationship, where use is made of later acquired confidential information, or where the giving of confidential information alone generates a relationship of confidence is simply inadequate to deal with their factual situation. Therefore, the Ontario Court, of Appeal had an opportunity to construct a third model; where a fiduciary relationship is created partly by the giving of confidential information and the misuse of this confidential information caused the breach of the fiduciary relationship. Unfortunately, the Court did not do this. Their Lordships, in "dealing" with the complicated matter of the connection between the breach of confidence action and the allegation of breach of a fiduciary relationship inadequately held

"In the case at bar, the trial judge concluded that the legal principles regarding the obligations imposed by the delivery of confidential information and the obligations imposed as a result of the existence of a fiduciary relationship are intertwined. We are of the opinion that he was correct in this conclusion, and the law of fiduciary relationships can apply to parties involved, at least initially, in arm's length commercial discussion."¹³⁷

¹³⁷Supra Note 111 at 639.

The highest court in Ontario agreed with the trial judge that the intertwined nature of confidence information and fiduciary obligations caused a jurisprudential problem. Unfortunately, that is all the Court of Appeal did; their Lordships did not proffer any solution to the problem. The court dealt only with one breach, that of the fiduciary relationship, but later it dealt with the remedies for breach of the fiduciary relationship and for breach of confidence. This approach would be defensible if the Court of Appeal had held that the breach of the fiduciary relationship was caused by the breach of confidence. Then the question of differing remedies would have meant that the Court had to indicate which doctrine was superior. Needless to say the Court of Appeal in LAC Minerals failed' to do this.

After simply addressing the problem of whether there had been a breach of the fiduciary duty, the Court of Appeal held that it was unnecessary to consider the proper remedy for the breach of confidence¹³⁸ the Court went ahead with holding that the constructive trust was the appropriate remedy. This was the same award made for the breach of the fiduciary duty, so no question of which doctrine was pre-eminent arose. One major difficulty that Gibbens identifies¹³⁹ is that the breach of confidence action,

¹³⁸Supra Note 111 at 656.

¹³⁹Supra Note 119 at 498.

according to **Gurry**,¹⁴⁰ is based upon contract, equity and property. This, of course, impacts on the remedies available for a breach. Unfortunately, the Court of Appeal did not allude to this difficulty.

d. Compensations for Improvements to the Williams Property.

Holland J., at first instance, ordered that **LAC** was to transfer the property to Corona upon Corona paying \$153,978,000. This amount was based upon s.37(1) of the Conveyancing and Law of Property Act¹⁴¹ which allowed a person who "makes lasting improvements on the land under the belief that it is his own ... a lien upon it to the extent of the amount by which its value is enhanced by the improvements." Although the Court of Appeal arrived at the same conclusion it rejected the reasoning of Holland J.¹⁴² As Gibbens points out¹⁴³ the Court of Appeal ordered a lien for the above-mentioned amount by the application of the doctrine of change of circumstance. The Court quoted ~~Goff~~ and Jones¹⁴⁴ as suggesting that in future years courts will accept as a full defence the doctrine of change of position.

¹⁴⁰Supra Note 128 at 28ff.

¹⁴¹R.S.O. 1980 c.90.

¹⁴²Supra Note 111 at 659.

¹⁴³Supra Note 119 at 499.

¹⁴⁴The Law of Restitution 3rd Edition (London: Sweet and Maxwell, 1986) at 661.

From this speculation the bench explicitly found change of position or circumstance as a **partial defence**.¹⁴⁵ However, Gibbens indicates that what the court did not do was to create a partial or complete defence, but rather it allowed an independent claim for improvements to be made. This contention is centred upon the fact that if it was a defence it should have affected the remedy claimed, but as the constructive trust remained untouched it could not have been a defence. Interestingly, Halsbury's¹⁴⁶ defines a lien as being over property. The Court of Appeal did not indicate what property the lien was over, but it may be presumed to have related to the property subject to the constructive trust. If this is accurate then Gibbens criticisms would appear unfounded.

As is obvious the Ontario Court of Appeal in LAC Minerals failed to grapple with many of the issues posed by the case. The Court's decision was reviewed by the Supreme Court of Canada.¹⁴⁷

The judgments of the Supreme Court must be carefully arranged to uncover the majority decision. The only issue all of the Justices agreed upon was that there had been a breach of confidence. Mr. Justice La Forest and Madame

¹⁴⁵Ibid. at 661.

¹⁴⁶Halsbury's Law of England (4th Edition 1979) Vol.28 at para 501.

¹⁴⁷(1989) 61 DLR (4th) 14.

Justice Wilson considered that there had also been a breach of fiduciary duty. These two judges considered that the appropriate remedy for both breach of a fiduciary duty was a constructive trust. Mr. Justice Sopinka and Mr. Justice McIntyre disagreed with the two preceding conclusions. The fifth member of the bench, Mr. Justice Lamer, possessed the deciding vote. His Lordship agreed with Sopinka J. that there was no fiduciary relationship, and he agreed with La Forest J. that the remedies available for a breach of confidence included a constructive trust, which was appropriate in this case. As can be seen no one Justice wrote a majority decision on all issues. This indicates that future litigation concerning fiduciaries in a commercial context is very probably.

Although it is recognised that the decision in this case turned on the finding of a breach of confidence this aspect of the decision will only be examined in terms of its connection with the existence (or lack thereof) of a fiduciary relationship."

¹⁴⁸this concentration is made whilst recognising that by the decision

"The doctrine of breach of confidence has finally come of age in this country"

per P. Maddaugh "Confidence Abused: LAC Minerals Ltd. v. International Corona Resources Ltd." (1990) 16 Can Bus. L.J. 198 at 198.

All five members of the court found a breach of confidence.¹⁴⁹ Unlike the Ontario Court of Appeal which recognised that the doctrine of confidential information and the law of fiduciary obligations are "intertwined" but then neglected this issue, the Supreme Court dealt with the doctrines in conceptually separate ways. A question arises as to how did the judgments differentiate between the two doctrines.

Sopinka J., with whom McIntyre and Lamer J.J. agreed, held that ¹⁵⁰ obtaining confidential information is not itself sufficient to lead to a fiduciary relationship. For his Lordship when the essence of the complaint is misuse of confidential information the appropriate course of action is to bring a suit for breach of confidence. This point by Sopinka J. suggests a "purity" doctrine. A relationship built purely on confidential information will not be a fiduciary relationship, and that an action premised upon a substantially pure breach of confidence allegation will be a breach of confidence. This is similar to how Gurry¹⁵¹ would present the matter. At what point the level of impurity of the confidential information to the relationship is high enough to convert the relationship into being

¹⁴⁹Supra Note 145; Lamer J. at 15, McIntyre J. at 15, Wilson J. at 17, La Forest J. at 25 and Sopinka at 74.

¹⁵⁰Supra Note 145 at 64.

¹⁵¹Supra Note 128 at 161.

fiduciary in nature and the cause of action into one for breach of a fiduciary obligation was not addressed by his Lordship.

La Forest J. held that

"... the law of confidence and the law relating to fiduciary obligations are not co-extensive. They are not, however, completely **distinct**."¹⁵²

What points of divergence did his Lordship perceive? One ground is

"A claim for breach of confidence will **only** be made out, however, when it is shown that the confidant has misused the information to the detriment of the confider. Fiduciary law, **being** concerned with the exaction of a duty of **loyalty**, does not require that harm in the particular case be shown to have **resulted**."¹⁵³

This observation is interesting on two grounds. First, it indicates that fiduciary law is wider than the law of confidences. Secondly, earlier in his judgment La Forest J. had adopted the test of Megarry J. (as he then was) in Coco v. A.N. Clark (Engineers) Ltd¹⁵⁴ to determine whether there had been a breach of confidence.¹⁵⁵ The third element of this test is that there is an unauthorized use of the

¹⁵²Supra Note 145 at 35.

¹⁵³Supra Note 145 at 36.

¹⁵⁴[1969] RPC 41 (Ch).

¹⁵⁵it should be noted that Gurry at pp.3-5 essentially adopts Megarry J.'s criteria.

confidential information to the detriment of the party communicating it. However, Megarry J. himself left upon the question whether detriment, at least to the confider him of herself in an absolute prerequisite.¹⁵⁶ Gurry states that while it is often said that the unauthorised use of disclosure must be to the detriment of the confider before a cause of action is established, detriment is more a factor which affects the **remedy**.¹⁵⁷ It would appear that La Forest J., has made detriment a requirement for a Canadian breach of Confidence cause of action.

The second ground of difference is that of duty of confidence can arise outside of **a direct relationship**.¹⁵⁸ The example La Forest J. gives is where a third party has received confidential information from a confidee **in breach** of the confidee's obligation to the confider.

The third ground of difference that his Lordship noted¹⁵⁹ was that the breach of confidence has a jurisdictional base at law, whereas **fiduciary obligations** are solely an equitable creation.¹⁶⁰

¹⁵⁶Supra Note 151 at 48.

¹⁵⁷Supra Note 128 at 5 fn 8.

¹⁵⁸Supra Note 145 at 36.

¹⁵⁹Supra Note 145 at 63.

¹⁶⁰see Gurry chapter 2 for a discussion of the origins of the relationship of confidence.

Apart from listing these divergent features of the relationship of confidence and a relationship fiduciary in nature his Lordship indicated that in the case before him the emphasis was upon the breach of confidence **claim**.¹⁶¹ Perhaps this was a de facto acceptance by La Forest J. that if the action is based purely, or at least to a substantial degree, on a misuse of confidential information it will not be an action for dereliction of a fiduciary obligation.

The fifth member of the bench, Madame Justice Wilson in her brief discussion of the **issues**,¹⁶² did not deal with the difficult problem of distinguishing between a relationship of confidence and a fiduciary relationship.

What we are left with is that a majority of the Supreme Court of Canada, it is difficult to conclude whether La Forest J. can be included in this majority, determined whether a relationship is one of confidence or is fiduciary in nature by looking towards the purity of the information as a causative agent. What this means is that if the passing of the information is the pure cause of the relationship it will be designated as one of confidence. If not, it will not be so designated. As is obvious, the question that this approach leaves is how "pure" is pure? LAC Minerals provided the opportunity for the Supreme Court to discuss this as the Ontario Court of Appeal found that

¹⁶¹Supra Note 145 at 25-6.

¹⁶²Supra Note 145 at 16-18.

the passing of confidential information was only one factor in the generation of the fiduciary relationship. Unfortunately, the majority of the Court were able to avoid confronting this issue.

Sopinka J., with whom both McIntyre and Lamer J.J. agreed with on all matters pertaining to the law of fiduciaries, held that there was no fiduciary relationship. After his Lordship¹⁶³ had stated that obtaining confidential information was not itself sufficient to produce a fiduciary relationship. Sopinka J. addressed the other reasons which the Court of Appeal had held generated a relationship which was fiduciary in nature. There were, according to his Lordship,¹⁶⁴ six factors in all.

The first reason was that the state of the negotiations attracted the United Dominions Corporation v. Brian Pty Ltd¹⁶⁵ principle. The majority of the Supreme Court of Canada identified that the negotiations in UDC had progressed further than the facts before the bench. Sopinka J. acknowledged that the Ontario Court of Appeal had recognized this fact and that this reason alone could not stand to support the fiduciary relationship conclusion. It was this reason, the similarity to UDC, coupled with the

¹⁶³Supra Note 145 at 64.

¹⁶⁴Supra Note 145 at 64.

¹⁶⁵Supra Note 68.

other five factors that the Court of Appeal held to be the foundation of the fiduciary relationship.

The second reason was that LAC sought out Corona. This point was dismissed by Sopinka J. by noting that in every commercial venture one party approaches the other. His Lordship dismissed the third reason,, relating to the arrangement of a geochemical programme, by overturning the Court of Appeal's finding of fact. The next pillar that the Court of Appeal utilized to construct a fiduciary relationship was the provision of confidential information. With respect, his Lordship did not accurately address the issue. Sopinka J. held that

"... the supply of confidential information is not necessarily referable to a fiduciary relationship and is therefore at best a neutral **factor**."¹⁶⁶

This statement contains a non-sequitur. The first part of the statement reflects what his Lordship had said earlier; simply that the obtaining and misuse of confidential information cannot itself create a fiduciary relationship. Thus, the supply of confidential information is not necessarily referable to such a relationship. What Sopinka J. appears to be saying is that if the confidential information is given it may or may not lead to a fiduciary relationship. Taking into account his Lordship's earlier statements concerning that if all that has occurred is the

¹⁶⁶Supra Note 111 at 317.

passing of the confidential information then this will not be referable to a fiduciary relationship. This is the "purity doctrine". However, by his Lordship's failure to exclude a fiduciary relationship being related to confidential information, a fiduciary relationship may exist. It is where there is the passing of confidential information in addition to other acts which are all referable to a fiduciary relationship. This is precisely what the Court of Appeal was doing by listing a total of six factors, one of which was confidential information. It does not follow from the statement that if all that has occurred is the passing of confidential information, which according to the purity doctrine would not generate a fiduciary relationship, then confidential information accompanied by other actions can not generate a relationship which is fiduciary in nature. Unfortunately, this would be the result of the application of his Lordship's non-sequitur that the supply of confidential information is a neutral factor. That is, unless Sopinka J. would reject the proposition that the relationship of confidence and the fiduciary relationship are "intertwined."

The fifth reason for the finding of a fiduciary relationship by the Court of Appeal was the practice of the mining industry for a party not to act to the detriment of the party it is negotiating with. His Lordship attacked this contention on several points. The first was that in a

commercial environment a practice which is well-known, such as the practice here that negotiating parties do not act to the detriment of each other, is an implied term of the contract. The first of two counterpoints that can be made regarding this contention by Sopinka J. is that there was no contract here for the term to be implied into. The second counterpoint is that it is irrelevant if there was a contractual term which incorporated this practice. Simply because a contract does exist does not oust the possibility of a fiduciary relationship. A company's executive officer will usually be in a contractual and fiduciary relationship with his or her company.

The second assault upon this industry practice supporting a fiduciary relationship is that Sopinka J. found that this practice is more relevant to an obligation of **confidence**.¹⁶⁷ Certainly this is true if this practice and the passing of confidential information were the **only** factors, then it would be a relationship of confidence. **This** is simply an application of the doctrine of purity. **Howe**ver, here additional factors were being asserted so that the doctrine of purity could not **apply**. **The only way that** the practice of the industry could not support a fiduciary relationship was if any evidence of confidential information could not be treated in regard to a fiduciary relationship.

¹⁶⁷Supra Note 145 at 67.

The final assault that Sopinka J. made upon the industry practice supporting a fiduciary relationship was really somewhat bizarre. His Lordship suggested¹⁶⁸ that the mining industry expert's evidence relating to the practice not to use information to the detriment of the negotiating party who gave that information was actually determining the legal issue of whether there existed a fiduciary relationship. With the upmost respect to the learned judge this cannot be true on the facts of the case. The expert simply stated that a particular practice was followed and then it was up to the court as the tribunal of law to determine the question of law upon the basis of evaluation of the facts. Simply because a witness gives particularly strong evidence, as was the situation with the expert witness, this is not determinative of the legal issue. If it were particularly strong evidence would be inadmissible in court, and this is obviously an absurd proposition. It is contended that Sopinka J.'s assault on the fifth reason supporting the Court of Appeal's finding of a fiduciary relationship can be successfully repulsed.

The final point on which the Court of Appeal rested its finding of a fiduciary relationship was that the parties were not simply negotiating towards an ordinary commercial contract but were negotiating in furtherance of a common

¹⁶⁸Supra Note 145 at 67.

object. Sopinka J. simply stated''' that all negotiations towards a partnership of joint venture have this feature in common and so it did not add anything to the analysis. What the Court of Appeal appeared to be rearguing here was its earlier point regarding the applicability of the UDC case. His Lordship is quite correct to reject this point as adding support to the finding of a fiduciary relationship.

When re-examining these six points it would appear that three remain intact after Mr. Justice Sopinka's assaults. They are the extension of the UDC principle, the divulgence of confidential information and the industry practice. For the creation of a fiduciary relationship the first two points are not sufficient of themselves. However, this combination of factors may, indeed, be sufficient. Unfortunately, this contention was not addressed by his Lordship.

As is apparent Mr. Justice Sopinka went to great lengths not to find a fiduciary relationship in this case. The rationale for going to these lengths is his Lordship's clear reluctance to extend fiduciary relationships into a commercial context. Sopinka J. quoted Dawson J. in Hospital Products who referred to the undesirability of finding fiduciary relationships in a commercial setting.¹⁷⁰ His

¹⁶⁹Supra Note 145 at 67.

¹⁷⁰Supra Note 145 at 61.

Lordship also cited¹⁷¹ approvingly **Campbell**¹⁷² who indicated clear displeasure in LAC Minerals and Standard Investments, which imposed fiduciary relations where the relationship had been formalised by contract. This importance of the contract is picked up by Sopinka J. but an initial comment must be made. Company directors and partners frequently have contracts with their beneficiaries but they are certainly examples of the traditional categories of fiduciaries. This notion that a reduction of a relationship to contractual form removes the fiduciary elements must be false.

At this point Sopinka J., after acknowledging his reluctance to extend fiduciary doctrine into a commercial environment, dealt with the law of fiduciaries at a more abstract level. His Lordship held that there are well-recognise fiduciary relationships, such as trustee-beneficiary, but that exceptionally a relationship traditionally presumed to the fiduciary in nature will not be on the facts. Furthermore, Sopinka J. held, not all obligations existing between the parties to a well-recognised fiduciary relationship will be fiduciary in nature. The example he gives is of a solicitor-client. Obviously, this is a traditional category. The solicitor owes his or her client a duty (or obligation) to use care or

¹⁷¹Supra Note 145 at 60.

¹⁷²The Advocates' Society Journal August 1988 at p.44.

skill. This obligation certainly is not fiduciary in nature.

His Lordship¹⁷³ then stated that if a relationship is not presumed to be fiduciary because of not being within a traditional category it may still be fiduciary in nature. To determine this issue Sopinka J. adopted the "rough and ready guide" of Wilson J. in Frame v. Smith,¹⁷⁴ In that case Madame Justice Wilson, dissenting but the majority made no adverse comment on this test, held

"Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power,

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."¹⁷⁵

It is of worth to find the sources for Wilson J.'s "rough and ready guide". Her Ladyship stated¹⁷⁶ that a similar three-fold formulation of the test had been adopted by the Australian High Court in Hospital Products. Wilson J. quoted both Gibbs C.J. and Mason J. to support her

¹⁷³Supra Note 145 at 62.

¹⁷⁴(1987) 42 DLR (4th) 81, [1987] 2 SCR 99, 9RFL (3d) 225.

¹⁷⁵(1987) 42 DLR (4th) 81 at 99.

¹⁷⁶Ibid. at 100.

contention. Thus Australian authority can be perceived as one of the central pillars underlying the Canadian "rough and ready guide" to determine the existence of a fiduciary relationship.

The explanation why the language relating to the determination of a fiduciary relationship includes expression such as "rough and ready guide" and "not inappropriate in the circumstances"¹⁷⁷ rather than "test" is shown by what Sopinka J. held immediately after citing, with approval, Wilson J.'s "rough and ready guide." His Lordship held:

"It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship."¹⁷⁸

Thus, whilst indicating factors which are strongly indicative of the relationship being fiduciary the doctrine, being the offspring of equity, will not be confined to a rigid formula.

However, Mr. Justice Sopinka does identify¹⁷⁹ one indispensable feature of a fiduciary relationship and that

¹⁷⁷Supra Note 30.

¹⁷⁸Supra Note 145 at 63.

¹⁷⁹Supra Note 145 at 63.

is dependency or vulnerability.¹⁸⁰ From this proposition Sopinka J. constructs what Potter and Laurence¹⁸¹ refer to as the dependency theory. His Lordship held that in this case

"... this vital ingredient was virtually lacking"¹⁸² (emphasis added)

It is an open question what the implications of "virtually lacking" are, but it would seem to indicate that any level of dependence or vulnerability will not be sufficient.

Mr. Justice Sopinka indicated that a psychological dependence is insufficient here.¹⁸³ Dealing with vulnerability in a commercial context his Lordship again quoted Wilson J. in *Frame v. Smith*. Her Ladyship in that case stated, in obiter as the decision dealt with family law,

"This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom

¹⁸⁰Finn in "Good Faith, Fair Dealing and Fiduciary Law in Canada" in Fiduciary Obligations by The Continuing Legal Education Society of B.C. [19 April, 1989].

