EB-2012-0087

IN THE MATTER OF the Ontario Energy Board Act 1998, S.O. 1998, c.15, (Schedule B) (the "Act");

AND IN THE MATTER OF an application filed by Union Gas Limited for an Order or Orders amending or varying the rate or rates charged to customers as of October 1, 2012

BRIEF OF AUTHORITIES
CANADIAN MANUFACTURERS & EXPORTERS ("CME")

September 14, 2012

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I N D E X

TAB 1

Case Name:

Soulos v. Korkontzilas

Fotios Korkontzilas, Panagiota Korkontzilas and Olympia Town Real Estate Limited, appellants;
v.
Nick Soulos, respondent.

[1997] S.C.J. No. 52

[1997] A.C.S. no 52

[1997] 2 S.C.R. 217

[1997] 2 R.C.S. 217

32 O.R. (3d) 716

146 D.L.R. (4th) 214

212 N.R. 1

J.E. 97-1111

100 O.A.C. 241

46 C.B.R. (3d) 1

17 E.T.R. (2d) 89

9 R.P.R. (3d) 1

REJB 1997-00862

71 A.C.W.S. (3d) 194

File No.: 24949.

Supreme Court of Canada

1997: February 18 / 1997: May 22.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trusts and trustees -- Constructive trust -- Agency -- Fiduciary duties -- Real estate agent making offer to purchase property on behalf of client -- Vendor rejecting offer but advising agent of amount it would accept -- Agent buying property for himself instead of conveying information to client -- Market value of property decreasing from time of agent's purchase -- Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

Real property -- Remedies -- Constructive trust -- Agency -- Real estate agent making offer to purchase property on behalf of client -- Vendor rejecting offer but advising agent of amount it would accept -- Agent buying property for himself instead of conveying information to client -- Market value of property decreasing from time of agent's purchase -- Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

K, a real estate broker, entered into negotiations to purchase a commercial building on behalf of S, his client. The vendor rejected the offer made and tendered a counteroffer. K rejected the counteroffer but "signed it back". The vendor advised K of the amount it would accept, but instead of conveying this information to S, K arranged for his wife to purchase to property, which was then transferred to K and his wife as joint tenants. S brought an action against K to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in his community. He abandoned his claim for damages because the market value of the property had decreased from the time of the purchase by K. The trial judge found that K had breached a duty of loyalty to S, but held that a constructive trust was not an appropriate remedy because K had not been "enriched". The Court of Appeal, in a majority decision, reversed the judgment and ordered that the property be conveyed to S subject to appropriate adjustments.

Held (Sopinka and Iacobucci JJ. dissenting): The appeal should be dismissed.

Per La Forest, Gonthier, Cory, McLachlin and Major JJ.: The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.

The following conditions should generally be satisfied before a constructive trust based on wrongful conduct will be imposed: (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands; (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff; (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and (4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case.

Here K's breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust. First, K was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price

the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted a breach of his equitable duty of loyalty. Second, the assets in K's hands resulted from his agency activities in breach of his equitable obligation to S. Third, a constructive trust is required to remedy the deprivation S suffered because of his continuing desire to own the particular property in question. A constructive trust is also required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty. Finally, there are no factors which would make imposition of a constructive trust unjust in this case.

Per Sopinka and Iacobucci JJ. (dissenting): The ordering of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. The trial judge's decision not to order such a remedy should be overturned on appeal only if the discretion has been exercised on the basis of an erroneous principle. The trial judge committed no such error here. He considered the moral quality of K's actions and there is thus no room for appellate intervention on this ground. He was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which is a correct statement of the law. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In this case, S withdrew his claim for damages. While compensatory damages were unavailable since no pecuniary loss was suffered, S could have sought exemplary damages. His decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust. The trial judge also considered deterrence, but held that it alone could not justify a remedy in this case.

Even if appellate review were appropriate, the remedy of a constructive trust was not available on the facts of this case. Recent case law in this Court is very clear that a constructive trust may only be ordered where there has been an unjust enrichment, and there was no enrichment, and therefore no unjust enrichment, here. The unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role and supported by specific consideration of the principles set out in Lac Minerals, [1989] 2 S.C.R. 574. Deterrence does not suggest that a constructive trust should be available even where there is no unjust enrichment. Despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not held it to be necessary where a tort duty or a contractual duty has been breached to order remedies even where no loss resulted. There is nothing which would justify treating breaches of fiduciary duties any differently in this regard. In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not have any significant effect on deterrence. Exemplary damages are available if deterrence is deemed to be particularly important, and an unscrupulous fiduciary has to reckon with the possibility that if there were gains in value to the property, he or she would be compelled to pay damages or possibly give up the property.

Cases Cited

By McLachlin J.

Referred to: Pettkus v. Becker, [1980] 2 S.C.R. 834; White v. Central Trust Co. (1984), 17 E.T.R. 78; Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2), [1969] 2 Ch. 276; Beatty v. Guggenheim Exploration Co., 122 N.E. 378 (1919); Neale v. Willis (1968), 19 P. & C.R. 836; Binions v. Evans, [1972] Ch. 359; Hussey v. Palmer, [1972] 1 W.L.R. 1286; Neste Oy v. Lloyd's Bank Plc, [1983] 2 Lloyd's Rep. 658; Elders Pastoral Ltd. v. Bank of New Zealand, [1989] 2 N.Z.L.R. 180; Mogal Corp. v. Australasia Investment Co. (In Liquidation) (1990), 3 N.Z.B.L.C. 101, 783; Re Goldcorp Exchange Ltd. (In Receivership), [1994] 2 All E.R. 806; Hodgkinson v. Simms, [1994] 3 S.C.R. 377; Meinhard v. Salmon, 164 N.E. 545 (1928); Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada (1984), 9 D.L.R. (4th) 729; MacMillan Bloedel Ltd. v. Binstead (1983), 14 E.T.R. 269.

By Sopinka J. (dissenting)

Donkin v. Bugoy, [1985] 2 S.C.R. 85; Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574; Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534; Hodgkinson v. Simms, [1994] 3 S.C.R. 377; Brissette Estate v. Westbury Life Insurance Co., [1992] 3 S.C.R. 87; Pettkus v. Becker, [1980] 2 S.C.R. 834; Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426; Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada (1984), 9 D.L.R. (4th) 729; MacMillan Bloedel Ltd. v. Binstead (1983), 14 E.T.R. 269; Reading v. The King, [1948] 2 All E.R. 27, aff'd [1949] 2 All E.R. 68, aff'd [1951] 1 All E.R. 617; Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592; Phipps v. Boardman, [1965] 1 All E.R. 849, aff'd [1966] 3 All E.R. 721; Lee v. Chow (1990), 12 R.P.R. (2d) 217.

Authors Cited

Birks, Peter. An Introduction to the Law of Restitution. Oxford: Clarendon Press, 1985.
Dewar, John L. "The Development of the Remedial Constructive Trust" (1982-84), 6 Est. & Tr. Q. 312.
Dixon, John. "The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment" (1992-95), 7 Auck. U. L. Rev. 147.
Goff of Chieveley, Robert Goff, and Gareth Jones. The Law of Restitution, 3rd ed. London: Sweet & Maxwell, 1986.
Goode, Roy. "Property and Unjust Enrichment". In Andrew Burrows, ed., Essays on the Law of Restitution. Oxford: Clarendon Press, 1991.
Litman, M. M. "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988), 26 Alta. L. Rev. 407.
McClean, A. J. "Constructive and Resulting Trusts -- Unjust Enrichment in a Common Law Relationship -- Pettkus v. Becker (1982), 16 U.B.C. L. Rev. 155.
Paciocco, David M. "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989), 68 Can. Bar Rev. 315.
Scott, Austin Wakeman. The Law of Trusts, vol. V, 3rd ed. Boston: Little, Brown, 1967.
Sealy, L. S. "Fiduciary Relationships", [1962] Camb. L.J. 69.
Waters, D. W. M. The Constructive Trust: The Case for a New Approach in English Law. London: University of London, Athlone Press, 1964.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221, reversing a decision of the Ontario Court (General Division) (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205, dismissing the respondent's action against the appellants for conveyance of a property. Appeal dismissed, Sopinka and Iacobucci JJ. dissenting.

Thomas G. Heintzman, Q.C., and Darryl A. Cruz, for the appellants.
David T. Stockwood, Q.C., and Susan E. Caskey, for the respondent.

Solicitors for the appellants: McCarthy Tétrault, Toronto.
Solicitors for the respondent: Stockwood, Spies & Campbell, Toronto.

The judgment of La Forest, Gonthier, Cory, McLachlin and Major JJ. was delivered by

McLACHLIN J.:--

I

1 This appeal requires this Court to determine whether a real estate agent who buys for himself property for which he has been negotiating on behalf of a client may be required to return the property to his client despite the fact that the client can show no loss. This raises the legal issue of whether a constructive trust over property may be imposed in the absence of enrichment of the defendant and corresponding deprivation of the plaintiff. In my view, this question should be answered in the affirmative.

II

2 The appellant Mr. Korkontzilas is a real estate broker. The respondent, Mr. Soulos, was his client. In 1984, Mr. Korkontzilas found a commercial building which he thought might interest Mr. Soulos. Mr. Soulos was interested in purchasing the building. Mr. Korkontzilas entered into negotiations on behalf of Mr. Soulos. He offered $250,000. The vendor, Dominion Life, rejected the offer and tendered a counter-offer of $275,000. Mr. Soulos rejected the counter-offer but "signed it back" at $260,000 or $265,000. Dominion Life advised Mr. Korkontzilas that it would accept $265,000. Instead of conveying this information to Mr. Soulos as he should have, Mr. Korkontzilas arranged for his wife, Panagiota Goutsoulas, to purchase the property using the name Panagiot Goutsoulas. Panagiot Goutsoulas then transferred the property to Panagiota and Fotios Korkontzilas as joint tenants. Mr. Soulos asked what had happened to the property. Mr. Korkontzilas told him to "forget about it"; the vendor no longer wanted to sell it and he would find him a better property. Mr. Soulos asked Mr. Korkontzilas whether he had had anything to do with the vendor's change of heart. Mr. Korkontzilas said he had not.

3 In 1987 Mr. Soulos learned that Mr. Korkontzilas had purchased the property for himself. He brought an action against Mr. Korkontzilas to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in the Greek community of which he was a member. However, Mr. Soulos abandoned his claim for damages because the market value of the property had, in fact, decreased from the time of the Korkontzilas purchase.

4 The trial judge found that Mr. Korkontzilas had breached a duty of loyalty to Mr. Soulos, but held that a constructive trust was not an appropriate remedy because Mr. Korkontzilas had purchased the property at market value and hence had not been "enriched": (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205 (hereinafter cited to O.R.). The decision was reversed on appeal, Labrosse J.A. dissenting: (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221 (hereinafter cited to O.R.).

5 For the reasons that follow, I would dismiss the appeal. In my view, the doctrine of constructive trust applies and requires that Mr. Korkontzilas convey the property he wrongly acquired to Mr. Soulos.

III

6 The first question is what duties Mr. Korkontzilas owed to Mr. Soulos in relation to the property. This question returns us to the findings of the trial judge. The trial judge rejected the submission of Mr. Soulos that an agreement existed requiring Mr. Korkontzilas to present all properties in the Danforth area to him exclusively before other purchasers. He found, however, that Mr. Korkontzilas became the agent for Mr. Soulos when he prepared the offer which Mr. Soulos signed with respect to the property at issue. He further found that this agency relationship extended to reporting the vendor's response to Mr. Soulos. This relationship of agency was not terminated when the vendor made its counter-offer. The trial judge therefore concluded that Mr. Korkontzilas was acting as Mr. Soulos' agent at all material times.

7 The trial judge went on to state that the relationship of agent and principal is fiduciary in nature. He concluded that as agent to Mr. Soulos, Mr. Korkontzilas owed Mr. Soulos a "duty of loyalty". He found that Mr. Korkontzilas breached this duty of loyalty when he failed to refer the vendor's counter-offer to Mr. Soulos.

8 The Court of Appeal did not take issue with these conclusions. The majority did, however, differ from the trial judge on what consequences flowed from Mr. Korkontzilas' breach of the duty of loyalty.

IV

9 This brings us to the main issue on this appeal: what remedy, if any, does the law afford Mr. Soulos for Mr. Korkontzilas' breach of the duty of loyalty in acquiring the property in question for himself rather than passing the vendor's statement of the price it would accept on to his principal, Mr. Soulos?

10 At trial Mr. Soulos' only claim was that the property be transferred to him for the price paid by Mr. Korkontzilas, subject to adjustments for changes in value and losses incurred on the property since purchase. He abandoned his claim for damages at an early stage of the proceedings. This is not surprising, since Mr. Korkontzilas had paid market value for the property and had, in fact, lost money on it during the period he had held it. Still, Mr. Soulos maintained his desire to own the property.

11 Mr. Soulos argued that the property should be returned to him under the equitable doctrine of constructive trust. The trial judge rejected this claim, on the ground that constructive trust arises only where the defendant has been unjustly enriched by his wrongful act. The fact that damages offered Mr. Soulos no compensation was of no moment: "It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none" (p. 69). Furthermore, "it seems simply disproportionate and inappropriate to utilize the drastic remedy of a constructive trust where the plaintiff has suffered no damage" (p. 69). The trial judge added that nominal damages were inappropriate, damages having been waived, and that Mr. Soulos had mitigated his loss by buying other properties.

12 The majority of the Court of Appeal took a different view. Carthy J.A. held that the award of an equitable remedy is discretionary and dependent on all the facts before the court. In his view, however, the trial judge had exercised his discretion on a wrong principle. Carthy J.A. asserted that the moral quality of the defendant's act may dictate the court's intervention. Most real estate transactions involve one person acting gratuitously for the purchaser, while seeking commission from the vendor. The fiduciary duties of the agent would be meaningless if the agent could simply acquire the property at market value, and then deny that he or she is a constructive trustee because no damages are suffered. In such circumstances, equity will "intervene with a proprietary remedy to sustain the integrity of the laws which it supervises" (p. 261). Carthy J.A. conceded that Mr. Soulos' reason for desiring the property may seem "whimsical". But viewed against the broad context of real estate transactions, he found that the remedy of constructive trust in these circumstances serves a "salutary purpose". It enables the court to ensure that immoral conduct is not repeated, undermining the bond of trust that enables the industry to function. The majority accordingly ordered conveyance of the property subject to appropriate adjustments.

13 The difference between the trial judge and the majority in the Court of Appeal may be summarized as follows. The trial judge took the view that in the absence of established loss, Mr. Soulos had no action. To grant the remedy of constructive trust in the absence of loss would be "simply disproportionate and inappropriate", in his view. The majority in the Court of Appeal, by contrast, took a broader view of when a constructive trust could apply. It held that a constructive trust requiring reconveyance of the property could arise in the absence of an established loss in order to condemn the

agent's improper act and maintain the bond of trust underlying the real estate industry and hence the "integrity of the laws" which a court of equity supervises.

14 The appeal thus presents two different views of the function and ambit of the constructive trust. One view sees the constructive trust exclusively as a remedy for clearly established loss. On this view, a constructive trust can arise only where there has been "enrichment" of the defendant and corresponding "deprivation" of the plaintiff. The other view, while not denying that the constructive trust may appropriately apply to prevent unjust enrichment, does not confine it to that role. On this view, the constructive trust may apply absent an established loss to condemn a wrongful act and maintain the integrity of the relationships of trust which underlie many of our industries and institutions.

15 It is my view that the second, broader approach to constructive trust should prevail. This approach best accords with the history of the doctrine of constructive trust, the theory underlying the constructive trust, and the purposes which the constructive trust serves in our legal system.

V

16 The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment in cases such as Pettkus v. Becker, [1980] 2 S.C.R. 834. Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff can demonstrate no deprivation and corresponding enrichment of the defendant.

17 The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

18 While specific situations attracting a constructive trust have been identified, the older English jurisprudence offers no satisfactory limiting or unifying conceptual theory for the constructive trust. As D. W. M. Waters, The Constructive Trust (1964), at p. 39, puts it, the constructive trust "was never any more than a convenient and available language medium through which . . . the obligations of parties might be expressed or determined". The constructive trust was used in English law "to link together a number of disparate situations . . . on the basis that the obligations imposed by law in these situations might in some way be likened to the obligations which were imposed upon an express trustee": J. L. Dewar, "The Development of the Remedial Constructive Trust" (1982-84), 6 Est. & Tr. Q. 312, at p. 317, citing Waters, supra.

19 The situations in which a constructive trust was recognized in England include constructive trusts arising on breach of a fiduciary relationship, as well as trusts imposed to prevent the absence of writing from depriving a person of proprietary rights, to prevent a purchaser with notice from fraudulently retaining trust properties, and to enforce secret trusts and mutual wills. See Dewar, supra, at p. 334. The fiduciary relationship underlies much of the English law of constructive trust. As Waters, supra, at p. 33, writes: "the fiduciary relationship is clearly wed to the constructive trust over the whole, or little short of the whole, of the trust's operation". At the same time, not all breaches of fiduciary relationships give rise to a constructive trust. As L. S. Sealy, "Fiduciary Relationships", [1962] Camb. L.J. 69, at p. 73, states:

> The word "fiduciary," we find, is not definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied. [Emphasis in original.]

Nor does the absence of a classic fiduciary relationship necessarily preclude a finding of a constructive trust; the wrongful nature of an act may be sufficient to constitute breach of a trust-like duty: see Dewar, supra, at pp. 322-23.

20 Canadian courts have never abandoned the principles of constructive trust developed in England. They have, however, modified them. Most notably, Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment. It is now established that a constructive trust may be imposed in the absence of wrongful conduct like breach of fiduciary duty, where three elements are present: (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: Pettkus v. Becker, supra.

21 This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as Pettkus v. Becker should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. The language used makes no such claim. A. J. McClean, "Constructive and Resulting Trusts -- Unjust Enrichment in a Common Law Relationship -- Pettkus v. Becker" (1982), 16 U.B.C. L. Rev. 155, at p. 170, describes the ratio of Pettkus v. Becker as "a modest enough proposition". He goes on: "It would be wrong . . . to read it as one would read the language of a statute and limit further development of the law".

22 Other scholars agree that the constructive trust as a remedy for unjust enrichment does not negate a finding of a constructive trust in other situations. D. M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989), 68 Can. Bar Rev. 315, at p. 318, states: "the constructive trust that is used to remedy unjust enrichment must be distinguished from the other types of constructive trusts known to Canadian law prior to 1980". Paciocco asserts that unjust enrichment is not a necessary condition of a constructive trust (at p. 320):

> ... in the largest traditional category, the fiduciary constructive trust, there need be no deprivation experienced by the particular plaintiff. The constructive trust is imposed to raise the morality of the marketplace generally, with the beneficiaries of some of these trusts receiving what can only be described as a windfall.

23 Dewar, supra, holds a similar view (at p. 332):

> While it is unlikely that Canadian courts will abandon the learning and the classifications which have grown up in connection with the English constructive trust, it is submitted that the adoption of the American style constructive trust by the Supreme Court of Canada in Pettkus v. Becker will profoundly influence the future development of Canadian trust law.

Dewar, supra, at pp. 332-33, goes on to state: "In English and Canadian law there is no general agreement as to precisely which situations give rise to a constructive trust, though there are certain general categories of cases in which it is agreed that a constructive trust does arise". One of these is to correct fraudulent or disloyal conduct.

24 M. M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of

Constructive Trust" (1988), 26 Alta. L. Rev. 407, at p. 414, sees unjust enrichment as a useful tool in rationalizing the traditional categories of constructive trust. Nevertheless he opines that it would be a "significant error" to simply ignore the traditional principles of constructive trust. He cites a number of Canadian cases subsequent to Pettkus v. Becker, supra, which impose constructive trusts for wrongful acquisition of property, even in the absence of unjust enrichment and correlative deprivation, and concludes that the constructive trust "cannot always be explained by the unjust enrichment model of constructive trust" (p. 416). In sum, the old English law remains part of contemporary Canadian law and guides its development. As La Forest J.A. (as he then was) states in White v. Central Trust Co. (1984), 17 E.T.R. 78 (N.B.C.A.), at p. 90, cited by Litman, supra, the courts "will not venture far onto an uncharted sea when they can administer justice from a safe berth".

25 I conclude that the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence.

VI

26 Various principles have been proposed to unify the situations in which the English law found constructive trust. R. Goff and G. Jones, The Law of Restitution (3rd ed. 1986), at p. 61, suggest that unjust enrichment is such a theme. However, unless "enrichment" is interpreted very broadly to extend beyond pecuniary claims, it does not explain all situations in which the constructive trust has been applied. As McClean, supra, at p. 168, states: "however satisfactory [the unjust enrichment theory] may be for other aspects of the law of restitution, it may not be wide enough to cover all types of constructive trust". McClean goes on to note the situation raised by this appeal: "In some cases, where such a trust is imposed the trustee may not have obtained any benefit at all; this could be the case, for example, when a person is held to be a trustee de son tort. A plaintiff may not always have suffered a loss." McClean concludes (at pp. 168-69): "Unjust enrichment may not, therefore, satisfactorily explain all types of restitutionary claims".

27 McClean, among others, regards the most satisfactory underpinning for unjust enrichment to be the concept of "good conscience" which lies at "the very foundation of equitable jurisdiction" (p. 169):

> "Safe conscience" and "natural justice and equity" were two of the criteria referred to by Lord Mansfield in Moses v. MacFerlan (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) in dealing with an action for money had and received, the prototype of a common law restitutionary claim. "Good conscience" has a sound basis in equity, some basis in common law, and is wide enough to encompass constructive trusts where the defendant has not obtained a benefit or where the plaintiff has not suffered a loss. It is, therefore, as good as, or perhaps a better, foundation for the law of restitution than is unjust enrichment.

28 Other scholars agree with McClean that good conscience may provide a useful way of unifying the different forms of constructive trust. Litman, supra, adverts to the "natural justice and equity" or "good conscience" trust "which operates as a remedy for wrongs which are broader in concept than unjust enrichment" and goes on to state that this may be viewed as the underpinning of the various institutional trusts as well as the unjust enrichment restitutionary constructive trust (at pp. 415-16).

29 Good conscience as the unifying concept underlying constructive trust has attracted the support of many jurists. Edmund Davies L.J. suggested that the concept of a "want of probity" in the person upon whom the constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts": Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2), [1969] 2 Ch. 276 (C.A.), at p. 301. Cardozo J. similarly endorsed the unifying theme of good conscience in Beatty v.

Guggenheim Exploration Co., 122 N.E. 378 (1919), at p. 380:

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. [Emphasis added.]

30 Lord Denning M.R. expressed similar views in a series of cases applying the constructive trust as a remedy for wrong-doing: see Neale v. Willis (1968), 19 P. & C.R. 836; Binions v. Evans, [1972] Ch. 359; Hussey v. Palmer, [1972] 1 W.L.R. 1286. In Binions, referring to the statement by Cardozo J., supra, Denning M.R. stated that the court would impose a constructive trust "for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises" (p. 368). In Hussey, he said the following of the constructive trust (at pp. 1289-90): "By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it".

31 Many English scholars have questioned Lord Denning's expansive statements on constructive trust. Nevertheless, he is not alone: Bingham J. similarly referred to good conscience as the basis for equitable intervention in Neste Oy v. Lloyd's Bank Plc, [1983] 2 Lloyd's Rep. 658.

32 The New Zealand Court of Appeal also appears to have accepted good conscience as the basis for imposing a constructive trust in Elders Pastoral Ltd. v. Bank of New Zealand, [1989] 2 N.Z.L.R. 180. Cooke P., at pp. 185-86, cited the following passage from Bingham J.'s reasons in Neste Oy, supra, at p. 666:

> Given the situation of [the defendants] when the last payment was received, any reasonable and honest directors of that company (or the actual directors had they known of it) would, I feel sure, have arranged for the repayment of that sum to the plaintiffs without hesitation or delay. It would have seemed little short of sharp practice for [the defendants] to take any benefit from the payment, and it would have seemed contrary to any ordinary notion of fairness that the general body of creditors should profit from the accident of a payment made at a time when there was bound to be a total failure of consideration. Of course it is true that insolvency always causes loss and perfect fairness is unattainable. The bank, and other creditors, have their legitimate claims. It nonetheless seems to me that at the time of its receipt [the defendants] could not in good conscience retain this payment and that accordingly a constructive trust is to be inferred. [Emphasis added.]

Cooke P. concluded simply (at p. 186): "I do not think that in conscience the stock agents can retain this money." Elders has been taken to stand for the proposition that even in the absence of a fiduciary relationship or unjust enrichment, conduct contrary to good conscience may give rise to a remedial constructive trust: see Mogal Corp. v. Australasia Investment Co. (In Liquidation) (1990), 3 N.Z.B.L.C. 101, 783; J. Dixon, "The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment" (1992-95), 7 Auck. U. L. Rev. 147, at pp. 157-58. Although the Judicial Committee of the Privy Council rejected the creation of a constructive trust on grounds of good conscience in Re Goldcorp Exchange Ltd. (In Receivership), [1994] 2 All E.R. 806, the fact remains that good conscience is a theme underlying constructive trust from its earliest times.

33 Good conscience addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised. As La Forest J. states in Hodgkinson v. Simms, [1994] 3 S.C.R. 377, at p.

453:

> The law of fiduciary duties has always contained within it an element of deterrence. This can be seen as early as Keech in the passage cited supra; see also Canadian Aero, supra, at pp. 607 and 610; Canson, supra, at p. 547, per McLachlin J. In this way the law is able to monitor a given relationship society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility.

The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

34 It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

35 Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

36 The situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories. The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. The traditional English institutional trusts largely fall under but may not exhaust (at least in Canada) this category. The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.

37 In England the law has yet to formally recognize the remedial constructive trust for unjust enrichment, although many of Lord Denning's pronouncements pointed in this direction. The courts do, however, find constructive trusts in circumstances similar to those at bar. Equity traditionally recognized the appropriateness of a constructive trust for breach of duty of loyalty simpliciter. The English law is summarized by Goff and Jones, The Law of Restitution, supra, at p. 643:

> A fiduciary may abuse his position of trust by diverting a contract, purchase or other opportunity from his beneficiary to himself. If he does so, he is deemed to hold that contract, purchase, or opportunity on trust for the beneficiary.

P. Birks, An Introduction to the Law of Restitution (1985) (at pp. 330; 338-43) agrees. He suggests that cases of conflict of interest not infrequently may give rise to constructive trust, absent unjust enrichment. Birks distinguishes between anti-enrichment wrongs and anti-harm wrongs (at p. 340). A fiduciary acting in conflict of interest represents a risk of actual or potential harm, even though his misconduct may not always enrich him. A constructive trust may accordingly be ordered.

38 Both categories of constructive trust are recognized in the United States; although unjust enrichment is sometimes cited as the rationale for the constructive trust in the U.S., in fact its courts recognize the availability of constructive trust to require the return of property acquired by wrongful act absent unjust enrichment of the defendant and reciprocal deprivation of the plaintiff. Thus the authors of Scott on Trusts (3rd ed. 1967), vol. V, at p. 3410, state that the constructive trust "is available where property is obtained by mistake or by fraud or by other wrong". Or as Cardozo C.J. put it, "[a] constructive trust is, then, the remedial device through which preference of self is made subordinate to loyalty to others": Meinhard v. Salmon, 164 N.E. 545 (1928), at p. 548, cited in Scott on Trusts, supra, at p. 3412. Scott on Trusts, supra, at p. 3418, states that there are cases "in which a constructive trust is enforced against a defendant, although the loss to the plaintiff is less than the gain to the defendant or, indeed, where there is no loss to the plaintiff".

39 Canadian courts also recognize the availability of constructive trusts for both wrongful acquisition of property and unjust enrichment. Applying the English law, they have long found constructive trusts as a consequence of wrongful acquisition of property, for example by fraud or breach of fiduciary duty. More recently, Canadian courts have recognized the availability of the American-style remedial constructive trust in cases of unjust enrichment: Pettkus v. Becker, supra. However, since Pettkus v. Becker Canadian courts have continued to find constructive trusts where property has been wrongfully acquired, even in the absence of unjust enrichment. While such cases appear infrequently since few choose to litigate absent pecuniary loss, they are not rare.

40 Litman, supra, at p. 416, notes that in "the post-Pettkus v. Becker era there are numerous cases where courts have used the institutional constructive trust without adverting to or relying on unjust enrichment". The imposition of a constructive trust in these cases is justified not on grounds of unjust enrichment, but on the ground that the defendant's wrongful act requires him to restore the property thus obtained to the plaintiff.

41 Thus in Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada (1984), 9 D.L.R. (4th) 729 (Ont. C.A.), a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor.

42 Again, in MacMillan Bloedel Ltd. v. Binstead (1983), 14 E.T.R. 269 (B.C.S.C.), a constructive trust was imposed on individuals who knowingly participated in a breach of fiduciary duty despite a finding that unjust enrichment would not warrant the imposition of a trust because the plaintiff company could not be said to have suffered a loss or deprivation since its own policy precluded it from receiving the profits. Dohm J. (as he then was) stated that the constructive trust was required "not to balance the equities but to ensure that trustees and fiduciaries remain faithful and that those who assist them in the breaches of their duty are called to account" (p. 302).

43 I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in Pettkus v. Becker, supra. Within these two broad categories, there

is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

44 The process suggested is aptly summarized by McClean, supra, at pp. 169-70:

> The law [of constructive trust] may now be at a stage where it can distill from the specific examples a few general principles, and then, by analogy to the specific examples and within the ambit of the general principle, create new heads of liability. That, it is suggested, is not asking the courts to embark on too dangerous a task, or indeed on a novel task. In large measure it is the way that the common law has always developed.

VII

45 In Pettkus v. Becker, supra, this Court explored the prerequisites for a constructive trust based on unjust enrichment. This case requires us to explore the prerequisites for a constructive trust based on wrongful conduct. Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment", in Andrew Burrows, ed., Essays on the Law of Restitution (1991), I would identify four conditions which generally should be satisfied:

(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
(2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
(3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

VIII

46 Applying this test to the case before us, I conclude that Mr. Korkontzilas' breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust for the following reasons.