¹⁸¹(1990) 44 Business Law Reports 1 at 7.

¹⁸²Supra Note 145 at 681.

¹⁸³Supra Note 145 at 68-69.

present in dealings of experienced businessmen of similar bargaining strength acting at arm's length: see for example Jirna Ltd v. Mister Donut of Canada Ltd (1971) 22 DLR (38) 639, [1972] 1 DR 251, 3 CPR (2d) 40 (C.A.); affirmed 40 DLR (3d) 303, [1975], SCR 2, 12 CPR (2d) 1. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, ie. any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of the discretion or power, namely damages, are adequate in such a case."¹⁸⁴

From this Sopinka J. held that here as Corona placed itself in a position of vulnerability and did not protect itself by contract then the vulnerability was its own fault and so no fiduciary relationship arose. Thus, vulnerability per se is not the essential ingredient for Sopinka J. but it is vulnerability which could not have been removed by the beneficiary's actions, such as a contract. This shall be referred to as the doctrine of unavoidable vulnerability.

Potter and Lawrence note with interest that if this approach was applied with rigor to the traditional fiduciary relationships they could easily be considered not to be fiduciary. The obvious example is the solicitor and client.

Moreover, traditional fiduciary relationships, such as a director and his or her company, often have a contractual basis. This certainly has never prevented such relationship as being fiduciary in nature.

¹⁸⁴Supra Note 171 at 100.

If this doctrine of unavoidable vulnerability is applied in a commercial context the necessary dependency or vulnerability would rarely be found in any commercial negotiations.

It is contended that the dependency theory coupled with the so-called doctrine of unavoidable vulnerability is simply unwarranted. It makes it practically impossible for the fiduciary relationship ever to exist in a commercial context. It is interesting to note what the primary source of the doctrine of unavoidable vulnerability was. It was an obviously obiter observation of Madame Justice Wilson, in dissent, in a family law matter. It is thus worthy of attention to see what her Ladyship held concerning this doctrine of unavoidable vulnerability when dealing with a case directly on point.

In an extremely brief discussion Madame Justice Wilson, without explicitly stating whether she was utilizing her own "rough and ready" guide, found a fiduciary duty was owned in this case.¹⁸⁵ This duty arose by Corona making available to LAC confidential information relating to the Williams property. This, her Ladyship held, placed Corona in a position of vulnerability. If the doctrine of unavoidable vulnerability was to be invoked it would be the next logical step in Wilson J.'s analysis. It was a step that her Ladyship did not take. Madame Justice Wilson implicitly

¹⁸⁵Supra Note 145 at 16.

rejected the doctrine of unavoidable vulnerability because at the commencement of her Ladyship's judgment she stated that she had read the judgement of Sopinka J. and so must have been aware of the doctrine.

Regarding the breach of confidence action Wilson J. held¹⁸⁶ that it was a breach of confidence at common law. This would clearly indicate that for Wilson J. a party can easily pursue a breach of confidence action and a breach of fiduciary duty action. If these two separate breaches are proved and the remedies are different her Ladyship held that a court should award the more "appropriate".¹⁸⁷

One facet of Madame Justice Wilson's judgement that is of particular interest is her attempt to differentiate between a fiduciary relationship and a fiduciary duty. In the pursuit of linguistic certainty in this area of law her Ladyship drew a distinction, for which no authority was cited nor, it is respectfully suggested, exists, between a fiduciary relationship and a fiduciary duty. Certain relationships are almost always fiduciary per se. These are the traditional categories of fiduciaries; such as trustee-beneficiary. Other relationships are not "of the essence" fiduciary, but certain elements of the relationship may be fiduciary. The relationships which only have fiduciary duties, and are not wholly fiduciary in nature. It is

¹⁸⁶Supra Note 145 at 17.

¹⁸⁷Supra Note 145 at 17.

contended that her Ladyship's suggested language serves no useful purpose for several reasons. The first is that not all aspects of a relationship traditionally considered as fiduciary are fiduciary obligations. For example, some of the obligations at a solicitor to his or her client will be contractual and tortious in nature. This point introduces the second reason for the contention that Wilson J.'s language is unnecessary; and that is, what precisely is a fiduciary relationship? It cannot be that a fiduciary relationship is only present where all the duties are equitable, the solicitor-client example above shows this. Is it that a certain number of fiduciary duties are needed to make up a fiduciary relationship? If so, how many? And the final point is that in the end this dichotomy serves no useful purpose. Madame Justice Wilson seemed to indicate¹⁸⁸ that when evaluating a fiduciary duty you have to examine closely the scope and content of that duty. This is perfectly accurate, but this is also fundamentally correct for what her Ladyship has referred as a fiduciary relationship. Much of past judicial confusion in this area has stemmed from judges failing to appreciate that the scope and content of the fiduciary obligation must always be examined.

¹⁸⁸Supra Note 145 at 16.

The fifth member of the bench was Mr. Justice La Forest. His Lordship¹⁸⁹ reviewed Wilson J.'s "rough and ready guide" from Frame v. Smith for determining the existence of a fiduciary relationship and found it "helpful." La Forest J. recognised that the term fiduciary is used in three different ways.¹⁹⁰ Here was not an argument that negotiating towards a joint venture was a traditional, nor created a new, category of relationship where its fiduciary nature would be presumed.¹⁹¹ This is for his Lordship, the first way that the term fiduciary may be utilized. La Forest J. clearly held that Wilson J.'s "rough and ready guide" only applies to this first usage of the term fiduciary.¹⁹²

The second way of employing the term fiduciary is in a factual or ad hoc way. As opposed to the first where because of the relationship falling into a set category it will be presumed to be fiduciary, here it is necessary to prove that fiduciary obligations were owed and broken.

The third use of the term is to provide relief when a wrong has been committed. That is, the court finds

¹⁸⁹Supra Note 145 at 27-28.

¹⁹⁰Finn in "Contract and the Fiduciary Principle" (1989) 12 UNSWLJ 16 refers to the first and second uses as "relationships fiduciary in law" and "relationships fiduciary in fact" at p.88.

¹⁹¹Supra Note 145 at 29.

¹⁹²Supra Note 145 at 40.

wrongdoing and desires to grant a specific remedy, but the gateway to that remedy is the fiduciary relationship. Thus, after the court has decided upon the appropriate remedy it will then, if necessary, find a fiduciary relationship. The cases which advocate such an approach include Sinclair v. Brougham,¹⁹³ In re Diplock,¹⁹⁴ Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd¹⁹⁵ and Goodbody v. Bank of Montreal.¹⁹⁶ Thankfully, La Forest J. recognized this approach and these cases read "equity backwards."¹⁹⁷

La Forest J. identified that the term fiduciary was being utilized here in the second way - a determination upon the facts. His Lordship upheld the finding by the Court of Appeal that there existed a fiduciary duty."¹⁹⁸ In reference to the activities within a commercial context La Forest J. expressed his view to be that

"While it is almost trite to say that a fiduciary relationship does not normally arise between arm's length commercial parties, I am of the view that the courts below correctly found a fiduciary obligation in the circumstances of this case and correctly found LAC to be in breach of it."¹⁹⁹

¹⁹³[1914] AC 398.

¹⁹⁴[1948] Ch 465.

¹⁹⁵[1981] Ch 105.

¹⁹⁶(1974) 47 DLR (3d) 335 at 339.

¹⁹⁷Supra Note 145 at 32.

¹⁹⁸Supra Note 145 at 33.

¹⁹⁹Supra Note 145 at 34.

For Mr. Justice La Forest J. there was no absolute barrier to the finding of fiduciary obligations in a commercial context. The next logical step is to consider what were the factors in this case that transformed this particular relationship into one possessing fiduciary duties.

The first factor that La Forest J. held to be relevant²⁰⁰ was trust and confidence. His Lordship held that the law of confidence and the law of fiduciary relationships, whilst distinct, are "intertwined". La Forest J. stressed the importance of the giving of the confidential information by Corona to LAC in deciding the "reasonable expectations" that each party held regarding how the other would act.

It would appear that the second factor mentioned by his Lordship is symbiotic in regard to the first. This second factor was the industry practice not to act to the detriment of the other negotiating party by the misuse of confidential information. This industry practice also was imputed into the "reasonable expectation" equation.

"It is clear to me that the practice in the industry is so well known that at the very least Corona could reasonably expect LAC to abide by it ... The industry practice therefore, while not conclusive, is entitled to significant weight in determining the reasonable expectations of Corona ..."

...²⁰¹

²⁰⁰Supra Note 145 at 35.

²⁰¹Supra Note 145 at 39.

The third factor was vulnerability. Mr. Justice La Forest explicitly held that vulnerability is not a necessary ingredient in every fiduciary relationship.²⁰² Citing Keech v. Sandford²⁰³ La Forest J. indicated that a breach of a fiduciary duty may occur even where no harm is inflicted on the beneficiary.²⁰⁴ From this proposition his Lordship held that

"... susceptibility to harm will not be present in many cases."²⁰⁵

The example he provided is that each director of General Motors owes a fiduciary duty to the company, but it cannot be said that General Motors is vulnerable to the actions of each individual director. Whilst this appears to be sensible Mr. Justice La Forest, without realising it, demonstrates why this contention is wrong.²⁰⁶ His Lordship indicated that the obligation is owed because, as a class, corporations are susceptible to harm from the actions of their directors. This statement reminds us that the relationship between a director and his or her company is traditionally presumed to be fiduciary. His Lordship's

²⁰²Supra Note 145 at 39.

²⁰³(1726) Sel Cas T. King 61; 25 ER 223.

²⁰⁴(1726) Sel Cas T. King 61; 25 ER 223.

²⁰⁵Supra Note 145 at 40.

²⁰⁶Supra Note 145 at 40.

entire contention proves the danger inherent when dealing with these traditional categories. That danger is that the rebuttable presumption that a relationship, that is traditionally so recognised, is fiduciary may, through the application of a lazy logical process, be perceived as irrebuttable. As the question must be how to rebut the presumption. The answer, it is contended, turns on vulnerability. The relationships traditionally recognised as fiduciary are relationships of vulnerability. Vulnerability is at the heart of the relationship. The rebuttable presumption must be rebutted when this element of vulnerability is missing.²⁰⁷ Thus, with the greatest respect to Mr. Justice La Forest vulnerability is an essential ingredient. However, La Forest stated his requirement for fiduciary obligations outside of the traditional categories as being

"... having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other."²⁰⁸

²⁰⁷see Waters' discussion of vulnerability in "LAC Minerals Ltd v. International Corona Resources" (1990) 19 Can. Bar Rev. 455 at 474-475.

²⁰⁸Supra Note 145 at 40.

His Lordship's approach is referred to, by Potter and Lavrencell,²⁰⁹ as the reasonable expectations theory. Potter and Lawrence criticize this theory because they claim that it is difficult to determine "reasonable expectations." With respect, the courts have been deciding what is "reasonable" for many decades and so this is not a valid criticism of Mr. Justice La Forest's approach.

The other main criticism of the "reasonable expectation" theory by the learned authors is that it requires the fiduciary to act for the benefit of its beneficiary rather than itself. This, Potter and Lawrence contend, is contrary to business practice in North America. However, this misunderstands what a court's finding of a fiduciary obligations means. The scope and content of the fiduciary obligation will often be limited, as it was here where it only related to the misuse of the confidential information. The holding that there is a fiduciary obligation is not "all or nothing" in that a relationship does not necessarily have to be held entirely fiduciary. Potter and Lawrence cannot be taken to suggest that it is North American business practice to misuse confidential information. And in this case that is what the finding of a fiduciary duty prevented.

The valid criticism of Mr. Justice La Forest's judgment is that he added an expression "reasonable expectation"

²⁰⁹Supra Note 177 at 7-8.

which is superfluous and generates more terminology for the already crowded fiduciary field.

It is necessary to attempt a summary of the position of the law of fiduciaries as propounded by the Supreme Court of Canada in LAC Minerals. Mr. Justice Sopinka, with McIntyre and Lamer J.J. concurred, held that the "rough and ready guide" of Wilson J. in Frame v. Smith established a suitable framework for determining whether a fiduciary relationship exists. The one indispensable ingredient for Sopinka J. is that of vulnerability or dependency. However, if the parties could have removed that vulnerability by contractual means but did not, as was the case before the bench, then no fiduciary relationship exists. Fundamentally, the imposition of the doctrine of fiduciaries into a commercial context was frowned upon by Sopinka J. Madame Justice Wilson, finding a fiduciary relationship on the facts before her, stressed the importance of vulnerability. La Forest J., also finding a fiduciary relationship, held that the Frame v. Smith "rough and ready guide" only applies to determining whether a category of relationships is or is not presumptively fiduciary.²¹⁰ In the case at bar this was not the relevant question. The relevant question was whether an aspect of a relationship was fiduciary. To determine this the reasonable

²¹⁰but Waters in "LAC Minerals Ltd. v. International Corona Resources Ltd" (1990) 69 Can. Bar Review 455 would not agree with this interpretation, see esp pp.473-474.

expectations of the parties had to be assessed. Vulnerability need not be present. Finally, La Forest J. offered cogent arguments against the "dependency theory" espoused by Mr. Justice Sopinka.

In conclusion, it is contended that by the adoption of the Frame v. Smith "rough and ready guide" and by placing emphasis upon vulnerability Sopinka J. surely presented appropriate guidance for examining a relationship to determine whether it is fiduciary. However his Lordship's desire to expel the fiduciary doctrine from the commercial context drove him to add the notion of "unavoidable vulnerability". The critique of this offered by Mr. Justice La Forest is particularly accurate and this additional "unavoidable vulnerability" doctrine is both unwarranted and unnecessary. It was given life simply to achieve the basic jurisprudential aim of attempting to exclude equity from the commercial world.

It is contended that the "rough and ready guide", coupled with particular attention to vulnerability is the appropriate approach. It will be rare for parties to become fiduciaries in a commercial setting when dealing with each other at arm's length. But if the circumstances are correct, according to the criteria suggested above, then there would appear to be no logical reason why fiduciary relations should be forbidden in this area.

3. Conclusion

At the end of the day what does the decision of the Supreme Court of Canada in LAC Minerals mean in relation to the law of fiduciaries? The Australian caselaw developments in Hospital Products and United Dominions Corporation were picked up by the majority and Wilson J.'s judgments to stress the primary importance of vulnerability. By making vulnerability the essential requirement of the fiduciary relationship the majority adopted a conservative view of the fiduciary relationship. Without expressly saying so the majority of the Supreme Court seemed to place the fiduciary relationship at the pinnacle of Professor Finn's hierarchy of judicially required honesty standards, and in this case this step was not reached. Additionally, the majority displayed a great reluctance to extend equitable doctrines into a commercial environment. Mr. Justice La Forest did explicitly address the question of the principle behind the law of fiduciaries. His Honour expressed the belief that the fiduciary standard should be utilized to achieve the reasonable expectations of the parties. This is the all-encompassing approach to the fiduciary relationship, where the fiduciary obligations are extended to guarantee community standards of morality. The conflicting judgments in LAC Minerals merely drew the battlelines for the dispute about which direction to take the law of fiduciaries. Effectively the case resolved nothing except the immediate

dispute between the litigants. As LAC did not resolve the questions of principles involved the courts in Canada will continue to be faced with a continuous flow of disputes allegations of a breach of a fiduciary obligation.

Chapter III
The Development of an Australian
Commercial Opportunity Doctrine

1. Introduction

There exists within the parameters of the law of fiduciaries who operate in a commercial context an area of particular interest to Australian lawyers. This is the development of a Commercial Opportunity Doctrine.' This would be a distinct doctrine overlapping with those fiduciary principles which have been mentioned previously.' What has been examined so far has been fiduciary relations existing between commercial entities. However, another important area for the operation of the law of fiduciaries is within a commercial entity itself. It concerns the fiduciary obligations of those who control the business.

To determine whether it is possible for Australian courts to fashion a commercial opportunity doctrine, and to discover what shape it might take, Canadian authority is of vital significance.

'This doctrine is known in the United States and Canada as the Corporate Opportunity doctrine, however, it will be later argued that it should not be limited to corporations but should relate to all business entities.

²for this area generally see Corporate Directors' Liability Research Paper No.17 (1989). Institute of Law Research and Reform, Edmonton, Alberta.

The justification for the formulation of a new fiduciary duty is threefold. First, the new doctrine would be limited to commercial fiduciaries.⁵ Commercial fiduciaries are legal persons who are in a fiduciary relationship with business entity. The clearest example of a commercial fiduciary is the executive director of a company. Unfortunately, the present law relating to commercial fiduciaries is

"a morass of conflicts and inconsistencies."⁴

Whether this statement be true in relation to Canada, it is an all too accurate portrayal of the Australian legal position. An early application of fiduciary duties to directors occurred in the decision of the Lord Chancellor in Charitable Corporation v. Sutton. Since that time the nature of a director or executive officer's relationship with his or her beneficiary has become more and more commercial. The courts have had to balance the right of the individual to compete with the employer with the protection of the employer's interest.⁶ The predictable outcome of this has been confusion. It is for this very reason that

⁴this concept will be discussed in greater detail later in this chapter.

⁵in Exco Corp. v. Nova Scotia Savings (1987) 35 BLR 149 at 246 (NSSC).

⁶(1977) 25 ER 642.

⁶see DCF Systems Ltd. v. Gellman (1978) 5 BLR 98.

Prentice argued, in 1967,⁷ that Canadian courts re-examine this area. Australian courts have the ability to adopt the commercial opportunity doctrine to solve this confusion. Confusion is intertwined with the second justification for the creation of this new duty. That reason is certainty.

Business men and women desire certainty. One of the principal grounds for attacking the role of Equity in the area of commerce is, as the preceding chapter indicated, the uncertainty that this body of law allegedly introduces. In order to minimize uncertainty a simple statement of the commercial fiduciary's obligation is desirable. The Commercial Opportunity Doctrine can provide this certainty, without the destruction of the flexibility that is also required.

The final justification⁸ for the Australian courts to generate a Commercial Opportunity Doctrine is the prevalence of commercial fiduciaries and their power to adversely affect the fiduciaries of their fiduciary obligations.⁹ A beneficiary is exceptionally vulnerable when it is a

⁷In "Regal (Hastings) Ltd. v. Gulliver - The Canadian Experience" (1967) 30 Mod LR 450 at 455.

⁸which appears to underlie much of the insider trading regulation, see Rider Insider Trading (Bristol: Jordans, 1983).

⁹There exists a large body of literature on the subject of the importance of senior executive officers eg. Mace Directors: Myth and Reality (Chicago: Brown, 1971) and Mace Directors: Myth and Reality - Ten Year Later (1979) 32 Rutgers L Rev.293.

business entity and the fiduciary in breach of its equitable duty is that entity's director or executive officer. As Beck indicates" the commercial fiduciary is often confronted with the temptation to exploit an opportunity relevant to its beneficiary. This temptation is compounded by the low risk of apprehension. Commercial fiduciaries possess the ability to cover their wrongdoing by complicated transactions and limiting the flow of information."

I have indicated that there exists a need for a Commercial Opportunity Doctrine in Australia. I will argue that there exists Commonwealth authority to support the creation of this doctrine which would prevent a commercial fiduciary from exploiting, for his or her own benefit, an opportunity of which he or she becomes aware of as a result of the execution of his or her fiduciary office or an opportunity which the commercial fiduciary knows or should reasonably know is closely related to the business in which the beneficiary is engaged or may reasonably be expected to engage in. The first part of this doctrine clearly relates to the "profit rule" and there exists ample authority which

¹⁰"The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 49 Can Bar Rev 80 at 84.

¹¹Professor Dodd first noted this several decades ago in "Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?" (1934-35) 2 U. Chi. L Rev 194. Nothing has occurred in the intervening years to suggest that this combination of temptation and low risk has altered.

deals with it." For that reason it is unnecessary to deal with it. However, it is the second half of the doctrine, relating to a prohibition on the commercial fiduciary taking an opportunity to engage in a business activity which he or she knows or should reasonably know is closely related to the business in which the beneficiary is engaged or may reasonably be expected to engage in that is particularly contentious and will constitute the majority of this chapter.

2. Authority for an Australian Commercial Opportunity Doctrine

a. Introduction

It will be shown that Commonwealth caselaw exists which would support the proposed Australian doctrine. The majority of this caselaw is Canadian. It is necessary to examine these decisions under the various rules that apply to fiduciaries generally."

¹²for example; Cook v. Deeks [1916] 1AL 554; Furs Ltd. v. Tomkies (1936) 54 CLR 583; Abbey Glen Property Corp. v. Stumborg (1978) 85 DLR (3d) 35.

¹³These rules are extensively detailed in Finn's Fiduciary Obligations, (Sydney: Law Book Co., 1977) chapters 18 and 21.

b. Rule against Misappropriation of Assets

The rule against misappropriation of assets, unlike the profit and conflict rules, is probably a manifestation of an underlying principle against unjust enrichment." Professor Beck has suggested the Canadian Corporate Opportunity Doctrine is based upon the rule against misappropriation. He states that

"He (the fiduciary) cannot appropriate to himself property or opportunities, the chance for which came to him because of the position he occupied. It is this principle which is behind the development of the law of fiduciaries."¹⁵

The proposition that the Antipodean Commercial Opportunity Doctrine may be founded on the misappropriation rule is tenuous. The contention, which Beck does not support by reference to any authority, is open to attack on two fronts. First, it is an interesting notion that an opportunity may be considered property, which is an obvious requirement if it is to be capable of misappropriation. Certainly an opportunity is not a "hard" asset¹⁶ like cash or materials. It would appear more like a "soft" (or

¹⁴see Jones "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 LQR 472.

¹⁵"The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 49 Can. Bar. Rev. 80 at 91.

¹⁶to utilize the language of Professor Austin in his scholarly and important article "Fiduciary Accountability for Business Opportunities" in Equity and Commercial Relationships Edited by Finn: (Sydney: Law Book Co., 1987) at p.144.

intangible) asset, and the criticisms that Austin makes of extending the rule against misappropriation to include other "soft" assets" can surely be levelled against applying it to opportunities. To further lessen Professor Beck's attribution of the foundation of the Canadian Corporate Opportunity Doctrine upon the misappropriation rule is that a distinction can be drawn between what is referred to as "soft" assets and opportunities. That is, "soft" assets like goodwill are identified by accountants as intangibles and are recognized in the accounting process. Opportunities have yet to be identified by the accounting profession as constituting an asset of the firm."

Secondly, the way that Beck has formulated his version of the doctrine it may be inadequate to fulfil the desired role that the Australian doctrine is to play. Beck includes in his formulation that the opportunity must come to the fiduciary "because of the position he occupied."¹⁹ This is

¹⁷Ibid. at pp. 144-146.

¹⁸the entire suggestion of opportunity as property is remarkably similar to Lords Hudson and Guest's finding in Boardman v. Phipps [1967] 2 AC 46 at 107 and 115 respectively, that the information acquired by Mr. Boardman was property which belonged to the estate. Lord Upjohn rejected this idea in his dissenting judgement at pp.127-28. Finn in Fiduciary Obligations (1977, Sydney: The Law Book Co., at paragraph 296) and subsequent writers, for example Stuckey "The Equitable Action for Breach of Confidence: Is Information ever Property?" (1981) 9 Syd LR 402, support Lord Upjohn's stance. However, note should be taken of Shepherd's counterargument in The Law of Fiduciaries (Toronto: The Carswell Company Ltd., 1981), at p.329.

¹⁹Supra note 14 at p.91.

the causal element for Professor Beck. An example will illustrate the implications and so highlight its inadequacy for the Australian doctrine. If the executive director of a supermarket is informed about the opportunity to purchase a rival supermarket by his golfing partner this opportunity cannot be said to have come to him "because of the position he occupied." If that opportunity is exploited then on Beck's formulation stemming from the misappropriation rule the commercial fiduciary will not be liable." However, on the proposed approach, that is where the commercial fiduciary is prohibited from exploiting an opportunity to engage in a business activity which he or she knows or should reasonably know is closely related to the business which the beneficiary is engaged in or may reasonably be expected to engage in, the commercial fiduciary should be liable.

Thus, Professor Beck's attempt to found the Corporate Opportunity Doctrine upon the misappropriation rule has been shown to be inaccurate and inadequate for our purposes.

G. The Conflict Rule

It can be said with confidence that if a Commercial Opportunity Doctrine is to develop in Australia it will not stem exclusively from the rule against misappropriation of

²⁰this is clearly ignoring an action based upon a breach of the conflict rule.

assets. The two remaining contenders for paternity of this Australian doctrine are the related rules pertaining to conflict and profit. The conflict rule requires that a fiduciary must avoid situations in which his or her personal interest conflicts or may conflict with his or her duty to his or her beneficiary.?' Gibbs J. (as he then was) expressed strongly his belief that the conflict rule is more fundamental to the law of fiduciaries than the profit rule.²² Gibbs J. is supported in this contention by Beck,²³ Goff and Jones,²⁴ Vinter²⁵ and Lord Upjohn.²⁶

Ellis states that the Canadian Corporate Opportunity Doctrine comes from

²²the possibility of conflict must satisfy the "real, sensible possibility" test annunciated by Lord Upjohn in Boardman v. Phipps [1967] 2 AC 121 and subsequently applied in many cases, for example, Queensland Mines Ltd. v. Hudson Ltd. (1978) 18 ALR 1 at 3; Consul Developments Pty Ltd. (1978) 18 ALR 1 at 3; Consul Developments Pty Ltd. v. DPC Estates Pty Ltd. (1975) 132 CLR 373 per Gibbs J. at 399; Chan v. Zacharia (1984) 154 CLR 178 per Deane J. at 205; Hospital Products Ltd. v. USSC (1984) 55 ALR 417 per Mason J. at 458.

²³Consul Development Pty Ltd. v. DPC Estates Pty Ltd. (1975) 132 CLR 373 at 393.

²⁴supra note 14 at pp.89-92.

²⁵The Law of Restitution 2nd Edition (London: Sweet and Maxwell, 1978) at p.491.

²⁶History and Law of Fiduciary Relationships and Resulting Trusts 3rd Edition (London: Butterworths, 1955) at p.11.

²⁷Boardman v. Phipps [1967] 2 AC 46 at 123.

"the basic premise that a corporate fiduciary may not place himself in a position of conflict of interest with his corporation."²⁷

Obviously, the learned author is placing the paternity of the Canadian doctrine with the conflict rule. It must be said that this does appear logical. The judgement of Viscount Sankey in Regal (Hastings) Ltd. v. Gulliver²⁸ provides support for this contention. His Honour held

"In my view, the [directors] were in a fiduciary position and their liability does not depend upon proof of mala fides. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his cestui que trust."²⁹

However, Professor Austin scrutinizes the conflict rule and indicates that it is inadequate to handle all the cases of profit making by a commercial fiduciary. From this finding this learned author concludes that the conflict rule is not suitable for the task of supporting Australia's Commercial Opportunity Doctrine.³⁰

²⁷Fiduciary Duties in Canada (Toronto: De Boo, 1988) Ch.15 p.9.

²⁸[1967] 2 AC 134.

²⁹supra note 16: at pp.147-148.

³⁰supra note 16: at pp.147-148.

Austin's reasoning for the above contention can be summarized thus: the conflict rule operates at the third step of the analysis of a fiduciary problem. The first step is to identify whether a fiduciary relationship does exist; the second step is to determine the scope and content of the fiduciary duty; and the third step is to perceive whether there has been a breach of that duty. The conflict rule, whilst determining the third step, does not assist in the second step. Austin illustrates this by providing an example.³¹

Reworking the facts of Regal (Hastings) Austin poses the question whether directors who discover a supermarket for lease while searching for a cinema for the beneficiary's cinema business and take that supermarket lease for themselves would be liable to account on the basis of the conflict rule.³² Certainly the directors' personal interests are at stake here but what is the conflicting interest of the beneficiary? On a commonsense and intuitive level it is obvious that there is no conflict between the directors' interest in a supermarket and the beneficiary's cinema business. They are, according to Austin,³³ too dissimilar to generate any practical conflict. But if the facts are reworked so that the business unearthed by the

³¹supra note 16 at pp.147-148.

³²the profit rule is put to oneside for this example.

³³supra note 16 at p.148.

directors was not a supermarket but a television store would this variation constitute a breach of the conflict rule? Altering the facts slightly more, if the lease was not of a television store but of a video store is there a conflict? Ultimately Austin twists the factual basis until the lease concerns a rival cinema. The question he poses is this: if the directors discovered a nearby rival cinema whilst searching for a cinema on the beneficiary's behalf is there a breach of the conflict rule? The commonsense and intuitive reaction is to say yes, this set of circumstances breaches the conflict rule.

The inadequacy of the conflict rule for Austin is demonstrated by this example: at either end of the conflict spectrum the conflict (or lack thereof) is clearly apparent. On the supermarket lease facts it is clear that no real sensible possibility of conflict exists. But with the rival cinema scenario it is obvious that a conflict does, or could easily, exist between the directors' own interests and their duty to their beneficiary. However, both of these conclusions are founded on our own commonsense and intuitive reaction to the facts presented. Difficulties manifest themselves in the utilization of the commonsense and intuitive approach when the facts of the problem move away from either pole on the conflict spectrum. Professor Austin's examples of leases over a television store and a video store are precisely that; movements away from the

extremes of the conflict spectrum, towards the mid-point of this spectrum where commonsense and intuition fail to provide an answer.

The step that must be taken to answer the question of whether there has been a conflict is the second step previously mentioned; the determination of the scope and content of the fiduciary duty. The commonsense and intuitive approach provides a de facto answer to this question by asserting that the scope and content of the duty clearly do (or do not) encompass the activity complained of. Austin faults this approach,³⁴ and quite rightly, as being of no assistance where the scope and content are in doubt. Further, the conflict rule provides no guidance in these doubtful situations. For Austin, the conflict rule can only operate when the action is near either end of the conflict spectrum. It is on proving this failure that Professor Austin turns his attention to the profit rule.

This critique of the conflict rule is accurate. However, the failings of the conflict rule does not, contrary to Professor Austin's stance, mean that it should be disregarded in the search for support for the Australian Commercial Opportunity Doctrine. If the doctrine is to prevent a commercial fiduciary from engaging in a business activity which he or she knows or should reasonably know is closely related to the business that the beneficiary is

³⁴supra note 16 at p.148.

engaged in or may reasonably be expected to engage in then the conflict rule is of extreme importance. Much of the support for the Australian doctrine must be drawn from the principles underlying the conflict rule. The conflict rule would certainly be a dominant element running through the Commercial Opportunity Doctrine. It would appear that Professor Austin's rejection of the conflict rule as sustaining the doctrine is based upon his unnecessary desire to have a single basis for it. There is no reason for this exclusively of origin, and the conflict rule must be seen to play a large part in it. However, much of the caselaw upon which a Commercial Opportunity Doctrine may be constructed from comes via the profit rule.

d. The Profit Rule

The profit rule requires the fiduciary to account to the beneficiary for any gain which the fiduciary makes in connection with his or her office. The central pillar of the construction of an Australian Commercial Opportunity Doctrine will be shown to be the profit rule. For this reason the caselaw will be examined in great detail. Both Shepherd³⁵ and Ellis³⁶ attribute the commencement of the

³⁵The Law of Fiduciaries (Toronto: The Carswell Co., 1981) at 276.

³⁶Fiduciary Duties in Canada (Toronto: De Boo, 1988) Ch.15 p.9.

Canadian Commercial Opportunity Doctrine to the House of Lords decision in Regal (Hastings) Ltd. v. Gulliver.³⁷

In that case Regal planned to acquire the leases on two cinemas. To achieve this a wholly-owned subsidiary was to be formed. After some difficulties the directors and solicitor of Regal decided to take up a majority holding in this subsidiary. This was done and the directors and solicitor reaped large profits. The new owners of Regal sued the four directors and the solicitor for an accounting of these profits. As Lord Russell of Killowen pointed out the only explanation why fraud in the normal sense was not made out was that errors in preparation and presentation of the case were made by the plaintiff.³⁸

Viscount Sankey's judgment has been quoted above. The judgment that has had far reaching implications for Canada in the development of this doctrine is that of Lord Russell. His Lordship stated.

"they [the directors and solicitor] may be liable to account for the profits which they have made, if, while standing in a fiduciary relationship to Regal, they have by reason and in course of that fiduciary relationship made a profit."³⁹

"The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or

³⁷[1967] 2 AC 137.

³⁸Ibid. at 143.

³⁹Ibid. at 143.

upon such questions or considerations as whether the profit would or should otherwise have gone to the [company], or whether the profiteer was under a duty to obtain the source of the profit for the [company], or whether the [company] has in fact been damaged or benefited by this action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."⁴⁰

"Did [the directors and solicitor] acquire them [the profits] by reason and in course of their office of directors of Regal? In my opinion, when the facts are examined and appreciated, the only answer can be that they did."⁴¹

"In the result I am of the opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these [profits] by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of the office, are accountable for the profits which they have made out of them."⁴² [the emphasis is by the author]

The key element of Regal (Hastings) and the basis upon which the directors were found liable, requiring them to disgorge these profits, was that the commercial fiduciaries made a profit in the "stated circumstances." Those "stated circumstances" were that the profit was made "by reason of and in the course of" the fiduciary office. Shepherd claims⁴³ that the legacy of Regal (Hastings) is that "a

⁴⁰Ibid. at 144-145.

⁴¹Ibid. at 149.

⁴²Ibid. at 149.

⁴³Supra Note 35 at 277.

very tight rule to be applied rigorously and with unyielding severity" had been created. Ellis formulates the rule derived from this decision to be that

"A director or officer of a corporation may not personally profit from a opportunity presented to him as a result - and only as a result - of this being a director. Where he does so profit, the presence or absence of good faith is irrelevant to his liability to account, such liability being strictly enforced regardless of intention."⁴⁴

According to Ellis⁴⁵ this principle has been the building stone of the Canadian doctrine. It is with the influential judgment of Lord Russell that Professor Austin commences his quest for caselaw support for an Australian Commercial Opportunity Doctrine. He finds Regal (Hastings) deficient to serve that purpose.

The Lord Russell test requiring that the fiduciary made that profit "by reason of and in the course of" his or her fiduciary duty is comprised of two elements. The first, pertaining to "in the course of" is a temporal limitation. The second, relating to "by reason of" is the causal limitation. The problem connected to the temporal limitation is obvious; an apparent escape from liability is by resignation. This is, as Austin correctly indicates,⁴⁶ manifestly unjust. Professor Austin's criticism of the

⁴⁴Supra Note 36 ch.15 p.11.

⁴⁵Supra Note 36 ch.15 p.11.

⁴⁶Supra Note 16 at 150.

causal element of the Lord Russell test is unfortunately poorly expressed. He suggests that the "by reason of" requirement implies that a commercial fiduciary can act in a fiduciary capacity and in a non-fiduciary capacity." Obviously, Austin's objection to a commercial fiduciary also being able to operate as a non-fiduciary is not as wide as his statements suggests.⁴⁸ Later in the article the learned author comments that even a full-time corporate executive in New York can write the "great American novel" in his recreational time.⁴⁹ It is easily grasped that Professor Austin does envisage a commercial fiduciary conducting him or herself for personal profit. The problem is what does he mean by the criticism of the second element of the Lord Russell. It is suggested that what Austin is endeavouring to convey is that at all times the commercial fiduciary is a commercial fiduciary. At any moment this duty may be breached. Whether the commercial fiduciary will be in breach of his or her duty is determined by the scope and content of the fiduciary duty. It would appear that Professor Austin's criticism of the second element is pivoted upon his perception that the causal test might indicate some way of removing the fiduciary duty. If this

⁴⁷Supra Note 15 at 150.

⁴⁸the Professor employs a hat metaphor in that the casual limitation appears to permit the taking off of the fiduciary hat and replacing it with a non-fiduciary hat.

⁴⁹Supra Note 16 at 150.

interpretation placed upon Austin's words is correct then this is a valid criticism of the causal limitation. However, a far stronger criticism exists of the Regal (Hastings) decision as a basis for the Australian Commercial Opportunity Doctrine.

The causal limitation requires that the opportunity must be available to the commercial fiduciary "by reason of" the equitable relationship. This element clearly places the Lord Russell test for liability under the profit rule. However, this is not as broad as the proposed doctrine. It has been argued, to sterilize an area of potentially great wrongdoing, that a commercial fiduciary should be prevented from keeping an opportunity to engage in a business activity if he or she knows that the activity is closely related to the business in which the beneficiary is presently engaged or may reasonably be expected to engage in. Causation is not dealt with. This highlights the strong claim that the conflict rule has to form part of the foundation of a Commercial Opportunity Doctrine in Australia. Thus, the Lord Russell test involves an element (causation) which is quite irrelevant to the proposed model of the doctrine.

As Professor Austin acknowledges⁵⁰ the facts of Regal (Hastings) did not offer Lord Russell much opportunity to consider his temporal and causal limitations. This largely untried test was subsequently applied in Canada.

⁵⁰Supra Note 16 at 150.

In Peso Silver Mines v. Cropper⁵¹ Peso was a mining company and the defendant Cropper was Peso's managing director. A prospector offered claims to Peso. At a meeting of directors, attended by Cropper, these highly speculative claims were rejected. The prospector then offered these claims to Cropper and others. This offer was accepted. The control of Peso changed and the new owners demanded that Cropper transfer these claims. He refused, and Peso pursued its claim, based on the opportunity rule.

In the British Columbia Court of Appeal Bull J.A., writing for the majority, and Norris J.A. differed in their respective interpretations of Regal (Hastings) as applied to the facts before them. Mr. Justice Bull perceived Regal (Hastings) as establishing two grounds for liability.⁵² The first, based on Viscount Sankey's judgment, is where the fiduciary places him or herself in a position of conflict between his or her personal interest and the duty to the beneficiary. The second ground for liability that his Lordship found established by Regal (Hastings) is that the fiduciary cannot retain a profit arising "by reason of and in the course of his fiduciary office."⁵³

⁵¹[1966] SCR 673, 56 WWR 641, 58 DLR (2d) 1.

⁵²(1966) 56 DLR (2d) 117 at 154.

⁵³In Zwicker v. Stanbury [1954] 1 DLR 257 approval was given to the conflict rule by the Supreme Court of Canada, and the same court endorsed the profit rule in Midcon Oil & Gas Ltd. v. New British Dominion Oil Co. Ltd. [1958] 12 DLR (2d) 705.

The conflict principle received distressingly scant regard from Bull J.A. His Lordship held that once the board of Peso had bona fide reached the decision not to purchase the claims the company no longer had any interest in them.

In regard to the profit rule Peso's counsel argued that as Cropper and his associates had acquired their knowledge of the claims as directors of Peso, their subsequent purchase of the claims was "in the course of" the fiduciary office. Bull J.A. rejected this contention by interpreting Lord Russell's judgment in Regal (Hastings) to necessitate the showing that the transaction was entered into only by reason of the fact that they were fiduciaries, and in the execution of their office. His Lordship held that this was not proven here. The directors were acting in the course of their fiduciary office when considering and rejecting the claims. After the rejection the purchase by the directors could not, according to Bull J.A., be said to have been made only in their capacity as directors. The majority judgement in Peso stands as authority for the proposition that the subsequent use of knowledge acquired as a director is not, of itself, sufficient to invoke the profit rule.

Bull J.A. also noted the comments of Greene M.R. in Regal (Hastings). Greene M.R. said in the Court of Appeal decision that

"To say that the Company was entitled to claim the benefit of those shares 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, who chooses to put **up** 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, as it seems to me, far beyond anything that has even been suggested as to the duty of directors, agents, or persons in a position of that kind."

Lord Russell in the House of Lords commented upon this statement by the Master of the Rolls. Mr. Justice Bull in Peso expressed the opinion that this comment on Lord Greene's hypothetical would have been superfluous, as the Court of Appeal's decision was being reversed, unless Lord Russell intended to agree with Lord Greene's reservation. Bull J.A. concluded that the facts before him did fall within this hypothetical and so the directors were at liberty to take the opportunity.

However, the validity of the hypothetical has been questioned. First, in reference to Lord Greene's rejection of the proposition as not possessing a "particle of authority" Ellis⁵⁴ points out that this clearly ignores all the cases that follow Keech v. Sandford.⁵⁵ Secondly, Beck convincingly suggests that a more likely explanation of Lord Russell's comment than the one expressed by Bull J.A. was a

⁵⁴Supra Note 36 Ch.15 p.12.

⁵⁵(1726) 25 ER 223.

desire on his Lordships behalf to clarify the fact that Lord Greene's hypothetical was not the case that the House of Lords was faced with. The comment was not intended to be an endorsement of the validity of the hypothetical.