47 First, Mr. Korkontzilas was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted breach of his equitable duty of loyalty. He allowed his own interests to conflict with those of his client. He acquired the property wrongfully, in flagrant and inexcusable breach of his duty of loyalty to Mr. Soulos. This is the sort of situation which courts of equity, in Canada and elsewhere, have traditionally treated as involving an equitable duty, breach of which may give rise to a constructive trust, even in the absence of unjust enrichment.

48 Second, the assets in the hands of Mr. Korkontzilas resulted from his agency activities in breach of his equitable obligation to the plaintiff. His acquisition of the property was a direct result of his breach of his duty of loyalty to his client, Mr. Soulos.

49 Third, while Mr. Korkontzilas was not monetarily enriched by his wrongful acquisition of the property, ample reasons exist for equity to impose a constructive trust. Mr. Soulos argues that a constructive trust is required to remedy the deprivation he suffered because of his continuing desire, albeit for non-monetary reasons, to own the particular property in question. No less is required, he asserts, to return the parties to the position they would have been in had the breach not occurred. That alone, in my opinion, would be sufficient to persuade a court of equity that the proper remedy for Mr. Korkontzilas' wrongful acquisition of the property is an order that he is bound as a constructive trustee to convey the property to Mr. Soulos.

50 But there is more. I agree with the Court of Appeal that a constructive trust is required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty: see Hodgkinson v. Simms, supra, per La Forest J. If real estate agents are permitted to retain properties which they acquire for themselves in breach of a duty of loyalty to their clients provided they pay market value, the trust and confidence which underpin the institution of real estate brokerage will be undermined. The message will be clear: real estate agents may breach their duties to their clients and the courts will do nothing about it, unless the client can show that the real estate agent made a profit. This will not do. Courts of equity have always been concerned to keep the person who acts on behalf of others to his ethical mark; this Court should continue in the same path.

51 I come finally to the question of whether there are factors which would make imposition of a constructive trust unjust in this case. In my view, there are none. No third parties would suffer from an order requiring Mr. Korkontzilas to convey the property to Mr. Soulos. Nor would Mr. Korkontzilas be treated unfairly. Mr. Soulos is content to make all necessary financial adjustments, including indemnification for the loss Mr. Korkontzilas has sustained during the years he has held the property.

52 I conclude that a constructive trust should be imposed. I would dismiss the appeal and confirm the order of the Court of Appeal that the appellants convey the property to the respondent, subject to appropriate adjustments. The respondent is entitled to costs throughout.

The reasons of Sopinka and Iacobucci JJ. were delivered by

53 SOPINKA J. (dissenting):-- I have read the reasons of my colleague McLachlin J. While I agree with her conclusion that a breach of a fiduciary duty was made out herein, I disagree with her analysis concerning the appropriate remedy. In my view, she errs in upholding the decision of the majority of the Court of Appeal to overturn the trial judge and impose a constructive trust over the property in question. There are two broad reasons for my conclusion. First, the order of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. Given that the trial judge did not err in principle in declining to make such an order, appellate courts should not interfere with the exercise of his discretion. Second, even if appellate review were appropriate in the present case, a constructive trust as a remedy is not available where there has been no unjust enrichment. The main source of my disagreement with McLachlin J. arises in consideration of the second point, but in order to address the reasons of the majority in the court below as well, I will consider both of these issues in turn.

Standard of Review and the Exercise of Discretion

54 It is a matter of settled law that appellate courts should generally not interfere with orders exercised within a trial judge's discretion. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: see Donkin v. Bugoy, [1985] 2 S.C.R. 85. As acknowledged by the majority in the Court of Appeal ((1995), 25 O.R. (3d) 257, at p. 259), the

decision to order a constructive trust is a matter of discretion. In Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, the majority held that the order of a constructive trust in response to a breach of a fiduciary duty would depend on all the circumstances. La Forest J. stated at p. 674:

> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award.... [A constructive trust] is but one remedy, and will only be imposed in appropriate circumstances.

The discretionary approach to constructive trusts is also consistent with the approach to equitable remedies generally: see Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, at p. 585.

55 Given that ordering a constructive trust is a discretionary matter, it is necessary to show an error in principle on the part of the trial judge in order to overturn the judge's decision not to order such a remedy. In my view, the trial judge committed no such error.

56 The majority of the Court of Appeal apparently found that the trial judge erred in failing to consider the moral blameworthiness of the appellants' actions. Similarly, McLachlin J. would hold that a constructive trust was appropriate in the present case simply because of considerations of "good conscience". In my view, the trial judge considered the moral quality of the appellants' actions and thus there is no room for appellate intervention on this ground. He stated ((1991), 4 O.R. (3d) 51, at p. 69) that, while "[n]o doubt the maintenance of commercial morality is an element of public policy and a legitimate concern of the court", morality should generally not invite the intervention of the court, except where it is required in aid of enforcing some legal right. Put another way, in my view the trial judge was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which statement of the law is in my view correct.

57 The majority of the Court of Appeal stated (at pp. 259-60) that the principles set out by the trial judge may be applicable where there are alternative remedies, but are questionable where only one remedy is available, as in the present case. I do not accept this contention. If a constructive trust is held to be inappropriate where there are a variety of remedies available, I cannot understand the principle behind the conclusion that such a remedy may be appropriate where it is the only remedy available. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In the present case, the plaintiff withdrew his claim for damages. While compensatory damages were unavailable since the plaintiff suffered no pecuniary loss (which I will discuss further below in assessing whether a constructive trust could have been ordered), the plaintiff could have sought exemplary damages __ his decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust.

58 The trial judge put significant emphasis on the absence of pecuniary gains in concluding that he would not order a constructive trust. For the reasons which I set out in detail below, I am of the opinion that the trial judge was correct in this regard. On the other hand, the majority of the Court of Appeal and McLachlin J. hold that the trial judge erred in improperly appreciating the deterrence role of a constructive trust in the present case. In my view, consideration of deterrence fails to disclose any error in principle on the part of the trial judge. Deterrence, like the morality of the acts in question, may be relevant to the exercise of discretion with respect to the remedy for a breach of a fiduciary duty (see, e.g., Hodgkinson v. Simms, [1994] 3 S.C.R. 377, at pp. 421 and 453), but the trial judge in the present case did not fail to consider deterrence in deciding whether to order a constructive trust. As noted above, he stated that while "maintenance of commercial morality is ... a legitimate concern of the court" (p. 69),

it would not alone justify ordering a remedy in the present case. In my view, his mention of the "maintenance of commercial morality" indicates that the judge considered deterrence, but held that it alone could not justify a remedy in the present case. Thus, even if failure to consider deterrence could be considered an error in principle, the trial judge in the present case did not so err.

59 In my view, the trial judge committed no error in principle which could justify a decision to set aside his judgment and order a constructive trust. Even if the trial judge did commit some error in principle, however, in my view the remedy of a constructive trust was not available on the facts of the present case. That is, even if no deference is owed to the trial judge, the majority below erred in ordering a constructive trust and the appeal should be allowed. The following are my reasons for this conclusion.

Unjust Enrichment and the Availability of a Constructive Trust

60 McLachlin J. would hold that there are two general circumstances in which a constructive trust may be ordered: where there has been unjust enrichment and where there has been an absence of "good conscience". While unjust enrichment and the absence of "good conscience" may both be present in a particular case, McLachlin J. is of the view that either element individually is sufficient to order a constructive trust. By failing to consider the "good conscience" ground on its own, McLachlin J. finds that the trial judge erred. I respectfully disagree with this finding. In my view, recent case law in this Court is very clear that a constructive trust may only be ordered where there has been an unjust enrichment. For example, passages in Lac Minerals, supra, set out the circumstances in which an order of a constructive trust might be appropriate. In my opinion, it is clear from that decision that a constructive trust is not available as a remedy unless there has been an unjust enrichment. La Forest J. stated at pp. 673-74:

> This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426. There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to Pettkus v. Becker, [[1980] 2 S.C.R. 834], where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that Pettkus v. Becker, supra, set out a two-step approach. First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment. In Hunter Engineering Co. v. Syncrude Canada Ltd., a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.
>
> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "The principle of unjust enrichment lies at the heart of the constructive trust": see Pettkus v. Becker, at p. 847, the converse is not true. The constructive trust does not lie at the heart of the law of restitution. [Emphasis added.]

La Forest J. added at p. 678:

> Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made

> out. The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. [Emphasis added.]

61 In Brissette Estate v. Westbury Life Insurance Co., [1992] 3 S.C.R. 87, the majority cited some of the passages above from Lac with approval and held at p. 96 that, "[t]he requirement of unjust enrichment is fundamental to the use of a constructive trust."

62 Citing only Pettkus, supra, specifically, McLachlin J. states at para. 21 that it and other cases should not be taken to expunge from Canadian law the constructive trust in circumstances where there has not been unjust enrichment. With respect, I do not see how statements such as "[t]he requirement of unjust enrichment is fundamental to the use of a constructive trust" could do anything but expunge from Canadian law the use of constructive trusts where there has been no enrichment. Unjust enrichment has been repeatedly stated to be a requirement for a constructive trust; thus to order one where there has been no unjust enrichment would clearly depart from settled law.

63 Even aside from the case law, in my view, the unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role. The respondent submitted that if no remedy is available in the present case, there would inappropriately be a right without a remedy. I disagree. Clearly, the beneficiary has a right to have the fiduciary adhere to its duty, and if damages are suffered, the beneficiary has a right to a remedy. In my view, this is analogous to remedial principles found elsewhere in the private law. Even if a duty is owed and breached in other legal contexts, there is no remedy unless a loss has been suffered. I may owe a duty to my neighbour to shovel snow off my walk, and I may breach that duty, but if my neighbour does not suffer any loss because of the breached duty, there is no tort and no remedy. Similarly, I may have a contractual duty to supply goods at a specific date for a specific price, but if I do not and the other party is able to purchase the same goods at the contract price at the same time and place, the party has not suffered damage and no remedy is available. It is entirely consistent with these rules to state that even if a fiduciary breaches a duty, if the fiduciary is not unjustly enriched by the breach, there is no remedy.

64 Remedial principles generally thus support the rule against a constructive trust where there has been no unjust enrichment. The rule is also supported, in my view, by specific consideration of the principles governing constructive trusts set out in Lac Minerals. In Lac Minerals, La Forest J. stated that, even where there has been unjust enrichment, the constructive trust will be an exceptional remedy; the usual approach would be to award damages. He stated at p. 678:

> In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in Hunter Engineering Co. v. Syncrude Canada Ltd., supra, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [Emphasis added.]

65 La Forest J. thus held that generally an aggrieved beneficiary will only be entitled to damages, not to the property itself. This implies that the beneficiary does not generally have a right to the property in question, but rather has a right to receive the value of the gains resulting from the acquisition of the property. Following this reasoning, if the value of the gains is zero, that is, there is no unjust enrichment, the beneficiary will not have a right to a remedy. Consequently, where there has been no unjust enrichment, there is no right to a constructive trust or any other remedy.

66 While, in my view, recent decisions of this Court and the principles underlying them settle the matter, McLachlin J. cites other Canadian case law in concluding that constructive trusts may be ordered

even where there has not been unjust enrichment. She cites three lower court decisions which she claims involved the award of a constructive trust absent unjust enrichment. With respect, I do not read any one of these cases as supporting her claim. An unjust enrichment exists where there has been an enrichment of the defendant, a corresponding deprivation experienced by the plaintiff and the absence of any juristic reason for the enrichment: Pettkus v. Becker, [1980] 2 S.C.R. 834; Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426. McLachlin J. fails to cite a case where a remedial constructive trust was ordered absent such an enrichment.

67 In Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada (1984), 9 D.L.R. (4th) 729 (Ont. C.A.), a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor. The bank was a secured creditor of the depositor, which depositor was in financial difficulty at the time of the deposits. Clearly, this case involved an unjust enrichment: the bank benefitted by gaining rights over the deposited money, as well as by increasing the likelihood of repayment of the depositor's credit; the plaintiff (a corporation whose agent, the depositor, breached his fiduciary obligations) was deprived of its right to its money; and there was no juristic reason for the enrichment. Thus, the order of a constructive trust responded to an unjust enrichment, whether or not the court adverted to such doctrine.

68 MacMillan Bloedel Ltd. v. Binstead (1983), 14 E.T.R. 269 (B.C.S.C.) is also, in my view, a case of unjust enrichment. In this case, a fiduciary to a corporation breached his duty by engaging in self-dealing without disclosing his interest. A constructive trust was imposed over the secret profits even though the plaintiff organization, because of its internal policy, could not have realized the profits itself. While the fiduciary was plainly enriched, the trial judge and McLachlin J. conclude that since the plaintiff could not have realized the profits, there was no "corresponding deprivation" and therefore no unjust enrichment.

69 I disagree with McLachlin J. that there was no unjust enrichment in Binstead. First of all, courts have consistently treated fiduciaries' profits explicitly as unjust enrichment, whether or not the beneficiary could have earned the profits itself. For example, in Reading v. The King, [1948] 2 All E.R. 27 (K.B.D.), aff'd [1949] 2 All E.R. 68 (C.A.), aff'd [1951] 1 All E.R. 617 (H.L.), Denning J. stated at p. 28:

> It matters not that the master has not lost any profit nor suffered any damage, nor does it matter that the master could not have done the act himself. If the servant has unjustly enriched himself by virtue of his service without his master's sanction, the law says that he ought not to be allowed to keep the money.... [Emphasis added.]

In Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592, at pp. 621-22, Laskin J., as he then was, stated:

> Liability of O'Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, as based on unjust enrichment, I would not interfere with the quantum. [Emphasis added.]

Reading and O'Malley are clear: the characterization of the profits earned by a fiduciary in breach of duty is one of unjust enrichment, whether or not the corporation could have earned the profits itself.

Thus, Binstead involved unjust enrichment, contrary to McLachlin J.'s assertion.

70 I wish to add that the treatment of the profits as unjust enrichment in Reading, O'Malley, and Binstead is not inconsistent with the general rules governing unjust enrichment. The plaintiff in each case had a right to have the fiduciary adhere to his duty. When the defendant breached that duty, the profits earned as a result of that breach are essentially treated in equity as belonging to the corporation, whether or not the corporation could have earned those profits in the absence of the breach. As an example of the proprietary analogy, Denning M.R. stated at p. 856 in Phipps v. Boardman, [1965] 1 All E.R. 849 (C.A.), aff'd [1966] 3 All E.R. 721 (H.L), that:

> [W]ith information or knowledge which he has been employed by his principal to collect or discover, or which he has otherwise acquired, for the use of his principal, then again if he turns it to his own use, so as to make a profit by means of it for himself, he is accountable ... for such information or knowledge is the property of his principal, just as much as an invention is.... [Italics in original; underlining added.]

71 Thus, in Binstead, the retention of the profits by the fiduciary would have deprived the corporation of its right to the profits. The deprivation is represented by the monies obtained by the fiduciary as a result of infringing the rights of the plaintiff. In order for there not to have been deprivation and unjust enrichment in circumstances otherwise similar to Binstead, the self-dealing could not have resulted in any secret profits __ if a remedy were awarded in a case without profit, thus no enrichment nor deprivation, McLachlin J. could well point to the case for support. Given that there was profit in Binstead, however, there was unjust enrichment which justified the order of a constructive trust, whether or not the court explicitly relied upon unjust enrichment.

72 In summary, McLachlin J. fails to refer to a single Canadian case where a constructive trust was ordered despite the absence of unjust enrichment. Given this conclusion and given that recent cases of this Court unambiguously foreclose the possibility of ordering a constructive trust in the absence of unjust enrichment, in my view McLachlin J. is in error in concluding that a constructive trust may be ordered in the absence of unjust enrichment.

73 Aside from Canadian case law, McLachlin J. attempts to rely on various scholars and foreign case law as providing support for her conclusion. Because of the clear statement of the law recently set out by this Court, in my view the scholarly writings and foreign cases are only useful in so far as the policy they set out suggests that the law in Canada should be modified. I will therefore simply address the policy upon which McLachlin J. relies, rather than each case and each article she cites.

74 Simply put, McLachlin J., reasoning similarly to the majority below, concludes that to fail to permit the order of a constructive trust where there has been a breach of a fiduciary duty, but no unjust enrichment, would inadequately safeguard the integrity of fiduciary relationships. She says at para. 33 that ordering a constructive trust simply on the basis of "good conscience"

> addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised.... The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

According to McLachlin J., then, deterrence of faithless fiduciaries requires the availability of constructive trust as a remedy even where there has been no unjust enrichment.

75 In my view, deterrence is not a factor which suggests modifying the law of Canada and permitting the order of a constructive trust even where there has been no unjust enrichment. As noted above, despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not, because of concern about protecting the integrity of these duties, held it to be necessary where a tort duty, or a contractual duty, has been breached to order remedies even where no loss resulted. I fail to see what distinguishes the role of fiduciary duties from the very important societal roles played by other legal duties which would justify their exceptional treatment with respect to remedy.

76 In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not, in my opinion, have any significant effect on deterring unfaithful fiduciaries and protecting the integrity of fiduciary relationships. First, if deterrence were deemed to be particularly important in a case, the plaintiff may seek and the trial judge may award exemplary damages; a constructive trust is not necessary to preserve the integrity of the relationship, even if this integrity were of particular concern in a given case. The fact that exemplary damages were not sought in the present case should not compel this Court to order a constructive trust in their place. Second, even if a remedy were unavailable in the absence of unjust enrichment, which is not true given exemplary damages, deterrence is not precluded. Taking a case similar to the present appeal, while an unscrupulous fiduciary would know that he or she would not be compelled to give up the surreptitiously obtained property if there were no gains in value to the property, he or she must also reckon with the possibility that if there were gains in value, and therefore unjust enrichment, he or she would be compelled to pay damages or possibly give up the property. Thus, if the fiduciary were motivated to breach his or her duty because of the prospect of pecuniary gains, which would, I imagine, be the typical, if not the exclusive, motive for such a breach, not ordering a constructive trust where there have been no pecuniary gains does not affect deterrence. I therefore disagree with McLachlin J. that deterrence suggests that a constructive trust should be available even where there is no unjust enrichment.

77 As is clear, I cannot agree with McLachlin J. that a constructive trust could be ordered, and indeed should have been ordered, in the present case even if there was no unjust enrichment. In order to decide whether such a remedy could be ordered, in my view, it must be decided whether there was unjust enrichment in the present case.

Was There Unjust Enrichment?

78 In my opinion, there was no enrichment and therefore no unjust enrichment in the present case. It is first of all plain that there were no pecuniary advantages accruing to the appellants from the purchase of the property. The trial judge stated (at p. 68):

> I now consider the facts of the case at bar. The nature of the duty and of the breach have already been discussed. At an interlocutory stage, the plaintiff abandoned any claim for damages. This step involved no sacrifice because the plaintiff could not have proved any. [Emphasis added.]

Any enrichment from the purchase of the property was not pecuniary, which would suggest that there has in fact been no enrichment and therefore no unjust enrichment.

79 It could, perhaps, be argued that if the property were unique or otherwise difficult to value, the defendant's pecuniary gains may not represent the enrichment of the defendant or the deprivation of the plaintiff. Analogizing to the award of specific performance in contract, where property that is the subject of a contract is unique or otherwise difficult to value, and the contract is breached, it may be held that monetary damages are inadequate and thus a remedy of specific performance must be ordered to

compensate the plaintiff adequately. In such cases, pecuniary damages may not represent the loss to the plaintiff or the gain to the defendant from the breach. Thus, perhaps, an enrichment could be found in the absence of a change in market price if the property were unique or otherwise difficult to value.

80 Whether or not such considerations could be relevant to a finding of an enrichment, the property in question was not found to be unique or otherwise difficult to value in a manner relevant to the remedy. The trial judge noted that the respondent had asserted that the property in question had special value to him given its tenant, a bank, and the significance of being a landlord to a bank in the Greek community. The trial judge (at p. 69) held that such a factor should not be taken into account any more than personal attachment in an eminent domain case. In other words, while there may have been personal motivation for the purchase, this was not relevant to an assessment of the value of the property. This indicates, in my view, that the trial judge did not view the property to be unique in a manner meaningful to the remedial analysis. Such a conclusion is plain in the trial judge's analysis of Lee v. Chow (1990), 12 R.P.R. (2d) 217 (Ont. S.C.). In Lee, a constructive trust was declared in a property that had been purchased surreptitiously by an agent in a situation similar to the present case. The trial judge in the instant appeal distinguished Lee in the following way (at p. 70):

> [The circumstances in Lee] included the following: a degree of dependence by the plaintiff which, in my view, is lacking in the case at bar; that it was a residential property meeting the specific requirements of the plaintiff, rather than a commercial property having value only as an investment; and that it appeared probable that the acquisition price represented a bargain, while the property at issue in the case at bar did not. [Emphasis added.]

In Lee there were pecuniary gains, thus an enrichment, and the property had unique qualities which helped justify a constructive trust. In the present case there were no pecuniary gains, and the trial judge did not find any meaningful non-pecuniary advantages associated with the property __ the property had value "only as an investment". In my view, given the absence of both pecuniary and non-pecuniary advantages from the property, there was no enrichment and therefore no unjust enrichment.

81 In the absence of unjust enrichment, in my view the trial judge was correct not to order the remedy sought, a constructive trust. The trial judge stated (at p. 69):

> A constructive trust was deemed appropriate in LAC Minerals, supra, because damages were deemed to be unsatisfactory. It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none.

The trial judge, in the absence of pecuniary damages which might have indicated unjust enrichment, declined to order a constructive trust. Neither the majority of the Court of Appeal nor McLachlin J. raise an error in principle in the trial judge's reasons; indeed, in my view they err in concluding that a constructive trust is available in the present case. Even if the trial judge ignored factors such as the moral quality of the defendants' acts and deterrence, which he did not, and even if this could be construed as an error in principle, the factors to be considered in ordering a constructive trust only become relevant at the second stage of the inquiry when it is decided what remedy is appropriate. Unless unjust enrichment is made out at the first stage of the inquiry, there is no need to consider the factors relevant to ordering a constructive trust. The majority of the Court of Appeal erred in interfering with the trial judge's discretion and in deciding that a constructive trust may be ordered in the absence of unjust enrichment.

Conclusion

82 Since the trial judge did not err in not ordering a constructive trust, but rather the majority of the Court of Appeal did in ordering one, I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the judgment of the trial judge. In the circumstances, I would not award costs to the appellants either here or in the Court of Appeal.

cp/d/hbb/DRS/DRS

TAB 2

III. THE CONSTRUCTIVE TRUST IN RESPONSE TO WRONGFUL CONDUCT

A. Breach of Fiduciary Duty

In *Soulos v. Korkontzilas*, McLachlin J (at para. 33) alluded to the importance of "the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised." Traditionally, breaches of fiduciary duty have been thought to warrant the recognition of a constructive trust (assuming property to which the trust could attach). However, even in these situations the constructive trust has been treated as a discretionary remedy.

It is impossible here to describe every possible breach by a fiduciary that might give rise to a constructive trust. It should be kept in mind that the primary duty of a fiduciary is the duty of utmost loyalty. This duty can be further articulated as the duty not to put oneself in a conflict of interest and the duty not to profit from one's fiduciary position. These duties are often referred to as the conflict rule and the profit rule. It has been argued that these two rules constitute the whole of the duties of the fiduciary.[18] Nonetheless, the categories enumerated by A.J. Oakley for trustees in *Constructive Trusts* are illuminating. For the purposes of discussion, Oakley summarizes these duties under the following headings:[19]

- unauthorized benefits obtained by a fiduciary as a result of his position (unauthorized remuneration, fees, and secret profits);
- transactions into which a fiduciary has entered in a double capacity—that is, purchases and sales by the fiduciary to the trust; and
- benefits obtained by a fiduciary as a result of his position to the exclusion of his principal (utilization of an opportunity to profit for his benefit).

In chapter 15 of this book there is an extended discussion of who is a fiduciary. Following is a brief discussion of some of the most salient points.

The simplest definition is that a fiduciary is a person who has undertaken to act in the best interests of another. Traditionally, the four categories of fiduciaries are:

1. trustee and beneficiary;
2. agent and principal;
3. director and company; and
4. partner and co-partner.

Over the years other relationships have been identified as fiduciary and include: solicitor and client; personal representative and the estate represented; and parent and child.

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18 See Oakley, supra note 10.

19 Ibid., at 48ff.

More generally, Wilson J (in dissent but not on this point) in *Frame v. Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81, provided the following short guide (at para. 60):

> Relationships in which a fiduciary obligation has 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.

The requirement of vulnerability has been somewhat controversial. In *Hodgkinson v. Simms*, [1994] 3 SCR 377, La Forest J (at 409-10) alludes to vulnerability as only one factor:

> In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination. Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

1. The Profiteering Fiduciary

Keech v. Sandford is the classic statement of the rule that a trustee cannot profit from her position as trustee even where the beneficiary has suffered no loss. In the modern language of restitution, the trustee may be required to disgorge her profit by giving up the gains acquired from her position.

Keech v. Sandford
(1726), 25 ER 223

[A trustee held a lease of the profits of a market for an infant. Just before the lease ran out the trustee sought to renew it for the benefit of the infant. The lessor declined to renew the lease because the infant could not grant the necessary covenant. The trustee subsequently obtained the benefit of the lease for himself. Proceedings were launched in the name of the infant as plaintiff to seek the transfer of the lease into his name and for an accounting for any profits made.]

LORD CHANCELLOR: ... [I]f a trustee, on the refusal to renew, might have a lease for himself, few trust estates would be renewed to a *cestui que use* [beneficiary]; though I do not say there is fraud in this case, yet he should rather have let it run out than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule

should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que use*. So decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.

NOTES AND QUESTIONS

1. The assumption in *Keech v. Sandford* seems to be that without holding trustees to strict rules of probity, equity cannot be certain that they will use their best endeavours to advance and protect the interest of the beneficiary. There also seems to be an implication that the trustees might not have been in a position to take over the lease *but for* their position as trustee. This rule also applies where the trustee buys property from the trust or sells property to the trust. In such cases, there is a real risk that the trust will not get the best bargain. There is an apparent conflict of interest between the trustee's duty to protect the beneficiary and the trustee's desire to protect his own interests.

2. It is not every appropriation of an opportunity or benefit by a fiduciary that requires the fiduciary to disgorge the profit. The benefit must arise from or in the course of the fiduciary relationship. Finn J in *Fiduciary Obligations*,[20] writing about appropriation of corporate opportunity, has suggested that two rules distinguish between the appropriation of corporate opportunity by a fiduciary during the course of her fiduciary duties and the appropriation of corporate opportunity outside the scope of her duties. He states (at para. 535):

> These rules, though interlocking, have distinct applications which illustrate both the conflict and profiting facets of the general rule. They are: (1) a fiduciary cannot, on his own account, derive any benefit which his undertaking authorizes or requires him to pursue in his representative capacity; and (2) a fiduciary, even though acting in a matter outside the scope of his undertaking to his beneficiary, cannot retain a private profit made, if it has been made only through some actual misuse of his representative position.

Consider whether Finn J's analysis assists in the cases that follow.

3. The result in *Keech* may have been an appropriate result in the 18th century in the context of a trust relationship, but what about today? In the business and law arenas, many individuals find themselves in possible positions of conflict. What effect might this have on the ability to procure individuals to serve in fiduciary positions? Is this something the courts should recognize?

In the following cases, the courts explore the law relating to the appropriation of corporate opportunity, a subject of particular interest to students of corporate law.

20 P.D. Finn, *Fiduciary Obligations* (Sydney: Law Book Co., 1977).

Regal (Hastings) Ltd. v. Gulliver
[1942] 1 All ER 378 (HL)

[Regal Ltd. owned a cinema and wanted to lease two additional cinemas so that it could sell the consolidated properties at an enhanced price as a going concern. The cinemas were to be leased by a subsidiary company, Amalgamated. The putative landlord of the cinemas was reluctant to lease to Amalgamated because of its perceived uncapitalization. The landlord would only agree to a lease if either the rent was guaranteed personally by Amalgamated's directors or if its paid-up capital was increased from £2,000 to £5,000. The directors of Regal Ltd., which had planned to hold all the shares of Amalgamated, decided Regal Ltd. could afford to subscribe only £2,000 and the Amalgamated directors (who were also Regal's directors with the addition of Garton, Regal's solicitor) were unwilling to give the necessary personal guarantees for the lease. Regal's directors then arranged to take up £2,500 worth of Amalgamated shares, mostly for themselves and partly for third parties. Garton, at the request of Regal's directors, took up the remaining £500 worth of shares. A board meeting of Regal Ltd. was held to formalize this arrangement.

In the result the lease was granted. All the shares of Regal Ltd. and Amalgamated were sold. The then directors (except the chair of the board) of Regal Ltd. and Garton received an enhanced price for their shares in Amalgamated.

After Regal Ltd.'s shares were acquired by its new owners, Regal Ltd. (with new directors) sued its old directors and Garton to recover from them their profit on the sale of the Amalgamated shares. Regal Ltd. sued its old directors on the basis that they had breached their fiduciary duty to the company, because they were in a fiduciary position toward Regal Ltd. and therefore unable to make a profit in the course of that relationship. The House of Lords held that the directors must disgorge the profits, but that the solicitor need not, because Garton was the solicitor of Regal Ltd. and not a trustee and he subscribed for his shares not only with the knowledge of but at the express request of his clients.]

LORD RUSSELL: 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 such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or upon whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from ... 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. ...

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 shares *by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office* (emphasis added), are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech v. Sandford* ... and similar authorities applies to them in full force. It

was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the shares owing to the lack of funds, and that the directors in taking these shares were really acting as members of the public. I cannot accept this argument. It was impossible for the *cestui que trust* in *Keech v. Sandford* to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain. ...

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

VISCOUNT SANKEY: In my view, the [directors] were in a fiduciary position and their liability to account 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*.

NOTES AND QUESTIONS

1. It is noteworthy that the result of the decision in *Regal* was to give an unmerited windfall to the new owners who, having bought the company at what they thought was a fair price, were able, by means of the action by Regal Ltd., to reclaim the directors' profit of £2.75 per share. If any persons were entitled to the unauthorized profit, they were surely the original 20 shareholders of Regal Ltd., other than the directors and solicitor, before the purchase. Section 240 of the *Canada Business Corporations Act*, RSC 1985, c. C-44 now provides that the court may make an order directing that any amount adjudged payable in a derivative action may be paid in whole or part to former and present shareholders of the corporation or its subsidiary instead of the corporation.

2. It should be mentioned that in *Regal*, Lord Russell stated that the old directors could have been relieved of their liability had the shareholders ratified their conduct. The effect of shareholder ratification under the *Canada Business Corporations Act* is not determinative, although s. 242(1) states that "evidence of [such] approval by the shareholders may be taken into account by the court."

3. *Regal* was cited by Cartwright J as he then was in *Peso Silver Mines Ltd. v. Cropper*, [1966] SCR 673, 58 DLR (2d) 1. In that case, the director of a company acquired speculative mining properties that the board of directors of the company, on behalf of the company, had previously declined to purchase. Cartwright J distinguished *Regal* on the facts. He held that though the director was a fiduciary vis-à-vis the company,

TAB 3

CHAPTER FOUR

The Express Trust

SECTION ONE
THE CREATION OF AN EXPRESS TRUST

I. INTRODUCTION

As noted in chapter 1, express trusts are trusts that are created by the expression of an intention to create a trust. This chapter examines express trusts in more detail. It considers the creation of express trusts. There are four requirements for the creation of an express trust:

1. the settlor must have legal capacity;
2. the so-called three certainties must be satisfied:
    a. certainty of intention;
    b. certainty of subject matter; and
    c. certainty of objects;
3. the trust must be constituted by the transfer of property to the trustee(s); and
4. any requisite formalities must be met.

In addition the trust cannot be for an illegal purpose or contrary to public policy. This latter aspect is examined in section two. Section one of this chapter considers each of the four requirements listed above. Subsection II looks at the capacity requirement, subsection III the three certainties, subsection IV the constitution of trusts, and subsection V the requisite formalities.

II. CAPACITY

For the creation of a trust, the settlor must have legal capacity.[1] Although it is possible to have a trustee who lacks legal capacity, the lack of legal capacity will make it difficult for the trustee to deal with the trust property. It is not necessary that the beneficiaries of a trust have legal capacity. Issues with respect to the required capacity of the settlor, the trustee, and the beneficiaries are further considered below.

A. The Settlor

The capacity required to dispose of property by way of trust is the same as the capacity required to dispose of any legal or equitable interest in property. Minority and incompetency (such as a mental incompetency) are the main reasons for a lack of capacity. Persons declared to be bankrupt may also have a limited capacity due to statutory controls on their power to dispose of property. The constraints on bankrupt persons are considered in section two, subsection VIII, below.

The constraints on the ability of minors and incompetent persons to settle property on trust reflects the protection afforded by the law to these persons from unconscionable transactions that may arise as a result of the influence that others may have over them.

1. Minors

Subject to certain limited exceptions,[2] minors[3] cannot create a trust by way of will since they cannot make a valid will. In the case of an inter vivos trust arising as a result of a contractual obligation on the minor to create the trust, the treatment is the same as with any other contract of a minor. The contract, subject to certain exceptions, is voidable and will only become binding on the minor, in the case of some contracts, if he or she ratifies the contract after obtaining the age of majority, or, in the case of contracts concerning

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1 Legal capacity as used here refers to the legal recognition of a person's ability to enter legally binding relationships. Persons may lack legal capacity because they have not attained some legally recognized age for entering into legally binding relationships, because they have yet to obtain some legally recognized status such as might be obtained through incorporation, or because they are not competent to understand the nature and effects of their own acts due, perhaps, to mental or other incapacity.

2 See, for example, the *Wills Act*, RSA 2000, c. W-12, s. 9; *Wills Act*, RSBC 1996, c. 489, s. 7; *Wills Act*, RSM 1988, c. W150, s. 8; *Wills Act*, RSNB 1973, c. W-9, s. 8; *Wills Act*, RSN 1990, c. W-10, s. 3; *Wills Act*, RSNWT 1988, c. W-5, s. 4; *Wills Act*, RSNS 1989, c. 505, s. 4; *Succession Law Reform Act*, RSO 1990, c. S.26, s.8; *Probate Act*, RSPEI 1988, c. P-21, ss. 59, 62; *The Wills Act, 1996*, SS 1996, c. W-14.1, ss. 4-6 (s. 5 amended by SS 2001, c. 51, s. 10(2)); *Wills Act*, RSY 1986, c. 179, s. 4.

3 See, for example, *Age of Majority Act*, RSA 2000, c. A-6, s. 1 (18 years of age); *Age of Majority Act*, RSBC 1996, c. 7, s. 1 (19 years of age); *Age of Majority Act*, RSM 1987, c. A7, s. 1 (18 years of age); *Age of Majority Act*, RSNB, 1973, c. A-4, s. 1 (19 years of age); *Attainment of Majority Act*, SN 1995, c. A-4.2, s. (19 years of age); *Age of Majority Act*, RSNWT 1988, c. A-2, s. 2 (19 years of age); *Age of Majority Act*, RSNS 1989, c. 4, s. 2 (19 years of age); *Age of Majority and Accountability Act*, RSO 1990, c. A.7, s. 1 (18 years of age); *Age of Majority Act*, RSPEI 1988, c. A-8, s. 1 (18 years of age); *Age of Majority Act*, RSS 1978, c. A-6, s. 2 (18 years of age); *Age of Majority Act*, RSY 2002, c. 2, s. 1.

long-term interests in property such as a lease, the minor fails to repudiate the contract within a reasonable time after obtaining the age of majority.[4]

The legal position with respect to inter vivos gratuitous settlements on trust by a minor person is more complicated and varies from province to province.[5] The ability of a minor to settle property on trust generally depends on the ability of the minor to have a legal or equitable interest in property and on the ability of the minor to dispose of that legal or equitable interest.

2. Incompetency

A person is considered not competent to create a trust where the court finds the person is incapable of properly understanding the nature and effect of the transaction. With respect to inter vivos trust settlements, the degree of mental incompetency required must be such as would "interfere with the capacity to understand substantially the nature and effect of the transaction."[6] In the case of a testamentary trust, the testator must be able have the capacity necessary to make a will. Generally, the testator should understand the nature and effect of making a will, the extent of her estate, the possible objects of her bounty and their claims upon her.[7]

Provincial legislation provides special protections for persons who are declared mentally incompetent. The legislation typically provides for the appointment of committees or guardians for mentally incompetent persons, or the intervention of a public trustee,

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4 See, for example, S.M. Waddams, *The Law of Contracts*, 4th ed. (Aurora, ON: Canada Law Book, 1999), at paras. 650-52. In the case of British Columbia, see the *Infants Act*, RSBC 1996, c. 223, part 3.

5 For example, in Ontario, court approval is required for the disposition of land or the sale of personal property of a minor. The disposition or sale may be made for the support, education, or benefit of the minor. See the *Children's Law Reform Act*, RSO 1990, c. C.12, s. 59. Similarly, in Alberta, where a minor is seized or possessed of or entitled to land or an interest in land, the court may order the sale, lease, or other disposition of the land or interest where it is necessary or proper for the maintenance or education of the minor or if the minor's interests require or will be substantially promoted by the disposition. See the *Minors' Property Act*, RSA 2000, c. M-18.1, s. 2. In some provinces, the common law allows a minor to hold a legal interest in land. However, contracts concerning the interest in land are voidable unless the minor fails to repudiate the contract within a reasonable time after obtaining the age of majority.

6 *Royal Trust v. Diamant*, [1953] 3 DLR 102, at 111 (BC). It may also be the case that the fact that a person has been declared "mentally incompetent" or "incapable of managing their own affairs by reason of mental infirmity" does not necessarily mean the person is incapable of understanding substantially the nature and effect of the creation of a particular trust. See, for example, *Royal Trust v. Rampone*, [1974] 4 WWR 735, which involved the validity of a codicil in a will and in which a person who had been declared incapable of managing his own affairs by reason of mental infirmity was nonetheless said to be competent for the purposes of making the particular codicil to his will.

7 *Ouderkirk v. Ouderkirk*, [1936] SCR 619, at 621; followed in *Beal v. Henri*, [1950] 1 DLR 260. In *Re Beaney*, [1978] 1 WLR 770, [1978] 2 All ER 595 (HC) the court commented on mental incompetency in both testamentary and inter vivos trusts noting that:

> The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree is always high. In the case of … a gift *inter vivos*, whether by deed or otherwise, the degree required varies with the circumstances of the transaction.

• trustees = need ability to hold legal interests in property. ie both mental incompetency + minors can be trustees.

• beneficiaries = all persons can be beneficiaries

and, in some cases, deals with how the property of mental incompetents is to be administered for their benefit.[8]

B. The Trustee

A person who is capable of holding an interest in property is also capable of holding an interest in property as a trustee. Thus any individual having legal capacity can be a trustee. Similarly, any incorporated entity having a separate legal personality is also capable of being a trustee.[9]

Although minors and incompetent persons may lack the legal capacity to deal with property, they can normally hold legal or equitable interests in property.[10] Thus, minors and mental incompetents can be made trustees. However, it is unwise to do so because their lack of legal capacity makes it difficult for them to deal with the trust property. Provincial trustee acts typically give courts a power to replace trustees who are minors and to deal with situations where a person who is a trustee is declared mentally incompetent.[11]

C. Beneficiaries

All persons, whether individuals or incorporated entities, can be beneficiaries. This is the case whether the persons are minors, mental incompetents, or bankrupts. Even unborn children or unascertained persons can be beneficiaries.

Entities that are not recognized as having a separate legal personality cannot be beneficiaries of a trust. Thus unincorporated associations, including partnerships, cannot be beneficiaries of a trust (although the members of the unincorporated association or the partners themselves can be beneficiaries of a trust).[12]

Provincial legislation provides for an Official Guardian for the management of the property of a minor, including equitable interests of a minor beneficiary of a trust, where

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8 See, for example, the *Public Trustee Act*, RSA 2000, c. P-44, ss. 24-30; *Mentally Disabled Persons' Estates Act*, RSN 1990, c. M-10. Mental incompetents may be able to create a trust in respect of a domestic settlement through his or her committee or the Public Trustee. See, for example, the *Family Law Act*, RSN 1990, c. F-2, s. 65(3); *Family Law Act*, RSO 1990, c. F.3, s. 55(3); *Family Law Act*, SPEI 1995, c. 12, s. 48(3).

9 Although corporations incorporated under general statutes of incorporation may be trustees for isolated transactions, they are typically precluded from carrying on the business of a trust company. For instance, while a corporation incorporated under the *Canada Business Corporations Act*, RSC 1985, c. C-44 may be a trustee in an isolated transaction, s. 3 of the Act provides that such a corporation cannot carry on the business of a company to which the *Trust and Loan Companies Act* applies.

10 An exception may arise with respect to land, as noted in subsection II.A.1 above dealing with the capacity of minors.

11 See, for example, the *Trustee Act*, RSA 2000, c. T-8, s. 16; *Trustee Act*, RSBC 1996, c. 464, s. 31; *Trustee Act*, RSM 1987, c. T160, s. 9(1)(a); *Trustees Act*, RSNB 1973, c. T-15, s. 29(1); *Trustee Act*, RSN 1990, c. T-10, s. 33; *Trustee Act*, RSNS 1989, c. 479, s. 31; *Trustee Act*, RSO 1990, c. T.23, s. 5; *Trustee Act*, RSPEI 1988, c. T-8, s. 4(a); *Trustee Act*, RSS 1978, T-23, s. 14(1).

12 See also, for example, chapter 5, "Purpose Trusts," section one, subsection III.

the minor has no parental or other appointed guardian.[13] The management of the property interests of mentally incompetent persons will normally be dealt with by a committee or guardian. An Official Guardian or Public Trustee can also be appointed to represent the interest of unborn beneficiaries and unascertained beneficiaries.[14]

III. THE THREE CERTAINTIES

Knight v. Knight[15] is the case most frequently cited for the proposition that the so-called three certainties must be satisfied for the creation of a trust.[16] This requirement has been adopted in Canada.[17] As noted above, the three certainties are the certainty of intention, the certainty of subject matter, and the certainty of objects. Aspects of the law relating to each of these three certainties are discussed in subsection III.A, below. Subsection III.B considers various underlying values that may motivate the decisions of courts on the three certainties and, more generally, on whether a trust obligation exists. This is followed in subsection III.C with some examples and excerpts from cases.

A. The Three Certainties

1. Certainty of Intention

Certainty of intention refers to the intention to create a trust. The intention to create a trust is an intention that either another person who is to receive property is to hold that property for the benefit of one or more other persons or an intention expressed by the person holding the property that it is held in trust for one or more other persons.

The expression of intention can be oral or written or may be construed from the conduct of the purported settlor. Conduct alone may be sufficient[18] but normally the intention to create a trust will have to be supported by some oral expression of intent or words in a written document. The intention is inferred from all of the circumstances

13 See, for example, the *Infants Act*, RSBC 1996, c. 223, ss. 1-16.

14 See, in particular, section three of this chapter dealing with the variation of trusts.

15 (1840), 3 Beav. 148, 49 ER 58 (Ch.).

16 See also the comments of Lord Eldon in *Wright v. Atkyns* (1823), Turn & R 143, at 157.

17 See, for example, *Renehan v. Malone* (1897), 1 NB Eq. 506. The requirement of the three certainties is so well accepted that numerous Canadian cases have referred to the three certainties without any citation of authority. For more recent cases referring to the three certainties see, for example, *Faucher v. Tucker Estate*, [1994] 2 WWR 1 (Man. CA); *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)* (1998), 227 AR 280, 64 Alta. LR (3d) 368, [1999] 4 WWR 334 (Alta. QB); *Howitt v. Howden Group Canada Ltd.* (1999), 170 DLR (4th) 423, 26 ETR (2d) 1; *Canada Trust Co. v. Price Waterhouse* (2001), 288 AR 387 (Alta. QB).

18 For cases discussing the potential for a trust to be inferred from conduct alone see, for example, *Kattler v. Kanter* (1995), 132 Sask. R 92 (QB); *Eu v. Rosedale Realty Corp. (Trustee of)* (1997), 33 OR (3d) 666, 18 ETR (2d) 288; and *Thomas v. Whitwell* (1991), 45 ETR 75 (Alta. QB); *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)*, supra note 17.

surrounding the disposition of the property. Where there is a document, the entire document must be considered in assessing the existence of an intention to create a trust.[19]

In some circumstances there are formal requirements for the creation of trusts such as where statute of frauds or wills legislation applies. In these instances, mere conduct or oral expressions of intent will normally not be sufficient to create a trust.[20] These formal requirements are considered in subsection V, below.

No specific or technical words are necessary to show an intention to create a trust. This is consistent with the principle of equity that "equity looks to the intent rather than the form." The words "in trust" or "as trustee for" are usually held to reveal an intention to create a trust. However, such words are not indispensable. Several cases have held that the word "trust" is not necessarily required and that other words may also show an intention to create a trust.[21] Further, the use of words such as "in trust" or "as trustee for" does not necessarily mean a trust has been created.[22]

The expression of intention must amount to more than a mere moral obligation or wish. Ambiguity is created when the person disposing of property speaks of a "fervent wish," a "desire," a "hope," an "expectation," a "recommendation," or a "firm belief" that the person receiving the property will use the property for the benefit of another person. Expressions of this sort may not be sufficient to impose a trust obligation on the transferee of the property. The person disposing of the property ("the grantor") may simply have intended to make a gift to the person receiving the property ("the grantee"). In other words, the grantor may intend that the grantee can do whatever he or she wants with the property but simply expresses the wish, or hope, that the grantee will use the property in a certain way.

There was a strong tendency in the early part of the 19th century for courts to find that a will created a trust even with words such as "wish" or "expectation" that might otherwise be interpreted as merely precatory. Under the law then in effect, executors were permitted to take any estate property that was not disposed of. The courts became less willing to find trusts out of precatory language when the *Executors Act* of 1830 changed the

19 See, for example, *Johnson v. Farney* (1913), 14 DLR 134 (Ont. CA) and *Re Atkinson* (1911), 103 LT 860, at 862 (CA). See also *LeBlanc Estate v. Beliveau* (1986), 68 NBR 145, 175 APR 145 (NBQB).

20 Except where, for example, in the case of a statute of frauds, the statute is being relied upon to fraudulently avoid a clear trust obligation, although the trust obligation is not corroborated by a written document signed by the alleged trustee. See subsection V.A.6, below.

21 See, for example, *Cameron v. Campbell* (1882), 7 OAR 361 and *Re Garden Estate*, [1931] 4 DLR 791 (Alta. CA); *Bullock v. Key Property Mgnt.* (1992), 46 ETR 275 (Ont. Gen. Div.); *McEachern v. Royal Bank of Canada* (1990), 78 Alta. LR (2d) 158, [1991] 2 WWR 702 (QB); *Mohr v. C.J.A.* (1991), 40 ETR 12 (BCCA); aff'g. (1989), 36 ETR 246 (BCSC); and *Luscar Ltd. v. Pembina Resources Ltd.* (1995), 165 AR 104 (Alta. CA), leave to appeal to SCC refused (1995), 31 Alta. LR (3d) xli; *Canada Trust Co. v. Price Waterhouse* (2001), 288 AR 387 (Alta. QB).

22 See, for example, *Re Rispin* (1912), 2 DLR 644. See also *Re Dickin* (1975), 7 OR (2d) 472, 55 DLR (3d) 504; *Howitt v. Howden Group Canada Ltd.* (1999), 170 DLR (4th) 185, 26 ETR (2d) 1 (Ont. CA); *Re Dalhousie Staff Association (Trustee of)* (1999), 175 NSR (2d) 102, 534 APR 102, 27 ETR (2d) 310 (NSSC); and *Creaghan v. Hazen* (1999), 215 NBR (2d) 240, 557 APR 240, 32 ETR (2d) 180 (NBQB).

rule regarding executors taking property. Thus pre-1830 cases may show somewhat more of an inclination to find an intention to create a trust under a will than post-1830 cases.[23]

2. Certainty of Subject Matter

Certainty of subject matter has two aspects: (1) the certainty of the property that is subject to the obligation that it be held in trust, and (2) certainty of the amount, or share, of the trust property that each beneficiary is to receive.

a. Certainty of the Property Subject to the Trust Obligation

The certainty of subject matter of the trust must be established at the time the trust is established.[24] The subject matter of the trust will normally be considered sufficiently certain when there is reference to a specific piece of property[25] that is subject to the trust obligation or where there is reference to a fixed amount of a specific fund that is subject to the trust obligation.[26] The subject matter may also be considered sufficiently certain

23 See Donovan W.M. Waters, Mark R. Gillen, and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Carswell, 2005), at 136-39; Philip H. Pettit, *Equity and the Law of Trusts*, 9th ed. (London: Butterworths, 2001), at 43-45.

24 See *Re Beardmore Trust* (1951), [1951] OWN 728, [1952] 1 DLR 41. See also *Ernst & Young Inc. v. Central Guarantee Trust Co.* (2001), 283 AR 325, 36 ETR (2d) 200, 12 BLR (3d) 72 (Alta. QB); additional reasons at (2002), 304 AR 1 (Alta. QB), in which trusts were set up with an initial $1 and further contributions were to follow based on actuarial assessments that would be made at various points in the future. The amounts subject to subsequent actuarial determination were not certain at the time the trust was set up. For a discussion of whether the law should require certainty at the date the trust is set up rather than at the date the trust begins to operate, see *Waters' Law of Trusts in Canada*, supra note 23, at 151-52.

25 In *Green v. Ontario* (1972), [1973] 2 OR 396, 34 DLR (3d) 20 (Ont. HC), the *Provincial Parks Act*, RSO 1970, c. 371, s. 2 provided that "the provincial parks shall be maintained for the benefit of future generations." The plaintiff claimed the government was in breach of a statutory trust created by this provision, but the court held there was no certainty of subject matter because s. 3(2) of the Act allowed the government to increase, decrease, or limit the size of any park. See [1973] 2 OR 407.

26 Suppose a person who holds 950 shares of a particular company declares himself to be a trustee of 50 shares but does not identify which 50 shares the trust applies to. Is the subject matter of the intended trust sufficiently certain? In *Hunter v. Moss*, [1994] 1 WLR 452, [1994] 3 All ER 215 (CA), it was held that, given the fungible nature of the shares, there was sufficient certainty of subject matter without identifying the specific shares. See the comments on this case in M. Ockelton, "Share and Share Alike?" (1994), 53 *Cambridge LJ* 451, and David Hayton, "Uncertainty of Subject-Matter of Trusts" (1994), 110 *LQ Rev.* 335. If, after the declaration of trust, the settlor profitably sells some of the 950 shares he has legal title to, who would be entitled to the profits? Would it be the settlor on the basis that the shares sold were from the 900 he owned, or would it be the beneficiary on the basis that the shares sold were from the shares held in trust by the settlor? Might the settlor, instead, be said to hold 1/19 of the profit on behalf of the beneficiary? See the discussion in Hayton, ibid. Ockleton raises a concern with the ability of the beneficiary to trace his interest in the shares if they were sold to more than one bona fide purchaser for value.

Even a small amount can satisfy the certainty-of-subject-matter requirement if the amount and its source is clearly identified. For example, in *Re Kadar Estate* (1997), 17 ETR (2d) 171 (BCSC), an amount of $10 was held to satisfy the requirement of certainty of subject matter.

where a method of determining the property subject to the trust obligation is available from the terms of the trust or otherwise. Suppose Sara transfers $500,000 to Tom subject to an obligation to hold in trust "a sufficient sum of money to provide $500 per month to Bill." This would probably satisfy the certainty-of-subject-matter requirement because a method exists to determine the amount of money that would have to be held in trust to provide $500 per month. On the other hand, if Sara transfers $500,000 to Tom and says "the bulk of which I entrust to Tom to hold on behalf of Bill," it would probably not satisfy the certainty of subject matter requirement. How much is "the bulk"?[27]

All property is capable of being trust property. This includes real property and personal property. It includes legal and equitable interests in property (including an interest as a beneficiary of a trust). It includes choses in action such as contractual rights or an interest in a chose in action.

b. Certainty of the Amounts Beneficiaries Are To Receive

As noted above, even if the property subject to the trust obligation is clear, the trust may fail if the beneficial shares in the trust property are not clearly defined. Certainty as to the amounts the beneficiaries are to receive can be satisfied by setting out specific amounts or the method by which such amounts are to be determined. Certainty as to the amounts the beneficiaries are to receive, however, can also be satisfied by giving the trustees the discretion to decide on the amounts. In some instances the court will cure an otherwise apparent uncertainty as to the amounts beneficiaries are to receive by assuming that the property of the trust is to be distributed equally among the beneficiaries.[28]

3. Certainty of Objects > WHO BENEFICIARIES ARE

Certainty of objects in the context of a trust for persons refers to certainty as to who the beneficiaries of the trust are. A related notion of certainty of objects that applies in the case of purpose trusts is discussed in chapter 5.

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27 See, for example, *Palmer v. Simmonds* (1854), 2 Drew. 221, 61 ER 704 (Ch. Div.), in which a testator disposed of the residue by saying:

> I give and devise [the residue] unto the said *Thomas Harrison*, ... for his own use and benefit, as I have full confidence in him, that if he should die without lawful issue he will, after providing for his widow during her life, leave the bulk of my said residuary estate unto the said [four-named persons] equally.

The "bulk" as the subject matter of the trust was said to be uncertain.

28 In *Re Golay's Will Trusts*, [1965] 1 WLR 969, [1965] 2 All ER 660 (Ch. D), the testator directed her executors to allow "Tossy" to "enjoy one of my flats during her lifetime and to receive a reasonable income from any other properties." Ungoed-Thomas J held that "reasonable income" was an objective assessment that either the trustees, or a court in lieu of the trustees, could make and thus the subject matter of the trust was held to be sufficiently certain. According to Ungoed-Thomas J (at [1965] 1 WLR 972), "the court is constantly involved in making such objective assessments of what is reasonable and it is not to be deterred from doing so because subjective influences can never be wholly excluded."

a. The Need for Certainty of Objects

For the trustee to administer the trust, and for the court to be able to enforce the trust, the objects of the trust must be clear. If the trust is a trust for persons, this means that the persons who are to benefit from the trust must be clear. In other words, the trustees must know to whom they must direct the benefits associated with the trust property. In order to assess a breach of trust, or to carry out the trust in lieu of the trustees, the court must also be able to assess to whom the trust property is to be distributed. Third parties must be able to determine whether they are beneficiaries of the trust.

b. The Test for a Fixed Trust

The trustees of a fixed trust have no discretion, but must distribute the property of the trust to each of the beneficiaries in a fixed proportion. They must therefore be able to identify each beneficiary of the trust

For a fixed trust the test of certainty of objects requires that one be able to

1. determine whether any person is a member of the class of beneficiaries; and
2. identify every member of the class—that is, the trustee must be able to make a complete list of all beneficiaries.

The test is sometimes referred to as the "class ascertainability test" because the trustee must identify every member of the class. For example, an instruction by a settlor to trustees to hold a fund in trust for the life of the settlor's spouse and to distribute the remainder upon the death of the settlor's spouse to each of the settlor's four daughters in equal shares requires that the trustees be able to identify each of the four daughters to make an equal distribution of the property among them.

c. The Test for a Discretionary Trust

In a discretionary trust the trustee has the discretion to decide which beneficiaries within a class of beneficiaries will be entitled to the benefits of the trust or the amount each beneficiary is to receive or both. In *McPhail v. Doulton*,[29] the House of Lords held that the requirement of certainty of beneficiaries for a discretionary trust is met "if it can be said with certainty that any given individual is or is not a member of the class."[30]

McPhail v. Doulton overruled an earlier decision of the Court of Appeal in *IRC v. Broadway Cottages Trust*.[31] The Court of Appeal had held in that case that certainty of

29 [1971] AC 424, [1970] 2 All ER 228 (HL). This case is set out below in subsection III.C.3.

30 [1971] AC 456. The *McPhail v. Doulton* test has been accepted in Canada. See, for example, *Jones v. T. Eaton Co.*, [1973] SCR 635; *Dickson v. Richardson* (1981), 32 OR (2d) 158, 9 ETR 66, 121 DLR (3d) 206 (Ont. CA); *Canada Trust Co. v. Ontario Human Rights Commission* (1990), 74 OR (2d) 481 69 DLR (4th) 321, 38 ETR 1 (Ont. CA); *Re Frechette* (1991), 3 OR (3d) 664, 41 ETR 289 (OCJ); *Moore v. Jaggers*, [1991] BCJ no. 53 (BCSC); *Lewis v. Union of BC Performers* (1996), 18 BCLR (3d) 382 (BCSC); *Elward v. McBay*, [1996] OJ No. 7237, 14 ETR (2d) 198 (OCJ—Gen. Div.).

31 [1955] Ch. 20.

beneficiaries for a discretionary trust required not only that one must be able to determine whether any particular individual is or is not a member of the class but that "the whole range of objects eligible for selection" must be "ascertained or capable of ascertainment."[32] The reason given was that the court must be able to execute the trust in lieu of the trustees should it be necessary. If the trustees fail to exercise their discretion, the court will step in and execute the trust. However, the Court of Appeal was of the view that the court could only execute the trust by implying a trust for equal distribution in the event the trustees failed to exercise their discretion. In the opinion of the Court of Appeal, equal distribution would require that one be able to make a complete list of the beneficiaries.[33]

Unfortunately, the *Broadway Cottages* test for the certainty of objects of a discretionary trust made the validity of many useful types of trusts doubtful. For example, a pension fund trust for past, present, and future employees would be of questionable validity because one would not be able to identify and make a complete list of all future employees. Trusts such as these might be defeated because it might be difficult to identify all the members of the class at any one time.

The test for certainty of beneficiaries set out in *McPhail v. Doulton* is sometimes referred to as the "individual ascertainability" test because one must be able to determine with certainty whether any given individual is or is not a member of the class of beneficiaries described by the settlor. This test can be difficult to apply. A distinction has been drawn between "conceptual uncertainty" and "evidential uncertainty." A trust is void only for conceptual uncertainty and not for evidential uncertainty. The beneficiaries will be considered conceptually certain where the description of the class is sufficiently clear to be applied. In other words, if one has clear evidence about what type of person a particular individual is, there will be conceptual certainty if one can determine whether a person of that type fits within the class. Even if there is conceptual certainty about the type of person who is within the class, there can still be evidential uncertainty where the evidence on whether a particular individual is of one type or another is unclear. The court will, however, make a decision about whether the particular individual is a member of the conceptually certain class based on the evidence concerning that particular individual. The trust will not be void just because it is unclear on the evidence whether a particular individual is a member of the conceptually certain class.

For example, suppose the class of persons is described as "residents of the donor's hometown of Austin." There may be conceptual uncertainty in that there may be several different meanings that could be assigned to the words "residents ... of Austin." If so the trust would be void for conceptual uncertainty. If "residents ... of Austin" was clear either because of the circumstances in which the trust was created or from other clarifying words in the trust instrument, the class could be conceptually certain and the trust would

32 Ibid., at 36.

33 The Court of Appeal, in setting out the arguments of the Crown that it ultimately accepted, stated (at [1955] Ch. 30) that

> if the class of beneficiaries was an ascertainable class, it would or might be possible to imply a trust in default of distribution by the trustees for all the members of the class in equal shares, and that would be a trust which the court could control and execute.

be valid. However, even though the class might be considered conceptually certain and the trust therefore valid, there might still be evidential uncertainty in that it may be difficult to determine on the available evidence with respect to a particular individual whether that individual fits within the conceptually clear definition of "residents ... of Austin."

B. Values or Concerns That May Influence Findings on the Three Certainties

If a court decides that a trust was not created in the particular circumstances, the property may be said to still belong to the purported settlor. Where the settlor is a testator, it may mean that the property reverts to the estate of the testator. The property will then fall either into the residue of the estate (and might thus be distributed according to the way the testator indicated for distribution of the residue in the will) or it will be dealt with as property that has not been disposed of in the will—that is, on an intestacy—in which case the intestate heirs will inherit the property.

There are also several legal relationships other than a trust that a court might say exists in the circumstances. For example, a court may find that the relationship is really one of agency, contract, debt, bailment or personal representative. Each of these alternatives is discussed in more detail in chapter 7. Other alternatives include gift,[34] charge,[35] or personal obligation.[36] Each of these alternatives is also discussed in chapter 7. Whether a court finds a trust relationship or some alternate relationship can have very different implications for persons affected by the relationship.