What informed Bull J.A.'s entire approach to the case was a decided reluctance to extend equitable principles into a commercial **context**.⁵⁶ His Lordship stated that

"... in this modern day and country when it is accepted as commonplace that substantially all business and commercial undertakings, regardless of size or importance, are carried on through the corporate vehicle with the attendant complexities involved by interlocking, subsidiary and associated corporations, I do not consider it enlightened to extend the application of these principles beyond their present limits. That the principles, and the strict rules applicable to trustees upon which they are based, are salutary cannot be disputed, but care should be taken to interpret them in the light of modern practice
...⁵⁷"

A rejection of this underlying philosophy constituted the basis of the dissenting judgment of Norris J.A. His Lordship held:

"With the greatest respect, it seems to me that the complexities of modern business are a very good reason why the rule should **be enforced** strictly in order that such complexities may not be used as a smoke screen or shield **behind which** fraud might be perpetrated. The **argument is** purely and simply an irrelevant **argument of expediency** as to what the law should **be, not what it is.** It might be well be said **that such an**

⁵⁶a theme common to this entire paper.

⁵⁷Supra Note 51 at 154-155.

argument if given effect to would open the door to fraud, and weaken the confidence which ordinary people should have in dealing with corporate bodies. In order that people may be assured of their protection against improper acts of the trustees it is necessary that their activities be circumscribed within rigid limits. ... The history today of many corporate bodies has disclosed scandals and loss to the public due to failure of the directors to recognize the requirements of their fiduciary position. No great hardship is imposed on directors by time enforcement of the rule, as a very simple course is available to them which they may follow [full disclosure to, and seek approval of, the shareholders]"⁵⁸

With this approach⁵⁹ Norris J.A. held that the actual decision of Resal (Hastings) and not Lord Greene's hypothetical covered the case before him.⁶⁰ The desire of Peso to purchase the claims, which was prevented by financial inability, meant that the acquisition of the opportunity by the fiduciary brought the case fairly within the facts of Regal (Hastings).⁶¹

Unfortunately this basic split between Bull J.A. and Norris J.A. concerning the application of Equity's traditional rules to the modern business world was not — commented upon by the Supreme Court of Canadian in its decision in Peso. Cartwright J., delivering the unanimous

⁵⁸Supra Note 51 at 139.

⁵⁹Prentice in "Resal (Hastings) - The Canadian Experience" (1967) 30 Mod LR 450 at 452 finds that it is this philosophical difference that generates the conflicting judgments.

⁶⁰Supra Note 51 at 125.

⁶¹Supra Note 51 at 134.

judgement of Canada's highest court, addressed only the profit rule and ignored the conflict rule. Xis Lordship quoted each of the judgments in Regal (Hastings). His conclusion was⁶² that all the judges in the House of Lords agreed with the following statement of Lord Russell;

"... and having obtained these shares by reason and only be reason of the fact that they were the directors of Regal and in the course of the execution of that office [they] are accountable for the profits which they have made out of them."

The finding of a bona fide rejection of the claims by the board meant that the subsequent purchase by Cropper was not in the course of the execution of this fiduciary office and so the appeal was dismissed.

The decision has been justly criticized by Beck." He claims that the decision in Regal (Hastings) does not support the narrow interpretation placed upon it by the Supreme Court of Canada. The statement by Lord Russell quoted by Cartwright J. came at the conclusion of his Lordship's examination of the facts to determine if the shares were acquired "by reason of and in the course of their office of directors of Regal." As Shepherd states

"The clear implication of Lord Russell's decision is that, once causation has been proved, no defence speaking to whether the beneficiary

⁶²(1966) 58 DLR (2d) at 8.

⁶³Supra Note 10 at 106.

corporation could or would have taken the opportunity is allowed."⁶⁴

With the greatest respect Mr. Justice Cartwright erroneously interpreted and applied Lord Russell's decision.

The practical implication of the decision in Peso was a move towards the relaxation of the opportunity doctrine in Canada. Effectively, the Court in Peso circumscribed the strength of Corporate Opportunity Doctrine laid down in Regal (Hastings) by permitting the fiduciary to successfully show the opportunity did not come to him or her exclusively and only in the course of the fiduciary office. One consequence of this decision has been a steady stream of academic criticism of the relaxation of the Corporate Opportunity Doctrine.⁶⁵ Obviously the decision in Peso is of little assistance in the development of an Australian Commercial Opportunity Doctrine.

The next significant decision in Canada concerning the doctrine is of vital importance for the Australian attempt to construct a domestic opportunity model. This is the

⁶⁴Supra Note 35 at 282 footnote 31.

⁶⁵for example, Beck "The Saga of Peso Silver Mines: Commercial Opportunity Reconsidered" (1971) 49 Can. Bar. Rev. 80; Beck "The Quickening of Fiduciary Obligations: Canadian Aero Services Ltd. v. O'Malley" (1975) 53 Can. Bar. Rev. 771; Prentice "Comment Industrial Development Consultants Ltd. v. Cooley" (1972) 50 Can. Bar. Rev. 623 Sugarman "Comment Oranje v. Kuys" (1974) 52 Can. Bar. Rev. 280.

seminal decision of the Supreme Court of Canada in Canadian Aero Services Ltd. v. O'Malley.⁶⁶

The facts of the case are straightforward. The plaintiff company engaged in topographical mapping. M was a director, president and chief executive officer of the company. Z was a director and executive vice-president. The company first became interested in the possibility of an extensive aerial mapping project in Guyana in 1961. Both M and Z spent time in Guyana in 1961 and 1962 preparing preliminary projects and consulting with government officials. The Canadian government decided to finance the project. M and Z were in contact with officials of the governments of both Guyana and Canada during this time. M and Z incorporated T Ltd. and shortly thereafter resigned their positions with Canadian Aero Services. Five companies, including Canaero and T Ltd. were invited to bid on the Guyana project. T Ltd. was selected as the contractor. Canaero brought an action against M and Z alleging that they had breached their fiduciary duty to "it by depriving the company of an opportunity it had been developing. As Beck⁶⁷ has pointed out these facts bear more than a passing resemblance to Cook v. Deeks⁶⁸ and it

⁶⁶(1973) 40 DLR (3d) 371.

⁶⁷"The Quickening of Fiduciary Obligations" (1975) 53 Can. Bar. Rev. 771.

⁶⁸[1916] 1 AC 554.

would have been understandable to assume that the Canadian courts would find as the Privy Council found in that case. However, at first instance and in the Ontario Court of Appeal no breach of fiduciary duty was **found**.⁶⁹ A consequence of these findings required the Supreme Court of Canada to reevaluate the requirements for liability in Regal (Hastings). Beck contends⁷⁰ and Finn agrees⁷¹ that it was this reevaluation that propelled Canada towards a "flexible and more spacious standard" for the Corporate Opportunity Doctrine. And it is this propulsion that gives the judgement of Canaero its importance.

Mr. Justice Laskin (as he then was), writing for the majority, had to grapple with the Ontario Court of Appeal's holding that as **M** and **Z** were defectively appointed as directors they were only employees possessing no fiduciary duties. Laskin J. dismissed this formalistic approach by stating

"Like Grant, the trial judge, I do not think it matters whether M and Z were properly appointed as directors of Canaero or whether they did or did not act as directors. What is not in doubt is that they acted prospectively as president and

⁶⁹The Ontario Court of Appeal decision was based upon the fact that neither M nor Z had been properly as directors. Thus, the Court of Appeal found that they were only employees and therefore owed the company no fiduciary duty.

⁷⁰Supra Note 61 at 775-776.

⁷¹Fiduciary Obligations (Sydney: Law Book Co., 1977) at 248.

executive vice-president of Canaero for about two years prior to their resignations ... they acted in those positions and their enumeration and responsibilities verified their status as senior officers of Canaero. They were "top management" and not mere employees ..."⁷²

Further, it can be contended, as Ellis does," that even if no appointments had been attempted M and Z would have been "de facto" fiduciaries according to the terminology of the High Court of Australia in the Hospital Products case."⁷⁴

Can the proposed Commercial Opportunity Doctrine be based on the Canaero decision? This is dependent upon the reasoning of the Supreme Court of Canada. Thus, a thorough examination of it is required.

Laskin J. held that:

"It follows that [they] stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far; a director or a senior officer ... is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company."⁷⁵

⁷²Supra Note 62 at 381.

⁷³Supra Note 36 at Ch.15 p.17.

"(1984) 156 CLR 41.

⁷⁵Supra Note 62 at 381-382.

This statement is of vital significant to the attempt to develop an Australian Commercial Opportunity Doctrine, the Court here clearly focused on the status of the "property or business advantage". By this formulation of the doctrine the commercial fiduciary is not permitted to use an opportunity which "belonged" to the beneficiary or for which it has been negotiating. Thus, if the earlier example is cited, where the commercial fiduciary receives an opportunity, in the ~~same~~ line of business as his or her beneficiary, from his or her golfing partner than the beneficiary cannot successfully bring an action on this doctrine.⁷⁶ Later, Laskin J. repeated this formulation.

"An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers show the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself ... a maturing business opportunity which his company is actively pursuing. ..."⁷⁷

Ellis points out⁷⁸ that these statements require that the opportunity must be developed at least to where it could be said that the opportunity was maturing. If not, no liability flows.

⁷⁶clearly though an action for breach of the conflict rule would be available.

⁷⁷Supra Note 62 at 381.

⁷⁸Supra Note 36 at Ch.15 p.18.

One way of attempting to utilize Laskin J.'s judgment for an expansive Commercial Opportunity Doctrine is to examine closely what his Lordship required for liability. At pages 381-382 Laskin J. held that the fiduciary

"... is precluded from obtaining for himself ... any property or business advantage either belonging to the company or which it has been negotiating."

In the example where the opportunity comes to the commercial fiduciary from his or her golfing partner obviously the benefit cannot be said to have been negotiated for. But can it be said that his opportunity "belongs" to the beneficiary? As was earlier argued it is difficult to conceptualize opportunity as property. It can be argued that the word "belongs" was not used in the Supreme Court's judgment to connote proprietorial rights as this is illogical when dealing with things which, by their very nature, are not property. It is reasonable to suggest that in common usage duties may be said to belong ~~to the~~ beneficiary. For example, the trustee owes duties to his or her beneficiary. These duties may be said to belong to the beneficiary. And what could form part of the commercial fiduciary's duty which belong to his or her beneficiary? Beck⁹ convincingly argues that a commercial fiduciary may receive information in a multitude of places, such as the

⁹Supra Note 67 at 782.

boardroom and the golf course. Twinned with this the learned author demonstrates that such information does not come neatly packaged as directed towards commercial fiduciaries because of their fiduciary position. Thus, Beck perceives⁸⁰ part of the fiduciary duty to be to pass on this information (or opportunity) to his or her beneficiary. On this particular approach it is plausible to argue that this duty to pass on the information (or opportunity) is owed to the beneficiary, or phrased differently, this duty "belongs" to the beneficiary."

On this approach Canaero can be viewed as supporting the expansive doctrine for Australia. There are other statements by Laskin J., obviously dicta, which also support the expansive approach. Laskin J. stated

"... there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company ..., as for example, by reason of the legal disability, to participate in the **transaction.**"⁸²

It would be puzzling to confine the doctrine to where the "opportunity" is maturing, if it is not an opportunity per

⁸⁰Supra Note 67 at 783.

⁸¹Lord Roskill in Industrial Development Corporation v. Cooley [1972] 2 All ER 162 also supports this duty of the commercial fiduciary to his or her beneficiary information "which was of concern to the Plaintiffs and was relevant for the Plaintiffs to know." at 173.

⁸²Supra Note 62 at 383.

se because the beneficiary cannot take advantage of it. His Lordship must be seen here to be including situations which do not involve maturing opportunities. As such, this observation provides foundation for an Australian Commercial Opportunity Doctrine.

One difficulty with attempting to utilize Laskin J.'s judgment as the cornerstone for the proposed doctrine is that his Lordship explicitly refused to establish specific rules for commercial fiduciaries. Instead Mr. Justice Laskin emphasised the fluid nature of the relationship by stating

"In holding that on the facts found by the trial judge, there was a fiduciary duty by M and Z which survived their resignation I am not to be taken as laying down any rule of liability to be read as if it were statute. The general standards of loyalty, good faith and avoidance of conflict of duty and self-interest to which the conduct of a director and senior officer must conform, must be tested in each case by many factors which it would be reckless to enumerate exhaustively."⁸³

Laskin J.'s refusal to deal with or to provide detailed rules for breach of a commercial fiduciary's duty is applauded by Shepherd⁸⁴ and Professor Gower⁸⁵ refers to

⁸³Supra Note 62 at 383.

⁸⁴Principles of Modern Company Law 4th Ed. (London: Butterworths: 1979) at 595.

⁸⁵Interestingly, the Ontario High Court of Justice recent held that decision of Hoffman Products v. Karr (1990) 70 DR (2d) 789 the fairness approach of Laskin J. entailed the examination of the beneficiary. In that case the beneficiary had been established as a vehicle both for

Canaero as "a masterly judgment."⁸⁶ His Lordship's judgment is appropriate for non-commercial fiduciaries where the flexible and fluid nature of Equity's doctrines must be retained. However, with commercial fiduciaries operating in an environment of the business world certainty is a valuable and important commodity. The flexibility of Equity's traditional approach caused the majority of the High Court of Australia to refuse to find a fiduciary relationship in the Hospital Products case and was explicitly acknowledged by Bull JA. in Peso.⁸⁷ Ziegel⁸⁸ criticizes the judgment in Cannero for being conducive of uncertainty regarding the liability of a commercial fiduciary. Austin⁸⁹ similarly finds fault with it. It is contended that the open ended fairness approach of Laskin J. is suitable for non-

concealing identity and for tax reasons. Chadwick J. held at p.798 that by fitting these two factors into the fairness matrix the commercial fiduciary was not in breach of his duty. This application of Laskin J.'s fairness approach has repercussions for business entities established for tax minimization purposes.

⁸⁶the open ended fairness approach of Laskin J. has been applied countless times, e.g. Jiffy People Sales (1966) Ltd. v. Eliason (1975) 58 DLR (3d) 439; Redckop v. Robco Construction Ltd. (1978) 89 DLR (3d) 507; Edgar T. Alberts Ltd. v. Mountjoy (1977) 79 DLR (3d) 108; Abbey Glen Property Corp. v. Strumburg (1978) 85 DLR (3d) 35; Sheather v. Assoc. Financial Services Ltd. (1979) 15 BCLR 265; Weber Feeds Ltd. v. Weber (1979) 99 DLR (3d) 176.

⁸⁷Supra Note 51.

⁸⁸"Bora Laskin's Contributions to Commercial Contract and Corporate Law" (1985) 35 U. Toronto LJ392 at 419.

⁸⁹Supra Note 16 at 165.

commercial fiduciaries, but not so for commercial fiduciaries. However, this contention does not mean that the law of fiduciaries should be banished from the arena of commercial fiduciaries and their business beneficiaries. It simply requires a search for an approach which brings into the fiduciary duties greater certainty whilst retaining some flexibility. This is provided by the proposed Commercial Opportunity Doctrine.

The decision of the Supreme Court of Canada in Canaero does provide support for the proposed Australian Commercial Opportunity Doctrine. However, these statements in support are overshadowed by the fairness approach which is entirely discretionary. It is therefore fortunate that Canaero is not the sole authority for the Australian model. Roskili J.'s judgment in Industrial Development Consultants v. Cooley⁹⁰ is also of assistance.

Cooley had been the managing director of the plaintiff company. During this time he had conducted negotiations, on behalf of his beneficiary, with the Eastern Gas Board. These dealings produced no results. However; subsequently a representative of Eastern Gas Board approach Cooley, in his private capacity, with a proposition similar to that in which the plaintiffs had been interested. Cooley accepted this offer. He resigned from the plaintiff, claiming ill health, and took up a contact with the Eastern Gas Board.

⁹⁰[1972] 2 All ER 162.

On the discovery of these facts the plaintiffs brought an action for breach of fiduciary duty. Cooley's defence, in part, was that the information he received had been given to him in his private capacity, and that there was no fiduciary obligation to pass this information to the plaintiff.

Regarding this argument, claiming that he had received the information in a private capacity, Roskill J. stated

"The defendant had one capacity and one capacity only in which he was carrying out business at that time. The capacity was as managing director of the plaintiffs. Information which came to him when he was managing director and which was of concern to the plaintiffs and was relevant to the plaintiffs to know, was information which it was his duty to pass on to the plaintiffs, because between himself and the plaintiffs a fiduciary relationship existed."

This is obviously of importance in interpreting Laskin J.'s comment on the opportunity "belonging" to the beneficiary:

Roskill J. found Cooley liable. His Honour's reasoning was that the opportunity which Cooley exploited was of "concern" and "relevance" to the company. In this formulation there is no requirement that the commercial opportunity was one that was in the process of being "matured" by the beneficiary. Prentice contends⁹² that this decision permits the formulation of a Commercial

⁹¹Ibid. at 173-174.

⁹²"Comments: Directors' Fiduciary Duties - The Corporate Opportunity Doctrine" (1972) 50 Can. Bar. Rev. 623 at 628-630.

Opportunity Doctrine along similar lines to the American Commercial Opportunity Doctrine. Austin," in addition, makes this contention.⁹⁴

e. Fulfillment of the Commercial Opportunity Doctrine

It is obvious that the Commonwealth caselaw, primarily Canadian but also English, is capable of providing a firm jurisprudential basis for the bulk of the proposed Commercial Opportunity Doctrine. However, further guidance is provided by the American learning in the area. The American doctrine, according to Shepherd,⁹⁵ is dominated by the "line of business" approach. The original statement of this test was in Guth v. Loft.⁹⁶ Guth was a commercial fiduciary in relation to Loft, which was a wholesaler and retailer of food and beverages. Guth, in his corporate position, began to investigate the substitution of Pepsi-Cola for Coca-Cola. The owner of Pepsi-Cola, National Pepsi-Cola Company (NPC), subsequently went bankrupt. The controller of NPC and Guth formed a new company and acquired both the formula and trademark of Pepsi-Cola. This new

⁹³Supra Note 16 at 151.

⁹⁴Beck in "The Quickening ..." Supra Note 66 at 777 suggests that this case does not go this far but fails to explain further.

⁹⁵The ALR (77 ALR (3d) 961 at 966-967) also accepts this proposition as correct.

⁹⁶(1939) 5 A 2d 503.

company was spectacularly successful. Loft sought relief for breach of Guth's fiduciary duty. Guth was found liable. The Supreme Court of Delaware held:

"The real issue is whether the opportunity ... was so closely associated with the existing business activities of Loft, and so essential thereto, as to bring the transaction within that class of cases where the acquisitions of the property would throw the corporate officer purchasing it into competition with his company ... [the] phrase "in the line of business" has a flexible meaning ... Where a corporation is engaged in a certain business, and an opportunity is presented to it, embracing an activity as to which it has fundamental knowledge, practical experience and ability to pursue, which, logically and naturally, is adaptable to its business having regard for its financial position, and is one that is consonant with its reasonable needs and aspirations for expansion, it may be properly said that the opportunity is in the line of corporation's business."⁹⁷

Loft's "line of business"; involved the sale of carbonated beverages, some of which were produced by itself."

This "line of business" test has been expanded by subsequent cases to cover prospective activities.⁹⁸ This expanded "line of business" test can be expressed as follows: the corporate fiduciary is not permitted to engage in an activity if he or she knows or should reasonably know

⁹⁷Ibid. at 513-514.

⁹⁸This case is discussed in greater detail by Bean "Corporate Directors' Liability" (1986) 65 Denver University Law Review 59 at 70-71.

⁹⁹for example Rosenblum v. Judson Engineering Corporation 99 N.H. 267; 109 A (2d) 558 (1984), Goodman v. Perpetual Building Association 32 OF Supp 20 1970.

that the activity is closely related to the business in which the beneficiary is engaged or may reasonably be expected to engage in. According to **Brown**¹⁰⁰ this expanded "line of business" test is certainly the preferred approach of the American Law Institute in its Tentative Draft Principles of Corporate Governance.¹⁰¹ This strict sterilization of a large area of potential activity by the commercial fiduciary indicates a commendable and desirable feature of applying the expanded "line of business" test, and that is it provides commercial fiduciaries with a great deal of certainty in reference to what they can and cannot do. The deterrence factor, required because of temptation and minimal risk of detection, coupled with the certainty generated by a categorical standard support its appropriateness *for* Australia.¹⁰²

¹⁰⁰"When Opportunity Knocks: An Analysis of the Brudney & Clark and ALI Principles of Corporate Governance Proposals of Deciding Corporate Opportunity Claims" Corporate Practice Commentor 28 (1986-87) 50 at 519.