The student of the law of trusts may be excused if her initial impression is that the determination of whether a valid trust has been created seems both a technical and bloodless exercise in interpretation and an ultimately mysterious process. The reason is that formal legal rules often have an indeterminate quality; the rules may not provide much assistance in determining the outcome of a case. This will be the case particularly if the trust is established or attempted to be established under the terms of a will. Until quite recently, courts were constrained by rules that limited their ability to interpret the will from the perspective of the testator, knowing about the circumstances that the testator knew. The position was definitively changed in Canada in *Haidl v. Sacher*.[37] In that case, the court opined that when interpretating a testator's will the court should put itself in the testator's armchair. Nonetheless, direct evidence of the testator's intention is generally inadmissible.

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34 In other words, what the testator or transferor of the property may have intended is a gift to the donee not subject to any trust obligation. A transfer on trust is sometimes described as a "gift by way of trust." If there is a gift by way of the trust, the transferee receives the interest in property on trust for the beneficiaries who are the intended recipients of the donor's bounty.

35 The property transferred may have been subject to a charge in favour of a creditor of the transferor. The transferee would be able to retain an interest in the property net of the charge in favour of the creditor and the transferee would not owe fiduciary duties to the creditor.

36 The court might construe a transfer as having been made subject to a personal obligation on the transferee in favour of a third party. The third party will have equitable rights, but not the same rights as are created under a trust.

37 (1979), 106 DLR (3d) 360 (Sask. CA).

TAB 4

Die Veneris, 20° Februarii, 1942

Parliamentary Archives,

HL/PO/JU/4/3/973

REGAL (HASTINGS) LIMITED

Viscount Sankey
Lord Russell of Killowen
Lord Macmillan
Lord Wright
Lord Porter

V.

GULLIVER AND OTHERS.

Viscount Sankey

MY LORDS,

This is an Appeal by Regal (Hastings) Limited from an Order of His Majesty's Court of Appeal dated the 15th February, 1941. That Court dismissed the Appeal of the Appellants from a judgment of the Hon. Mr. Justice Wrottesley, dated the 3Oth August, 1940. The Appeal was brought by special leave granted by this House on the 2nd April, 1941.

The Appellants we're the plaintiffs in the action and are referred to as "Regal"; the Respondents were the Defendants.

The action was brought by Regal against the first five Respondents, who were former Directors of Regal, to recover from them, sums of money amounting to £7,010 8s. 4d., being profits made by them upon the acquisition and sale by them of shares in the subsidiary company formed by Regal and known as Hastings Amalgamated Cinemas Limited. This Company is referred to *as* "Amalgamated ". The action was brought against the Defendant, Garton, who was Regal's former solicitor, to recover the sum of £1,402 1s. 8d., being profits made by him in similar dealing in the said shares. There were alternative claims for damages for misfeasance and for negligence.

The action was based on the allegation that the directors and the solicitor had used their position as such to acquire the shares in Amalgamated for themselves, with a view to enabling them at once to sell them at a very substantial profit, that they had obtained that profit by using their offices as directors and solicitor and were, therefore, accountable for it to Regal, and also that in so acting

they had placed themselves in a position in which their private interests were likely to be in conflict with their duty to Regal. The facts were of a complicated and unusual character. I have had the advantage of reading, and I agree with, the statement as to them prepared by my noble and learned friend, Lord Russell of Killowen. It will be sufficient for my purpose to set them out very briefly.

In the summer of 1935 the directors of Regal, with a view to the future development or sale of their Company, were anxious to extend the sphere of its operations by the acquisition of other cinemas. In Hastings and St. Leonards there were two small ones called the Elite and the De Luxe. Negotiations began both for their acquisition or control by lease or otherwise and for the disposal of Regal itself.

Part of the machinery for the purpose was the creation by Regal of a subsidiary company, the Amalgamated. It was registered on the 26th September, 1935, with a capital of £5,000 in £1 shares. The directors were the same as those of Regal with the addition of Garton. It was thought that only £2,000 of the capital was to be issued and that it would be subscribed by Regal, who would control it.

Then difficulties began with the Elite and the De Luxe as to a lease, amongst others whether the directors of Amalgamated would guarantee the rent. The directors were not willing to do so.

At last all difficulties were surmounted at a crucial meeting of October 2nd, 1935. It was a peculiar meeting, the directors both of Regal and Amalgamated were summoned to attend at the same

place and at the same time. They did so, but, although separate minutes were subsequently attributed to each Company, it is not easy to say from the evidence at any particular moment for which company a particular director was appearing. It was resolved that Regal should apply for 2,000 shares in Amalgamated. It was agreed that £2,000 was the total sum which Regal could find. The value of the leases of the two cinemas was taken at £15,000. The draft lease was approved. Each of The Regal directors, except Gulliver, the Chairman, agreed to apply for 500 shares, Gulliver saying he would find people to take up 500. The Regal directors requested Garton to take up 500. I will deal later with particular evidence applying to Gulliver and Garton, who delivered separate defences.

Thus the capital of Amalgamated was fully subscribed, Regal taking 2,000 shares, the five Respondents taking 500 shares each, and the persons found by Gulliver the remaining 500. The shares were duly paid for and allotted. In the final transaction shortly afterwards these shares were sold at substantial profit and it is this profit which Regal asks to recover in this action.

The directors gave evidence and were severely cross-examined as to their good faith. The trial Judge said: " All this subsequent " history does not help me to decide whether the action of the " directors of the Plaintiff company and their solicitor on the 2nd " October was *bona fide* in the interests of the company and not " *mala fide* and in breach of their duty to the company ", and later on he said: " I must take it that in the realisation of those facts it " means that I cannot accept what has to be established by the " Plaintiff, and that is that the Defendants here acted in ill faith ", and later, " Finally I have to remind myself, were it necessary, that " the burden of proof, as in a criminal case, is the Plaintiffs', who " must establish the fraud they allege. On the whole I do not think " the Plaintiff company succeeds in doing that and, therefore, there " must be judgment for the Defendants."

This latter statement was criticised by du Parcq, L.J., in the Court of Appeal, who says: " To anyone who has read the plead- " ings but not followed the course of the trial that would seem a " remarkable statement on the part of the learned Judge, because " it is common ground that there is no allegation of fraud in the " pleadings whatever . . . but the course which the case has taken " makes the learned Judge's statement quite comprehensible " because it does appear to have been put before him as, in the " main at any rate, a case of fraud."

It must be taken, therefore, that the Respondents acted *bona fide* and without fraud.

" In the Court of Appeal the Master of the Rolls said: " If the " directors in coming to the conclusion that they could not put up " more than £2,000 of the company's money had been acting in

" bad faith, and if that restriction of the company's investment had
" been done for the dishonest purpose of securing for themselves
" a profit which not only could but which ought to have been pro-
" cured for their company, I apprehend that not only could they
" not have held that profit for themselves if the contemplated trans-
" action had been carried out, but they could not have held a profit
" for themselves even if that transaction was abandoned and
" another profitable transaction was carried through in which they
" did in fact realise a profit through the shares ... but once they
" have admittedly *bona fide* come to the decision to which they
" came in this case, it seems to me that their obligation to refrain
" from acquiring those shares for themselves comes to an end. In
" fact, looking at it as a matter of business, if that was the conclusion
" which they came to, a conclusion which in my judgment was

[3] 3

" amply justified on the evidence from the business point of
" view, then there was only one way left of raising the money,
" and that was putting it up themselves. . . . That being so, the
" only way in which these directors could secure that benefit
" for their company was by putting up the money themselves.
" Once that decision is held to be a *bona fide* one and fraud drops
" out of the case, it seems to me there is only one conclusion,
" namely that the appeal must be dismissed with costs". It seems therefore that the absence of fraud was the reason of the decision.

In the result, the Court of Appeal dismissed the Appeal and from their decision the present Appeal is brought.

The Appellants say they are entitled to succeed—

> " (1) because the Respondents secured for themselves
> " the profits upon the acquisition and sale of the shares in
> " Amalgamated by using the knowledge acquired as
> " directors and solicitor respectively of Regal and by using
> " their said respective positions and without the knowledge
> " or consent of Regal;
>
> " (2) because the doctrine laid down in such cases with
> " regard to trustees is equally applicable to directors and
> " solicitors ".

Although both in the Court of first instance and the Court of Appeal the question of fraud was the prominent feature, the Appellants' Counsel in this House at once stated that it was no part of his case and quite irrelevant to his arguments. His contention was that the Respondents were in a fiduciary capacity in relation to the Appellants and as such accountable in the circumstances for the profits they made on the sale of the shares.

As to the duties and liabilities of those occupying such a fiduciary position, a number of cases were cited to us which were not brought to the attention of the trial Judge. In my view the Respondents were in a fiduciary position and their liability to account 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.*

The earlier cases are concerned with trusts of specific property, *Keech v. Sandford* (1726) Sel. Ch. Cas. 61, Wh. and Tud. Edition 9th, II, 648, per Lord Chancellor King.

The rule, however, applies to agents, as for example solicitors and directors, when acting in a fiduciary capacity. In *Ex parte James* (1802) 8 Ves. jun. 337; the headnote reads: " Purchase of a
" bankrupt's estate by the solicitor to the commission set aside. The

" Lord Chancellor would not permit him to bid upon the resale, " discharging himself from the character of solicitor, without the " previous consent of the persons interested, freely given, upon full " information ". Lord Eldon said, p. 345: " The doctrine as to " purchase, by trustees, assignees, and persons having a confidential " character, stands much more upon general principle than upon " the circumstances of any individual case. It rests upon this, that " the purchase is not permitted in any case, however honest the " circumstances, the general interests of justice requiring it to be " destroyed in every instance, as no Court is equal to the examina- " tion and ascertainment of the truth in much the greater number " of cases." In *Hamilton v. Wright* (1842), 9 Cl. and Fin. III, the

headnote reads: " A trustee is bound not to do anything which can " place him in a position inconsistent with the interests of his trust, " or which can have a tendency to interfere with his duty in dis- " charging it. Neither the trustee nor his representative can be " allowed to retain an advantage acquired in violation of this rule."

Lord Brougham said, at p. 124, "The knowledge which he " acquires as trustee is of itself sufficient ground for disqualification, " and of requiring that such knowledge shall not be capable of " being used for his own benefit to injure the trust. The ground of " disqualification is not merely because such knowledge may enable " him actually to obtain an undue advantage over others." In *Aberdeen Railway Company v. Blaikie* (1853), I, MacQ., 461, the headnote reads: " The director of a railway company is a trustee, " and as such is precluded from dealing on behalf of the company " with himself or with a firm of which he is a partner." Lord Cranworth said, at p. 471, "A corporate body can only act by " agents, and it is of course the duty of those agents so to act as best " to promote the interests of the corporation whose affairs they are " conducting. Such agents have duties to discharge of a fiduciary " nature towards their principal, and it is a rule of universal appli- " cation that no one having such duties to discharge shall be allowed " to enter into engagements in which he has or can have a personal " interest conflicting, or which possibly may conflict, with the " interests of those whom he is bound to protect."

It is not, however, necessary to discuss all the cases cited because the Respondents admitted the generality of the rule as contended for by the Appellants but were concerned rather to confess and avoid it. Their contention was that in this case upon a true perspective of the facts they were under no equity to account for the profits they made. I will deal first with the Respondents, other than Gulliver and Garton. We were referred to the *Imperial Hydropathic Company v. Hampson* (1882), 23, Ch. D., 1, where Bowen, L.J., at p. 12, drew attention to the difference between directors and trustees, but the case is not an authority for contending that a director cannot come within the general rule.

No doubt there may be exceptions to the general rule, as for example where a purchase is entered into after the trustee has divested himself of his trust sufficiently long before the purchase to avoid the possibility of his making use of special information acquired by him as trustee: (see the remarks of Lord Eldon, in *ex Parte James (ubi supra)* at p. 352) or where he purchases with full knowledge and consent of his *cestui que trust. Imperial v. Hampson (ubi supra)* makes no exception to the general rule that a solicitor or director if acting in a fiduciary capacity is liable to account for the profits made by him from knowledge acquired when so acting.

It is then argued that it would have been a breach of trust for the Respondents as directors of Regal to have invested more than £2,000 of Regal's money in Amalgamated and that the transaction would never have been carried through if they had not themselves

put up the other £3,000. Be it so, but it is impossible to maintain that because it would have been a breach of trust to advance more than £2,000 from Regal and that the only way to finance the matter was for the directors to advance the balance themselves, a situation arose which brought the Respondents outside the general rule and permitted them to retain the profits which accrued to them from the action they took. At all material times they were directors and in a fiduciary position, and they used and acted upon their exclusive knowledge acquired as such directors. They framed resolutions by which they made a profit for themselves. They sought no authority from the company to do so, and by reason of their position and actions, they made large profits for which, in my view, they are liable to account to the company.

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I now pass to the cases of Gulliver and Garton. Their liability depends upon a careful examination of the evidence. Gulliver's case is that he did not take any shares and did not make any profit by selling them. His evidence, which is substantiated by the documents, is as follows. At the board meeting of October 2nd he was not anxious to put any money of his own into Amalgamated. He thought he could find subscribers for £500 but was not anxious to do so. He did, however, find subscribers—£200 by South Down Land Company, £100 by a Miss Geering and £200 by Seguliva A.G., a Swiss company. The purchase price was paid by these three, either by cheque or in account, and the shares were duly allotted to them. The shares were held by them on their own account. When the shares were sold the moneys went to them and no part of the moneys went into Gulliver's pocket or into his account.

In these circumstances, and bearing in mind that Gulliver's evidence was accepted, it is clear that he made no profits for which he is liable to account. The case made against him rightly fails and the appeal against the decision in his favour should be dismissed.

Carton's case is that in taking the shares he acted with the knowledge and consent of Regal and that consequently he comes within the exception to the general rule as to the liability of the person acting in a fiduciary position to account for profits.

At the meeting of October 2nd, Gulliver, the Chairman of Regal, and his co-directors were present. He was asked in cross-examination about what happened as to the purchase of the shares by the directors. The question was: " Did you say to Mr. Garton, ' Well, " Garton, you have been connected with Bentley's for a long time " will you not put up £500? ' His answer was, " I think I can " put it higher. I invited Mr. Garton to put the £500 and to make " up the £3,000." This was confirmed by Garton in examination in chief. In these circumstances, and bearing in mind that this evidence was accepted, it is clear that he took the shares with the full knowledge and consent of Regal and that he is not liable to account for profits made on their sale. The appeal against the decision in his favour should be dismissed.

The appeal against the decision in favour of the Respondents other than Gulliver and Garton should be allowed, and I agree with the order to be proposed by my noble and learned friend, Lord Rusell of Killowen as to amounts and costs. The appeal against the decision in favour of Gulliver and Garton should be dismissed with costs.

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Viscount

Sankey
Lord

Russell of

Killowen

Lord

Macmillan

Lord

Wright

Lord

Porter

[6]

REGAL (HASTINGS), LIMITED

v.

GULLIVER AND OTHERS.

Lord Russell of Killowen

MY LORDS,

The very special facts which have led up to this litigation require to be stated in some detail, in order to make plain the point which arises for decision on this Appeal.

The Appellant is a limited company called Regal (Hastings), Ld., and may conveniently be referred to as Regal. Regal was incorporated in the year 1933 with an authorised capital of £20,000 divided into 17,500 preference shares of £1 each and 50,000 ordinary shares of one shilling each. Its issued capital consisted of 8,950 preference shares and 50,000 ordinary shares. It owned, and managed very successfully, a freehold cinema theatre at Hastings called the Regal. In July, 1935, its board of directors consisted of one Walter Bentley and the Respondents Gulliver, Bobby, Griffiths, and Bassett Its shareholders were twenty in number. The Respondent Garton acted as its solicitor.

In or about that month, the Board of Regal formed a scheme for acquiring a lease of two other cinemas (viz., the Elite at Hastings, and the Cinema de Luxe at St. Leonards), which were owned and managed by a company called Elite Picture Theatres (Hasting and Bristol) Limited. The scheme was to be carried out by obtaining the grant of a lease to a subsidiary limited company, which was to be formed by Regal, with a capital of 5,000 £1 shares, of which Regal was to subscribe for 2,000 in cash, the remainder being allotted to Regal or its nominees as fully paid for services rendered. The whole beneficial interest in the lease would, if this scheme were carried out, enure solely to the benefit of Regal and its shareholders, through the shareholding of Regal in the subsidiary company.

The Respondent Garton, on the instructions of Regal, negotiated for the acquisition of the lease, with the result that an offer to take a lease for 35 or 42 years at a rent of £4,600 for the first year, rising in the second and third years, up to £5,000 in the fourth and subsequent years, was accepted on behalf of the owners on the 21st August, 1935, subject to mutual approval of the form of the lease. Subsequently the owners of the two cinemas required the rent under the proposed lease to be guaranteed.

On the nth September, 1935, Walter Bentley died; and on the 18th September, 1935, his son, the Respondent Bentley, who was one of his executors, was appointed a director of Regal. It should now be stated that concurrently with the negotiations for the acquisition of a lease of the two cinemas, Regal was contemplating a sale of its own cinema, together with the leasehold interest in the two cinemas which it was proposing to acquire.

On the 18th September, 1935, at a Board meeting of the Regal, the Respondent Garton was instructed that the directors were prepared to give a joint guarantee of the rent of the two cinemas, until the subscribed capital of the proposed subsidiary company amounted to £5,000. He was further instructed to deal with all offers received for the purchase of Regal's own assets. On the 26th September, 1935, the proposed subsidiary company was registered under the name Hastings Amalgamated Cinemas, Ld., which may tor brevity be referred to as Amalgamated. Its directors were the five directors of Regal, and in addition the Respondent Garton.

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Harry Bentley, who had been appointed a director of Regal only on the 18th September at the end of the Board meeting of that date, enquired from Garton the position as regards the new company Amalgamated. In reply he received a letter dated the 26th September, 1935, in which the position, as at that date, is set out by Garton. After stating that the capital of Amalgamated is £5,000, of which £2,000 is being subscribed by Regal, " which sum " will form virtually the whole of the present paid up capital" of Amalgamated, and that the rent is to be guaranteed by the directors so long as the issued capital of Amalgamated is under £5,000, he concludes as follows: —

> " Inasmuch as it is the intention of all the parties that the Regal (Hastings) Ltd. will not only control the Hastings (Amalgamated) Cinemas Ltd., but will continue to hold virtually the whole of the capital, the position of a shareholder of Regal (Hastings) Ltd. is merely that he has the advantage of a possible asset of the two new cinemas on sale by the Regal (Hastings) Ltd. of its undertaking, so that the price realised to the shareholders of the Regal (Hastings) Ltd. will be the amount that he would normally have received for his interest in such company, plus his proportion of the sale price of such two new cinemas."

On the 2nd October, 1935, an offer was received from would-be purchasers offering a net sum of £92,500 for the Regal cinema and the lease of the two cinemas. Of this sum £77,500 was allotted as the price of Regal's cinema, and £15,000 as the price of the two leasehold cinemas. This splitting of the price seems to have been done by the purchasers at the request of the Respondent Garton; but it must be assumed in favour of the Regal directors that they were satisfied that £77,500 was not too low a price to be paid for their company's cinema, with the result that £15,000 cannot be taken to have been in excess of the value of the lease which Amalgamated was about to acquire.

On the afternoon of that same 2nd October, the six Respondents met at No. 62 Shaftesbury Avenue, London, the registered offices of Regal. Various matters were mentioned and discussed between them, and they came to certain decisions. Subsequently minutes were prepared which record the different matters as having been transacted at two separate and distinct Board meetings, viz., a meeting of the Board of Regal, and a meeting of the Board of Amalgamated. The Respondent Gulliver stated in his evidence that two separate meetings were held, that of the Amalgamated Board being held and concluded, before that of the Regal Board was begun. On the other hand the Respondent Bentley says " It " was more or less held in one lump, because we were talking about " selling the three properties." And the Respondent Garton states that after it was decided that Regal could only afford to put up £2,000 in Amalgamated, which was purely a matter for the consideration of the Regal Board, the next matter discussed was one which figures in the minutes of the Amalgamated Board meeting. Moreover both meetings are recorded in the minutes as having been

held at 3 p.m.

Whatever may be the truth-as to this, the matters discussed and decided included the following: (1) Regal was to apply for 2,000 shares in Amalgamated: (2) the offer of £77,500 for the Regal cinema and £15,000 for the two leasehold cinemas was accepted: (3) the solicitor reporting that completion of the lease was expected to take place on the 7th October, it was resolved that the seal of Amalgamated be affixed to the engrossment when available : and (4) the Respondent Gulliver having objected to guaranteeing the rent it was resolved—here I cite the words of the minute —" that the directors be invited to subscribe for 500 shares each " and that such shares be allotted accordingly."

3 [8]

On the 7th October, 1935, a lease of the two cinemas was executed in favour of Amalgamated, for the term of 35 years from the 29th September, 1935, in accordance with the agreement previously come to. The shares of Amalgamated were all issued, and were allotted as follows: 2,000 to Regal, 500 to each of the Respondents Bobby, Griffiths, Bassett, Bentley, and Garton, and (by the direction of the Respondent Gulliver) 200 to a Swiss company called Seguliva A.G., 200 to a company called South Downs Land Co., Ltd., and 100 to a Miss Geering.

In fact the proposed sale and purchase of the Regal cinema and the two leasehold cinemas fell through. Another proposition, however, took its place, viz., a proposal for the purchase from the individual shareholders of their shares in Regal and Amalgamated. This proposal came to maturity by agreements dated the 24th October, 1935, as a result of which the 3,000 shares in Amalgamated held otherwise than by Regal were sold for a sum of £3 16s. 1d. per share, or in other words at a profit of £2 16s. 1d. per share over the issue price of par.

As a sequel to the sale of the shares in Regal, that company came under the management of a new Board of directors, who caused to be issued the writ which initiated the present litigation.

By this action Regal seek to recover from its five former directors and its former solicitor a sum of £8,142 l0s. 0d. either as damages or as money had and received to the Plaintiff's use. The action was tried by Wrottesley J., who entered judgment for all the Defendants with costs. An appeal by the Plaintiffs to the Court of Appeal was dismissed with costs.

My Lords, those are the relevant facts which have led up to the debate in your Lordships' House, and I now proceed to consider whether the Appellant is entitled to succeed against any and which of the Respondents.

The case has, I think, been complicated and obscured by the presentation of it before the trial judge. If a case of wilful misconduct or fraud on the part of the Respondents had been made out, liability to make good to Regal any damage which it had thereby suffered could no doubt have been established; and efforts were apparently made at the trial by cross-examination and otherwise to found such a case. It is, however, due to the Respondents to make it clear at the outset that this attempt failed. Nor was the case so presented to us here. We have to consider the question of the Respondent's liability on the footing that in taking up these shares in Amalgamated they acted with *bona fides,* intending to act in the interest of Regal.

Nevertheless they 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

This aspect of the case was undoubtedly raised before the trial judge, but in so far as he deals with it in his judgment, he deals with it on a wrong basis. Having stated at the outset quite truly that what he calls " this stroke of fortune " only came the way of the Respondents because they were the directors and solicitor of Regal, he continues this—

> ' But in order to succeed the Plaintiff company must show that the "Defendants both ought to have caused and could have caused the Plaintiff "company to subscribe for these shares, and that the neglect to do so caused "a loss to the Plaintiff company. Short of this, if the Plaintiffs can estab- "lish that though no loss was made by the company, yet a profit was cor- "ruptly made by the directors and the solicitor, then the company can claim "to have that profit handed over to the company, framing the action in such "a case for money had and received by the Defendants for the Plaintiffs' "use."

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Other passages in his judgment indicate that in addition to this " corrupt" action by the directors, or perhaps alternatively, the Plaintiffs in order to succeed must prove that the Defendants acted *mala fide,* and not *bona fide* in the interests of the company, or that there was a plot or arrangement between them to divert from the company to themselves a valuable investment. However relevant such considerations may be in regard to a claim for damages resulting from misconduct, they are irrelevant to a claim against a person occupying a fiduciary relationship towards the Plaintiff for an account of the profits made by that person by reason and in course of that relationship.

In the Court of Appeal, upon this claim to profits, the view was taken that in order to succeed the Plaintiff had to establish that there was a duty on the Regal directors to obtain the shares for Regal. Two extracts from the judgment of the Master of the Rolls show this. After mentioning the claim for damages, he says: —

> " The case is put on an alternative ground. It is said that in the cir-
> " cumstances of the case the directors must be taken to have been acting in
> " the matter of their office when they took those shares; and that accordingly
> " they are accountable for the profits which they have made. . . . There
> " is one matter which is common to both these claims which, unless it is
> " established, appears to me to be fatal: It must be shown that in the
> " circumstances of the case it was the duty of the directors to obtain these
> " shares for their company."

Later in his judgment he uses this language: —

> " But it is said that the profit realised by the directors on the sale of
> "the shares must be accounted for by them. That proposition involves that
> "on the 2nd October, when it was decided to acquire these shares, and at the
> "moment when they were acquired by the directors, the directors were
> "taking to themselves something which properly belonged to their com-
> "pany."

Other portions of the judgment appear to indicate that upon this claim to profits, it is a good defence to show *bona fides* or absence of fraud on the part of the directors in the action which they took, or that their action was beneficial to the company, and the judgment ends thus: —

> " That being so, the only way in which these directors could secure that
> " benefit for their company was by putting up the money themselves. Once
> " that decision is held to be a *bona fide* one, and fraud drops out of the case,
> " it seems to me there is only one conclusion, namely, that the Appeal must
> " be dismissed with costs."

My Lords, with all respect I think there is a misapprehension here. 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 upon such questions or considerations as whether the profit would or should otherwise have gone to the Plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the Plaintiff, or whether he took a risk, or acted as he did for the benefit of the Plaintiff, or whether the Plaintiff has in fact been damaged or benefited by his

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.

The leading case of *Keech v. Sandford* (Sel. Ch. Ca. 61) is an illustration of the strictness of this rule of Equity in this regard, and of how far the rule is independent of these outside considerations. A lease of the profits of a market had been devised to a trustee for the benefit of an infant. A renewal on behalf of the infant was refused: it was absolutely unobtainable. The trustee, finding that it was impossible to get a renewal for the benefit of the infant, took a lease for his own benefit. His duty to obtain it for the infant was incapable of performance; nevertheless he was ordered to assign

the lease to the infant, upon the bare ground that if a trustee on the refusal to renew might have a lease for himself, few renewals would be made for the benefit of *cestuis que trust.* ' This may seem " hard," said Lord King, " that the trustee is the only person of all " mankind who might not have the lease, but it is very proper that " rule should be strictly pursued, and not in the least relaxed ".

One other case in Equity may be referred to in this connection, viz., *ex parte James* (8 Ves. jun. 337) a decision of Lord Eldon's. That was a case of a purchase of a bankrupt's estate by the solicitor to the commission, and Lord Eldon (at p. 345) refers to the doctrine thus: —

> " The doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance, as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases."

Let me now consider whether the essential matters which the Plaintiff must prove, have been established in the present case.

As to the profit being in fact made there can be no doubt. The shares were acquired at par and were sold three weeks later at a profit of £2 16s. 1d. per share.

Did such of the first rive Respondents as acquired these very profitable shares acquire them by reason and in course of their office of directors of Regal? In my opinion, when the facts are examined and appreciated the answer can only be that they did. The actual allotment no doubt had to be made by themselves and Garton (or some of them) in their capacity as directors of Amalgamated; but this was merely an executive act, necessitated by the alteration of the scheme for the acquisition of the lease of the two cinemas for the sole benefit of Regal and its shareholders through Regal's shareholding in Amalgamated. That scheme could only be altered by or with the consent of the Regal Board. Consider what in fact took place on the 2nd October, 1935. The position immediately before that day is stated in Garton's letter of the 26th September, 1935. The directors were willing to guarantee the rent until the subscribed capital of Amalgamated reached £5,000; Regal was to control Amalgamated and own the whole of its share capital; with the consequence that the Regal shareholders would receive their proportion of the sale price of the two new cinemas. The Respondents then meet on the 2nd October, 1935. They have before them an offer to purchase the Regal cinema for £77,500, and the lease of the two cinemas for £15,000. The offer is accepted. The draft lease is approved; a resolution for its sealing is passed in anticipation of completion in five days. Some of those present, however, shy at giving guarantees, and accordingly the scheme is changed by the Regal directors in a vital respect. It is agreed that a guarantee shall be avoided, by the six Respondents bringing the subscribed capital

up to £5,000. I will consider the evidence and the minute in a moment. The result of this change of scheme (which only the Regal directors could bring about) may not have been appreciated by them at the time; but its effect upon their company and its shareholders was striking. In the first place, Regal would no longer control Amalgamated, or own the whole of its share capital; the action of its directors had deprived it (acting through its shareholders in general meeting) of the power to acquire the shares. In the second place, the Regal shareholders would only receive a largely reduced proportion of the sale price of the two cinemas. The Kegal directors and Garton would receive the moneys of which the Regal shareholders were thus deprived. This vital alteration was brought about in the following circumstances (I

[11] 6

refer to the evidence of the Respondent Garton.) He was asked what was suggested when the guarantees were refused, and this is his answer:—

> " Mr. Gulliver said ' We must find it somehow. I am willing to find ' £500. Are you willing,' turning to the other four directors of Regal, ' to ' do the same? ' They expressed themselves as willing. He said, ' That ' makes £2,500 ', and he turned to me and said, ' Garton, you have been ' interested in Mr. Bentley's companies; will you come in to take £500?' I agreed to do so."

Although this matter is recorded in the Amalgamated minutes, this was in fact a decision come to by the directors of Regal, and the subsequent allotment by the directors of Amalgamated was a mere carrying into effect of this decision of the Regal Board. The resolution recorded in the Amalgamated minute runs thus—

> " After discussion it was resolved that the directors be invited to sub- " scribe for 500 shares each, and that such shares be allotted accordingly ".

As I read that resolution, and my reading agrees with Carton's evidence, the invitation is to the directors of Regal, and is made for the purpose of effectuating the decision which the five directors of Regal had made, that each should take up 500 shares in Amalgamated. The directors of Amalgamated were not conveying an " invitation " to themselves. That would be ridiculous. They were merely giving effect to the Regal directors' decision to provide £2,500 cash capital themselves, a decision which had been followed by a successful appeal by Gulliver to Garton to provide the balance.