¹⁰¹see paragraph 5.05 (b) (2) and this has been applied in Klinicki v. Lundaren 298 Dr 662.

¹⁰²The current controversy that is consuming much legal journal space in the United States, for example, "Consent and the Contract Model of the Corporation" by Honabach in (1989) 18 University of Baltimore Law Review 310 and "Free at Last? The Contractual Theory of the Corporation and the New Maryland Officer-Director Liability Provisions" (1989) 18 University of Baltimore Law Review 352, concerning the concept that a corporation as a set of private contractual relationships and the shareholders should be free to order internal corporate relations, in particular the fiduciary duties of officers and directors will not be examined here.

f. Conclusion

The need exists for a Commercial Opportunity Doctrine in Australia. With the assistance of Canadian, English and American authority such as doctrine can be understood and developed. No single authority is absolute in its appropriateness to Australia. The English decision of IDC v. Cooley comes near to this but Professor Austin¹⁰³ identifies two problems with the approach of Roskill J. The first is that it must be remembered that here we are dealing with the general profit rule, which covers both commercial and non-commercial fiduciaries. Although appropriate for commercial fiduciaries the Roskill J. approach is too broad and onerous for a non-commercial fiduciaries. The way to escape this dilemma is to apply Roskill J.'s "concern" and "relevance" test to commercial fiduciaries but to utilize some more flexible test for a non-commercial fiduciary.¹⁰⁴ The obvious contender for this is the fairness approach of Canaero which is designed explicitly to provide the greatest flexibility.

The second difficulty that Professor Austin¹⁰⁵ has with the Roskill J. formula is that it provides an insufficient guide to the content of the Commercial

¹⁰³Supra Note 16 at 151.

¹⁰⁴this effectively creates a Commercial Opportunity Doctrine.

¹⁰⁵Supra Note 16 at 151.

Opportunity Doctrine. This is a consequence of the words "concern" and "relevance" being ambiguous. Austin proposes,¹⁰⁶ quite convincingly, that what should be of "concern" and "relevance" to the commercial fiduciary's beneficiary is determined by the fiduciary's present and likely future business. If the activity falls within this ambit then it is of "concern" and "relevance" to the beneficiary, but it falls outside of this field then it can not be considered to be of "concern" and "relevance". Therefore, it would not be prohibited. If this sensible interpretation of Roskill J.'s test is adopted, then IDC v. Cooley and Canaero both support clearly the proposed Australian Commercial Opportunity Doctrine. In its entirety the doctrine would prevent a commercial fiduciary from exploiting, for his or her own benefit, an opportunity of which he or she becomes aware of by execution of his or her fiduciary office or an opportunity which the commercial fiduciary knows or should reasonably know is closely related to the business which the beneficiary is engaged in or may reasonably be expected to engage in. This fiduciary duty increases the certainty for the commercial fiduciary, by being strict in its prohibition whilst retaining it's Equitable nature by exhibiting flexibility. Opposed to the viewpoint of Professor Austin this doctrine is drawn from

¹⁰⁶Supra Note 16 at 151.

the rule against misappropriation of assets, the conflict rule and the profit rule.

3. Scope of the Proposed Doctrine

a. Introduction

As has been demonstrated caselaw does exist to assist the Australian courts developing an indigenous Commercial Opportunity Doctrine. The immediate question that is posed logically is what should the scope of this doctrine be? This question has two substantial parts. First, should the doctrine apply equally to all businesses or just to public companies and secondly, what persons should be made subject to this doctrine?

b. What Businesses Would be Covered by the Doctrine?

In 1981 Professor Brudney and Clarke¹⁰⁷ proposed a corporate opportunity doctrine employing a differential standard for fiduciaries of public corporations and close corporations.¹⁰⁸ Their arguments supporting this have been broken down into several main contentions by David J.

¹⁰⁷"A New Look at Corporate Opportunities" (1981) 94 Harv. L. Rev. 997.

¹⁰⁸see "Corporate Opportunity" Georgetown Law Journal 56 (1967) 381 for a general rejection of this.

Brown.¹⁰⁹ There contentions will be individually examined to decide whether they can support such a differentiation.

The first contention by Brudney and Clark is founded upon power. The authors argue that the shareholders of a close corporation have a much enhanced position relative to their public corporation counterparts pertaining to the selection and monitoring of their fiduciaries. The close corporation shareholders can be said to have explicit practical power over their fiduciaries. Unfortunately, this generalization ignores the often powerless position of the minority shareholder, frequently trapped into this shareholding as these shares are not readily transferable.

From the opposing extremity of the power continuum the public company shareholder may not be as weak as the learned professors suggest. Austin cites¹¹⁰ current research indicating that today, certainly in Australia, institutional investors are managed by persons who are motivated by performance-related job security and are equipped with the resources necessary to monitor carefully, and have an input into the selection of, the commercial fiduciary.

In this way the clear dichotomy between the powerful close corporation shareholder and the powerless public corporation shareholder becomes less clear. With this

¹⁰⁹Corporate Practice Commentor 28 (1986-87) 508 at 517.

¹¹⁰Supra Note 16 at 167.

blurring comes the realization that to base different fiduciary standards upon it is fraught with danger.

The second contention that Brudney and Clark base their dichotomous approach upon is that the exploitable opportunities for a public company are far greater than for a close corporation, and so different standards are necessary to reflect this greater temptation confronted by public corporation fiduciary. This argument requires a (thankfully) brief discussion of micro-economic theory.

A public company should, according to this theory, accept any new investment opportunity that offers a rate of return (risk adjusted) that is the same or higher than that being currently earned. A public company should be interested in any opportunity that produced the above-mentioned rate of return. Thus, according to Brudney and Clark's application of theorem the quantity of opportunities that may be in the expanded "line of business" of the public company could well be extremely large; the close corporation, because of its size, a much smaller set of opportunities. This argument supporting a differentiated approach to the fiduciary standard is vulnerable to criticism.

First, it is apparent that the entire notion of opportunity sets is premised on the generalization that public companies are large and close corporations are small. This generalization fails to take into account the numerous

businesses which do not conform to this structure. Secondly, Professor Austin argues¹¹² that this micro-economic theory does **not** operate in practice for various reasons.¹¹³ Thirdly, if it is accepted that the micro-economic theory is accurate it is still irrelevant to **the** Commercial Opportunity Doctrine. This is a consequence of what the doctrine is; it prevents a commercial fiduciary from exploiting, for his ~~OK~~ her own **benefit**, an opportunity of which he or she becomes aware by execution of his or her fiduciary office or an opportunity which the commercial fiduciary knows or should reasonably know is closely related to the business which the beneficiary is engaged in or may reasonably be expected to engage in. This does not involve examining the opportunity set of the beneficiary. It involves a determination upon the specific facts before the court. That is, the Court will examine what the beneficiary presently does (that is, it determines the business' present line of work) and then it will look to discover any future business plans (that is, the Court determines whether **the** beneficiary would be reasonably expected to engage in this activity). Opportunity sets are not addressed by **the** Court.

¹¹²Supra Note 16 at 169-170.

¹¹³for example, the results of corporate executives are measured on a short-term basis whilst new business activities generally take a considerable period of time to reach profitability.

Brown¹¹³ identifies the third argument of Brudney and Clark¹¹⁴ as based on the permissible outside activities of the commercial fiduciary. For the authors, in a public company the commercial fiduciary is well-paid and understood to be devoting his or her full attention to the beneficiary's interests, whereas the close corporation offers low remuneration and expects less from their chief personnel. There exist two extremely important flaws with this contention. First, this entire construct is a vast generalization. Generally, it may be true that most public companies are managed by well-paid full time executives and that may not be usual in close corporations. But the numerous exceptions to this generalization must cause serious doubt on any recommendation founded on it. The second shortcoming of this argument is identified by Austin.¹¹⁵ It is that this approach by Brudney and Clark is a simplification. Austin introduces into this dichotomous world two additional permutations; the well-compensated part-time executive and the poorly-compensated full-time manager. Dealing with these variations is not possible with the Brudney and Clark approach.

The three grounds identified by Brown as being the foundations for Professors Brudney and Clark's argument for

¹¹³Supra Note 109 at 517.

¹¹⁴Supra Note 107 at 1023-4.

¹¹⁵Supra Note 16 at 169.

different fiduciary standards for the commercial fiduciary dependent upon whether the beneficiary is a public company or a close corporation have each been found to be wanting. The contentions of the two professors are premised on generalizations and simplifications which are indicated by their numerous and substantial exceptions. For this reason it is necessary to reject Brudney and Clark's differing treatment of a commercial fiduciary depending upon whether the beneficiary is a public company or a close corporation.¹¹⁶ The Commercial Opportunity Doctrine should apply to all companies, whether public or private. But should the Commercial Opportunity Doctrine be limited only to businesses utilizing the form of a corporation?

The rationale for the proposed commercial opportunity doctrine is not founded upon the legal personality or designation of the beneficiary. It is based on the recognition that in today's commercial environment senior management, referred to throughout this paper as commercial fiduciaries, possess such a degree of control over the operation of the beneficiary that some definite standard is required to limit any self-serving behaviour. It is irrelevant in the present commercial environment whether the business is or is not a legal person, it can still be

¹¹⁶Interestingly, the author of "Corporate Opportunity" (1967) 56 Georgetown Law Journal 381 at 387 suggests that the fiduciary obligations of a partner should be stricter than a company director.

extremely vulnerable to the defaulting commercial fiduciary. Further, with the ever-increasing pressure to avoid taxation and to be attractive to would-be financiers many businesses are being established as non-legal persons.

Thus, there would appear to be no sound justification for excluding from the ambit of the doctrine a commercial fiduciary of a business established as, say, a partnership or a trading trust. Indeed, logic would suggest that all businesses be covered by this doctrine. So, as long as a business is present" a commercial fiduciary should be accountable on the Commercial Opportunity Doctrine."

c. Who Is a Commercial Fiduciary?

This chapter has utilized extensively the phrase "commercial fiduciary" in relation to the Commercial Opportunity Doctrine. It is logical to examine further the scope of this doctrine to determine who is a commercial fiduciary. Obviously, the full-time executive director should be subject to the doctrine. Laskin J, in Canaero is authority for the inclusion of full-time non-director

¹¹this is decided by the application of traditional caselaw, see, for example, Division C. in Canadian Taxation, contributing editors Hansen, Krishna and Rendall. (Toronto: De Boo Ltd., 1981).

¹²Knepper and Bailey in Liability of Corporate Officers and Directors 4th Ed. (Michie Company: Charlottesville Virginia 1988), at 101 also reject Brudney and Clark's proposed differentiated treatment.

executives.¹¹⁹ His Lordship in Canaero enunciated what is now referred to as the "top management" test for **liability.**¹²⁰ As this is of fundamental importance to determine liability in this entire area his Lordship's comments on the matter will be quoted at length.

"I do not think it matters whether M and Z were properly appointed **as** directors of Canaero or whether they did or did not act as directors. What is not in doubt is that they acted respectively as president and executive vice-president of Canaero for about two years prior to their resignation. To paraphrase the findings of the trial Judge in this respect, they acted in those positions and their enumeration and responsibilities verified their status as senior officers of Canaero. They were "top management" and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a large, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer by its directors. I adopt what is said on this point by Gower, Principles of Modern Company Law 3rd Ed (1969) at p.518 as follows:

... these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not

¹¹⁹other cases where a person who was a senior executive employee was found to occupy a fiduciary position have included Consul Developments Pty Ltd. v. DFC Estates Pty Ltd. (1975) 132 CLR 373 at 394 per Gibbs J.; Timber Engineering Co Pty Ltd. v. Anderson [1980] 2 NSWLR 488; Green v. Bestobell Industries Pty Ltd. [1982] WAR 1.

¹²⁰another, much wider, test has been proposed in Demarco Agencies Ltd. v. Merlo (1984) 48 Nfld & P.E.I. R. 227 (Nfld Dist. Ct.), Edgar T. Alberts Ltd. v. Mountjoy (1977) 2 BLR 178 and Hudson's Bay Co v. McClocklin [1986] 5 WWR 29. This is the "key personnel" test. Ellis convincingly criticises this at chapter 16-7 to 16-9.

so restricted but apply equally to any officials of the company who are authorised to act on its behalf, and in particular to those acting in a managerial capacity.'

The distinction taken between agents and servants of an employer is apt here, and I am unable to appreciate the basis upon the Ontario Court of Appeal concluded that M and Z were mere employees, that is servants of Canaero rather than agents. Although they were subject to supervision of the officers of the controlling company, their positions as senior officers of a subsidiary, which was a working organization, charged them with initiatives and with responsibilities far removed from the obedient role of servants. It follows that [they] stood in a fiduciary relationship to Canaero."¹²¹

Ellis states¹²² that the Supreme Court of Canada in Canaero was advocating a functional approach to determine who is a commercial fiduciary. This functional approach was applied in Empire Stevedores (1973) Ltd. v. Sparringo¹²³ and White Oaks Welding Supplies v. Tapp.¹²⁴ In the latter it was held that

"The defendant was, in fact, almost entirely responsible for sales and had a day-to-day managerial responsibility, for that side of the company's business. Though this was not a large company, it was substantial and the defendant reported directly to Arthur, the owner. In my opinion, on the whole of the evidence he was the

¹²¹Supra Note 66 at 381-382.

¹²²Supra Note 37 at Ch.16 p.16.

¹²³(1978) 19 D.R. (2d) 610 (HC).

¹²⁴(1983) 42 D.R. (2d) 445, 149 DLR (3d) 159 (HC).

kind of senior officer upon whom a fiduciary duty is laid."¹²⁵

In MacMillan Bloedel Ltd. v. Binstead¹²⁶ the British Columbia Supreme Court applied this functional approach. The later British Columbia Supreme Court decision in 57,134 Manitoba Ltd. v. Palmer Smith Paper Ltd.,¹²⁷ before Spencer J., is of interest because the defendant had been employed for many years. His work title was never altered but he gradually had assumed a managerial position. His Lordship¹²⁸ found, by applying the functional approach, that the defendant, regardless of his title, was in a fiduciary position. It is apparent that if the functional approach is to be applied to determine whether a person is or is not a commercial fiduciary the functions of top management must be identified. Various indicia which the courts have held relevant to the determination of this have been the period of notice of termination that is required, the extent of the control over all human, financial and contractual resources, what their work responsibilities include, and the remuneration offered for the position. Considering that senior executives (that is, "top management") often determine the information relayed to the

¹²⁵Ibid. at 162.

¹²⁶(1983) 22 BLR 255.

¹²⁷(1985) 65 BLR 355.

¹²⁸Ibid at 362-363.

directors and establish their agenda¹²⁹ the function of the full-time non-director executive must be considered to make them a commercial fiduciary.

Directors are fiduciaries even if they receive no remuneration. The question here is whether they should also be commercial fiduciaries, and therefore caught by the doctrine. Often these non-executive directors, Austin suggests,¹³⁰ are not expected to devote much time or attention to his or her beneficiary. Applying the Canaero approach non-remunerated directors would generally not be commercial fiduciaries.

It is unlikely that low level employees of a business will qualify as commercial fiduciaries, but once again, this is ultimately decided by the functional approach.

It is necessary to consider whether a commercial fiduciary needs to be a natural person or whether the term may, if the functional approach is satisfied, be applied to all legal persons. There is no apparent reason for any limitation to natural persons. This would permit commercial fiduciaries, such as private companies which are established for taxation purposes, to be exposed to the doctrine.

In determining whether a person is a commercial fiduciary two factors require scrutiny. The first is the

¹²⁹see, for example, Eisenberg The Structure of the Corporation (Boston: Little Brown, 1976) pp.148 onwards.

¹³⁰Supra Note 15 at 172.

nature of the beneficiary, as the Commercial Opportunity Doctrine only operates when the beneficiary is a business entity. Secondly, the functional role of the alleged commercial fiduciary must be examined. Full-time executive directors will, almost without exception, be subject to the doctrine. Full-time non-director executives, such as O'Malley and Zanycki in Canaero, will generally be commercial fiduciaries, and non-employed directors rarely will be. However, the functional approach must always be applied to determine whether a person is, in reality, a commercial fiduciary.

4. Defences

a. Introduction

Various contenders for defences to a Commercial Opportunity Doctrine suit have been advanced. They include resignation, the beneficiary's inability to take the opportunity and connected with this defence is the claim that no damage has been suffered by the beneficiary, and, finally, ratification. It is proposed to examine each of these possible defences in turn.

b. Resignation

An obvious difficulty with the "by reason of and in the course of" test for liability for breach of the profit rule,

propounded by Lord Russell in Regal (Hastings), is ~~he~~ the temporal limitation of the test. On this approach the fiduciary can resign and is then allowed to ~~ne~~ opportunity. The conflict rule likewise has this temporal ~~al~~ defect. For a breach of this rule what is required is ~~an~~ an actual or potential clash between the fiduciary's personal interests and the duties of the fiduciary office. The difficulty here is answering the argument that any conflict disappears on resignation.

The Commercial Opportunity Doctrine can overcome these temporal difficulties. As has been noted earlier Laskin J. in Canaero stated

"he (the commercial fiduciary) is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired."¹³¹

This statement was quoted and approved by the British Columbia Supreme Court recently in Roper v. Murdoch.¹³² It is obvious that termination of employment does not come within Laskin J.'s test, if the termination is bona fide.

¹³¹Supra Note 66 at 381.

¹³²(1987) 14 BCLR (2d) 385 at 389.

It has been held that the test is not satisfied where the commercial fiduciary is forced to resign.¹³³

Ellis perceives¹³⁴ Laskin J.'s test concerning the continuation of the fiduciary duty as having two components. First, did the commercial fiduciary leave his or her employment in order to acquire the opportunity? The second component is not as straightforward as the first. The commercial fiduciary is also liable where the opportunity came to him or her as a result of his or her fiduciary position and he or she subsequently uses it for personal advantage. This second element has been addressed by Hutchinson J. in Island Export Financing Ltd. v. Umunna:¹³⁵

"literally construed, this last part of the formulation could justify holding former directors accountable for profits wherever information acquired by them as such led them to the source from which they subsequently - perhaps as the result of prolonged fresh initiative-acquired business. ... It is one thing to hold them accountable when, in the graphic words of Laskin J. (at 391), 'they entered the lists in the heat of the maturation of the project, known to them to be under active Government consideration when they resigned from Canaero and when they proposed to bid on behalf of [themselves]', but it is an altogether different thing to hold former directors accountable whenever they exploit for their own or a new employer's benefit information which, while they may have come by it solely because of their position as directors of the plaintiff company, in truth forms part of their

¹³³309925 Ontario Ltd. v. Tyrrell (1981) 127 DLR (3d) 99 (Ont. HC).

¹³⁴Supra Note 37 at Ch.15 p.18.

¹³⁵[1986] BCLC 460.

general fund of knowledge and their stock-in-trade"¹³⁶

Unfortunately, Hutchinson J. did not offer an alternate test, and recently Laskin J.'s approach was approved and applied in Vertlieb Anderson v. Nelford,¹³⁷

c. Inability to Take the Opportunity and No Damage Suffered.

There exists ample Commonwealth authority that a fiduciary is accountable by breach of the conflict or profit rules though no loss has been incurred by the beneficiary.¹³⁸ This principle can be extended to commercial fiduciaries by utilizing IDC v. Cooley,¹³⁹ according to Austin."¹⁴⁰

Lord Porter's concern in Regal (Hastings) that the "windfall" profits of recovering from the defaulting commercial fiduciary would be obtained by the new

¹³⁶(1990) 40 BCLR (2d) 379 at 384.

¹³⁷An unwarranted extension of Canaero occurred in Albert's (Edgar J.) Ltd. v. Mountjoy (1977) 16 OR (2d) 682 where a senior employee of an insurance corporation set up his own business. Estey J. in upholding the suit against the former employee, relied on "the implied term of the contract of fiduciary service by the defendants or their breach of fiduciary duty."

¹³⁸for example, Parker v. McKenna (1874) 10 Ch App.96; Birtchnell v. Equity Trustees, Executors & Agency Co. Ltd. (1929) 42 CLR 384; Furs Ltd. v. Tomkies (1936) 54 CLR 583.

¹³⁹Supra Note 90.

¹⁴⁰Supra Note 16 at 175.

shareholders of Regal formed the basis of McDermid J.A.'s dissent in Abbey Glenn Property Corp. v. Stumborg.¹⁴¹ His Lordship agreed that there had been a breach of fiduciary duty but declined to give judgment for the plaintiff corporation. Clement J.A., for the majority, held that a change in the shareholders, of itself, can not diminish the rigour of the obligation to account to the company. Two difficulties manifest themselves with the minority approach of McDermid J.A. The first, identified by Braithwaite,¹⁴² is that his Lordship's approach requires acceptance that unjust enrichment, in a very narrow sense, drives the fiduciary obligation. This is an extremely contentious issue. The second difficulty with Mr. Justice McDermid's approach is that it indicates that fiduciary obligations are owed to the shareholder's and not to the company.

More difficult to account for is where the beneficiary is unable to take the corporate opportunity. Clearly the trend in the United States during the 1980's was that unless a corporation is financially insolvent and not merely unable to obtain credit or pay current bills, its financial inability to take the advantage of a business opportunity would absolve neither an officer nor a director from

¹⁴¹85 DLR (3d) 35.

¹⁴²"Unjust Enrichment of Directors' Duties: Abbey Glenn Property Corp. v. Stumborg" (1979) 3 Can Bus LJ 210.

usurping the opportunity.'" Shepherd'" refers to this as the "impossibility" defence. The most obvious type of impossibility would be where by taking advantage of the opportunity the beneficiary would be acting ultra vires. Other examples of impossibility include where the third party refuses to deal with the beneficiary'" and where the beneficiary, for reasons such as financial inability¹⁴⁶ is unable to accept the opportunity. In relation to the profit and conflict rules authority has indicated that corporate inability is no defence.¹⁴⁷ In Canaero Laskin J. held

"... there may be situations where a profit must be disgorged although not gained at the expense of the company, on the ground that a director not be allowed to use his position as such to make a profit even if it was not open to the company ... as for example by reason of legal disability, to participate in the transaction."¹⁴⁸

¹⁴³for example Klinicki v. Lundgren 67 Ore App 160 (1984) affmd 298 Ore 662 (1985); Nicholson v. Evans 642 ~~Utah~~ 2d 727 (1982).

¹⁴⁴Supra Note 35 at 293.

¹⁴⁵for example IDC v. Cooley.

¹⁴⁶for example Peso.

¹⁴⁷for example, Furs Ltd. v. Tomkies (1936) 54 (LR58); Regal (Hastings) v. Gulliver [1967] 2 AC 134; Boardman v. Phipps [1967] 2 AC 46; IDC v. Cooley [1972] 1 WLR 443; Consul Development Pty Ltd. v. DPC Estates Pty Ltd. (1985) 373 at 395 per Gibbs J.; Green v. Bestobell Industries Pty Ltd. [1982] WAR 1.

¹⁴⁸Supra Note 66 at 383.

In Weber Feeds Ltd. v. Weber¹⁴⁹ the Ontario Court of Appeal ruled that a director may be precluded from such conflicting activities despite an inability on the part of the company to obtain the benefit. The Court of Appeal held

"In this case, the factor which, in my view, is determinative of the issue is that the transaction occurred on the eve of bankruptcy. If, as a result of the disposal of an asset by a company on the eve of bankruptcy, a right is acquired by a director, the director must, in my opinion, account to the trustee of the bankruptcy of the company for any profit realised ... to hold otherwise, would, in my opinion, open the door to fraud.

The fact that the company might not have been able to benefit from the transaction is immaterial."¹⁵⁰

The recent British Columbia Supreme Court decision of Roper v. Murdoch¹⁵¹ applied Weber Feeds.

The reasoning of the Ontario Court of Appeal in Weber Feeds is reflected by the approach of Shepherd¹⁵² who suggests, by implication, that this danger of fraud is a primary rationale for the beneficiary's inability being no defence. Austin¹⁵³ expands upon this notion by finding an underlying principle of the law of fiduciaries in regard to

¹⁴⁹(1979) 24 OR (2d) 754.

¹⁵⁰*Ibid.* at 157.

¹⁵¹(1987) 14 BCLR (2d) 385.

¹⁵²*Supra* Note 35 at 294.

¹⁵³"Commerce and Equity - Fiduciary Duty and Constructive Trust" (1986) 6 OJLS 444.

the commercial field and perceives that much of the law is premised on the notion of the courts attempting to sterilize a large area of potential wrongdoing. As such, the defence of inability is regarded as exposing the beneficiary to the commercial fiduciary's actions and it will often be difficult to decide whether the beneficiary is or is not capable of taking the opportunity. To avoid this problem Equity simply prohibits it. At the bottom of this prohibition is the possibility of fraud. IDC v. Cooley supports the proposition that profit and loss cases holding that inability on the beneficiary's behalf is no defence may be extended to the opportunity doctrine.

d. Ratification¹⁵⁴

Difficulties exist in relation to the ratification of a breach of a fiduciary duty where the beneficiary is a commercial entity. The explanation of the existence of these problems is easily perceived; the commercial fiduciary is normally part of the organ by which the beneficiary makes business decisions. Additionally, it is often the case that a commercial fiduciary will be a substantial shareholder in the beneficiary. Therefore, the two organs which have the power of ratification are often "contaminated" by the

¹⁵⁴various authors would divide this heading into waiver (ratification before the breach) and exoneration (ratification after the breach). For example, Austin Supra Note 16 at 182.

influence of the commercial fiduciary. Unfortunately, Anglo-Australian authority provides little consistent guidance as to what can be done on such occasions. The caselaw is in fundamental conflict.¹⁵⁵ The obvious temptation is to forbid any ratification in reference to the Commercial Opportunity Doctrine.¹⁵⁶ However, **Shepherd**¹⁵⁷ rejects this call for a blanket prohibition on ratification and argues that if the commercial fiduciary can prove that he or she did not effect the decision to ratify then the ratification is effective. Obviously, this prohibits that fiduciary from taking part in the vote. Shepherd's approach to ratification should be adopted in regard to the Australian Commercial Opportunity Doctrine as it casts a very heavy onus upon the commercial fiduciary to prove that he or she had no effect on the decision but it also does not preclude such a defence if it is genuine. The flexibility of Equity is maintained whilst guaranteeing a high standard of conduct.

¹⁵⁵for example, Cook v. Deeks [1916] 1 AC 554; Furs Ltd. v. Tomkies (1936) 54 CLR 583; Regal (Hastings) Ltd. v. Gulliver [1967] 2 AC App Cases 589; Consul Developments Pty Ltd. v. DPC Estates Pty Ltd. (1975) 132 CLR 373; and Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No.2) [1980] 2 All ER 841.

¹⁵⁶Prentice in "Comment: IDC Ltd. v. Cooley" (1972) 50 Can. Bar. Rev. 623 at 635 and Beck "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 49 Can. Bar. Rev. 80 at pp.115ff suggest this.

¹⁵⁷Supra Note 35 at 297.

The Canadian decision of Ukrainian Cultural Heritage Village v. Lakusta¹⁵⁸ addresses an issue that may arise in seeking such a ratification: which is the correct organ of the beneficiary to grant ratification of the breach? Here it was the board of directors that we asked to ratify. Agsio J. held

"The Society bases its monetary claims on the breach of fiduciary duty owed to it by Mr. Lakuska as a Director of the Society and the resulting conflict of interest between his duty to the Society and his personal interests ... In its submissions the counsel for the [Society] relies on the authorities that no fiduciary agent should place themselves in a position in which there is a conflict between their duties to the company and their personal interests. I need not set out the authorities for the defendants do not quarrel with the principle. Counsel for the Lakvstas simply state that the fact situation discloses that no fiduciary duty has been violated ... The [company] also submits ... that the agreement was never ratified by the Society's general meeting ... It is contended that a contract made under the circumstances of this case is voidable at the instruction of the Society. Quoting from L.B. Gower's Modern Company Law 3rd Ed. at p.527:

'... Disclosure (by the directors to themselves) is ineffective even if the interested directors refrained from attending and voting leaving an independent quorum to decide, for a company has the right to the unbiased voice and advice of every director. Hence, in the absence of express provision in the company's articles, the only effective step is to make full disclosure to the members of the company and to have the contract entered into or

¹⁵⁸(1983) 46 ARI 91 (QB).

ratified by the company at a general meeting."¹⁵⁹

His Lordship found that as the shareholders had a right to the opinion of every director and no ratification could take place until full disclosure had been made to the beneficiary at a general meeting and the impugned actions ratified by the shareholders.

It would appear that ratification of a commercial fiduciary's breach of his or her duty should be possible.¹⁶⁰ Therefore, the effectiveness of any purported ratification must be determined by a fairness standard, the factors of which must include the full disclosure to the appropriate organ (usually the general meeting) that the commercial fiduciary did not vote on the issue of ratification (although allowed to speak) and that the ratification was carried by a majority vote. It must be remembered that the onus of proving that the ratification was "fair" rests upon the commercial fiduciary.

5. Conclusion

In the late twentieth century commercial fiduciaries possess the ability to prey upon the vulnerability of their business

¹⁵⁹Ibid at 196-197.

¹⁶⁰For a fuller discussion of this issue see Brown "When Opportunity Knocks: An Analysis of the Brudney and Clark and ALI Principles of Corporate Governance Proposals for Deciding Corporate Opportunity Claims." (1986-87) 28 Corporate Practice Commentor 508 at 521ff.

beneficiaries and there is little chance of them being brought to account. To combat this a strict test for liability has been proposed. This prohibition is referred to as the Commercial Opportunity Doctrine. This doctrine can be developed by the Australian courts relying upon the authority of various Commonwealth authorities, primarily Canadian. Such a doctrine would prohibit a commercial fiduciary from exploiting, for this or her own benefit, an opportunity of which he or she becomes aware of by execution of his or her fiduciary office or an opportunity which the commercial fiduciary knows or should reasonably know is closely related to the business in which the beneficiary is engaged in or may reasonably be expected to engage in. As is obvious, this doctrine draws upon the various strands of the fiduciary obligations. This doctrine generates certainty, a desirable business commodity, whilst demonstrating its Equity origins by its flexibility.

Chapter IV

Remedies for a Breach of A

Fiduciary Obligation In A Commercial Context

1. Introduction

After a fiduciary relationship has been shown to exist within a commercial context the next step in the analysis is proof of the breach of this obligation. After establishing this factual issue attention is turned to the remedy to be ordered by the court. Lord Hodson in Phipps v. Boardman held that:

"The proposition of law involved in this case is that no person standing in a fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person."¹

This quotation recognizes that the defaulting fiduciary is liable for the profit (which is often referred to as the gain) made from the breach of the equitable obligation. In a commercial context it is often difficult to identify accurately the profit or gain made. This will be the subject of detailed scrutiny later in this chapter. The other issue to be substantially reviewed in this section is

¹[1967] 2 AC 46 at 105.

the nature of the remedy to be ordered. The fiduciary relationship is, of course, equitable in nature and so involves possible recourse to equitable relief of a personal or a proprietary nature or both. Such remedies include a declaration of a constructive trust, an accounting of profits, equitable compensation and the tracing of property into the hands of third parties which are often financial institutions. Frequently the relations between the beneficiary and fiduciary will also have common law ramifications, so common law remedies such as damages may be sought in addition, or alternatively, to the equitable remedy.

Two preliminary points ought to be made prior to embarking upon the examination of the main issues confronted by this chapter. The first preliminary point is that it is irrelevant to the determination of whether a breach of fiduciary duty has occurred that the fiduciary acted honestly. Lord Russell in Regal (Hastings) Ltd. v. Gulliver² held;

The rules of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides."

However, the determination of bona fides may impact upon the court's assessment of the fiduciary's gain.

²[1967] 2 AC 134 at 144-145.

The other initial point is that fully informed consent will excuse a fiduciary from liability but it should be noted that this can be a very onerous responsibility to discharge as evidenced by the attempts to do precisely this in Boardman v. Phipps.

2. Quantification of the Gain of the Defaulting Fiduciary.

The gain must be ascertained as the liability of the fiduciary is determined by it. Often this will not be difficult. In the case dealt with in detail in the preceding chapter, Regal (Hastings), the shares obtained by the defaulting fiduciaries, the price paid and the price received for their sale were known so it was a relatively straightforward task to determine the gain. However, the ease of the job disappears when the gain of the fiduciary takes the form of an interest in a business. Quantification becomes difficult, and this is a frequent problem encountered in breaches involved in a commercial context.

In Timber Engineering Co. Pty. Ltd. v. Anderson³ Mr. Justice Kearney held that the gain made by the fiduciary was the whole of the business set up by the fiduciaries and carried on by them during and after termination of their employment with the beneficiary through the medium of companies of which they and their wives were the directors and shareholders. The facts of the case were that two

³[1980] 2 NSWLR 488.

fiduciaries began to sell products in fraud of their beneficiary. One of these fiduciaries, together with his wife, incorporated a company to sell these products. The other fiduciary and his wife later became shareholders and directors of this company. The fiduciaries argued that liability should be limited to the profits of the business as the profits were derived not from its capital resources but from the skill and industry of those conducting the business. Kearney J. rejected this limitation on the qualification of the gain by finding that the business was directly attributable to resources and facilities provided by the beneficiary. The logical outcome of this finding, that the business of the defaulting fiduciaries was gorged out of the business of the beneficiary, was that his Honour declared that the entire business be held on trust for the beneficiary.

A Queensland decision which relied on the Timber Engineering decision was that of Fraser Edmiston Pty. Ltd. v. A.G.T. (Old) Pty. Ltd. and Hussey.⁴ The facts in that case were that the plaintiff was the lessee of a store in a shopping mall. When a later stage of the mall was nearing completion the landlord approached the plaintiff to attempt to entice it to open an additional outlet. As the offer was attractive the plaintiff began discussions with Hussey regarding a partnership in reference to the new store. The

⁴[1988] 2 Qd. R. 1.

parties reached broad agreement but the details of the agreement remained to be resolved. The defendant then took the unilateral step of obtaining the lease for itself. Williams J, in the Queensland Supreme Court, held that a fiduciary relationship did exist between the parties. His Honour held that the defendants were liable to account

“for any benefit or gain which was obtained or received by reason of the opportunity or knowledge that was obtained through their fiduciary position and any profit resulting from the use of the property.”⁵

This would appear to be a straightforward statement of principle, however, what constituted the gain was the difficulty here. Explicitly, what should be done with the accretions in value of the property that had been misappropriated? Williams J. held that accretions form part of the property that is subject to the constructive trust.⁶ His honour did this by citing with approval Kearney J.'s, in Timber Engineering, application of Docker v. Somes.⁷ In that case Lord Brougham held

“Whenever a trustee, or one standing in the relation of a trustee violates his duty, and deals with the trust estate for his own behoof, the rule is, that he shall account to the cestui que trust

⁵Ibid. at 11.

⁶see Street J. in Re. Dawson deceased [1966] NSW 211, quoted by the Ontario Court of Appeal in LAC Minerals at 648-649. for differences to common law damages.

⁷(1834) 2 My & K 655; 39 ER 1095.

for all of the gain which he has made ... it is so much fruit, so much increase on the estate on the chattel of another, and must follow the ownership of the property and go to the proprietor."

Another authority cited by Kearney J. was Re. Jarvis deceased.⁹ In that case the defendant submitted that she should be liable only for the value of the direct benefit proved to have flowed by reason of the breach of the fiduciary obligation. Upjohn J. rejected this limited quantification of the gain and held that the profit obtained by the defaulting fiduciary extended to the whole business.

The case of Hospital Products also highlighted the frequent difficulties encountered with determining the gain acquired by the defaulting fiduciary. At first instance¹⁰ McLelland J. held that the fiduciary relationship had been breached. The gain from this breach, according to his Honour, was the benefit of a market in Australia which otherwise would have belonged to the beneficiary. This view of the gain explains McLelland J.'s holding that the fiduciary was liable to account for the profits thereby made. When this matter went on appeal to the New South Wales Court of Appeal¹¹ the bench characterised the gain acquired by the fiduciary differently. The Court held that

⁹Ibid. at 664 and 1098 respectively.

⁹[1958] 1 WLR 815.

¹⁰[1982] 2 NSWLR 766.

¹¹[1983] 2 NSWLR 157.

two points of uncertainty to the above proposition. The first makes the accurate point that the true statement of principle is that the fiduciary will not be liable unless the gain comes from an action which constitutes a breach of fiduciary duty. Thus, the limiting factor is not the fiduciary relation per se, as the traditional approach would suggest, but the fiduciary duty. Mason 3. illustrated this point by stating,

"However, it does not follow as a matter of principle or logic that the profits for which A.P.I. is liable are necessarily restricted to profits made within the ambit, geographical or otherwise, of the fiduciary relationship. As a fiduciary A.P.I. is liable for any profits made in breach of its fiduciary duty, even if they happen to be made outside the area of the fiduciary relationship. If, for example, the responsibilities of the Victorian manager of a company with a nation-wide business are limited to Victoria, this geographical limitation on his responsibility gives him no immunity from liability to account for profits which he makes in Western Australia in competition with his employer by, making use in breach of his fiduciary duty of knowledge of an opportunity gained in his fiduciary position: see Green and Clara Pty. Ltd. v. Bestobell Industries Pty Ltd. [1982] W.A.R. 1; McLeod and More v. Sweezy [1944] 2 D.L.R. 145. Although there are cases in which the defendant turned to his own advantage confidential information or knowledge acquired in his capacity as a fiduciary, they clearly illustrate that limitations on the ambit of the fiduciary's liability to account for profits resulting from his breach of duty."¹⁵

The second question raised by Mason J. is whether the gain for which the fiduciary is liable to account includes a

¹⁵Supra Note 12 at 113.

profit made from an act which, by itself, is not a breach of the fiduciary duty but is only undertaken to enable the gain from the breach of the fiduciary obligation to be obtained.¹⁶ It is suggested that his Honour's approach to this question is practical and sensible which makes it most appropriate for the often difficult and complex cases involved in the commercial world. As Mason J. stated

"In some circumstances it may be proper to hold a fiduciary liable to account for a profit or benefit arising from the pursuit of an activity which did not amount to breach of fiduciary duty but for the circumstances that the activity was also undertaken for the purpose of obtaining another profit or benefit which was a breach of the fiduciary duty. If the breach of fiduciary duty is a sine qua non in the sense that the pursuit of the activity for the purpose of obtaining the legitimate profit or benefit could not have been undertaken as a practical business operation on its own without seeking also to obtain the forbidden profit or benefit, then there is much to be said for the view that the fiduciary's liability to account should extend to all profits and benefits."¹⁷

In a sense the paper so far has examined the notion of the gain only from the point of view of the beneficiary. That is, what has been focused upon has been the "gross" gain. Once attention is redirected to the fiduciary the gain that is being examined is the "net" or true gain.¹⁸

¹⁶Supra Note 12 at 113-114.

¹⁷Supra Note 12 at 113-114.

¹⁸net gain is used here to indicate the gross gain less any amounts that the fiduciary is entitled to.

The two important doctrines to ascertain this true gain are just allowances and apportionment.

In O'Sullivan v. Management Agency & Music Ltd.¹⁹ Lord Justice Fox held that

"A hard and fast rule that the beneficiary can demand the whole profit without an allowance for the work without which it could not have been created is unduly severe. Nor do I think that the principle is only applicable in cases where the personal conduct of the fiduciary cannot be criticised. I think that the justice of the individual case must be considered on the facts of that case. Accordingly, where there has been dishonesty or surreptitious dealing or other improper conduct then, as indicated by Lord Denning M.R., it might be appropriate to refuse relief; but that will depend upon the circumstances."²⁰

This statement by this Lordship clearly indicates that a just allowance²¹ may be made to a fiduciary regardless of the moral character of the breach. Indeed, in O'Sullivan it was found that the defaulting fiduciary was not entirely without "moral blame."²² In the Manitoba Court of Appeal decision in G. Mida Construction Ltd. v. Imperial Developments (International) Ltd. and Cambridge Imperial

¹⁹[1985] QB 428.

²⁰Ibid. at 468.

²¹see Finn Fiduciary Obligations (Sydney: Law Book Co., 1977) for a discussion of the notion of the just allowance and the vagueness which surrounds its applicability.

²²Supra Note 19 at 468.