My Lords, I have no hesitation in coming to the conclusion upon the facts of this case, that these shares when acquired by the directors were acquired by reason, and only by reason, of the fact that they were directors of Regal, and in the course of their execution of that office.

It now remains to consider whether in acting as directors of Regal they stood in a fiduciary relationship to that company. Directors of a limited company are the creatures of Statute, and occupy a position peculiar to themselves. In some respects they resemble trustees, in others they do not. In some respects they resemble agents, in others they do not. In some respects they resemble managing partners, in others they do not. In the case of the *Forest of Dean Coal Mining Co.* (10 C.D. 450) a director was held not liable for omitting to recover promotion money which had been improperly paid on the formation of the company. He knew of the improper payment, but he was not appointed a director until a later date. It was held that although a trustee of settled property which included a debt would be liable for neglecting to sue for it, a director of a company was not a trustee of debts due to the company and was not liable. I cite two passages from the judgment of Sir George Jessel, M.R.: —

> Directors have sometimes been called trustees, or commercial trustees, " and sometimes they have been called managing partners, it does not matter " what you call them so long as you understand what their true position is, " which is that they are really commercial men managing a trading concern

> " for the benefit of themselves and all the other shareholders in it."

Later, after pointing out that traders have a discretion whether they shall sue for a debt, which discretion is not vested in trustees of a debt under a settlement, he says: —

> " Again, directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company. ... A director is the managing partner of the concern, and although a debt is due to the concern I do not think it is right to call him a trustee of that debt which remains unpaid, though his liability in respect of it may in certain cases and in some respects be analogous to the liability of a trustee."

The position of directors was considered by Kay, J., in the case of the *Faure Electric Co.* (40 C.D. 141). That was a case of directors

having applied the company's money in payment of an improper commission; a claim was made for the loss thereby occasioned to the company. In referring to the liability of directors, the learned judge pointed out that directors were not trustees in the sense of trustees of a settlement, that the nearest analogy to their position would be that of a managing agent of a mercantile house with large powers, but that there was no analogy which was absolutely perfect; and he added: —

> " However, it is quite obvious that to apply to directors the strict rules
> " of the Court of Chancery with respect to ordinary trustees might fetter
> " their action to an extent which would be exceedingly disadvantageous to
> " the companies they represent."

In addition a passage from the judgment of Bowen, L.J., in *Imperial Hydropathic Co. v. Hampson* (23 C.D. 1) may be usefully recalled. He says:

> " I should wish ... to begin by remarking this, that when persons
> " who are directors of a company are from time to time spoken of by judges
> " as agents, trustees, or managing partners of the company, it is essential
> " to recollect that such expressions are used not as exhaustive of the powers
> " or responsibilities of those persons, but only as indicating useful points
> " of view from which they may for the moment, and for the particular pur-
> " pose, be considered—points of view at which for the moment they seem
> " to be either cutting the circle or falling within the category of the suggested
> " kind. It is not meant that they belong to the category, but that it is
> " useful for the purpose of the moment to observe that they fall *pro tanto*
> " within the principles which govern that particular class."

These three cases, however, were not concerned with the question of directors making a profit; but that the equitable principle in this regard applies to directors is beyond doubt. In *Parker v. McKenna* (L.R. 10 Ch. 96), a new issue of shares of a joint stock bank was offered to the existing shareholders at a premium. The directors arranged with one Stock to take, at a larger premium, the shares not taken up by the existing shareholders. Stock, being unable to fulfil his contract, requested the directors to relieve him of some. They did so, and made a profit. They were held accountable for the profit so made. The Lord Chancellor (Lord Cairns) stated (at p. 118) that: —

> " The Court will not enquire, and is not in a position to ascertain,
> " whether the Bank has lost or not lost by the acts of the directors. All that
> ' the Court has to do is to examine whether a profit has been made by an
> ' agent, without the knowledge of his principal, in the course and execution
> ' of his agency, and the Court finds in my opinion that these agents in the
> ' course of their agency have made a profit, and for that profit they must
> ' in my opinion account to their principal."

In the same case James, L.J., (at p. 124) stated his view in the following terms: —

> ' It appears to me very important that we should concur in laying down
> " again and again the general principle that in this Court, no agent in the
> " course of his agency, in the matter of his agency, can be allowed to make
> " any profit without the knowledge and consent of his principal, that that

" rule is an inflexible rule, and must be applied inexorably by this Court,
" which is not entitled in my judgment to receive evidence, or suggestion, or
" argument, as to whether the principal did or did not suffer any injury in
" fact, by reason of the dealing of the agent, for the safety of mankind
" requires that no agent shall be able to put his principal to the danger of
" such an enquiry as that."

In the case of the *Imperial Mercantile Credit Association v. Coleman* (6 E. & I. App. 189) one Coleman, a stockbroker and a director of a financial company, had contracted to place a large amount of railway debentures for a commission of 5 per cent. He proposed that his company should undertake to place them for a commission of 1 1/2 per cent. The 5 per cent, commission was in due course paid to the director, who paid over the 1 1/2 per cent, to the

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company. He was held liable to account for the 3 1/2 per cent., by Malins, V.C., who said (see 6 Ch. App. at p. 563): —

> " It is of the highest importance that it should be distinctly understood
> " that it is the duty of directors of companies to use their best exertions for
> " the benefit of those whose interests are committed to their charge, and that
> " they are bound to disregard their own private interests whenever a regard
> " to them conflicts with the proper discharge of such duty."-

His decree was reversed by Lord Hatherley on the ground that the transaction was protected under the company's Articles of Association. Your Lordships' House, however, thought that in the circumstances of the case the Articles of Association gave no protection, and restored the decree with unimportant variations. The liability was based on the view, which was not disputed by Lord Hatherley, that the director stood in a fiduciary relationship to the company. That relationship being established he could not keep the profit which had been earned by the funds of the company being employed in taking up the debentures. The Courts in Scotland have treated directors as standing in a fiduciary relationship towards their company and, applying the equitable principle, have made them accountable for profits accruing to them in the course and by reason of their directorships. It will be sufficient to refer to the case of the *Huntington Copper Co.* v. *Henderson* (4 Rettie 294) in which the Lord President cites with approval the following passage from the Lord Ordinary's judgment: —

> " Whenever it can be shown that the trustee *has* so arranged matters as
> " to obtain an advantage, whether in money or in money's worth, to himself
> " personally through the execution of his trust, he will not be permitted to
> " retain it, but be compelled to make it over to his constituent."

In the result I am of 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 shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech v. Sandford, ex parte James* and similar authorities applies to them in full force. It was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the snares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. I cannot accept this argument. It was impossible for the *cestui quo trust* in *Keech* v. *Sandford* to obtain the lease, nevertheless the trustee was accountable: and the suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain.

The result is that in my opinion each of the Respondents Bobby, Griffiths, Bassett and Bentley is liable to account for the profit which

he made on the sale of his 500 shares in Amalgamated.

The case of the Respondent Gulliver, however, requires some further consideration, for he has raised a separate and distinct answer to the claim. He says—" I never promised to subscribe for " shares in Amalgamated. I never did so subscribe. I only promised " to find others who would be willing to subscribe. I only found " others who did subscribe. The shares were theirs; they were never " mine. They received the profit. I received none of it." If these are the true facts, his answer seems complete. The evidence in my opinion establishes his contention. Throughout his evidence Gulliver insisted that he only promised to find £500, not to subscribe it himself. The £500 was paid by two cheques in favour of

Amalgamated, one a cheque for £200 signed by Gulliver as director and on behalf of the Swiss company Seguliva, the other a cheque for £300 signed by Gulliver as managing director of South Downs Land Co., Ltd. They were enclosed in a letter of the 3rd October, 1935, from Gulliver to Garton, in which Gulliver asks that the share certificates be issued as follows: 200 shares in the name of himself, Charles Gulliver, 200 shares in the name of South Downs Co., Ltd., and 100 shares in the name of Miss S. Geering. The money for Miss Geering's shares was apparently included in South Down Co.'s cheque. The certificates were made out accordingly, the 200 shares in Gulliver's name being, he says, the shares subscribed for by the Swiss company.

When the sale and purchase of the Amalgamated shares was arranged, the agreement for the sale and purchase was signed on behalf of the vendor shareholders (other than the Respondent Bentley) by Garton & Co.: and in a letter of the 17th October, 1935, Gulliver sent to Garton (who held the three certificates) three transfers, viz. (1) a transfer of 200 shares executed by South Downs Land Co., Ltd., (2) a transfer of 200 shares executed by himself, and (3) a transfer of 100 shares executed by Miss Geering. When the purchase money was paid cheques were drawn as follows: a cheque for £360 in favour of Miss Geering, a cheque for £720 in favour of South Downs Land Co., Ltd., and a cheque for the same amount in favour of Gulliver. By letter of the 24th October, 1935, written by Gulliver to the National Provincial Bank, these cheques were paid into the respective accounts of Miss Geering, South Downs Land Co., Ltd., and Seguliva, A.G.

From the evidence of Gulliver it appeared that Miss Geering is a friend who from time to time makes investments on his advice; that the issued capital of South Downs Land Co., Ltd., is £1,000 in £1 shares, held by some 11 or 12 shareholders, of whom Gulliver is one and holds 100 shares; and that in the Swiss company Gulliver holds 85 out of 500 shares.

It is of the first importance on this part of the case to bear in mind that these directors have been acquitted of all suggestion of *mala fides* in regard to the acquisition of these shares. They had no reason to believe that they could be called to account. Why then should Gulliver go to the elaborate pains of having the shares put into the names of South Downs Co. and Miss Geering, and of having the proceeds of sale paid into the respective accounts before mentioned, if the shares and proceeds really belonged to him ? *Ex hypothesi* he had no reason for concealment; and no question was raised against the transaction until months after the proceeds of sale had been paid into the banking accounts of those whom Gulliver asserts to have been the owners of the shares. I can see no reason for doubting that the shares never belonged to Gulliver, and that he made no profit on the sale thereof.

Counsel for the Appellant, however, contended that the trial judge had found as a fact that Gulliver was the owner of the shares;

and he relied on certain scattered passages in the judgment, the strongest of which seems to me to be the one in which the learned Judge said—" I may say this with regard to Mr. Gulliver, that I " have not been misled in any way or led to decide in his favour by " the fact that he handed over his shares to his nominees, but rather " the reverse ". I cannot regard that as a finding by the judge that the shares were subscribed for by Gulliver under aliases, and that the shares and the proceeds of sale in fact belonged to him. It is equally susceptible of the meaning that he allowed others to subscribe for the shares which he could have obtained for himself had he so wished. But if it be claimed as a finding of fact in the former sense, all I can say is that there is no evidence which in my opinion would justify such a finding.

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It was further argued that even if the shares and the proceeds of sale did not belong to Gulliver, he is nevertheless liable to account to Regal for the profit made by the owners of the shares, and that upon the authority of the case of the *Liquidators of the Imperial Mercantile Credit Association v. Coleman,* to which I have already referred. One of the contentions put forward there by Coleman was that his transaction was a transaction for the benefit of a partnership in the profits of which he was only interested to the extent of a half, and that accordingly he could only be made accountable to that extent. That contention was disposed of by Lord Cairns in the following terms: —

> " My Lords, I think there is no foundation for this argument. The "profit on the transaction was obtained by Mr. Coleman, and in the view "that I take was obtained by him as a director of the Association. Whether "he desired ori whether he determined to reserve it all to himself or to share "it with his firm appears to me to be perfectly immaterial. The source from "which the profit is derived is Mr. Coleman. It is only through him that "his firm can claim. He is liable for the whole of the profits which were "obtained; and it is not the course for a Court of Equity to enter into the "consideration of what afterwards would have become of those profits."

I am unable to see how this authority helps Regal if it be assumed that neither the shares nor the profit ever belonged to Gulliver.

It was further said that Gulliver must account for whatever profits he may have made indirectly through his shareholding in the two companies, and that an enquiry should be directed for this purpose. As to this, it is sufficient to say that there is no evidence to ground such an enquiry. Indeed the evidence so far as it goes shows that neither company has distributed any part of the profit.

Finally, it was said that Gulliver must account for the profit on the 200 shares as to which the certificate was in his name. But if in fact the shares belonged beneficially to the Swiss company (and that is the assumption for this purpose), the proceeds of sale did not belong to Gulliver, and were rightly paid into the Swiss company's banking account: Gulliver accordingly made no profit for which he is accountable.

As regards Gulliver, this Appeal should in my opinion be dismissed.

There remains to consider the case of Garton. He stands on a different footing from the other Respondents in that he was not a director of Regal. He was Regal's legal adviser; but in my opinion he has a short but effective answer to the Plaintiffs' claim. He was requested by the Regal directors to apply for 500 shares. They arranged that they themselves should each be responsible for £500 of the Amalgamated capital, and they appealed, by their chairman, to Garton to subscribe the balance of £500 which was required to make up the £3,000. In law his action, which has resulted in a profit, was taken at the request of Regal, and I know of no principle or authority which would justify a decision that a solicitor must

account for profit resulting from a transaction which he has entered into on his own behalf, not merely with the consent, but at the request of his client.

My Lords, in my opinion the right way in which to deal with this Appeal is (1) to dismiss the Appeal as against the Respondents Gulliver and Garton with costs, (2) to allow it with costs as against the other four Respondents, and (3) to enter judgment as against each of these four Respondents for a sum of £1,402 1s. 8d. with interest at 4 per cent, from the 25th October, 1935, as to £1,300 part thereof, and from, the 5th December, 1935, as to the balance. As regards the liability of these four Respondents for costs, I have read the shorthand notes of the evidence at the trial, and it is clear

to me that the costs were substantially increased by the suggestions of *mala fides* and fraud with which the cross-examination abounds, and from which they have been exonerated. In my opinion a proper order to make would be to order these four Respondents to pay only three-quarters of the Appellants' taxed costs of action. The taxed costs of the Appellants in the Court of Appeal and in this House they must pay in full.

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

Viscount

Sankey
Lord

Russell of
Killowen
Lord
Macmillan
Lord
Wright
Lord
Porter

[17]

REGAL (HASTINGS), LIMITED
v.
GULLIVER AND OTHERS.

Lord Macmillan

MY LORDS,

The real question for decision in this Appeal seems unfortunately to have been somewhat obscured by the course of the arguments before the trial judge and to some extent also in the Court of Appeal.

The issue as it was formulated before your Lordships was not whether the directors of Regal (Hastings) Limited had acted in bad faith. Their *bona fides* was not questioned. Nor was it whether they had acted in breach of their duty. They were not said to have done anything wrong. The sole ground on which it was sought to render them accountable was that, being directors of the plaintiff company and therefore in a fiduciary relation to it, they entered in the course of their management into a transaction in which they utilised the position and knowledge possessed by them in virtue of their office as directors, and that the transaction resulted in a profit to themselves. The point was not whether the directors had a duty to acquire the shares in question for the company and failed in that duty. They had no such duty. We must take it that they entered into the transaction lawfully, in good faith and indeed avowedly in the interests of the company. But that does not absolve them from accountability for any profit which they made if it was by reason and in virtue of their fiduciary office as directors that they entered into the transaction.

The equitable doctrine invoked is one of the most deeply rooted

in pur law. It is amply illustrated in the authoritative decisions whicli my noble and learned friend Lord Russell of Killowen has cited. I should like only to add a passage from Lord Kames's " Principles of Equity," which puts the whole matter in a sentence : " Equity,' he says, " prohibits a trustee from making any profit by " his management, directly or indirectly." (3rd edition, 1778, Vol. II, p. 87.)

The issue thus becomes one of fact. The plaintiff company has to establish two things: (1) That what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors; and (2) that what they did resulted in a profit to themselves. The first of these propositions is clearly established by the analysis of the whole complicated circumstances for which the House is indebted to my noble and learned friend who has preceded me. The second proposition is admitted, except in the case of Mr. Gulliver, in whose case I agree that on the evidence he is not proved to have made any profit personally. The conditions are therefore in my opinion present which preclude the four directors who made a personal profit by the transaction from retaining such profit.

The position of the Respondent Mr. Garton is quite different. He was the solicitor of the plaintiff company and in no sense a trustee for it. True, he made a profit, as did the four directors, but he subscribed for his shares not only with the knowledge but at the express request of his clients, and I know of no principle on which he could be held accountable to them for any resultant profit to himself.

I should have been content simply to express my concurrence with the views expounded by my noble and learned friend Lord Russell of Killowen, with which I wholly agree, but for the fact that we are differing from the Court of Appeal. For that reason I have thought it proper to state briefly the grounds of my concurrence.

Viscount

Sankey

Lord
Russell of

Killowen

Lord

Macmillan

Lord
Wright

Lord
Porter

[18]

REGAL (HASTINGS), LIMITED

v.

GULLIVER AND OTHERS.

Lord Wright

MY LORDS,

Of the six Respondents, two, Gulliver and Garton, stand on a different footing from the other four. It is in regard to the latter that the important question of principle brought into issue by the decisions of Wrottesley J. and the Court of Appeal call for determination. That question can be briefly stated to be whether an agent, a director, a trustee or other person in an analogous 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 his fiduciary position and 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 the profits with the knowledge and assent of the other person. The most usual and typical case of this nature is that of principal and agent. The rule in such cases is compendiously expressed to be that an agent must account for net profits secretly (that is without the knowledge of his principal) acquired by him in the course of his agency. The authorities show how manifold and various are the applications of the rule. It does not depend on fraud or corruption.

The Courts below have held that it does not apply in the present case for the reason that the purchase of the shares by the Respondents, though made for their own advantage, and though the

knowledge and opportunity which enabled them to take the advantage came to them solely by reason of their being directors of the Appellant Company, was a purchase which in the circumstances the Respondents were under no duty to the Appellants to make, and was a purchase which it was beyond the Appellant's ability to make, so that if the Respondents had not made it, the Appellant would have been no better off by reason of the Respondents abstaining from reaping the advantage for themselves. With the question so stated it was said that any other decision than that of the Courts below would involve a dog-in-the-manger policy. What the Respondents did, it was said, caused no damage to the Appellant, and involved no neglect of the Appellant's interests or similar breach of duty. But I think the answer to this reasoning is that both in law and equity it has been held that if a person in a fiduciary relationship makes a secret profit cut of the relationship, the Court will not enquire whether the other person is damnified or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship. Nor can the Court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person who is being charged. They are matters of surmise; they are hypothetical because the enquiry is as to what would have been the position if that party had not acted as he did, or what he might have done if there had not been the temptation to seek his own advantage, if in short interest had not conflicted with duty. Thus in *Keech* v. *Sandford,* Cases Ch., Temp. King, a case in which the fiduciary relationship was that of trustee and *cestui que trust,* the trustee was held liable to convey a lease to the infant *cestui que trust,* though the lessor had refused to renew to the infant. Lord Chancellor King said, " This may seem hard that the trustee is the " only person of all mankind who might not have the lease." It did

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not matter that the infant could not himself have got it and that he was not damaged by the trustee taking it for himself. One reason why the rule is strictly pursued is given by Lord Eldon in *ex p. James,* 8 Ves. Jun. 337, " no Court is equal to the examination " and ascertainment of the truth in much the greater number of " cases." In *Parker* v. *McKenna,* L.R. 10 Ch. 96, a most instructive case, the rule is so admirably stated by James L.J. that I cannot resist repealing his language, though my noble and learned friend Lord Russell of Killowen in his speech just delivered, which I have had the opportunity of reading in print and with which I agree completely, has already quoted it to your Lordships. The words of the Lord Justice which I emphasise are " that that rule is an in- " flexible rule, and must be applied inexorably by this Court, which " is not entitled to receive evidence or suggestion or argument as " to whether the principal did or did not suffer an injury in fact " by reason of the dealing of the agent, *for the safety of mankind* " *requires that no agent shall be able to put his principal to the* " *danger of such an enquiry as that."* The italics are mine. I need not multiply citations to the same effect, or illustrations of the different circumstances in which the rule has been applied.

In the present case the four Respondents were acting in the matter as agents for the Appellant Company in their capacity of directors, that is " as commercial men managing a trading concern " for the benefit of themselves and all other shareholders in it" if I may borrow that part of the description applied to directors by Sir George Jessel M.R., in *Forest of Dean Coal Mining Co.,* 10 Ch. D. 450 at p. 452. In the numerous actions, or most of them, which have been brought against directors of companies for profits secretly (that is without the assent of the shareholders) secured in the course of their dealing as directors, the claims have been against them in their capacity as agents. Thus, to take a familiar instance, in *Boston Deep Sea Fishing and Ice Company* v. *Ansell,* 39 Ch. D. 339, the Defendant was held liable to account to the Plaintiff Company of which he was director for secret bribes or bonuses which he had received from persons making contracts with the Company. The Defendant's liability flowed from the fiduciary relationship in which he stood to the Company as its agent. Bowen L.J. said at p. 367, " The ' law implies a use, that is, there is an implied contract, if you put ' it as a legal proposition—there is an equitable right, if you treat it ' as a matter of equity—as between the principal and agent that ' the agent should pay it over, which renders the agent liable to ' be sued for money had and received, and there is an equitable ' right in the master to receive it and to take it out of the hands of ' the agent, which gives the principal a right to relief in equity." But as it was held in *Lister v. Stubbs,* 45 Ch. D. 1, the relationship in such a case is that of debtor and creditor, not trustee and *cestui que trust.* Many instances can be quoted from the books of the stringency with which the Courts have enforced the rule that a director must account to his Company for any benefit which he obtains in the course of and owing to his directorship, even though

the benefit comes from a third person and involves no loss to the Company. I cite as one example *Archer's* case, 1892 1 Ch. D. 322, where a director was held liable to account to the Company for the sum paid to him by the promoter of the Company by way of indemnity against the money which the director had to pay for his qualification shares.

The analysis of the facts in the present case which has been made by Lord Russell of Killowen shows clearly enough that the opportunity and the knowledge which enabled the four Respondents to purchase the shares came to them simply in their position as directors of the Appellant Company. Wrottesley J. clearly so held. He said at the outset

of his judgment, "There is no doubt they (the Respondents) ' did take up in their own names shares which only after ' a few days and certainly only after a week or two they were ' able to sell at a very large profit indeed. There is no doubt that it ' was only because they were directors and solicitor respectively of ' the Plaintiff Company that this stroke of fortune came in their ' way." But he decided against the Appellant Company because he fixed his attention on his view that the Appellant suffered no loss by the Respondents' conduct, instead of fixing attention on the crucial fact that the Respondents made a secret profit out of their agency. I do not think that any different view was taken on this aspect of the case by the Court of Appeal, or that it was questioned by that Court that the opportunity of making the profits came to the four Respondents by reason of their fiduciary position as directors. But the Court of Appeal held that in the absence of any dishonest intention or negligence or breach of a specific duty to acquire the shares for the Appellant Company, the Respondents as directors were entitled to buy the shares themselves. Once, it was said, they came to a *bona fide* decision that the Appellant Company could not provide the money to take up the shares, their obligation to refrain from acquiring those shares for themselves came to an end. But with the greatest respect, I feel bound to regard such a conclusion as dead in the teeth of the wise and salutary rule so stringently enforced in the authorities. It is suggested that it would have been mere quixotic folly for the four Respondents to let such an occasion pass when the Appellant Company could not avail itself of it. But Lord Chancellor King faced that very position when he accepted that the person in the fiduciary position might be the only person in the world who could not avail himself of the opportunity. It is, however, not true that such a person is absolutely barred, because he could by obtaining the assent of the shareholders have secured his freedom to make the profit for himself. Failing that the only course open is to let the opportunity pass. To admit of any other alternative would be to expose the principal to the dangers against which James L.J. in the passage I have quoted, uttered his solemn warning. The rule is stringent and absolute because " the safety of mankind " requires it to be absolutely observed in the fiduciary relationship.

In my opinion the Appeal should be allowed in the case of the four Respondents.

In the case of the other two Respondents, I agree with Lord Russell of Killowen that the appeal should be dismissed for the several reasons which he has given in regard to each of them. These appeals turn on issues of evidence and fact, and I do not desire to add to what has fallen from my noble and learned friend.

Viscount Sankey
Lord

Russell of Killowen
Lord Macmillan
Lord Wright
Lord Porter

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REGAL (HASTINGS), LIMITED,

v.

GULLIVER AND OTHERS.

Lord Porter

MY LORDS,

I have had an opportunity of reading the speech which has been delivered by my noble and learned friend, Lord Russell of Killowen and had we not been differing from the view of the Court of Appeal I should not desire to add to what he has said. But as we are reversing the judgment of both the Court of first instance and the Court of Appeal I desire, out of respect for the opinions expressed in them, to state in the briefest possible compass the grounds for the view which I hold.

My Lords, I am conscious of certain possibilities which are involved in the conclusion which all your Lordships have reached. The action is brought by the Regal Company. Technically, of course, the fact that an unlooked-for advantage may be gained by the shareholders of that Company is immaterial to the question at issue: the company and its shareholders are separate entities. But one cannot help remembering that in fact the shares have been purchased by a financial group who were willing to acquire those of the Regal and the Amalgamated at a certain price. As a result of your Lordships' decision that group will, I think, receive in one hand part of the sum which has been paid by the other. For the shares in Amalgamated they paid £3 16s. 1d. per share, yet part of that sum may be returned to the group, though not necessarily to the individual shareholders, by reason of the enhancement in value of the shares in Regal:—an enhancement brought about as a result of the receipt by the Company of the

profit made by some of its former directors on the sale of Amalgamated shares. This, it seems, may be an unexpected windfall, but whether it be so or not, the principle that a person occupying a fiduciary relationship shall not make a profit by reason thereof is of such vital importance that the possible consequence in the present case is in fact, as it is in law, an immaterial consideration.

The Plaintiff, the Regal Company, by its pleadings claimed (1) damages for negligence, (2) alternatively the profit obtained on the sale of the shares in Amalgamated as money had and received by the Defendants to the Plaintiffs' use, and (3) in the further alternative damages for misfeasance. No claim for fraud was suggested, and the learned judge at the trial expressly exonerated the Defendants from any liability for negligence or misfeasance. Before your Lordships' House the claim for money had and received was alone persisted in.

The alternative claim for misfeasance, however, seems also to have been presented to the Court of Appeal, but to have been rejected by them, and in common with the rest of your Lordships I unreservedly accept the findings of both Courts.

It remains, therefore, to consider the claim that (in the words of the Master of the Rolls) " in. the circumstances of the case the " directors must be taken to have been acting in the matter of their " office when they took those shares and that, accordingly, they are " accountable for the profits which they have made ". That the shares were obtained by the Defendants by reason of their position as directors of Regal is, I think, plain. The original proposition, when the formation of the subsidiary company was suggested, was that the whole of the shares should be issued to the Regal Company partly for cash and partly for services rendered, and this

proposition was discussed and accepted at board meetings of that company. It was only afterwards when the necessity for finding £5,000 cash arose that the issue to any one other than the company was considered, and then the directors turned to themselves, " There is no doubt it was only because they were directors and " solicitor respectively of the Plaintiff company that this stroke of " fortune came their way," says the learned judge, and I agree with his observation.

In these circumstances it is to my mind immaterial that the directors saw no way of raising the money save from amongst themselves and from the solicitor to the company, or indeed that the money could in fact have been raised in no other way. The legal proposition may, I think, be broadly stated by saying that one occupying a position of trust must not make a profit which he can acquire only by use of his fiduciary position, or if he does he must account for the profit so made. For this proposition the cases *of Keech v. Sandford* (1726), Sel. Cas. Temp. King. 61, and *exparte James* (1803) 8 Ves. jun. 337 are sufficient authority.

The learned Judge and the members of the Court of Appeal appear to have adopted a narrower outlook with which, with all respect, I find myself unable to agree. " In order to succeed the " Plaintiff company must show that the Defendants both ought to " have caused and could have caused the Plaintiff company to sub- " scribe for these shares and that the neglect to do so caused a loss " to the Plaintiff company " are the words used by the learned Judge.

" It must be shown," says the Master of the Rolls, " that in the " circumstances of the case it was the duty of the directors to obtain " these shares for their company ".

And, again, " The position of the Regal Company would have ' been very much strengthened by having all these shares in the ' two companies in the same hands with the possibility of one ' control. That being so, the only way in which these directors ' could secure that benefit for their company was by putting up the ' money themselves. Once that decision is held to be a *bona fide* ' one, and fraud drops out of the case, it seems to me there is only ' one conclusion, namely, that the Appeal must be dismissed with ' costs."

To treat the problem in this way is, in my view, to look at it as involving a claim for negligence or misfeasance and to neglect the wider aspect. Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form. Their liability in this respect does not depend upon breach of duty but upon the proposition that a director must not make a profit out of property acquired by reason of his relationship to the company of which he is director. It matters not that he could not have acquired the property for the company itself—the profit which he makes is the company's, even though the property by means of which he made it was not and could not have, been acquired on its behalf. Adopting the words of Lord Eldon in

ex parte James (supra), " the general interests of justice require it, " as no Court is equal to the examination and ascertainment of the " truth in much the greater number of cases."

My Lords, these observations apply generally to the action, but the cases of Gulliver and Garton stand on a somewhat different footing. As to them, there are additional and special considerations to be kept in mind. I need not set them out or refer to them further than by saying that I find myself in agreement with the reasoning and conclusion of my noble and learned friend, Lord Russell of Killowen, and would submit with him that the Appeal should be allowed so far as concerns the Defendants Bobby, Griffiths, Bassert and Bentley and should be dismissed in the case of Gulliver and Garton. I also concur in the order as to costs which he suggests.

(18679r) Wt. — 16 4/42 D.L. G. 338

TAB 5

1 of 1 DOCUMENT

Indexed as:

MacMillan Bloedel Ltd. v. Binstead

Between
MacMillan Bloedel Limited and MacMillan Bloedel Industries Limited, plaintiff, and
Dennis Binstead, Andersen-MacKinnon Log Sales Ltd., Andersen-MacKinnon Log Brokerage Co. Ltd., Amco Forest Industries Ltd., Delta Cedar Products Ltd. Delta Chip Ltd., Canadian Pulp Chip Ltd., North View Enterprises Ltd., Evan D. MacKinnon, Charles T. Andersen, John Francis Morgan and Leslie Scoffham, defendants

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22 B.L.R. 255

14 E.T.R. 269

20 A.C.W.S. (2d) 87

Vancouver Registry Nos. C776766 and C781404

British Columbia Supreme Court
Vancouver, British Columbia

Dohm J.