Properties Ltd.²³ Freedman C.J.M., with whom Hall J.A. concurred, found the fiduciary to have committed morally reprehensible acts but permitted an allowance. The Nova Scotia Supreme Court, Appeal Division, has likewise held that a just allowance can be granted to a defaulting fiduciary who has acted with mala fides.²⁴ Also of note is the finding by Dohm J. in the British Columbia Supreme Court in MacMillan Bloedel Ltd. v. Einstead²⁵ that the defaulting fiduciary is liable only for the profit made, and profit is defined by this Lordship as being the surplus product after deducting wages, cost of raw materials, rent and charges. No mention is made of a distinction between where the fiduciary has acted with bona or mala fides. In the Ontario Court of Appeal²⁶ decision in LAC Minerals²⁷ an allowance was permitted because

"The sheer magnitude of the enrichment of, or benefit conferred on Corona if LAC were denied a lien cannot be ignored, particularly in the light of the reality that the expenditures made by LAC to make the property productive inevitably would have been required on the part of Corona had there been no breach of the constructive trust. The principles of equity in our view, need not be employed in a manner that itself creates an unjust

²³[1978] 5 WWR 577.

²⁴see MacDonald v. Lockhart (1980) 118 DLR (3d) 397.

²⁵(1983) 22 BLR 255 at 294.

²⁶the Supreme Court of Canada did not deal with this.

²⁷(1988) 44 DLR (4th) 592.

seeks equity must do equity." By simple examination of this maxim it is obvious the great discretion that should reside with the court when it has to decide what would be equitable or fair in the circumstances that confront it. The rule-like barrier to a dishonest fiduciary at obtaining a just allowance makes practical sense in that notions of fairness would not be in such a person's favour but this practical approach has metamorphosed into claiming that it would never be fair to permit a dishonest fiduciary from recovering a just allowance. In this way the discretion inherent in the Court of Equity is fettered. Thus, it is suggested that the wider approach of it being possible for all fiduciaries to recover a just allowance be acknowledged as a correct application of the maxim.

The other major mechanism utilized by the courts to ascertain the net gain is referred to as apportionment. Apportionment is simply the term used to indicate the amount of the fiduciary's own property that is in a mixed fund with the property taken in breach of the fiduciary duty. The distinction that can be drawn with the just allowance is that a just allowance is concerned with the income stream that any ill-gotten gain may produce, whereas apportionment

detract from the validity of the arguments here.

³³see Commercial Bank of Australia v. Amadio (1983) 57 ALJR 358 at 372 per Deane and Kearney J. supra note 29 at 197.

relates to the capital. that is used to produce this stream.)'

The court's attempt to follow the gain into a mixed fund is known as "tracing".³⁵ Although tracing was originally a doctrine which only related to trust law Elgin Loan & Savings Co. v. National Trust³⁶ is clear Canadian authority" that tracing is equally applicable to any scenario involving a breach of a fiduciary duty.³⁸

Where the property acquired by a mixed fund is specifically severable the beneficiary is entitled to that part of the property as bears the same proportional relationship to the whole fund as the ill-gotten gain bore to the purchase price. This principle was articulated in Brady v. Stapleton,³⁹ in which it was held by the High Court of Australia that where a trustee holds shares in a company, some of which are his or her own and some of which

³⁴see Klippert supra note 32 at 221 for American authorities on the question of apportionment.

³⁵see Jacob's Law of Trust in Australia 5th Edition (Sydney: Butterworths, 1986) chapter 27 for a detailed discussion of this doctrine.

³⁶(1903) 7 OLR 1.

³⁷for other jurisdictions accepting this principle see Re West of England & South Wales District Bank; Ex Parte Dale & Co. (1879) 11 Ch.D. 772; Re Hallett's Estate (1879) 13 Ch.D. 696 at 709 and Holt v. Giblin (1888) 5 WN (NSW) 19.

³⁸Elgin was expressly approved in Re Norman Estate [1951] OR 752.

³⁹(1952) 88 CLR 322.

are held on trust, the fact that precise identification of the trust shares is not possible does not preclude the making of an order for a transfer of the trust shares by the trustee to the beneficiary.

Often a defaulting fiduciary in a commercial context will invest the property obtained in breach of the fiduciary obligation with some of his or her own and this investment will produce a greater capital sum. Apportionment allows the defaulting fiduciary to claim that he or she is not liable to account for the entirety of this new larger amount. This is the basis of the decision of the High Court of Australia in Scott v. Scott.⁴⁰

This issue of permitting the defaulting fiduciary to seek an apportionment introduces the next difficulty in this field; upon which party is the onus to show whose property was utilized to generate the new capital amount? Authority on this point is quite straightforward - the onus is upon the fiduciary. Page-Wood V.C. in Frith v. Cartland held:

"If a man mixes trust money with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own."⁴¹

⁴⁰(1963) 109 CLR 649.

⁴¹(1865) 2 H&M 417 at 420; 71 ER 525 at 526.

Sir George Jessel M.R. *Re Hallett's Estate*" explicitly approved and applied this statement. In Canada this proposition relating to onus was accepted in *McTaggart v. Buffo et al.*,⁴³ *Re Norman Estate*⁴⁴ and in *Re Kolari*.⁴⁵ This principle appears to comply with the notions that it is fair that if the wrongdoer fiduciary wishes to claim property he or she should prove it to be his or her's, and failure to do so disadvantages the wrongdoer and not the wronged party.

One common problem with breach by a commercial fiduciary is illustrated by *Paul A. Davies (Australia) Pty Ltd. (in liq) v. Davies*.⁴⁶ This was a situation where company directors applied their beneficiary's money to part finance the purchase of a country property. The outstanding amount was to be paid on the completion of the sale. This outstanding amount was to be provided by a bank loan, a loan secured by the subject property. Thus the loan, which the commercial fiduciaries were claiming as their own contribution and so there should have been an apportionment they argued, was itself based on a breach of the fiduciary duty and was in reality property which belonged to the

⁴²(1879) 13 Ch.D. 696 at 719.

⁴³(1975) 10 OR (2d) 733; 63 DLR (3d) 604.

⁴⁴[1971] OR 752, [1972] 1 DLR 174.

⁴⁵(1981) 36 OR (2d) 473.

⁴⁶[1983] 1 NSWLR 440.

beneficiary. Thus, no apportionment was permitted in this context.

One final issue dealing with apportionment is whether it should be available to a fraudulent fiduciary. According to Kearney J., in an extra-curial article,⁴⁷ the Paul A. Davies case is authority for the proposition that apportionment will be denied to a fraudulent fiduciary. This is the clear and explicit position of Mason J. in Hospital Product.⁴⁸ A close review of his Honour's comments does, however, reveal something less than a blanket prohibition. He states that

"The proposition [permitting apportionment] may also need to be modified to take account of a profit by a fraudulent fiduciary through a combination of trust property and his own property or efforts. It may well be that equity in such circumstances will not seek to apportion the gain." [emphasis added].⁴⁹

By employing "may" the future Chief Justice permits the Court exercising equitable jurisdiction to award apportionment, although often it would be unlikely to do so. Once again this reflects the importance of doing justice in the case before the bench rather than establishing rigid rules to be applied inflexibly.

⁴⁷Supra Note 30 at 199.

⁴⁸(1984) 156 CLR 41.

⁴⁹Ibid. at 109-110.

3. Remedies

a. Introduction

After the true gain has been determined the court must then focus its attention on the remedy to be ordered. So that it may best achieve what it perceives as a just result, which has been the driving force for the Court of Chancery, the judge commences his or her investigation by returning to basic principles. The fundamental notion is that a defaulting fiduciary cannot retain any profit or benefit obtained by reason of breach of his or her fiduciary duty." The liability in fiduciary law is equivalent to that in trust law rather than in contract or tort. This was clearly shown in the Guerin v. R.⁵¹ decision. In that case, which found the federal government of Canada liable for breach of its fiduciary obligation owed to native Indians, the Supreme Court of Canada expressly approved and adapted a statement by Street J. (as he then was) in the New South Wales Supreme Court decision of Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.⁵² where his Honour held that

⁵⁰see Ellis Fiduciary Duties in Canada (Toronto: De Boo, 1988) Ch.20-4 and Kearney Supra Notes 30 at 201.

⁵¹[1984] 2 SCR 335.

⁵²(1966) 84 WN (Pt.1.) (NSW) 399.

"The obligation of the defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not limited by common law principles governing remoteness of damage ... Caffrey v. Darby (1801) 6 Ves. Jun. 488; 31 ER 1159 is consistent with the proposition that if a breach has been committed then the trustee is liable to place the trust estate in the same position **as** it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter. The cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries is of a more absolute nature than the common-law obligation to pay damages for tort or breach of contract." [emphasis added]⁵³

Holland J. explicitly adopted much of this quotation in the first instance decision of International Corona Resources Ltd. v. IAC Minerals Ltd.⁵⁴ and when the case went to the Ontario Court of Appeal it was affirmed.⁵⁵ Thus, it is apparent that the court aims at removing any gain the fiduciary has made by the breach of the fiduciary obligation.⁵⁶ The wide range of remedies available to the court include both proprietary and personal orders. Before undertaking an examination of these remedies and their

⁵³Ibid. at 404-406.

⁵⁴(1986) 53 OR (2d) 737 at 779.

⁵⁵(1988) 44 DLR (4th) 592; (1987) 62 OR (2d) 1.

⁵⁶the contention made by Ellis supra note 50 at Ch.20-5 that the court is attempting to restore the status quo must be incorrect as often the fiduciary will be liable for some gain the beneficiary could not have acquired and so the status quo is largely irrelevant. Boardman v. Phipps stands as an example of this.

significance within a commercial context several initial points need to be addressed.

The first relates to a particular commercial fiduciary, the agent. This point is the heresy of Lister v. Stubbs.⁵⁷ Underhill⁵⁸ argues that this decision stands as authority for the proposition that an agent who receives a profit in breach of his or her fiduciary duty otherwise than by use of his or her beneficiary's property is not a trustee of that profit, but is only a debtor of his or her beneficiary, both at law and in equity." In the New South Wales Court of Appeal decision of Consul Developments Pty Ltd. v. DPC,⁶⁰ two judges, Hardie and Hutley JJA, held that Lister was anomalous⁶¹ and should be confined to its own facts. Unfortunately when the case went on appeal to the High Court of Australia that bench was not required to resolve this issue and so left it open.⁶² In Anglo-Australian jurisprudence a fiduciary who is an agent finds himself or

⁵⁷Waters Supra Note 29 at 394 seems to suggest that Lister is no longer relevant to Canada but compare the position taken by Youdan in "The Fiduciary Principle: The Applicability of Proprietary Remedies" in Equity, Fiduciaries and Trusts Edited by Youdan (Toronto: Carswell, 1989) at 97-101.

⁵⁸Law of Trusts and Trustees 12th Edition at 240.

⁵⁹[1974] 1 NSWLR 443.

⁶⁰[1974] 1 NSWLR 443.

⁶¹as they implicitly accepted Underhill's interpretation of it.

⁶²(1975) 132 CLR 373.

herself in the position of being subjected to Lister v. Stubbs which, because of the strange interpretation of its ratio coupled with a reluctance to overrule it, confuses the nature of fiduciary liability. As it appears unlikely that courts will acknowledge the true status of this interlocutory decision the suggestion of Lehane⁶³ and Youdan⁶⁴ that it be overruled as insupportable in principle is endorsed. Such an action would remove this quirk from the remedies available for a fiduciary's breach of obligation.

The other initial point is that the ethical conduct of the fiduciary should not be relevant to the remedy ordered by the court.⁶⁵ However, there does exist some Australian decisions suggesting that there may be circumstances where the court will not impose a certain remedy, usually a constructive trust, and that decision appears to have been premised on the court's findings relating to the moral character of the fiduciary's conduct.⁶⁶ However, it is

⁶³"Fiduciaries in A Commercial Context" in Essays in Equity Ed. by Finn (Sydney: Law Book Co., 1984) at 107.

⁶⁴Youdan Supra Note 56 at 100.

⁶⁵but compare Professor Jones' "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 LQR 472 at 502 and Goode "Ownership and Obligation in Commercial Transactions" (1987) 103 LQR 433 at 497-8.

⁶⁶Hospital Products International Pty. Ltd. v. USSC [1983] NSWLR 157 at 235; Timber Engineering Co. Pty Ltd. v. Anderson [1980] 2 NSWLR 488 at 499 and Daly v. Sydney Stock Exchange Ltd. [1982] 2 NSWLR 42 at 426.

suggested with the greatest respect that these obiter comments indicate what is a flaw in analysis. The moral nature of conduct is relevant, as has already been discussed, to the question of the quantification of the gain. The primary purpose of the remedy, and therefore what should largely determine its nature, is simply to best recoup this gain. It is quite apparent that ethical considerations are not directly relevant here.

b. Types of Remedies

Professor Finn⁶⁷ identifies one of the great advantages of findings of breaches of equitable obligations, and hence an explanation for the recent increase in recourse to the fiduciary notion in Canada, is the great range of remedies available to the court. Upon what basis should the courts decide between the available remedies? Fundamentally, two considerations must be balanced. The first is that the remedy selected should be the best possible way to recoup the gain made by the fiduciary. In many cases the determination of the gain will point to the appropriate remedy. A clear example of this was McLelland J.'s finding at first instance in the Hospital Products litigation regarding the gain which indicated that the gain could be best recovered by ordering an account of profits

⁶⁷"Good Faith, Fair Dealing and Fiduciary Law in Canada" in Fiduciary Obligations (Vancouver: Continuing Legal Society of British Columbia, 1989) at 2.1.01.

whereas the New South Wales Court of Appeal's finding concerning the gain dictated the ordering of A constructive trust.

The second consideration is that the remedy must be "just" in a wider sense. Simply put, the implications of the order must be examined. In a commercial context this often means looking to the impact of the remedy upon secured creditors. This is because an important consequence of the imposition of the constructive trust is that proprietary implications displaces the priority of the secured creditors in favour of the equitable owner. Paciocco⁶⁸ in a closely argued article suggests a number of principles for the court to consult when determining whether a constructive trust, which would have consequences upon a third party, should be ordered. Such a consideration will normally tell against the ordering of a constructive trust. This explains Mason J.'s decision in Hospital Products⁶⁹ not to declare a trust over all the assets of HPI. Such an order by the court would have implications outside of the immediate parties to the litigation, in that HPI would have been prevented from legitimately competing with USSC within the American market. It was for this consideration of the wider implications for justice of the various remedies that Reynolds J.A. in Daly

⁶⁸"The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989) 68 Can. Bar Rev. 315.

⁶⁹(1984) 156 CLR 41 at 114.

v. Sydney Stock Exchange⁷⁰ suggested that the constructive trust should not be ordered automatically in breach of fiduciary obligation cases. This search for justice is also apparent in the words of Cardozo J. in Beatty v. Guggenheim Exploration Co.⁷¹

"A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of the relief."

Thus, when deciding upon the remedy or combination of remedies to be ordered the court should keep in mind these two considerations of recoupment and justice, and if necessary balance them.

Perhaps the best known of the remedies available for a breach of a fiduciary obligation is the constructive trust.⁷² According to Kearney J.

"Provided the fiduciary's gain exists in the form of identifiable property the anticipated result would be a declaration of trust."⁷³

⁷⁰[1982] 2 NSWLR 421 at 426.

⁷¹225 NY 380 (1919) as quoted by Mason J. in Hospital Products (1984) 156 CLR 41 at 108.

⁷²for a recent and learned discussion relating to this remedy see Youdan "The Fiduciary Principle: The Applicability of Proprietary Remedies" in Equity, Fiduciaries and Trusts Ed. by Youdan (Toronto: Carswell, 1989). Also see Oakley Constructive Trusts (London: Sweet and Maxwell, 1987) and Heydon "Recent Developments in Constructive Trusts." (1977) 51 ALJ 635.

⁷³see Waters Supra Note 28 at 1037.

A constructive trust was imposed both at first instance and in the Ontario Court of Appeal in the LA litigation. As previously noted the ordering of a constructive trust is largely determined by the quantification of the gain. One important consequence, and perhaps the most important consequence to the commercial world, is that the constructive trust is linked closely to tracing. Tracing is simply the following of property: to a mixed fund or into the hands of a third party."

In the commercial context tracing is often of vital significance for several reasons. The first is that frequently the fiduciary utilizes a shelf company to take the gain. This introduces a party into the litigation. In Hospital Products the Court of Appeal imposed a constructive trust upon the assets of HPL which the company had acquired through a reverse takeover of the fiduciary. Tracing, which allowed the ordering of the constructive trust, was permitted as the bench held that HPL took the assets with knowledge of the breach.

Another aspect of the constructive trust and tracing is the third party liability stemming from Barnes v. Addy.⁷⁵ This involves a third party, unlike immediately above, who is quite a separate and independent entity from the fiduciary. In Barnes Lord Selbourne L.C. held:

⁷⁴see Waters Supra Note 28 at 1037.

⁷⁵(1874) 9 Ch. App. 244.

"Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps, of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees ... I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent, by reason of the fiduciary relation, upon the trustees."⁷⁶

Since the enunciate of this view the law in this area has been divided into three **categories**:⁷⁷

1. persons who act as trustees without appointment
2. persons who receive trust property or deal with it with notice (knowing receipt) and
3. persons who knowingly assist a trustee in a dishonest and fraudulent **design**⁷⁸

⁷⁶Ibid. at 251-252.

⁷⁷see, for example, Austin "Constructive Trusts" in Essays in Equity Edited by Finn (Sydney: Law Book Co., 1984) at 202 and Brindle and Hooley "Does Constructive Knowledge Make a Constructive Trustee?" (1987) 61 ALJ 281.

⁷⁸see Westpac Banking Corp. v. Savin [1985] 2 NZLR 41 at 69 and Harpum "Notes on Cases - Liability for Intermeddling with Trusts" (1987) 50 Mod LR 217 for **alternative categories**.

Category 1 is of little interest here. The weight of authority⁷⁹ suggest that for knowing receipt cases actual or constructive knowledge will be sufficient for third party liability. The position in regard to the knowledge required in the knowing assistance cases is much more controversial. Any analysis of this area must commence with the five categories created by Peter Gibson J. in Baden Delvaux. His Lordship identified five types of knowledge. They were:

- i. "actual" knowledge
- ii. the wilful shutting of eyes to the obvious (colourfully referred to by his Lordship at "Nelsonian" knowledge)
- iii. wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make
- iv. knowledge of circumstances which would indicate the facts to an honest and reasonable man
- v. knowledge of the circumstances which would put a reasonable man on inquiry."

⁷⁹for example, Consul Developments Pty Ltd. v. DPC Estates Pty Ltd. (1975) 132 CLR 373 at 410 per Stephen J. and [1974] 1 NSWLR 443 at 459 per Jacobs P.; Belmont Finance Corp. Ltd. v. Williams Furniture Ltd. (No.2) [1980] 1 All ER 393 at 412 per Goff L.J.; International Sales & Agencies Ltd. v. Marcus [1982] 3 All ER 551 at 557-8 per Lawson J.; Baden Delvaux v. Societe Generale [1983] BCLC 325; Jacob's Law of Trusts in Australia (5th Edition) 1986 para 1334 and Nathan & Marshall Cases and Commentary by Hayton 7th Ed., p.412.

⁸⁰[1983] BCLC 325 at 408-421.

According to Jacobs,⁸¹ categories (i) and (ii) have always been considered as notice at common law and in equity. The third category stems from statements made by Buckley L.J. in Belmont Finance Ltd. v. Williams Furniture (No. 1).⁸² His Lordship stated,

"The knowledge of that design on the part of the parties sought to be made liable may be actual knowledge. If he wilfully shuts his eyes to dishonesty, or wilfully or recklessly fails to make such inquiries as an honest or reasonable man would make, he may be found to have involved himself in the fraudulent character of the design, or at any rate to be disentitled to rely on actual knowledge of the design as a defence. But otherwise, as it seems to me, he should not be held to be affected by constructive notice."

Although his statement is inconclusive on the point of whether category (iii) constitutes actual notice the New South Wales Court of Appeal in United States Surgical Corporation⁸³ held a calculated omission to enquire for fear of what such an enquiry may discover is functionally equivalent to actual knowledge.

The fourth category proposed by Peter Gibson J. is a form of constructive notice. This is apparent from the source of this category, which are statements made by Gibbs

⁸¹Jacob's Law of Trusts in Australia 2nd Edition (Sydney: Butterworths, 1986) at 307.

⁸²[1979] 250 at 267.

⁸³[1983] 2 NSWLR 157.

and Stephen J.J. in Consul Development.⁸⁴ The final category is constructive notice as traditionally understood by equity.