Heard: January 12, 13, 17-21, 24-28; January 31 - February 3; February 7-11, 14-18, 21, 25; March 4, 7-11, 14-18, 21-25, 28-30, 1983.
Judgment: filed May 2, 1983.

(95 pp.)

Fiduciaries -- Senior employee in fiduciary relationship -- Accountable to employer for secret profits -- Immaterial whether employer suffered damage.

This was an action by a corporation for recovery of secret profits allegedly made by a senior employee, and for an accounting. The plaintiff company which was in the business of dealing in forest products used to sell surplus logs through its marketing department. The defendant B was the head of the marketing department. B held a one-third interest in A Ltd. the main purchaser of the plaintiff company's surplus logs. The plaintiff was not informed of B's interest in A Ltd.

HELD: The action was allowed. The shareholders of A Ltd. including B were constructive trustees for

the plaintiff and therefore accountable to the plaintiff. B was a fiduciary of the plaintiff by virtue of his position and was accountable to his employer for the secret profits he made. The fact that the plaintiff did not suffer any damage was immaterial. There was a fundamental breach of the fiduciary relationship.

Counsel:

Douglas G.S. Rae and Marion J. Allan, for the plaintiff.
E.D. Crossin and M. Skwarok, for Dennis Binstead.
W.H.K. Edmonds, for the defendants, Delta Cedar Products Ltd., and Delta Chip Ltd.
David B. Smith and J.M. MacEwing, for the defendant, John Francis Morgan.
B.J. McConnell, for the defendant, Leslie Samuel Scoffham.
J.D. McAlpine, Q.C., and Carol J. Ross, for all remaining defendants.

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1 **DOHM J.**:-- Over 100 years ago, Lord Selbourne, the Lord Chancellor, spoke in these terms:

> "Those who create a trust clothe the trustee with a legal power and control over the trust property, using 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 these agents receive and became 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."

(Barnes v. Addy (1874), 9 Chan. App. 244 (C.A.))

These remarks are as applicable today as they were when they were spoken. Time has only served to enhance their importance. Nowhere is this more evident than in today's commercial world. The present case is an excellent illustration of the point.

2 This action to recover profits is framed in three ways: (1) for money had and received (the bribery kind of action), (2) for damages by reason of the tortious conduct of the Defendants either in conspiracy, in fraud or in inducing a breach of contract and (3) for a declaration that certain of the Defendants are fiduciaries and constructive trustees and for an accounting and delivery of the profits realized by these fiduciaries and trustees.

3 In a nutshell, the circumstances giving rise to this claim are as follows. The Plaintiff MacMillan Bloedel Limited (MB), Canada's largest forest products company, had, from time to time, logs which were either surplus to its own requirements or could not be used in its manufacturing or converting plants. These logs were either sold or traded through its log marketing section. The Defendant Dennis Binstead (Binstead) was manager of log trading and it was his function to dispose of these logs, either by selling them outright or trading them for other logs which could be used by MB in its converting mills. While in this position, Binstead held a secret one-third interest in the Defendant Andersen-MacKinnon Log Sales Ltd. (Log Sales). The shareholders of record in that company were the Defendants Even D. MacKinnon (MacKinnon) and Charles T. Andersen (Andersen). Andersen and MacKinnon were the sole shareholders in the Defendant Andersen-MacKinnon Log Brokerage Co. Ltd.,

(Log Brokerage) and both of these companies, Log Brokerage and Log Sales, traded very extensively with the Plaintiff in logs by outright sales and purchases or through trades. Generally speaking, Log Sales' acquisitions from the Plaintiff were as principal and Log Brokerage's acquisitions were as agent for third party purchases from MB. In the period 1969-1977, most of MB's excess logs found their way into the market place through Log Sales and throughout this time Binstead's interest in that company, as well as in certain of the other Defendant comPanies, remained undisclosed to his employer.

4 Handsome profits were realized by Log Sales during the eight-year period and it is those profits or other benefits or the product thereof which the Plaintiff seeks in this action.

5 Regrettably, it will be necessary to review the evidence in some detail. The trial lasted some nine weeks with most of that time being devoted in hearing witnesses. My review, at the outset, will be on an annual basis commencing in 1969.

6 To understand the years 1969-1977, it is necessary to know a little of the backgrounds of Binstead, Andersen and MacKinnon. Each has been involved in some aspect of log trading since the early 1950's. Binstead was employed with MB from 1952 and for a time, Mackinnon was also employed in the log marketing section of MB. In fact, out of this association, Binstead and MacKinnon became very good friends. Andersen and MacKinnon became acquaintances in 1955 and in the latter part of the 1950's, after working for the same employer, acquired the business. By this time, presumably for business reasons, Andersen became acquainted with Binstead. In 1963, the Defendant Log Brokerage was incorporated and on the basis of the expertise which each had gained up to this time, the labour was divided, with Andersen being in charge of domestic transactions and MacKinnon being in charge of the export side of the business. The company's business was solely on an agency basis, a brokerage fee being charged to the third party purchasers. Needless to say, these transactions brought Binstead, Andersen and MacKinnon into frequent contact. The seeds for a close liaison between MB and Andersen and MacKinnon were sown in these early years. There is nothing sinister in this comment for it is well known in the industry for each forest products company to have its "favourite broker" and up until 1977, Andersen and MacKinnon, either through Log Brokerage or through Log Sales, enjoyed that relationship with MB. Such a relationship carries benefits for both parties and could not be established without mutual trust and respect.

7 In the mid 1960's, during business trips to the United States Pacific Northwest, MacKinnon noticed the increased presence of Japanese buyers. He recognized the influence those buyers were having on the United States market and that potentially, rather than there being only a domestic and United States market for British Columbia logs, there was a third offshore market in Japan. Quite correctly, I think MacKinnon concluded that there were large profits available in this new market but that in order to realize them, the marketing would have to occur with his company acting as principal rather than as agent.

8 Having decided by mid 1969 to take steps to expand into this new market, Andersen and MacKinnon spoke with Binstead. They claim an agreement was reached whereby Binstead would come to work for a new company (Log Sales) in which he would have a one-third interest. This interest was to remain secret until he left his employer. Binstead was also to have the option of being a partner in any new ventures. As part of the arrangement, 25% of Log Sales' gross profits was to be paid to Log Brokerage for management services. Log Sales was incorporated in November 1969.

9 On March 17, 1970 Andersen and MacKinnon met with their accountant, the Defendant John Francis Morgan. The Defendants say the purpose of the meeting was to familiarize Morgan with the circumstances of Binstead joining the new company As a result of this meeting and a telephone conversation with MacKinnon on April 22, Morgan's knowledge of the event, including his instructions was as follows:

1. Log Sales had been incorporated in November 1969.
2. The Defendant Binstead was a one-third shareholder.
3. Binstead's interest was effective from the date of incorporation and he was to share in the profits from that date.
4. Binstead had not joined Log Sales as yet but was to do so at some time in the future.
5. Binstead was an employee of MB.
6. Binstead was to receive the shares when he joined the company.
7. The company solicitor, William T. Esselmont, was not to be advised of Binstead's interest in Log Sales. He was only to be told that three shares were to be issued - "one to Charlie - two to Doug - period".

Morgan's advice to his clients on the basis of this information was to issue the shares and to hold Binstead's in trust until he joined the company. In this way, if the company made any profits from the date of incorporation to the date when Binstead joined the company, the documentation of Binstead's interest required by the taxing authorities would be available. Having received this advice, MacKinnon instructed Morgan to prepare a trust declaration, it having been decided to issue three shares each to Andersen and MacKinnon, with each of them holding one share in trust for Binstead.

10 The trust declarations were produced at the trial by a solicitor who held them in safe keeping for Binstead. Binstead, in his evidence during the Plaintiff's case as a witness adverse in interest, said he had no knowledge as to the whereabouts of the declarations. While Morgan admits to drawing the trust declarations for MacKinnon, he says that Exhibits 126 and 127 are not those declarations. Exhibit 126 reads:

DECLARATION OF TRUST

I HEREBY DECLARE that the one (1) share in the capital stock of ANDERSEN-MacKINNON LOG SALES LTD registered in my name is held by me as nominee of Dennis R. Binstead and not as beneficial owner and I HEREBY CONSENT to transfer the said share at any time upon the direction of the said Dennis R. Binstead to Dennis R. Binstead.

I HEREBY also authorize and direct ANDERSON-MacKINNON LOG SALES LTD. to pay to or to the order of the said Dennis R. Binstead any dividends including stock dividends or other distribution whether capital or income which may from time to time be payable on the said share.

WITNESS my hand and seal this SIXTH day of JULY, 1970.

SIGNED, SEALED and DELIVERED)
BY E. Douglas MacKinnon in the)
presence of)
)
) E. Douglas MacKinnon

An identical declaration was signed by Andersen. When these declarations "appeared" at the trial, two single share certificates in Log Sales were also produced. Each is appropriately endorsed by the shareholder (Andersen and MacKinnon), passing ownership to Binstead. That particular transaction is undated. Accordingly, as of July 1970, the agreement was fulfilled, save for Binstead joining the

company. His concern for secrecy had been accommodated and he had tangible evidence in the form of the shares showing his interest in Log Sales. This is somewhat surprising since transfer of the shares, according to Morgan, was not to take place until Binstead joined the company as a working partner. In 1970 Morgan received instructions from MacKinnon to list Binstead as a one-third shareholder in the company tax return filed at the year end (October 31, 1970). Binstead's interest was to appear with Andersen and MacKinnon holding one share each in trust for Binstead. One might wonder, with the package tied up as well as it was, if Binstead ever intended to join Log Sales. It would appear that he had the best of both worlds, holding a significant position with MB and at the same time building an equity for the future.

11 By 1971 Binstead had still not joined Log Sales. There were discussions with MacKinnon on the subject but nothing came of them. In one of the exchanges Binstead told MacKinnon that he thought he could do more good for him (MacKinnon) if he stayed with MB. Both MacKinnon and Andersen said they became desperate and did not know how to resolve the matter. The following Discovery of MacKinnon and adopted by him at the trial is a fair example of his frame of mind at the time.

"Q And you were concerned because Mr. Binstead again held a one-third interest in your company while he was employed at MacMillan Bloedel?

A Yes, that is correct.

Q And your company, Log Sales, was doing a great deal of business with MacMillan Bloedel in 1971, wasn't it?

A It was doing a big volume of business with MacMillan Bloedel but so was Log Brokerage Company. We were also doing a big volume of business there.

Q And you were doing a big volume of business particularly with Mr. Binstead, weren't you?

A Mr. Binstead and the other members of the log supply staff.

Q But you were doing more business with Mr. Binstead than with anybody else, weren't you?

A Yes, I was.

Q Particularly in the cypress, yellow cedar and high grade spruce log market, weren't you?

A Yes. Yes.

Q Is it fair to say that as far as the yellow cedar and high grade spruce market as far as your dealings with MacMillan Bloedel was concerned, you were dealing almost exclusively with Binstead, weren't you?

A No I was not.

Q Who else were you dealing with in 1971?

A Mr. Heatherington.

Q Who else?

A Possibly the odd transaction would be with Mr. Boyd.

Q But the majority of the transactions were with Mr. Binstead, weren't they?

A Yes, they were, yes. He was the producer over there and he was the one you went to if you wanted to get wood."

The year ended with the Binstead problem left unresolved. The reason was purely economic; neither Andersen nor MacKinnon were prepared to lose that for which they had worked so diligently to achieve. They were concerned their log supply would be cut off -- that their company would be damaged "through diverting wood and the business we'd created, the good business we d created with MacMillan Bloedel over the years, that we would lose that position that we had with them". (MacKinnon Discovery Q 331). "Mr. Binstead was a very powerful log trader with MacMillan Bloedel". (MacKinnon Discovery Q 339.) It would seem that Andersen and MacKinnon were prepared to gamble.

12 After 1971, nothing much was done to resolve the Binstead problem. In fact, the steps taken to give him an interest in Log Sales were repeated in August 1972 when the Defendant AMCO Forest Industries Ltd. (AMCO) was incorporated. The main purpose of incorporating AMCO was to provide Log Sales with a sawmilling service that it could offer to its customers who wanted their logs custom cut into lumber. Binstead was to be a one-third shareholder in this new venture in keeping with the 1969 agreement. The funds used by AMCO to acquire a 50% interest in the Defendant Delta Cedar Products Ltd. and a 23% interest in the Defendant Delta Chip Ltd. (The Delta companies) came from Log Sales which took advantage of a special provision in the Income Tax Act allowing for surplus to be paid attracting only a 15% tax. In 1972, Log Sales declared a surplus of $250,000 and after the tax of $37,500 was paid, a balance of $212,500 remained. Of this amount $210,000 was paid to the registered shareholders of Log Sales (Andersen and MacKinnon) and they in turn loaned it to AMCO. Binstead's share of the loan was of course $70,000. His interest in AMCO was attended to in the same manner as that in Log Sales with the issuance of six shares, three registered to Andersen and three registered to MacKinnon with each of them holding one share in trust for Binstead as set out in the following

agreement drawn by Morgan. Morgan's involvement in this transaction was purely mechanical. However the concern for confidentiality was expressed and again the company solicitor, Mr. Esselmont, was not to be advised. It would appear that Andersen and MacKinnon were becoming more and more concerned about any leak and the effect it would have on the supply of wood to their companies from MB.

December 20, 1972

> This letter is to confirm that Amco Forest Industries Ltd. is held as to registered shareholders by E.D. MacKinnon and C.P. Andersen equally, but it is acknowledged and agreed that one third of the beneficial interest in the company both shareholdings and shareholders' advances are held for Dennis A. Binstead and that the shares and shareholders advances belong one third to each of E.D. MacKinnon, C.P. Andersen and Dennis A. Binstead.
>
> This agreement can be drafted in are precise legal form at a later date.

13 In 1973, Log Sales enjoyed a big year so far as sales were concerned. It was the year that the Japanese market 'went wild' - in particular the price of yellow cedar and high grade spruce. The prime source of supply of this wood for Log Sales was MB. In this period the sellers and buyers of logs were enjoying prosperity that they had not seen before. Seemingly, the only concern was how long the market was going to remain as buoyant. Certainly, for Andersen and MacKinnon there was no time to be concerned about the dilemma they found themselves in with Binstead.

14 With 1974 came another banner year for Log Sales. The 'off-shore' and domestic markets remained strong resulting in continuing high profits for the company. Distribution of those profits attracted the attention of the registered shareholders for the first time in 1974. (Binstead was content to leave the money in the company - just in case there were any large losses.) Andersen and MacKinnon were not as easily pleased and to resolve the difficulty and to seek some guidance in estate planning, they, together with Binstead, his accountant Leslie Samuel Scoffham and the Defendant Morgan, met in a room at the Hyatt Hotel in September. (The plaintiff's action against Scoffham was dismissed on consent at the opening of the trial).

15 As one might expect, there is no consensus as to what occurred at this meeting. One thing is clear and that is Scoffham's concern about Binstead holding an interest in Log Sales and AMCO at the same time that he was employed by MB. He was assured that there was no difficulty and that everything was "on the up and up". With this assurance, the meeting then discussed how to get the undistributed income and the repayment of shareholder's loans in these companies into the hands of the shareholders with the minimum impact of tax. Related to this inquiry was the one concerning the death of one of the shareholders. The accountants had no instant answer. The undisclosed interest of Binstead - the need for the continued secrecy of that interest and the taxation ramifications all required further research. The result was that each accountant received instructions to find a solution. To that end, steps were taken - Morgan contacted a solicitor to draw an appropriate buy-sell agreement (not the company solicitor although he had drawn one earlier for another situation involving Log Brokerage). Scoffham contacted a solicitor to determine if a blind trust arrangement could be used to provide for Binstead. However, it seems the accountant's energies were wasted as nothing ever was done by their clients to solve their problems.

16 The problem of getting some of the fruits of their labour was solved to an extent in 1975. AMCO repaid the shareholders' loan of $210,000 used to acquire the interests in the Delta companies in 1972. At the same time (April 1975) a reallocation of the management fee paid by Log Sales to Log Brokerage in the previous year occurred. This was necessary when the logging tax authorities questioned the size of

the management fee. Binstead's share of the $210,000 was $70,000, and since there was no personal income tax payable by him on this amount it was quite a simple exercise for Andersen and MacKinnon to each pay Binstead $35,000. The management fee recalculation and the payment of it ($31,342) was not quite as simple. The funds were payable by Log Sales and personal income taxes were therefore payable by the recipients. Morgan's calculation is as follows:

ANDERSON-MacKINNON

	Brokerage	Sales	Total
Commissions	$ 984,982.69		
Less administrative charge	485,951.79		
	$ 409,030.90		
Gross Profit Trading	$1,530,074.60		
Add: commissions	317,889.06		
	$1,847,963.66		
	$2,256,994.56		
Ratio	18%	82%	
Overhead			
Auto			12,225.24
Audit and legal			12,266.91
Light and rent			19,170.78
Miscellaneous expense			5,125.32
Office			4,523.48
Postage			1,168.50
Salaries			123,352.47
Stationary			3,922.85
Telephone			10,366.70
Travel and client promotion			55,240.03
Depreciation			8,328.33
	46,024.49	209,667.12	255,691.61

Actual administrative charge	485,951.79	
Overcharge	276,284.67	
1/3 share	92,094.89	
Less tax at 61% personal rates	56,177.88	
	35,917.01	
Deduct tax on Amco interest of 1/3 X $22,500.00		
Tax thereon at 61%	4,575.00	
		31,342.01
1/2 E.D.M.		15,671.00
1/2 C.P.A.		15,671.00
		31,342.01

Binstead was owed the total sum of $101,342 by Andersen and MacKinnon. The latter paid Binstead in cash ($50,671) and received a receipt while Andersen wrote a cheque on his personal account and made it payable to Scoffham, at Binstead's request. Scoffham, in turn, gave Binstead a cheque drawn on his personal account.

17 The next two years, 1976 to October 1977, were eventful times for Andersen, MacKinnon and Binstead. The markets were not quite as strong as in previous years. Andersen and MacKinnon had some time for reflection. Their mood toward Binstead seemed to change. In the latter part of 1976 they took steps to cancel Binstead's interest in their companies. Ostensibly the steps were taken because Binstead had not fulfilled his part of the deal. Whether that is the real reason or not, a meeting at the Hotel Vancouver took place with Binstead and MacKinnon. MacKinnon requested the return of the Log Sales' share certificates. Binstead agreed to give up his interests -- but for a price -- one-third of the break-up value of Log Sales and one-third of the profits of the other Andersen and MacKinnon companies for a period of five years. To add insult to injury, Binstead wanted interest on the unpaid balance. A heated debate followed, resulting in MacKinnon walking out of the meeting. Whether an agreement was reached before he did so, or at some subsequent meeting, is not clear but, eventually, Binstead agreed to return the share certificates and the other documentation for a net figure of $406,000. This amount was determined by Mackinnon as representing a third interest in Log Sales after the payment of income taxes. The evidence pertaining to this event is most uncertain. However, beginning in mid-1977, in order to retire the $406,000, payments were made to Binstead by Andersen of approximately $30,000 in cash and by MacKinnon of approximately $48,000 in cash, and he received two gold bars, valued at $12,834 (when purchased), and some Doman Industries shares valued at $10,000. On the basis of this agreement MacKinnon advised Morgan, before the end of 1976, that Binstead no longer had any interest in the companies. The "shares for money" to Binstead meant "shares for money when paid in full".

18 Sometime in October 1977 the R.C.M.P. took possession of certain documents located at Binstead's office and home. As a consequence, he and MacKinnon met and, among other things,

exchanged the following correspondence:

"E.D. MacKinnon
508 Vienna Cres.
North Vancouver, B.C.

and

C.P. Andersen
941 Beaconfield Road
North Vancouver, B.C.

Dear Sirs:

Please allow me, , to clarify for you ny understanding of our past discussions relative to your offer to hold in trust for me 1/3 of the shares of Andersen-MacKinnon Log Sales Ltd.

As I recall, these shares were offered when Andersen-MacKinnon Log Sales Ltd. was formed as an enticement for me to join your Company as an active working partner and shareholder. Serious consideration was given by me to this offer and after several meetings over an extended period of time whereby you fully disclosed the financial position of your Companies, I reluctantly decided not to accept your share offer. I therefore wish to make clear for your records that I renounce all interest whatsoever in any shares of Andersen-MacKinnon Log Sales Ltd. Thank you for the share offer which I shall return.

I wish to express ny appreciation for your generous offer and trust that you may someday consider me for the opportunity of becoming a partner in your Company.

Also, I note you are holding for me in trust 1/3 of the shares of Amco Forest Industries, for which if I join your Company you will sell to me for $30,000.00. I do not recind (sic) this offer but will consider this option at a latter (sic) date.

Yours truly, (signed) Dennis R. Binstead"

"

January 13/76.

E.D. MacKinnon
508 Vienna Cres.
North Vancouver

and

C.P. Andersen
941 Beaconfield Road
North Vancouver, B.C.

Dear Sirs:

I wish to thank you and clarify my position regarding past discussions, relative

to your offer to me to join your company as a working partner.

You have set aside and are holding for me 1/3 of the shares of Andersen-MacKinnon Log Sales Ltd. in anticipation of me coming to work with you.

I wish to advise that I, after considerable consideration feel I must decline your very generous proposal and will return your certificates.

Yours truly (signed) Dennis R. Binstead

In as much as you also hold 1/3 of Amco 2 Forest Ind. Ltd. for me I hereby agree to sell or recind (sic) my shares to you for 1/3 the break up value of the Co.

(signed) Dennis R. Binstead"

The first letter was written by MacKinnon prior to the Hotel Vancouver meeting, the intention being to have Binstead sign it if an agreement was reached. When that did not occur Mackinnon carried the letter in his wallet to await a more opportune moment. That moment came immediately following the police involvement. On the same occasion, aboard MacKinnon's boat, Binstead wrote and signed the second letter the date of which was suggested by MacKinnon. In his mind the date, January 13, 1976, properly reflected the time when he had consummated the deal with Binstead, cancelling his interest. If that were the reason for pre-dating the letter I think that January 13, 1977 would be more accurate. Whatever the date and whatever the reason, the letter really did not reflect the agreement, nor did it provide the desired cover-up. Binstead was shortly thereafter charged (and eventually convicted and sentenced) on six counts under Section 383 of the Criminal Code "of being an agent and accepting or demanding rewards or benefits as consideration for doing or not doing something with relation to the affairs of his principal". At the trial(s) Andersen and MacKinnon gave evidence on behalf of the Crown. They were not charged.

19 To appreciate the relationship in the eight-year period (1969-1977) of MB and Log Sales, it is essential to know a little of the day-to-day operations of those companies. The Raw Material Planning and Allocation department is the lifeline for MB's operations. During the period in question, it was headed by H.R. Chisholm, who also was on the Plaintiff's Executive Committee. Next to him was K.G. Boyd as Vice-President of Wood Supply. Boyd oversaw the working of five separate departments, all dealing with the handling of the Plaintiff's wood: Planning, Marketing, Transportation, Allocation and Accounting. The Marketing department was managed by J.N. Hetherington. Binstead, as manager of log trading, was directly responsible to Hetherington. These individuals, including Mr. Chisholm, had the prime responsibility of keeping the Plaintiff's converting or manufacturing mills supplied with the wood that those plants would use. It was one thing for MB to control massive tracts of timber but if that timber, once harvested, did not reach the right mill at the right time, in the right specie and in the right quantity, it was of little value to MB.

20 MB was required to go to the marketplace to provide for 15% of its annual log requirements. Certain of the 85% which it produced from its own reserves could not be used in its mills. These logs were sold or traded but they had to be replaced. It was these two areas of supply that concerned Hetherington. MB's policy was to keep this aspect of supply "small, lean and trim" with the result that Hetherington and Binstead became dependent upon one another in their work. Although Hetherington did some selling, essentially he was the administrator. He made things run. It was his duty to prepare the weekly, monthly and annual reports of the departments. To do so properly, it was necessary for him to know the market well including its trends and prices. He was Chisholm's and Boyd's eyes and ears. Binstead on the other hand was "tending the general store", buying, selling and trading in logs on a daily

basis. As such he became the person to contact at MB with regard to the sale or purchase of logs. Indeed, in the eyes of many, particularly brokers, he was MB! Binstead distinguished himself not only in the company but also in the industry as being a very aggressive log trader.

21 Hetherington prepared the following job description for Binstead's position:

"POSITION: Manager, Log Trading DATE: January 15, 19

REPORTS TO: Manager, Log Marketing Section DIVISION: Log Supply

I. JOB OBJECTIVE

To direct and supervise the purchase and sale of logs for the maximum benefit of the Company in British Columbia.

II. FUNCTIONS

1. To plan, direct, supervise and train the staff of Log Trader, Log Buyers and Inspector in carrying out their duties at the lowest cost.
2. To establish and maintain a close relationship with others in the industry to keep abreast of market trends and the plans of our competitors.
3. To keep well informed of plans and conditions in the Company's wood supply picture through regular contact with the Planning and Allocation sections.
4. To ensure that information on log transactions flows to the Accounting and Allocation sections for scaling, towing and credit control.
5. To ensure that advantageous log trade agreements are negotiated with other companies, and to maintain control.
6. To negotiate major and long term purchase/sales agreements and supervise the subsequent administration of these agreements by subordinates.
7. To plan strategies that will allow sales to be made at the highest possible prices and purchases at the best prices to the Company, bearing in mind overall log term results.
8. To maintain close contact with activities in the log export market and actively pursue opportunities for the company to acquire logs that may otherwise be exported and to sell logs for export when logs are available so that such sales will increase the company's profits.
9. To act as the representatives of MacMillan Jardine Ltd. on the sale of B.C. logs and maintain a close liaison with MacJard Office in Tokyo.
10. To maintain personal contact with U.S. Northwest forest products companies for opportunities to purchase and sell logs.

III. RELATIONSHIPS

The Manager, Log Trading, observes and maintains the following relationship:

1. Superiors

He is accountable to the Manager, Log Marketing Section for the fulfilment of his function, responsibility and authority, and relationships, and for their proper interpretation.

2. Subordinates

He is accountable for the activities of:

. Log Trader
. Log Buyer
. Log Inspector"

22 Hetherington's evidence is helpful in appreciating the practical application of this job description. Without question, Binstead fulfilled the duties described by Hetherington. The difficulty occurred when those duties conflicted with other interests of Binstead's. He negotiated short and long term contracts on behalf of MB to acquire and dispose of wood. In doing so, he used his knowledge and expertise in both the domestic and export markets, particularly when he was disposing of the high value woods of red shingle cedar in the domestic market and high grade spruce and yellow cedar (cypress) destined for the export market. Binstead kept himself well informed of the market conditions both locally and off-shore and he did this by maintaining his contacts and close relationships in the industry. (Indeed, Binstead's explanation for taking a one-third interest in Log Sales while employed at MB was that it would allow him to get close to Andersen and MacKinnon and "to get their confidence so that they would impart information to him.") Through these various contacts and by visiting Japan on company business, Binstead became an expert in dealing with the Japanese log buyers and understanding their somewhat different ways. As such then, he was in a position "to sell logs for export when logs were available so that such sales would increase the company's profits". And in all of this, Binstead was conscious of the prices and of his obligation to "get the highest possible prices on sales and purchases".

23 Brokers played a very significant role for Binstead in the discharge of his responsibilities. In fact, the broker was the central conduit through which Binstead acquired and disposed of wood for MB. Originally, the function of the broker was to dispose of the logs of the small independent logger in the marketplace. In that way, the logger was able to remain in the bush and continue his work. In the 1950's the brokers' function was expanded when they began to provide other services such as log storage, booming and sorting and financing. The broker in effect became a central clearing house for logs and, as a consequence, became an excellent source of information on prices and on the market. They possessed information and had connections which the large forest companies could not attain. It was also important to these large companies that they could look to the broker for payment for their logs. The broker became a sort of double relief valve by being able to supply wood which was in short supply and by being able to take large accumulated surpluses and dispose of them, both without upsetting the prices in the Vancouver log market. This was the market where the price of logs was established. All logs on the coast, both domestic and those destined for export, went through the Vancouver log market. The term: "Vancouver log market" was described by Hetherington (and concurred in by Dr. Patterson) as "a body of information". However one may refer to it, the part played by the broker in the market was of vital importance to MB for it was responsible for cutting about a third of the timber on the coast and it was also the largest buyer of logs in the industry. It was vital then for MB that the prices it paid for the wood which it acquired through the Vancouver log market were in keeping with the prices it would receive for its lumber. The slightest increase could have a domino effect not only in MB itself but also in the industry. It was important to keep the domestic market stable and the brokers had a large part in achieving that end. The broker in the end provided a necessary and significant service. They were a convenience that the industry encouraged and could not do without.

24 Different considerations were applicable in the marketing of logs by MB in the domestic and export markets. Common to both markets was the concern for price and the need for the involvement of the brokers. Up until 1970, MB's policy was not to export logs for it would be seen to be exporting jobs. Politically too, this was a dangerous practice as MB relied upon the Provincial Government for a large portion of its timber tenure. However what it did not do through the front door, MB did through the back door by using trading companies and particularly brokers. To export logs, the applicant had to obtain an export permit issued by the Federal Government and this government would only act upon an order-in-council of the Provincial Government. Such an order-in-council would be issued upon proof that there was no local demand for the logs. Proof of the lack of demand was originally shown by production of three letters of refusal supplied by local mills. This system was changed to require advertising of the logs for sale for a period of time. After 1970, MB's export policy changed and it began to export logs directly without involving brokers. MB nevertheless proceeded cautiously. These minimal efforts came to an abrupt end in 1972 for two reasons: (1) a new Provincial Government was elected that year. Included in its policy was a ban on the export of logs; (2) beginning in 1972, the local demand for logs was high. This local demand included the Japanese buyer whose interest was in cypress and high grade spruce. Actually, what happened was that the Japanese buyer, in order to get around the export ban on logs, bought the logs locally and had them cut into timbers which could be exported without a permit.

25 After 1968, yellow cedar became a surplus wood in MB's inventory. There was practically no local demand for it. In this same time period the Japanese recognized that their own wood was being depleted. They looked elsewhere for a substitute and, for a time, one was located in Oregon. When that source was in jeopardy, the Japanese log buyer came to British Columbia and became interested in not only the cypress but, also, in another "surplus" and minor specie of the Plaintiff; the high grade spruce. It was in this market that MacKinnon and Binstead were able to use and expand their expertise in dealing with the Japanese buyer. It was into this market that Log Sales was born. The demand was one factor. How it was met by MB, and the part played by Binstead, was quite another story. Without question, Binstead played a major role in the success of the log marketing section of MB. He also played a major role in Log Sales' success. But what must not be forgotten in all of this, is that his employer produced 40 MBF of the 90 MBF of cypress cut in the world each year. In a rising market, Binstead held the trump card by controlling almost half of the production.

26 When Binstead disposed of wood for MB he sold either through agents for third-party purchasers or he sold directly. His arrangements with Log Sales involved both methods but for the most part and, particularly, in the sale of cypress and high grade spruce, he sold to Log Sales as principal. Wood was also acquired and disposed of through trading one species for another upon certain conditions. The evidence regarding the transactions is sketchy as much of the relevant documentation is missing. From the material I tried to put a complete transaction together. I was not able to do so. My understanding as to what took place before the wood reached the ultimate purchaser is as follows:

(1) Mackinnon would communicate an offer to Binstead to purchase certain booms of logs for a certain price;
(2) Binstead would reply that the offer was accepted and they would then enter into a letter of agreement, setting out the terms and the prices to be paid;
(3) MacKinnon would then receive an invoice for the logs from the plaintiff and,
(4) using that invoice, Log Sales would prepare its own invoice directed to its customer. Actually, all that Log Sales did was to copy the MB invoice and substitute different prices. If there were other changes these would be shown. Examples are as follows:

[See paper copy -- pages 33 and 34]

These transactions typify the kind of sales which took place between Binstead, Log Sales and the ultimate purchaser.

27 Binstead understood and maintained company policy except where it conflicted with his interest in Log Sales. That policy can be briefly stated:

(1) the Log Marketing Division had the primary concern to keep the Plaintiff's mills supplied with wood;
(2) the use of brokers was to be encouraged to facilitate the movement of the very large volume of wood necessary to meet its commitments;
(3) the matter of prices was basic to everything that occurred in the Log Marketing Division. "We were judged on our profits and profits are determined by the prices paid for the logs. Log prices controlled everything"; (Chisholm)
(4) MB was not involved in "log futures". The volume of wood to be moved mitigated against any speculation. The company, too, was not prepared to take the risk inherent in speculation. Any speculation was to be left for others outside of the company;
(5) even when the prices escalated to unbelievable levels for cypress and high grade spruce, MB decided to maintain its policy, adopted after 1968, of not cutting the wood into timbers and shipping it to Japan in that form. However tempting the suggestion to enter the Japanese market, MB decided that it was more profitable for it to sell the wood as logs in Vancouver and "to take the fabulous profits and run". The predominant MB view was that the market of 1972-74 was not going to last, and that it would cost too much to convert a mill to accommodate the wood.

28 As indicated earlier, the relationship between Hetherington and Binstead was a close one. This factor, in my view, is the single most important reason for Log Sales being a success. Hetherington and Binstead worked as a team - a team built upon mutual respect and trust. Both men were highly qualified and experienced and understood the importance of dividing the labour. Binstead understood the log buyers and their market, and Hetherington understood reports and their importance in the company hierarchy. Hetherington had approval to sells directly to the Japanese log buyers, if their credit was established. Binstead advised Hetherington against selling directly. His reasoning was that the Japanese were too difficult to deal with - "they always wanted to cherry-pick the booms and to roll every log over". To use the broker would avoid this and would also mean an immediate payment for the logs. The other advice which Binstead gave Hetherington concerned the prices which were being received for the logs. As a general rule, Hetherington and Binstead did not discuss prices. The responsibility of entering into letters of agreement was delegated by Hetherington to Binstead in keeping with their "team" approach. Obviously, Hetherington recognized Binstead's expertise and his aggressive nature in getting the best price. Hetherington was satisfied that Binstead was getting those prices found in the Vancouver log market. Hetherington's independent studies, and information through the Council of Forest Industries and elsewhere, confirmed what Binstead was telling him. "I accepted his advice that he was getting the best price possible. I accepted that as he was a dedicated company employee". (Hetherington). I think the advice which Binstead gave was well founded. After all, not only was Hetherington looking over Binstead's shoulder, but Boyd and Chisholm had their independent sources as well (including the Terminal City Club and the lumberman' s table "where there was little else (other than prices) discussed - a little football perhaps but never women"). Their own information confirmed what they were reading in the Hetherington reports. There were happy with the results as the company was receiving "fabulous prices".

29 It is obvious that Binstead could not have accomplished what he did for Log Sales without taking advantage of his relationship with Hetherington. The results of Binstead's work - the high prices he was receiving for MB's logs created an aura of confidence and Binstead showed no reluctance in trading on it in his day to day relationship with Hetherington. The invoices which Binstead was sending to Log Sales showing that the wood was "for the accounts of" a named purchaser were clearly intended to create the impression in Hetherington's mind that the wood was being sold on an agency basis. The thing was a fiction. In many instances the wood went to a company other than the one named. But the fiction had the desired effect as Hetherington did believe that when the invoice showed an ultimate purchaser, that the transaction was one of agency. I reject any suggestion that the inclusion of the ultimate purchaser's name in the MB invoice was to inform MB of information considered helpful in reading the market. Hetherington's comment (in part) regarding the "black book" (Ex. 48, which purports to list all of Log Sales' transactions in the period 1969-77, including the profits) is a telling one - "I was shocked and disillusioned". As far as Hetherington was concerned, he thought that the sales to Log Sales as principal were rare.

30 MB's policy and the Hetherington/Binstead factor presented Binstead, Andersen and MacKinnon with all of the ingredients needed to facilitate a profitable operation. If one were to try and think of any other necessary ingredient, one would be hard pressed. In my view, the culture medium for Log Sales to grow was founded in MD's own operation and policies and in the economic climate present at the time in the industry. This did not give a licence to Binstead to be disloyal to MB.

31 Andersen and MacKinnon said that to them, Binstead was MB. This has substance but not for the reasons they advance. Their suggestion is that no steps were taken to terminate the relationship with Binstead out of fear of reprisals from him. I see it in a different way. Binstead's position at MB was unique in the sense that he almost single handedly disposed of MB's surplus production - at least that portion destined for export in one form, or the other. Log Sales' prosperity was attributable to the export business. Domestic sales played a part but it was a minor one. The following table gives a good analysis:

[See paper copy -- page 40]

Binstead was given authority and a free hand to deal with the export business and as the following table shows, he was very much front and centre in that market. The first seven companies are "export companies":

MacMILLAN BLOEDEL LIMITED LOG BOOMS SOLD BY DENNIS BINSTEAD TO ANDERSEN-MacKINNON LOG SALES LTD. FOR RE-SALE TO THIRD PARTIES: 1974-1977

		TOTAL SOLD	SOLD BY BINSTEAD
1.	Mitsubishi	291	291
2.	Toyomenka	38	38
3.	Trans Pacific Trading	166	163
4.	Ataka	139	124
5.	Sumitomo Shoji	11	11
6.	Nissho Iwai	26	26
7.	Sato Lumber	72	43

8.	meeker Cedar Products	227	222
9.	Acorn	58	56
10.	Terminal Sawmills	46	45
11.	Clayton Cedar Products	40	40
12.	Q.C. Timber	52	52
13.	Field Sawmills	27	27
14.	Sooke Forest products	157	63
15.	Delta Cedar Products	115	68
16.	Others	273	182
		---	---
	TOTAL	1,738	1,451 (63.5%)

Export	743	696 (93.7%)
Domestic	995	755 (75.6%)

32 A second table illustrative of the point that Log Sales was doing pretty well in the export market is the following:

[See paper copy -- page 42]

33 It was the these export companies that were buying the cypress and high grade spruce and it is these woods which produced the profit for Log Sales. The demand exceeded supply and prices reached unprecedented levels. Given MB's place in the annual production, Binstead's position in MB and in Log Sales took on an even greater significance particularly when it was Binstead who determined whether the sales would be direct or through brokers. Dr. Ralph Patterson, a former Vice-President of Canadian Forest Products Ltd. and now a forestry consultant, said in his evidence that his company produced some 15 MBF of cypress annually and that because there was so much money involved, he was personally in charge. Such sales were made not through brokers - "indeed the sale was almost conducted like an auction! The wood was such a hot issue, that I reported directly to Mr. Bentley" (the President). (An example of where MacKinnon dealt with Dr. Patterson for the purchase of 5 MBF of cypress, is Exhibit 47 (February 10, 1976).) Can there by any question that Binstead "could do more good" for Log Sales by staying at MB, than he could by joining it as a working partner? The guaranteed wood supply had to be the prime asset of Log Sales.

34 There is some evidence that Binstead participated in negotiating and setting the end prices paid by the Japanese log buyers. There are three examples, the first of which is shown in Exhibits 13 to 15. This transaction involved the sale of 8 MBF of cypress - some 20% of MB's annual production. The exhibits show that on February 7, 1974, Binstead contracted by letter agreement with Ataka America Inc. for the purchase of booms with a log average of 201 FBM and above, in three grades at $725, $625 and $500. For booms of 200 FBM and below in three grades, the prices were $500, $400 and $300. Four days later on February 11, Binstead contracted with Log Sales for the sale of the same wood in the same dimensions at $700, $600 and $475 and $480, $380 and $280 respectively, a reduction of $25 and $20 per thousand from the agreement with Ataka. On February 21, Log Sales by letter of agreement contracted with Ataka for the sale of the same wood at the prices set out in Binstead's letter of agreement with Ataka of February 4. Binstead's letter of February 11 is copied to Hetherington as was the usual practice at MB but Binstead's earlier letter to Ataka is not copied to Hetherington. The letter was located in one of Binstead's files after he left MB. (See Exhibit 101).

35 This transaction in terms of size was significant. It did not involve a trade for wood nor were there

any other complications. It was an outright sale which produced a gross profit for Log Sales of between $200,000 and $250,000. A second transaction involving the same parties and taking place at the same time, but involving high grade spruce instead of cypress, produced a gross profit for Log Sales of approximately $100,000. A third example involving Sato America in 1977 is found in Exhibits 44 and 112.

36 Binstead attempted to explain the Ataka arrangement. Andersen and MacKinnon could offer no explanation. MacKinnon did explain the third transaction in 1977 by saying that Binstead was doing him a favour while he (Binstead) was in Japan on company business. MacKinnon also said that it was not unusual for Binstead (because of his aggressive nature) to sell logs for companies other than his employer while he was on business in Japan. In this way, he could ingratiate himself to these other companies. The explanations are nonsense.

37 Out of the thousands of transactions in the period between MB and Log Sales, these are the only examples produced in evidence where Binstead personally negotiated with the end customer. The Defendants have conducted searches in their offices but no other documents were located. I am particularly concerned that while there are other letter agreements in evidence, there is a complete absence of any for the 1972-74 period, save for those I have referred to. MacKinnon explains that in this time frame, he changed his office procedure and rather than using the filing system, he "worked out of his desk and when the agreements' deliveries had been fulfilled, he simply threw the agreement away". He also says that he conducted some of his business orally.

38 Whether there is any substance to these explanations and whether the Ataka practice was followed in other transaction is really not the issue. This is evidence which is unexplained, that Binstead negotiated the end price to the Japanese log buyer. Inherent in the transaction is the involvement of Log Sales, who for doing nothing more than executing a 'pre-made' contract and typing some invoices, made a considerable profit. There was no necessity to involve Log Sales. It seems evident that since the Japanese buyer was prepared to pay $725/M to Log Sales, that it would do likewise to MB, particularly in this situation where any additional duties carried out by Log Sales for Ataka were charged at $10/M extra. The Ataka transactions were dishonest and fraudulent.

39 The other part of the formula for the success of Log Sales was Andersen and Mackinnon. They were the ones who made the machine operate. They were not just mechanics. Their work as log traders covering sales, purchases and trades required expertise and many 18 hour days. They had Log Sales finely tuned and over the period moved a great deal of wood. Both men believed they performed a valuable service to MB by delivering the product required, when it was required and by paying MB the prices established in the Vancouver log market. To them a wood supply was not the prime reason for the profit, rather it was knowing how to trade in that wood. Andersen and MacKinnon are intelligent, knowledgeable log traders and strike me as being able to anticipate and deal with problems and crises. The nature of their work would seem to imply that capacity.

40 Andersen and MacKinnon's view that Log Sales' success was due more to them than to Binstead, may have merit were it not for these considerations:

(1) The Binstead involvement in Log Sales may have started out innocently, but surely that situation changed with the passage of time. Every month that passed that Binstead did not "come over to join Log Sales", Andersen and MacKinnon had a more difficult time explaining Binstead's interest. There were tell-tale signs along the way that Binstead was not going to join Log Sales, such as his statement to MacKinnon that he (Binstead) could do more good if he stayed at MB. If Andersen and MacKinnon saw Binstead's interest as a problem as they suggest, they would

have taken steps to correct it. Frankly I think they saw Binstead not as a problem but as an asset. If Binstead was to join Log Sales shortly, why was it necessary to put Binstead's interest into trust? I question whether it ever was the intention of Binstead, Andersen or MacKinnon that Binstead join Log Sales.

(2) Andersen and MacKinnon were actively involved in the concealment of Binstead's interests. It was in their best interest to do so. Binstead would be of little help to them if it were known to MB that Binstead was wearing two hats at the same time.

(3) MacKinnon was involved with the Ataka and Sato America arrangements and knew that a higher price could have been obtained by MB. He must have been impressed with a $200,000 gross profit for so little work.

41 Credibility of most of the witnesses is not an issue. With respect to Binstead, Andersen and MacKinnon, some comment is necessary. I found each of them to be less than frank and to have convenient and selective memories, remembering well what was helpful but not so well what was damaging. If I were to speculate as to the architect of the scheme, I would choose Binstead. From his vantage point, his vision of the future was unobstructed. The only cloud in the sky was the means by which he might personally gain. He saw Andersen, MacKinnon and Log Sales as providing that mechanism. I found Binstead to be the least believable. Illustrative of the point is an extract from his evidence as follows:

"Q I'm really interested in this. The focus is all the time on MacMillan Bloedel. Did you sort of view, from your position, all these brokers that were in the log -- in the industry as arms going out for MacMillan Bloedel to assist you in selling logs at MacMillan Bloedel?

A Absolutely.

Q Yes.

A What I did or what we did was we hired the very best talent that we could on a part-time basis, maybe you can say, because those were the excellent people; Mr. Probyn and Mr. MacKinnon and Mr. Menzies -- and they used to work for us -- and Mr. Richmond and Mr. Clark. They all worked for us. They were excellent people who we trusted. We know how they thought; we knew how they reacted to a certain set of circumstances or we felt we did and we wanted those people on our side and we couldn't. MacMillan Bloedel wouldn't pay them the salary or give them whatever was required to keep them there. And so they left because they said they could do better elsewhere. And just because they are good people doesn't mean that I didn't -- we did want to have the use of those people so we -- yes, I considered that at any time we could hire those people and keep them as loyal to us as we could, by giving us information and helping us, and because it's a big world out there and John and I couldn't do it -- couldn't do it all. In fact, I think I related to you earlier that basically we were -- it was a big world out there. We had a smaller staff than E.R. Probyn's or Andersen-MacKinnon did as far as getting out to the Ark. We had other

> limitations on us that didn't allow us to do the things they could do and we were basically like the factory, we had to get stuff out of our door everyday, we had to get booms out of our door, four or five booms a day, and we had a budget to meet. And we used those people to go out and be our distributors or however you want to call it or be our purchasers. And it was very sale to call up someone who knew exactly the workings of our operation, who knew Charlie Mair, who knew Mr. Boyd, who knew our Scaling Department, who knew our Towing Department. And it was very easy to phone up a person and say all right, would you be interested in such and such and the person knew the logs from that particular area and knew it and he probably, over the telephone, could say yes, if they are the same as the other ones, yes, Dennis, or, yes, John, or, yes, whoever he is talking to, I would be glad to buy a million feet of that. And it was done "bang" as against trying to take that million feet, which might consist of five booms, and go out and spend a day or two days seeing bank managers, seeing towing people, seeing everybody with each man. I could have taken five days to two weeks to do the same thing that I could do over a three-minute phone call calling Mr. Probyn or Mr. Andersen because that meant I didn't have to get out of my office to arrange and charter an airplane to go up -- drive up to Mission to take a man by the hand to bring him to Vancouver, to buy him lunch -- and he probably wants to have three martinis before he went out -- and get him in an airplane because he doesn't like flying -- to take him up the cost because the guys would say listen, I can;t get away from my mill, my jib is running the mill and I don't have a log man. Well Charlie -- they trusted Charlie. For example, they would see Charlie and they would you go look at it and if its okay, we will buy it on your say-so. But they wouldn't buy it on my say-so because I was selling it to them. I think you made mention of a mill like Parker's. If I called up Mr. Parker and said I have got a boom of logs, would you like to buy it, he wouldn't say yes. He wouldn't know what it looks like and he would say I don't Like flying and I only go by water taxi and that would maybe mean a two-day trip. Or he would say I can't go, I'm running my mill and the only day I can go is Sunday when I'm not doing maintenance or the only time I can go is at seven o'clock tonight because I stay in the mill until six o'clock. Whereas I could call Charlie at eight o'clock in the morning or nine o'clock in the morning and he would say yes, I will buy it. And Mr. Parker would say Charlie, I trust you and probably -- I presume this now; you will have to ask this out of Charlie, but Charlie had a rapport with all of these people. So the fact that we use, whether it's Charlie of E.R. Probyn or whoever we use, it just made it so simple for us to be a factory, just shoving stuff out the door and in return getting wood back."

Need I say more?

42 The picture Andersen and MacKinnon tried to paint is that even with Binstead being an employee of MB and a part owner of Log Sales (its customer), there was no harm done to MB. In their hearts thought, I think they always knew that the association was wrong. They may have rationalized it on the basis that if MB was getting the established price for its logs, then it was alright for them (Log Sales) to participate. But naivety is not a quality Andersen and MacKinnon can lay claim. They were street-wise and understood the basis of the principal and agent relationship.

43 There were many aspects of their evidence that I simply did not believe. In part those are:

1. Binstead's shares in Log Sales as being dependent upon Binstead joining them as a working partner.
2. Binstead's interest in AMCO as being a further incentive to join Log Sales.
3. MacKinnon's explanation of Binstead's statement to him that he (Binstead) could do more good if he stayed at MB. Frankly, I really cannot understand what MacKinnon took from this comment. He seemed to give at least three explanations.
4. The explanation of why Andersen and MacKinnon took no steps to correct the problem when Binstead showed no signs of joining Log Sales. I very much doubt that Binstead held so much power at MB that he could destroy their companies.
5. Andersen's explanation for destroying his cheque book showing payments he had made to Binstead in pursuance of the buy-out of Binstead's interests.
6. That Andersen and MacKinnon had no explanation for the Ataka transactions.
7. The explanation for charging brokerage fees to the Japanese log buyers involving transactions which were purely in the nature of a sale. (Log Sales acted as principals.) To suggest that the 'brokerage' was to cover other unexplained expenses is not acceptable. (see earlier invoice examples where such charges appear). Incidently the explanation for including towing charges when no towing in fact took place is found in Andersen's evidence which I do accept on this point.

In making references to these charges, particularly the brokerage fees, I appreciate that the Plaintiff was unaffected by the imposition of them. It does however reflect an attitude which I found to be all too prevalent on Binstead, Andersen and MacKinnon's part; that there was nothing improper in what they were doing so long as MB received the prices of the Vancouver log market. I very much doubt that commercial mores have reached that stage.

44 Prior to dealing with liability, it might be appropriate for one or two general comments. There is some evidence that Binstead negotiated the end price with the Japanese buyer. If the evidence pertaining to the letter agreements had been complete, there might well be a pattern of such selling established. But save for those transactions I referred to, there is no other evidence to support a conclusion that Log Sales received any price advantage, or put another way, that there was any price disadvantage to MB. I am satisfied that MB received the prices prevailing in the Vancouver log market. Dr. Patterson and others established this. Had Binstead consistently received less than those prices established in that market, I am confident that the Plaintiff, which relied so heavily upon prices, would have taken remedial steps. For the most part, then, MB suffered no serious financial loss as a consequence of Binstead's actions. The policy of MB was not to sell directly to the Japanese log buyer and therefore even if Binstead remained faithful, MB would be in no worse financial position. The one slight difficulty I have with this aspect is that Binstead's consistent advice to Hetherington was that MB should not sell directly into this market. What part that advice played in the overall company policy is far from clear.

45 Liability in this case is determined by examining the law with respect to fiduciary duty. It would be too simplistic an approach to view this case as either one for money had and received (bribery) or as a case in tort for conspiracy or for fraud. To resolve the issues here, one must follow the classic cases in fiduciary duty.

46 In my view, Binstead had a fiduciary duty towards MB which he breached. While holding an interest in Log Sales he dealt with that company on behalf of MB in his capacity as manager of log trading. His interest in Log Sales remained undisclosed throughout. His personal interest in Log Sales conflicted with the duty he owed to MB. In the result, he made a secret profit for which he must account. Nowhere is this principle better stated then in the case of Regal (Hastings) Ltd. v. Gulliver and Others (1942) 1 All E.R. 387 (H.L.) where Viscount Sankey at p. 382 adopts the words of Lord Cranworth L.C. in Aberdeen Ry. Co. v. Blaikie:

> "A corporate body can only act by agents, and is of course the duty of those agents so to act as best to promote the interests of the corporation dose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

47 It is not necessary that MB lost any profit nor suffered any damage in order to be entitled to an accounting, and it does not matter that MB's policy was such that it could not have received such profits. In Reading v. The King [1948] 2 K.B. 268 Denning, J., as he then was, put it in these terms:

> "In my judgment, it is a principle of law that if a servant, in violation of his duty of honesty and good faith, takes advantage of his service to make a profit for himself, in this sense, that the assets of which he has control, or the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money, as distinct from being the mere opportunity for getting it, that is to say, if they play the predominant part in his obtaining the money, then he is accountable for it to the master. It matters not that the master has not lost any profit, nor suffered any damage. Nor does it matter that the master could not have done the act himself. It is a case where the servant has unjustly enriched himself by virtue of his service without his master's sanction. It is money which the servant ought not to be allowed to keep, and the law says it shall be taken from him and given to his master, because he got it solely by reason of the position which he occupied as a servant of his master."

(My underlining).

48 A fiduciary will not be liable to account if the person to whom he owes the duty is fully informed of the conflict of interest or the possibility of the conflict and the person to whom the duty is owned consents to the actions of the fiduciary. Referring again to Regal (Hastings) Ltd. we find the following:

> "Viscount Sankey:
>
> In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of mala fides. The general rule of equity is that no one who had 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.

Lord Russell of Killowen said at p. 386:

> "My Lords, of the six respondents, two, Gulliver and Carton, stand on a different footing from the other four. It is in my regard to the latter that the important question of principle brought into issue by the decisions of Wrottesley, J., and the Court of Appeal call for determination. That question can be briefly stated to be whether an agent, a director, a trustee or other person in an analogous 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 his fiduciary position, and 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. The most usual and typical case of this nature is that of principal and agent. The rule in such cases is compendiously expressed to be that an agent must account for net profits secretly (that is, without the knowledge of his principal) acquired by him in the course of his agency. The authorities show how manifold and various are the applications of the rule. It does not depend on fraud or corruption ... What the respondents did it was said, caused no damage to the appellant and involved no neglect of the appellant's interests or similar breach of duty. However, I think the answer to this reasoning is that, both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damnified or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship. Nor can the court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person who is being charged. They are matter of surmise, they are hypothetical because the inquiry is as to what would have been the position in that party had not acted as he did, or what he might have done if there had not been the temptation to seek his own advantage, if, in short, interest had not conflicted with duty. Thus, in Keech v. Sandford (1), a case in which the fiduciary relationship was that of trustee and cestui que tryst, the trustee was held liable to assign a lease to the infant cestui que trust, though the lesser had refused to renew to the infant. Lord King, L.C., said at p. 62:
>
> > This may seem hard, that the trustee is the only person of all mankind who might not have the ...
> >
> > It did not matter that the infant could not himself have got it and that he was not damaged by the trustee taking it for himself." (my underlining)

49 As Sheppard, J.A. said in Morrison v. Coast Finance Ltd. (1965) 54 W.W.R. 257 (BCCA) "unless the fiduciary discloses to the Plaintiff all of the material facts so that the Plaintiff could exercise an independent will, he must account for any profits". The Defendants said they did not think there was any conflict, but that is not for them to decide. And in Canadian Aero Service Ltd. v. O'Malley et al. (1979) 40 D.L.R. (3d) 371 (S.C.C.) at 382. Laskin, J., as he then was, put the matter in these words:

> "Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki 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 advantages 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."

50 Mr. McAlpine relies on this dicta saying that Binstead was not in breach of a fiduciary duty because he was not a director or senior officer of MB. With respect, this argument cannot succeed. The Canadian Aero case involved the fiduciary duties of officers and directors who took advantage of a corporate opportunity after leaving the company to "whom they owed the fiduciary duty". Laskin, J. is speaking only of the limits of fiduciary duty in those circumstances and he never intended to place any limitation on the high level of fidelity traditionally expected of employees and/or agents during the course of their employment and agency. Binstead was employed throughout with MB (the company to whom he owed the duty). The terms of his employment and the unique position which he held in the

company, including the control he exercised in the acquisition and disposition of MB's property, precluded any finding but that Binstead was a fiduciary liable to account. In any case, he was in a management position comparable to the Defendant in Canadian Aero.

51 The Defendants Andersen and MacKinnon and their companies knowingly participated in Binstead's breach of fiduciary duty and received profits derived as a result. In law they are therefore constructive trustees. In Barnes v. Addy (1874) 9 Chan. App. 244 (C.A.), the classic case in this aspect of the law, Lord Selborne, L.C. divides constructive trustees into two classes:

> 1) Those who receive trust property with knowledge of the trust or who are otherwise chargeable with some part of the trust property.
> 2) Those who actually participate in any fraudulent conduct of the trustee or those who assist with knowledge in a dishonest and fraudulent design on the part of the trustee. In either of the latter possession of the trust property is irrelevant.

These Defendants can be placed into either classification. The point is stated even more clearly by Sheppard, J.A. in the Morrison v. Coast Finance case:

> "When a third person knowingly participates with a trustee in the breach of trust, such third person becomes subject to the same liability as the trustee, including the liability to account."

This, of course, must also apply to a breach of a fiduciary duty.

52 Mr. McAlpine argues that for a constructive trust to arise the Plaintiff must have been deprived of something or suffered some loss and since there has been little or no loss to MB the Defendants cannot be held to be constructive trustees. In Becker v. Pettkus (1980) 117 D.L.R. (3d) 257 (S.C.C.) Dickson, J. at 273 makes the following comment:

> "The principle of unjust enrichment lies at the heart of the constructive trust. Unjust enrichment has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of Moses v. Macferlan (1760), 2 Burr. 1005 at p. 1012, 97 E.R. 676, put the matter in these words: ... the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money. It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise: see A.W. Scott, "Constructive Trusts", 71 L.Q.R. 39 (1955); Leonard Pollock, "Matrimonial Property and Trusts: The Situation from Murdoch to Rathwell", 16 Alta. L. Rev. 357 (1978). The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury; see Babrociak v. Babrociak (1978), R.F.L. (2d) 95 (Ont. C.A.); Re Spears and Levy et al. (1974), 52 D.L.R. (3d) 146, 9 N.S.R. (2d) 343, 19 R.F.L. 101 (N.S.C.A.); Douglas v. Guaranty Trust Co. of Canada (1978), 8 R.F.L. (2d) 98, 4 E.T.R. 65 (Ont. H.C.); Armstrong v. Armstrong (1978), 93 D.L.R. (3d) 128, 22 O.R. (2d) 223 (Ont. H.C.).
>
> How then does one approach the question of unjust enrichment in matrimonial causes? In Rathwell I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it

> seems to me, is supported by general principles of equity that have been fashioned by the Courts for centuries, though, admittedly, not in the context of matrimonial property controversies."
>
> (emphasis added)

I do not think that Pettkus or any other law supports Mr. McAlpine's proposition. Equity imposes a constructive trust in at least two different situations:

(1) to prevent "unjust enrichment" as suggested by Dickson, J. in Pettkus. To be successful in this type of case the plaintiff must show that the defendant has been enriched and that the plaintiff has suffered a "corresponding deprivation". This type of constructive trust is imposed to enable the Court to balance the equities between two persons such as a husband and wife. I do not think that Dickson, J. intended this to apply where there is a dishonest scheme or where there is a breach of a fiduciary duty. To do so would be to ignore the law which has been tested and applied in the highest Courts.

(2) the second type of constructive trust is that referred to in Barnes v. Addy and the cases which preceded and followed it. This type of trust is imposed even when the Plaintiff has suffered no loss or deprivation. It is imposed not to balance the equities but to insure that trustees and fiduciaries remain faithful and that those who assist them in the breaches of their duty are called to account. In Regal (Hastings) Ltd. Lord Wright quotes with approval the sage words of James, L.J. in Parker v. McKenna (1874) L.R. 10 Ch. App. 97 p. 221:

> "... it appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allied to make any profit without the knowledge and consent of his principal; that the rule is an inflexible rule, and must be applied inexorably by this court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to such an inquiry as that."