Thus, categories (i), (ii) and (iii) are variations of actual knowledge, whilst (iv) and (v) constitute forms of constructive. The decisions of the courts, except for the Australian ones, can be divided into those that have accepted both actual or constructive knowledge as sufficient for liability and those that require actual knowledge. According to Selangor United Rubber Estates Ltd. v. Cradock (No. 3),⁸⁵ Karak Rubber Co Ltd. v. Burden (No. 2),⁸⁶ Rowlandson v. National Westminster Bank Ltd.,⁸⁷ the Saskatchewan Court of Appeal in MacDonald v. Haver⁸⁸ and Baden Delvaux either actual or constructive knowledge is sufficient to render the third party liable.

There exists, however, much authority, some of it recent, which goes against these cases. They include Carl-Zeiss-Stiftung v. Herbert Smith & Co. (No. 2),⁸⁹ the two

⁸⁴Consul Development Pty Ltd. v. DPC Estates Pty Ltd. (1975) 132 CLR 373 at 398 and 412 respectively.

⁸⁵[1968] 2 All ER 1073.

⁸⁶[1972] 1 All ER 1210.

⁸⁷[1976] 1 WLR 798 and see Crane [1979] Conv. 222 for a comment on this case.

⁸⁸(1977) 72 DLR (3d) 110 and see Gregory (1979) 42 MLR 707 for a comment.

⁸⁹[1969] 2 Ch 276 criticized by Gordon (1970) 44 ALJ 261.

cases of Belmont Finance,⁷⁷ International Sales and Agencies v. Marcus,⁷⁸ the obiter comments of Megarry V.C. in Re Montague's Settlements,⁷⁹ which were applied by Alliot J. in Lipkin Gorman v. Karpnale Ltd.,⁸⁰ the Court of Appeal also required actual knowledge in Lipkin Gorman,⁸¹ Barclays Bank Plc v. Quincecare Ltd.,⁸² (Africa) Ltd. v. Jackson,⁸³ the High Court of New Zealand decision in Marr v. Arabco Traders Ltd.⁸⁴ and the New Zealand Court of Appeal decision in Westpac Banking Corp. v. Savin.⁸⁵ Not only has the contention that constructive notice is not acceptable as "knowledge" for this liability been accepted by the vast number of cases academics also

⁷⁷[1979] Ch.250 and [1980] 1 All ER 393.

⁷⁸[1982] 3 All ER 551 and see Competitive Insurance Co. v. Cavies Investments (1975) 3 All ER 254.

⁷⁹[1987] Ch 269. Re Montague's further held that the person has not forgotten the actual knowledge, at 289.

⁸⁰[1986] FLR 271.

⁸¹[1989] 1 WLR 1340.

⁸²[1988] FLR 166.

⁸³[1989] 3 WLR 1367.

⁸⁴(1987) 1 NZBLC 102, 732 see Loughlar's comment on this 'decision in (1989) 7 Otago Law Review 179.

⁸⁵[1985] 2 NZLR see Harpum article (1987) 50 Mod LR 217 which considers and criticizes Re Montague's, the first instance decision in Lipkin Gorman and Westpac v. Savin.

have rejected the possibility of constructive knowledge as constituting sufficient "knowledge".⁹⁹

Thus it can be asserted that the modern tendency has been to require actual knowledge to ground liability for knowing assistance. However, this has not been the situation within the jurisdiction of Australia.

In Consul Development Stephen J.'s judgment stands as clear authority that knowledge under categories (i), (ii), and (iv) will be sufficient for liability, but category (v) will not. Whether category (iii) would constitute knowledge for his Honour is open to question. Stephen J. acknowledged that a third party will be liable if he or she has

"consciously refrained from inquiry for fear lest he [or she] learn of fraud."¹⁰⁰

His Honour dealt with the preceding cases on this point as involving circumstances where

"constructive notice arose out of the defendant's failure to recognize fraud when he [or she] saw it, not from a failure to pursue inquiries."¹⁰¹

The strange position that Consul Developments placed the law in Australia in was that some forms of actual knowledge and

⁹⁹for examples, Goode (1976) 92 LQR 4 and 399, Matthews [1981] NLJ 26 Feb. 1981 at 243, Heydon (1977) 51 ALJ 635 and Brindle and Hooley, "Does Constructive Knowledge make a Constructive Trustee?" (1987) 61 ALJ 281.

¹⁰⁰supra Note 82 at 412.

¹⁰¹supra Note 82 at 413.

some forms of constructive knowledge were sufficient to generate liability but other forms were not.

The New South Wales Court of Appeal decision in United States Surgical Corp.¹⁰² has already been commented upon as recognizing that category (iii) is a species at actual knowledge. Further, the Court held that this category is sufficient to found liability upon. Additionally, the Court of Appeal accepted Stephen J.'s judgment that categories (i), (ii), and (iv) of knowledge will be sufficient to require accountability. The unique position of Australia is that all forms of actual knowledge, as well as one variety of constructive knowledge, possess the quality of knowledge required for liability for knowing assistance.

Professor Austin accurately indicates that, taken together, categories (i) to (iv) required not only the court to examine if there exists a "want of probity", but also to enforce, and thereby prescribe, reasonable standards of behaviour. It is illogical to commence such an activity without completing it, and to complete it simply requires accepting category (v), that is, either actual or constructive knowledge will suffice to generate liability.

¹⁰²Supra 11 Note.

Both Dr. **Loughlan**¹⁰³ and Maxton¹⁰⁴ argue for the extension of third party liability for knowingly assisting a fiduciary in a dishonest and fraudulent design to include full constructive knowledge, that is, category (v) knowledge. This contention is centred around providing protection for the fiduciary relationship. Further, it must be remembered that all that is being asked of the third party is that his or her action coincide with the reasonable person's action. It is difficult to perceive any real objection to the stranger being required to act reasonably. The fear that is generated by the threat of the reasonable person standard is that in the past the standard required under the reasonable person test has, in fact, been unreasonably high. This is so especially in commercial contexts. As Dr. Loughlan has made clear it must be the reasonable person in the third person's position. **Loughlan**¹⁰⁵ points out that case law indicates that when such a specific reasonable person test is being utilized the court, to determine what a reasonable person in the defendant's position would have done, must consider the following circumstances: (a) whether the transaction was in 'the common course of business', (b) what the usual practice

¹⁰³"Liability for Assistance in a Breach of Fiduciary Duty" (1989) 9 OJLS 260 at 268 and (1989) 7 **Stago Law Review** 179.

¹⁰⁴[1990] NZ Recent Law Review 89 at 94.

¹⁰⁵Supra Note 103 at 269.

would be in the business or profession to which the third party belongs, (c) what the usual practice is of fiduciaries of the particular type with whom the third person has become involved or what the scope of the particular fiduciary's obligation was, (d) the type of trust property involved, and (e) whether the transaction was of a commercial nature or not. Professor Austin¹⁰⁶ likewise argues that it is more sensible to impose a reasonable person test which relates to the situation of the actual third party, rather than to attempt a generalization concerning constructive knowledge

"which may either impose duties of inquiry which are less realistic in one commercial relationship than in another, or exonerate where inappropriate in order to protect where necessary."¹⁰⁷

In this way justice and fairness are served by requiring the inquiries that a reasonable person would make, but it rebuts the typical commercial argument of imposing unrealistic standards by the imposition of a specific standard directly related to the third party's position.

Canada has a tradition of finding a commercial entity, which usually is a bank, to possess constructive knowledge and hence to be liable. This has occurred in both the knowing receipt and knowingly assist cases. What has been held to place the financial institution upon notice, and

¹⁰⁶Supra Note 77 at 235.

¹⁰⁷Supra Note 77 at 234.

thus have constructive knowledge of the fiduciary's breach, is often very little as demonstrated by Bank of Nova Scotia v. Bank of Montreal,¹⁰⁸ White v. Dominion Bank¹⁰⁹ and Carl B. Potter Ltd. v. Mercantile Bank of Canada.¹¹⁰ The very recent Alberta Court of Queen's Bench decision in McEachren v. Royal Bank of Canada¹¹¹ illustrates the great danger involved with this area when applied to a commercial setting, with particular significance to banks.

Briefly, the facts were the Mr. McEachren deposited money with a mortgage company to earn interest on the purchase of mortgages. After this deposit negotiations between the mortgage company and the Royal Bank began regarding the higher payment of interest for large deposits. Some of the money which was deposited belonged to Mr. McEachren. The mortgage company went bankrupt and the plaintiff sought recovery of his money from the bank. To obtain it the plaintiff claimed a constructive trust over the money held by the bank. The Court found that there existed a fiduciary obligation between the plaintiff and the mortgage company and that this was breached by the deposit of the money with the Royal Bank. The Court went on to hold that a defendant was a constructive trustee on the basis of

¹⁰⁸(1982) 14 ETR 222 (Ont. H.C.).

¹⁰⁹[1934] 3 WWR 385.

¹¹⁰(1980) 8 ETR 219.

¹¹¹reported in The Lawyers Weekly Jan. 25, 1991, p.1.

being an intermeddling stranger who had joined with the fiduciary with knowledge of the dishonest and fraudulent design. The knowledge here, that made the bank liable, was knowledge that the accounts of the mortgage company

"were possibly impressed with a trust."¹¹²
[emphasis added]

With the greatest respect to Mr. Justice Andrekson to base constructive knowledge, as the bank certainly did not have actual knowledge, and hence liability on the mere possibility of a breach of a fiduciary obligation is to lower the requirements for the imposition of constructive knowledge **so** that it does not constitute a real barrier to liability. It is suggested that something more than the mere possibility should be required to lead to liability of the third party.

Therefore, one feature of the fiduciary relationship is that a breach of it will permit tracing which leads to the **imposition** of the constructive trust. This has the **greatest** impact upon commercial entities, particularly banks, as it exposes them to liability.

The next remedy which is **available** to the **court** is to order an account of profits. **This** will be **appropriate** where the fiduciary's gain is not represented by any capital asset but by profits. **As** the gain in the Hospital Products case

¹¹²Ibid at p.17.

was held at first instance to be made by the "headstart" acquired by the breach of the fiduciary duty the obvious remedy, and the one ordered by McLelland J., was an account of profits. Additionally, an account of profits may be ordered as a supplement to a declaration of trust.¹¹³ The Supreme Court of British Columbia in MacMillan Bloedel Ltd. v. Binstead¹¹⁴ indicated the true nature of the remedy of an account of profits:

"The difficult and contentious issue, in my view, is not that of liability but rather of the consequences flowing therefrom. Where there has been a breach of fiduciary duty, as in the present circumstances, the law calls upon the defendants to account to the plaintiff for any profit made or benefits received as a result of the breach of duty. This is not the same as paying damages, which are compensatory in nature. The purpose of damages is to put the plaintiff in the same position it would have been in if not for the wrongdoing. Here the plaintiff suffered little damage and will be in a better position than it would have been if not for the wrongful act of the defendants.

A trustee who has breached his duty and profited as a result is obligated to disgorge those profits regardless of whether there was a corresponding loss to the cestui que trust."¹¹⁵

¹¹³see Kearney J. Supra note 30 at 205.

¹¹⁴(1983) 22 B.L.R. 225.

¹¹⁵Ibid. at 293-294.

As acknowledged by Ellis¹¹⁶ and Kearney J.¹¹⁷ the account of profits is a most complicated and cumbersome remedy when the action involves a commercial aspect. Ellis goes so far as to suggest that the sheer magnitude of the procedure may be a factor encouraging the out-of-court settlement of the matter.¹¹⁸ Indeed, one reason why the Ontario Court of Appeal ordered a constructive trust in the LAC case was the "insurmountable difficulties" posed by the accounting process because of nature of the facts involved.¹¹⁹

One possible method of avoiding much of the accounting procedure which makes this remedy so difficult in operation was suggested by the Appellate Division of the Nova Scotia Supreme Court in Re MacCulloch; Price Waterhouse Ltd. v. MacCulloch.¹²⁰ This alternative method is to require the defaulting fiduciary to pay back improperly used property plus interest. The Court adapted the following statement from Halsbury's Laws of England:

"957. Liability to Account. Where a trustee [or fiduciary] makes a profit by an improper employment of trust [or fiduciary] money or property, he is liable to make good to the trust

¹¹⁶Supra Note 50 at Ch.20-9.

¹¹⁷Supra Note 30 at 205.

¹¹⁸Supra Note 50 at Ch.20-7.

¹¹⁹(1987) 62 OR (2d) 1 Ont CA at 58.

¹²⁰(1986) 22 ETR 34.

estate [or beneficiary] the amount of that profit in addition to the money or property improperly employed. Where he makes a profit by improperly using trust [or fiduciary] money in trade or speculation, he is liable at the beneficiary's option to account to the trust estate [or beneficiary] either for the profit actually made or for compound interest at 1 per cent above the clearing banks' base rate from time to time on the amount of the trust [or fiduciary] money improperly employed."¹²¹

The particular problems of an accounting of profits which are often encountered within a commercial context can be avoided by recourse to another remedy; this is equitable damages. In Fraser Edmiston Williams J. was confronted with the possibility of ordering an account of profits where the procedure would have been cumbersome and time consuming. Thus, his Honour held that

"For reasons already stated it would be virtually impossible for a Master to conduct an inquiry in the traditional way; in the long run because of the absence of data it becomes necessary for an assessment to be made virtually on a jury basis."¹²²

His Honour therefore concluded that the appropriate remedy was an order for equitable damages.¹²³ In this way the

¹²¹Halsbury's Laws of England (4th Ed.) Vol.48 at 531.

¹²²Supra Note 4.

¹²³see Gummow J.'s excellent and recent exposition on the quantification of these damages in "Compensation for Breach of Fiduciary Duty" in Equity, Fiduciaries and Trusts Edited by Youdan. (Toronto: Carswell, 1989)

often complex nature of an account of profits inherent in many commercial situations was avoided.

This remedy is only an indirect form of accounting for the fiduciary's gain as the measure of the relief is the loss to the beneficiary."¹²⁴ The power to award equitable damages, recognised in Canada by Hawboldt Industries Ltd. v. Chester Bain Hydraulics & Machine Ltd.,¹²⁵ Bedard v. James¹²⁶ and Williams R. Barner Co. v. MacKenzie,¹²⁷ stems from the inherent jurisdiction of the court. This position was articulated in Nocton v. Lord Ashburton.¹²⁸ This basis for the power to grant equitable damages for breach of fiduciary obligation has been subsequently endorsed.¹²⁹ In Fraser Edmiston Pty. Ltd. Williams J. stated that

"Thomas J. in Markwell Bros v. S.P.N. Diesels held that the court had an inherent jurisdiction in a

¹²⁴see McLelland J. in USSC v. Hospital Products Int. [1982] 2 NSWLR 766 at 816, but see a contrary statement by Gertner and Lenczner in "A Tale of Two Cases" (1988) 27 Alta Law Review 98 at 101.

¹²⁵(1983) 22 BLR 215 (NSTD).

¹²⁶(1986) 32 BLR 188 (Ont. Dist Ct.).

¹²⁷(1974) 2 OR (2d) 659 (CA).

¹²⁸[1914] AC 932 (HL), see also Gummow J. *supra* note 123 at 59.

¹²⁹see, for example, McKenzie v. McDonald [1927] VLR 134, Homes v. Walton [1961] WAR 134; Davidson "The Equitable Remedy of Compensation" in 13 Mel. Uni. L.R. 349; Meagher, Gummow and Lehane Equity: Doctrines and Remedies 2nd Ed. at 604-605; Birks "Restitutionary Damages for Breach of Contract: Snepp and the Fusion of Law and Equity" [1987] MCLQ 421.

case such as this to award equitable damages in lieu of ordering an inquiry [i.e. an account of profits] and I am prepared to adopt his conclusion. As was his Honour, I am prepared to accept the validity of the reasoning in Chapter 7 of the 3rd ed of Dr. Spry's work, Equitable Remedies (in particular, I would refer to pp.588-589 and 608-610). Daniell's Chancery Practice (7th ed.) Vol.1, p.602 appears to support the proposition that a court of equity has the jurisdiction in an appropriate case to assess damages rather than order an inequity; see also the judgment of Fry J. in Cockburn v. Edwards (1880) 16 Ch.D. 393 (cf. Finn, op.cit. par: 387).¹³⁰

Thus, the remedy of equitable damages is available to the court and as it avoids many of the difficulties encountered with an account of profits is particularly suitable for use within a commercial context.

4. Conclusion

In a commercial context the remedy ordered for a breach of a fiduciary obligation is often of crucial importance. The court subsequent to finding a fiduciary obligation and a breach of this must turn its attention to the remedy. So that a remedy may be ordered the gain attained by the defaulting fiduciary must be ascertained. Within a commercial context the greatest difficulty when examining this is: what can be recovered when the gain is utilized to constitute an ongoing business? Basically this involves the notion of accretions to wealth. Two other factors need to

¹³⁰Supra Note 4 at 13.

be considered to accurately determine the gain that can be recouped; the just allowance permitted the fiduciary and apportionment.

After the true gain has been identified the court must then address itself to the nature of the remedy to be ordered. It should be guided by two principles; the first is that the remedy should best recoup the identified gain and secondly, that overall justice or the impact of the remedy must be gauged. Within a commercial context the issue most often addressed by the second principle is the consequences on secured creditors.

Various remedies and particular difficulties they possess in relation to the commercial world have been addressed. The most important remedy available to the courts is the declaration of a constructive trust. A third party may be made a constructive trustee following a breach of a fiduciary obligation through the doctrine of tracing. Commercially, this is of fundamental significance to banks and other financial institutions. Often such institutions will be found liable as a constructive trustee based on constructive knowledge which is triggered at a dangerously low level. Another remedy is an account of profits. Within a commercial context this remedy can be particularly very cumbersome and complicated. Various means have been suggested to alleviate these difficulties. One alternative to the problems encountered with an order for an account of

profits is the utilization of another remedy, that of equitable damages.

Chapter VConclusion

In recent years the function of the fiduciary obligation has been expanded at a tremendous rate. The fiduciary relationship has been held to exist in many novel contexts, often appearing merely to be a gateway to the rich array of remedies which are available for a breach of this equitable duty. If this tendency continues, that is, using the fiduciary relationship merely as a preliminary step to remedial relief rather than as an institution, the onerous responsibilities which accrue to such designated relationships are in danger of erosion. I have argued that it is important to maintain the limited institutional nature of the fiduciary relationship and as such have examined the operation of the fiduciary relationship within the commercial context.

Historically, the courts have articulated a deep reluctance to extend equitable doctrines generally, and the fiduciary relationship in particular, to the commercial world. This reluctance has been manifested in many of the recent decisions involving fiduciary obligations. This inclination has been premised upon various arguments, such as the perceived inadequacies of equity personnel, the uncertainty generated by equitable doctrines and their

complex nature. These have all been shown to be wanting, with the exception of the requirement of certainty for commercial fiduciaries. Generally, therefore, no real barrier exists to the extension of the fiduciary obligation to the commercial world.

It is at this point that the recent decision of LAC Minerals becomes important. This case drew upon various High Court of Australia decisions in addition to Canadian authority. The cases which were of most importance to LAC Minerals were reviewed in detail. The Supreme Court of Canada was presented with the opportunity to set clearly the direction of fiduciary law within this country and the appropriate test for the determination of the existence of this relationship. Unfortunately the decision has been found wanting in regard to the answers it provided to these issues. subsequent litigation is therefore assured.

The one argument against the extension of equitable doctrines into the commercial environment which was found to possess any validity was that of uncertainty. And this argument only possessed real strength in relation to certain persons, referred to as commercial fiduciaries. Commercial fiduciaries, because of their positions, can do exceptional harm to the business entities they work for. As a consequence of this tremendous vulnerability a strict test has been proposed for adoption by the Australian courts in regards to commercial fiduciaries. This test has been

labelled the Commercial Opportunity Doctrine. Various Commonwealth authorities, primarily Canadian, are useful in constructing this doctrine. Several limited defences have been suggested in order that certainty may prevail, but that this certainty does not come at the cost of justice.

After the court has determined that a fiduciary obligation was owed and has been breached its attention should turn to the remedy. As a consequence of the rich array of remedies available upon the breach of an equitable obligation the judicial decision pertaining to which remedy to order may often be critical not only to the litigants, but also third parties. This is particularly true in cases involving commercial ramifications. Thus it has been argued that when ordering the remedy the court should look to two factors. The first is what remedy will best recoup the fiduciary's ill-gotten gain. To appreciate how the varying remedies may achieve this goal each have been individually examined, with any difficulties, especially those relevant to a commercial context, clearly set out. The second factor which must be examined is the fairness of the remedy to the parties and to any third party effected by it, such as unsecured creditors.

In sum, I have argued for a sensible, practical and just approach to be taken to the utilization of the fiduciary obligation within a commercial context.

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