Pearson, L.J. in Phipps v. Boardman and Others [1965] 1 All E.R. 849 at 864 makes much the same comment in even stronger terms:

> "It is to my mind a regrettable feature of this case that the plaintiff seems likely to recover an unreasonably large amount from the defendants even when under the judgment the defendants have been credited with an allowance on a liberal scale for their work and skill. The rule of equity is rigid. The agent who has made a profit from his agency, without having obtained informed consent from his principle, has to account for the whole of the profit. In an ordinary case, where an agent has simply made a secret profit, the rule is, so to speak, good for discipline: there is a penal element calculated to deter agents from behaving in that way. The present case is exceptional, inasmuch as the defendants were acting in a manner which was likely to be and in fact was highly beneficial to the trust, and they did disclose the facts that they were going to buy the shares on their own behalf and hoped to make a profit. Their mistake was in not fully disclosing all the material facts, especially those bearing on the probable size of the anticipated profit, and their mistake was made at

> one particular stage of the history, which was a late stage. The defendants did the work and exercised the skill and took the risk of failure and loss. The plaintiff's claim is based solely on property rights, and not on any expenditure of time, skill, effort or money or taking any risk. However, there is no basis that I can find for making an apportionment of the profit in this case in the events that have happened. The plaintiff gains a great deal from the defendant's mistake, if he is minded to exercise his full right. I agree that the appeal should be dismissed."

53 Binstead, Andersen, MacKinnon and their companies are trustees and are all liable to account for the profits made as a result of the breach of fiduciary duty. In my view, the authorities cited fully support this position and I adopt Mr. Rae and Mr. Allan's comment in their argument:

> "In the result the Defendants, Andersen, MacKinnon and Binstead, and their companies, are constructive trustees and must account for all profits realized from this breach of fiduciary duty. The Defendants cannot be seen to profit from their wrong doing.
>
> These Defendants are to be held to account even if they believed they were entitled to take and refrain this profit. The Defendants are liable to account for these profits without proof of mala fides or fraud. Nor is it necessary to prove that the Plaintiff has been damaged or that it could have benefited from the opportunity to make those profits but for the wrongful act."

54 Morgan's involvement can be restated in these terms:

(1) He advised MacKinnon that Binstead's shares could be held in trust:

> "A And I believe it was my advice to them that if he were to come a few months later and work for them and the value of the company had grown, and by this, you know, let's ensure that we weren't talking about growing to a million dollars or anything, nobody had any idea, I think I indicated there could be some income tax problems attached to transferring shares at what might be other than fair market value, so that if he were to acquire the shares at the nominal value it would be better to be able to show at a later date to be income tax people that he had had a right to these shares from the, from the beginning when they were worth nominal value.
>
> Q That's what's been referred to as the gift tax problem?
>
> A There was a gift tax problem, in effect, at that time and it was part of the problem, yes."

(2) Morgan prepared trust declarations covering Binstead's interest in Log Sales and in AMCO. He denies preparing the declarations marked Exhibits 126 and 127 as they do not reflect the information and instruction and instruction he received from MacKinnon. Morgan understood that Binstead was to receive the one-third interests if he joined Log Sales and until he did, he was not to receive the shares or any dividends. What in fact occurred is that he received both.

(3) Morgan rendered advice in 1971-72 and facilitated the payment of dividends

($210,000) from Log Sales to its registered shareholders.

(4) He also rendered estate planning advice to Binstead, Andersen and MacKinnon and took steps in the preparation of a buy-sell agreement covering the respective interests in Log Sales.

(5) He facilitated the repayment of the shareholders loan by AMCO to Andersen and MacKinnon.

(6) Morgan recalculated the management fee paid by Log Sales to Log Brokerage.

55 These services by Morgan were performed in the usual course of his business as an accountant. I think it is important to remember that in carrying them out, Morgan was advised that Binstead would be joining the company as an active working partner. Secondly, until he did so, there was nothing to be concerned about as between Binstead and his employer. Morgan recognized that there was a potential conflict of interest situation present as long as Binstead remained at MB and continued to do business with Log Sales. Certainly Morgan appreciated with the passage of time and Binstead remaining at MB, that the chances of a conflict increased. To alleviate this concern, Morgan made inquiries as to when Binstead was joining Log Sales and MacKinnon assured him that there was a delay only but that in the meantime, there was nothing improper being done that MB was receiving the prices determined in the Vancouver log market and that Log Sales was receiving no price advantage from Binstead. It was on the basis of these assurances, that Morgan continued to act as the company accountant. From his experience with MacKinnon and Andersen, Morgan had no reason not to accept the assurances. Morgan's work in doing the company audits bolstered these assurances as did outside knowledge which Morgan had of the industry. He determined that the large profits were not the result of "buying the logs and one day selling them the next day. There was a great deal more involved".

56 The information which Morgan did not have is also important to note. He did not know that it was Binstead primarily who was dealing with Log Sales on behalf of the Plaintiff. Morgan was not advised, when he prepared the recalculation of the management fee in Exhibit 7, that Binstead was to receive dividends from Log Sales. The mathematics was purely a hypothetical exercise to determine what the situation would have been had Binstead joined Log Sales. If dividends were payable they would be payable only to the shareholders of record.

57 A stranger to a trust who has not received any trust property can be fixed with liability as a constructive trustee only if it is shown that he assisted the trustee as his agent in a breach of trust and had knowledge of a dishonest or fraudulent design on the part of the trustees. The knowledge need not be actual, it need only be constructive. And to succeed in an action for an accounting in these circumstances, it need not be shown that the stranger was the recipient of any of the trust property (Morgan received his professional fee only and no trust funds passed through his hands). Nor must it be shown that the stranger profited from the trust or that he was an active participant in the dishonest scheme.

58 The law is set out in Barnes v. Addy (1874) 9 Ch. App. 244, in Selangor United Rubber Estates Ltd. v. Cradock (a bankrupt) (No. 3) [1968] 2 All E.R. 1073 and in Karak Rubber Co. Ltd. v. Burden & Others (No. 2) [1972] 1 All E.R. 1210. For my purposes, it is necessary to refer only to Brightman, J. in Karak Rubber:

> " The conclusion of law reached by the learned judge in the Selangor case, in relation to the second category of constructive trustees, was as follows: (1) strangers who act as the agents of trustees are liable as constructive trustees if they assist with knowledge in a dishonest and fraudulent design on the part of the trustee;
>
> (2) 'The knowledge required to hold a stranger liable as constructive trustee in a

dishonest and fraudulent design, is knowledge of circumstances which would indicate to an honest, reasonable man that such a design was being committed or would put him on enquiry, which the stranger failed to make, whether it was being committed'.

(3) What is 'a dishonest and fraudulent design' is to be judged:

> '... according to "the plain principles of a court of equity" ... The governing consideration is to give effect to equitable rights, where it is not inequitable to do so, and when knowledge of the existence of those rights is material to granting equitable relief. In general, at any rate, it is equitable that a person with actual notice or constructive notice of rights should be fixed with knowledge of them. This is in a context of producing equitable results in a civil action and not in the context of criminal liability.'
>
> ...
>
> The formulation in the Selangor case of the law applicable to the second category of constructive trusteeship is based on the judgment of Lord Selborne LC in 1874 in Barnes v. Addy with which James and Mellish LJJ concurred. This was a case in which beneficiaries unsuccessfully sued solicitors who had been associated with the fraud of the trustee; it was found that the solicitors had no knowledge or suspicion of the fraud and that
>
> there was nothing to lead them to suppose that a fraud was intended. The test of liability (which it may be convenient to call the Barnes v. Addy formula), in the words of Lord Selborne LC., was that:
>
> 'they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.'
>
> This was paraphrased with approval by Lord Esher MR in Soar v. Ashwell (a first category case) as:
>
> '... he has knowingly assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property.'
>
> The point on which the authorities were obscure, until the Selangor case, was what degree of 'knowledge' was required to satisfy that test. A person may have knowledge of an existing fact because in a subjective sense he is actually aware of that fact. In an appropriate context a court may attribute knowledge of an existing fact to that person because in a subjective sense he has knowledge of circumstances which would lead a postulated man to the conclusion that the fact exists or which would put a postulated man on enquiry whether the fact exists."

In the result, Brightman, J. adopted the explanation of the Barnes v. Addy formula as applied in the Selangor judgment.

59 The evidence in my view falls short of proof of actual knowledge of the dishonest scheme on the part of Morgan. Whether there is constructive knowledge within the authorities is dependent upon all of

the circumstances. The evidence is difficult to reconcile at times. The inconsistencies cast a shadow on Morgan's evidence that he was nothing more than a technician. But painting with a broad brush I am of the view that the Plaintiff, as regards Morgan, has not met the burden of proof. The impression I have is that Andersen, and particularly MacKinnon purposely kept Morgan "in the dark" about some of the facts, supplying him only with the minimum of information necessary to effect their purpose. I accept Morgan's evidence that he made inquiries and that he had a reasonable basis for accepting most of the responses he received as being factual. I believe that he was intentionally misled as to the complete state of affairs. The action against Morgan is dismissed but the shadow mentioned above persuades me there should be no order as to costs.

60 It is regrettable that so much time was spent at the trial on the matter of liability. 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 benefit 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 in if not for the wrongful act of the defendants.

61 A trustee who has breached his duty and profited as a result is obligated to disgorge those profits regardless of whether there is a corresponding loss to the cestu que trust. Nowhere is this principle more clearly stated than in Boardman v. Phipps by Upjohn, L.J.:

> "Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case. The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict. I believe the rule is best stated in Bray v. Ford by Lord Herschell, who plainly recognised its limitations:
>
> > ' It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondents, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."

62 Basic to the application of this principle is a determination of what is meant by the term "profit". The Oxford Dictionary describes "profit" as being "the surplus product of industry after deducting wages, cost of raw material, rent and charges". In the present circumstances then, what must be returned by the Defendants to MB is the difference between the gross earnings of MB transactions and expenses. In Waters on Trusts, the learned author states it in these terms:

> " In principle, if the beneficiary is enriched, he should be liable to meet the expenses of the person who has thus enriched him, and this approach is applied in those cases where the court deems a person a constructive trustee of property for another. The

> constructive trustee, although he installed the improvements, for instance, thinking or intending to claim that the property in question is his own, will be held entitled to recover what he put into the property."

The expenses though must be proper, that is, all reasonable and necessary expenses incurred by the trustee in earning the profit. Jessel, M.R. in Emma Silver Mining Co. v. Grant (1897), 11 Ch. D 918 (C.A.) put the issue of expenses as follows:

> "It appears to me that is the true view of the case, that the person in the fiduciary position cannot keep the secret profit, and that the fact that the relations of the profit to the purchase-money originally are altered can make no difference.
>
> ...
>
> If that be the true principle, it remains to consider what is the amount of profit derived by the agent in this transaction. The broad view of the case is to take the whole transaction together and see how much more money he has got than he would have had if he never entered into it at all. (My underlining).
>
> As I read Bagnall v. Carlton, although the point did not arise there exactly as it arises here, I think that was the view of the Court of Appeal.
>
> Lord Justice James says this with regard to the costs, charges, and expenses incurred by the Defendants: "The costs, charges, and expenses, I think they had a right, independently of the offer in the bill, to deduct, because what they were liable to pay the company was the profits which they had made in a fiduciary character, that is to say, the net profits which they had made, and I think that costs, charges, and expenses might properly be deducted in ascertaining the net profits, and to that extent, therefore, they were, I think, entitled, independently of the offer in the bill." Lord Justice Baggallay concurs.
>
> Lord Justice Cotton says this: "That being so" - that is, as to the fiduciary relation - "the principle of equity clearly applies. Carlton and Grant are trustees for the company. They cannot, by any possibility, secretly make to themselves a profit in the transaction in which they were trustees. "Then he says this: "I think I need add nothing to what has been said by the Lord Justice as regards the charges and expenses. The principle on which I decide this case is, that the trustee cannot make for himself a secret profit; and the profit is the net balance of the 85,000 pounds [Sterling], after deducting any charges and expenses properly incurred in the formation of the company. He uses these words "properly incurred" because there was no contest in that case as to whether they were properly incurred or not. He defines it at the beginning as a "secret profit."
>
> ...
>
> "I then deduct all sums actually paid by him, whether to brokers for getting rid of the option, or to brokers for getting rid of the shares, or for sustaining the market, or to the directors, or to the agent who procured the directors, or to the gentlemen connected with the press for the part they took in the transaction. It seems to me all those sums ought to be allowed to him. Taking the books to be correct, and they are not challenged, and I see no reason for challenging them, those sums will be deducted

from the sub he is charged with. I find as a verdict that he is liable, as promoter, for the balance together with interest at 4 per cent from the date which has been mentioned."

63 Evidence of an accounting nature was called by both sides. Additionally, I have what has been referred to as the "black binder" (Ex. 47). This document is supposed to be a summary of all Log Sales' transactions for the period. It sets out the gross sales figures which include amounts charged for scaling, towing, inspection fees. I also have the audited financial statements of Log Sales and Log Brokerage for the period. The gross sales figures shown in the "black binder" do not reconcile with the audited statements. I prefer to follow the material which was available prior to the commencement of this law suit. The "black binder" is not without some merit, as Mr. McMann of Coopers & Lybrand points out:

> "The Summary (Ex. 47) gives the basis of computation of the percent gross profit of total gross profit contributed by MB business. This ratio would not change significantly if all the "non-log figures such as commissions and towing were removed from all invoices.
>
> For the material years, these percentages are:
>
> MB gross profit as % of total gross profit

Year	%
1969-70	92
1971	72
1972	78
1973	84
1974	88
1975	81
1976	66
1977	75"

I accept these figures.

64 The earnings summaries for Log Sales and Log Brokerage for the period in question were submitted. All counsel relied on these documents and, accordingly, I accept the material as being accurate and rely on it in computing the profit due to the Plaintiff. I point out that the gross profit of Log Sales for each year is the combination of gross revenues from logs sold and commissions earned from the brokerage of logs.

65 The total direct expenses are expenses properly incurred. All counsel agree. They do not agree, however, on whether the proportion of direct expenses allowed ought to be based upon a percentage of profits or upon the volume of logs involving MB transactions with Log Sales. The direct expenses include towing, insurance, storage, scaling and inspection fees or charges. In my view, those charges relate not to gross profit but to "volume of logs" and, accordingly, I intend to rely upon the following figures prepared by Mr. Loughton:

COMPARISON OF LOG VOLUMES AND GROSS PROFITS ON THIRD PARTY

LOGS SOLD TO MACMILLAN BLOEDEL LIMITED

Year Ending	Total Log By Andersen-MacKinnon	Mac.Blo. Logs Sold to Andersen-MacKinnon	Third Party Logs sold to Mac.Blo.	Gross Profit on Third Party Logs Mac.Blo. sold to
	MFBM	MFBM	MFBM	
1970	35,338	21,485	9,135	($55.527.01)
1971	81,231	39,830	5,211	(7,101.72)
1972	91,333	28,911	26,013	(189,777.26)
1973	109,532	47,240	20,947	(89,626.24)
1974	74,762	32,488	21,282	(36,451.34)
1975	70,895	52,615	1,393	(85.56)
1976	109,969	19,431	8,756	272.45
1977	110,995	72,830	7,248	5,123.66
TOTAL	684,055	364,830	100,685	($373,182.02)

Note: For comparison purposes cubic scales have been converted to MFBM using 2 units per MFBM

66 The next area of expenses are those related to the administration of the business and include legal expenses, capital tax, telephone, rent and utilities, stationery, postage automobile, travel and bank expenses. For the most part, I think these expenses are those which are normally found in the operation of a business. Andersen and MacKinnon impressed me as being frugal and as exercising a firm control of expenditures. I am not so naive though to conclude that all of these expenses were properly incurred. Some allowance must therefore be made for a proportion of the administrative expenses in both companies, Log Sales and Log Brokerage.

67 The Plaintiff's first position regarding these expenses is that none ought to be allowed. Its second position is that they should be allowed at the rate of 69% of the administrative expenses incurred by Log Sales and 35% of the expenses of Log Brokerage. The Defendants use another formula and come up with an overall figure of 54% based on the total of administrative expenses incurred by both companies. Keeping in mind that the bulk of Log Brokerage's expenses related directly to the expenses incurred by Log Sales and that not all of the expenses in this area were properly incurred, I think an appropriate allowance would be 50% calculated as follows:

(a) 50% of the administrative expenses or Log Sales;
(b) 50% of the administrative expenses of Log Brokerage (excluding interest payments made on shareholder loans to Andersen and MacKinnon; and

(c) 50% of the non-management salaries paid by Log Brokerage.

68 The Defendants claim that there should be some allowance for the salaries and bonuses paid by Log Brokerage to Andersen and MacKinnon either by allowing them in full on the basis of the contract between the two companies or by replacing those figures by an annual salary. The salary suggested was $90,000 per year beginning in 1977 and reducing that amount each year by 10% to provide for inflation. Certainly this kind of remuneration may be allowed to trustees and Boardman v. Phipps is a good example of where the court made provision for such remuneration. But in the present circumstances, and considering the part played in the scheme by Andersen and MacKinnon, such an allowance is out of the question. To provide for salaries and bonuses, whether as claimed or in any form, would be to reward Andersen and MacKinnon for their dishonest conduct.

69 Counsel gave me little help with regard to the income tax and logging tax expense. The cases cited were of no help for they dealt with situations involving the assessment of damages. It seems to me, that in an accounting for profits situation, that different principles apply. I am not scolding counsel. The subject of the income tax ramifications in a case of this nature could easily be a study by itself.

70 It strikes me as being fair and reasonable to make allowance for the payment of the taxes. These monies were paid by Log Sales pursuant to law. It is an expense which MB would have had to pay had it possessed that income. Even if MB enjoyed a tax advantage that Log Sales did not, I doubt that the picture would be changed. To force a trustee, including a constructive trustee, to personally bear this expense would be grossly unfair. As indicated earlier, an accounting of profits is quite a different thing from an award of damages. In the latter, the court tries to restore the Plaintiff to the position it would have been in but for the wrong. On the other hand, on an accounting for profits the court must ensure that all of the benefits flowing to the constructive trustees is disgorged so that their breach of trust does not enrich them. The court "must see how much more money he has got than he would have had if the breach of duty had not taken place". (Emma Silver Mining Co. v. Grant, supra). Those tax monies were not monies which went to the Defendants. They received no benefit from them. To make the trustee pay those monies twice would be patently unfair. In the end result, the constructive trustee's position should be no worse or no better than it would have been but for the breach of duty. I think it appropriate therefore that an allowance be made for the payment of taxes, allowing for that portion of Log Sales' business emanating from MB as opposed to income from other sources.

71 Applying these findings, the Plaintiff is entitled to recover $4,243,383 from the Defendants (not including the Delta companies or AMCO) as the net benefit received by them as a result of breach of fiduciary duty. (see chart following). The figure of $4,243,383 exceeds any award that could have been made either for money had and received or in tort. The Plaintiff is entitled to interest on this sum for the reason that the Defendants have had the use of that money and since that is a benefit, the constructive trustees are bound to account for it. If there was evidence that the money was invested from the time it was received, I think the Plaintiff could claim the actual sum realized (assuming that it was invested wisely). In the absence of such evidence, I have decided to award interest at the Chartered Bank Prime Business Loan Rate as calculated by the Bank of Canada and for this purpose, I adopt the figures of Mr. Loughton in Exhibit 89 (tab 8). Compound interest would be appropriate in the present circumstances if the Ataka kind of arrangements were prevalent. But the evidence in this regard is lacking. Perhaps it is appropriate to be guided by the comments of Dean Pound in Home Fire Insurance Co. v. Barber, 67 Ned. 644 (1903), where he said that "it was not the function of courts of equity to administer punishment".

72 To show the breakdown of income and expenses and of the interest due to the Plaintiff, I have prepared two tables. Following Table 1 is an explanation. Table 2 is the calculation of the interest payable and requires no explanation.

TABLE 1	1970	1971	1972	1973
INCOME:				
1. MB's percent of income	92	72	78	84
2. Gross income MB's percent	283,135	357,332	647,454	3,926,751
EXPENSES:				
3. MB's percent of volume	88	55	60	62
4. Direct Expenses	13,070	20,420	82,123	114,598
5. Administration (AMLS 50%)	580	5,329	1,513	9,965
6. Administration (Brokerage 50%)	22,891	25,969	31,833	86,689
7. Non-Management Salaries (Brokerage 50%)	17,510	20,025	25,845	33,038
8. Logging Tax	24,946	25,250	49,589	520,553
9. Income Tax	79,253	81,538	1,137,350	502,161
10.NET INCOME	124,885	178,801	300,152	2,061,414

11.Dividend Paid		(210,000)		
		90,152		
12.Principal defined -				
(a) 1/2 income for year	62,442	89,400	45,076	1,030,707
(b) Amount not paid from previous year	124,885	303,686	393,838	
(c) Principal sum bearing interest	62,442	214,285	348,762	1,424,545
(d) Accumulated Interest		303,686	393,838	2,455,252

TABLE 1	1974	1975	1976	1977
INCOME:				
1. MB's percent of income	88	81	66	75
2. Gross income MB's percent	1,626,207	637,815	1,025,902	1,216,977
EXPENSES:				
3. MB's percent of volume	72	76	71	72
4. Direct				

Expenses	29,074	13,582	120,141	232,000
5. Administration (AMLS 50%)	24,768	38,457	3,188	4,275
6. Administration (Brokerage 50%)	86,689	80,814	80,814	122,580
7. Non-Management Salaries (Brokerage 50%)	40,727	47,445	86,065	98,869
8. Logging Tax	138,678	37,665	83,133	92,587
9. Income Tax	502,161	180,557	286,690	288,690
10.NET INCOME	904,110	239,305	366,513	378,203
11.Dividend Paid				
12.Principal defined -				
(a) 1/2 income for year	402,055	119,652	183,256	189,101
(b) Amount not paid from previous year	2,455,252	3,259,362	3,498,667	3,865,180
(c) Principal sum bearing interest	2,857,307	3,379,014	3,681,923	4,054,281
(d) Accumulated Principal	3,259,362	3,498,667	3,865,180	4,243,383

TABLE 1	TOTAL
INCOME:	
1. MB's percent of income	
2. Gross income MB's percent	9,721,573
EXPENSES:	
3. MB's percent of volume	
4. Direct Expenses	624,998
5. Administration (AMLS 50%)	88,075
6. Administration (Brokerage 50%)	500,344
7. Non-Management Salaries (Brokerage 50%)	369,524
8. Logging Tax	972,401
9. Income Tax	2,712,848
10.NET INCOME	4,453,383

11.Dividend Paid	(210,000)
	2,243,383
	==========

12.Principal defined -

(a)	1/2 income for year
(b)	Amount not paid from previous year
(c)	Principal sum bearing interest
(d)	Accumulated Principal

[Ed. note: the above columns appeared side by side on paper copy]

Line by Line Explanation of Table 1:

73 1. The percentage of the gross profits attributable to transactions between Log Sales and MB: In 1970, 92% of the gross profits could be attributed to transactions between Log Sales and MB. In 1977, 75% of the transactions could be so attributed. (See p. 77 supra).

74 2. The gross profits on sales and commissions earned by Log Sales attributable to transactions with MB: The numbers recorded in the table represent the gross profit on the sale of logs plus gross commissions times the percentage shown on Line 1. In 1977 the gross profit on sales was $1,482,646 and commissions earned were $139,972, for a total of $1,622,636. 75% of the latter figure is $1,216,977, which is recorded in the table on line 2 for 1977.

75 3. The percentage of logs attributable to MB transactions by volume of logs: In 1970, 88% of the logs dealt with by Log Sales were purchased from or sold to MB. In 1977 the percentage was 72%. (see p. 78 supra).

76 4. The direct operating expenses which relate to transactions with MB: This line includes such items as towing, log insurance, boom chains, dumping and booming, scaling fees, log inspection, log storage, export timber tax and other similar items. Each figure is arrived at by multiplying the total of direct operating expenses on the statement of earnings of Log Sales by the percentage indicated on line 3. In 1977 Log Sales had $322,223 in direct operating expenses. 72% (line 3) of the logs handled could be related to transactions with MB. 72% of $322,223 is $232,000, the figure on line 4 of the 1977 totals.

77 5. The figures in this line represent 50% of the administrative expenses incurred by Log Sales, not including the management fee which was paid for Log Brokerage, which is accounted for separately below. These expenses include audit and legal fees, settlement of a damage claim, telex, bad debts, capital tax, travel and promotion, and other items.

78 6. Administrative expenses incurred by Log Brokerage: Log Sales paid 25% of its gross profits to Log Brokerage year and, in return, received certain services. 25% was a high price to pay for the services rendered. I have examined the annual statement of earnings and expenses for Log Brokerage to determine the true amount necessarily expended to earn the profit from the transactions. This line

represents the non-salary portion of those expenses which include rent, light, telephone and telex, office and stationary postage, towing, travel and client promotion, automobiles, export expense, strapping, bank and other interest, and other items. Some of the interest paid by Log Brokerage was paid to Andersen and MacKinnon, and this amount has been excluded. Again, for the reasons set out above, 50% of this total can be claimed as an expense.

79 7. Non-management salaries paid by Log Brokerage: This line represents 50% of all salaries paid by Log Brokerage to persons other than Andersen and MacKinnon. This would be monies paid to secretaries and other office staff.

80 8. The logging tax paid in each year times the percentage on line 1: In 1977 Log Sales paid $123,450 in logging taxes and 75% of its gross profits were attributable to MB transactions. (See line 1). 75% of $123,450 is $92,587, the figure found on line 8 under 1977.

81 9. The income tax paid on the profits earned on the MB transactions: This figure is arrived at by multiplying the net earnings from operations, as set out in the statement of earnings, by the percentage of gross income which can be related to MB transactions (line 1). This product is then divided by the total net pre-tax earnings to arrive at the percentage of total pre-tax earnings attributable to MB transactions. The total income tax paid for the year is then multiplied by this percentage to give the figure in line 9.

82 In 1977 net earnings from operations (sales and commissions) was $921,082 and the MB share was 75% (line 1) of that figure or $690,811. Divided by the total of pre-tax earnings of $1,114,346, we find that 62% of the earnings before income taxes were attributable to MB transactions in that year. Log Sales paid $465,263 in taxes during that year, and therefore the MB share (62% of that) is $288,463, as indicated in line 9 of the 1977 figure.

83 The actual tax paid was based on the net figure in the statement of earnings compiled by Log Sales and not on the net figure which I have compiled for purposes of this case only. As tax was assessed on the amounts reported by Log Sales, using the figures as presented in that statement of earnings would be the most accurate way to find the amount of tax which Log Sales was required to pay on account of its transactions with MB.

84 10. This line represents the gross profit in line 2 less the expenses shown in lines 4 - 9.

85 11. In 1972 $210,000 was taken from Log Sales by way of dividends and used to purchase the AMCO shares. The figure must be subtracted to prevent the Plaintiff from recovering both the price paid for the shares and the shares themselves.

86 12. These lines represent the calculation of the principal used in table 2 to arrive at the interest payable. I have assumed that the income was earned evenly throughout the year. It would be wrong to give interest on the total net income earned during a year, as the Defendants only had use of most of the money for part of the year. Therefore, line 12(a) represent half the amount on line 10 (line 11 in 1972). Line 12(b) is the sum of the net income for all previous years. Line 12(c) is the sum of 12(a) and 12(b). Line 12(d) is the accumulated principal at the end of the year.

87 In 1977 Log Sales earned $378,203 (line 10), and half of that amount is $189,101 (12(a)). Line 12 (b) is the sum of the net income earned 1970-1976 (per line 10) less the dividend paid in 1972 -- $3,865,180. Line 12(c) shows the sum of 12(a) and 12(b) is $4,054,281, the amount which also appears in table 2, line 1 for 1977. Interest on that amount at 8%, the 1977 prime rate, is $323,343, the amount shown on line 3 of table 2 for 1977.

TABLE 2 INTEREST	1970	1971	1972	1973
1. Principal	62,442	214,285	348,762	1,424,545
2. Prime	8	6	6	8
3. Interest	4,985	12,857	20,926	113,964

TABLE 2 INTEREST	1974	1975	1976	1977
1. Principal	2,857,307	3,379,014	3,681,923	4,054,281
2. Prime	11	9	10	8
3. Interest	314,304	304,111	368,192	324,343

TABLE 2 INTEREST	1978	1979	1980	1981
1. Principal	4,243,383	4,243,383	4,243,383	4,243,283
2. Prime	10	13	14	19
3. Interest	424,338	551,640	594,074	806,243

TABLE 2	1982	1983
INTEREST		
1. Principal	4,243,383	4,243,383
2. Prime	16	12
3. Interest	678,941	168,038
	TOTAL 4,869,708	

[Ed. note: the above columns appeared side by side on paper copy.]

88 As referred to earlier, the Defendant AMCO was incorporated by Andersen and MacKinnon to acquire an interest in a sawmill, the intention being to add another dimension to their operation. An interest in the Delta companies was acquired by AMCO and Binstead's interest was not made known to the other shareholder in the Delta companies, Errol Wintemute. Wintemute's plan in selling the shares was to provide the mechanism for him to slowly retire from the business. In fact, what occurred was that Andersen and MacKinnon did not join him in the business as originally planned and to make things worse Wintemute found that he had contributed to the welfare of Binstead, a person he disliked very much. Mr. Wintemute has my sympathy. I doubt that Andersen or MacKinnon ever really intended to join Wintemute.

89 The funds used to acquire the shares in the Delta companies came from Log Sales. The Plaintiff is entitled to trace those monies. The fund from which the monies came was of course, mixed. It may be presumed that the monies so paid out are attributable to profits wrongfully earned on MB logs. Some courts have also allowed tracing by fixing a percent of the mixed fund as tainted money. In the present case, 79% of Log Sales' retained earnings at the time were paid in 1972 was attributable to MB transactions. The allocation in this case should not be made on this basis. I would order that all of the shares of AMCO are held by the Defendants in trust for MB. All money, whether interest, dividends, salary or bonuses which was paid out to the Defendants, is also recoverable by MB, save for the $210,000 paid out by AMCO to repay the shareholders loans.

90 MB argues that it is entitled to the highest value of the AMCO shares during the time that the property was wrongfully held. Rather than being awarded the shares in specie, MB claims a right to judgment against the Defendants for that cash amount instead. In the present circumstances, that argument cannot succeed. The only evidence I have of value of, the AMCO shares is the book value. On the Plaintiff's own evidence, that does not reflect the market value. It would be quite wrong to rely upon any valuation which does not reflect the true market value.

91 It might be useful to make one or two other comments about the evidence of the Plaintiff as it related to the Delta companies. Criticism is made as to the payment of dividends by Delta Chip in 1975, 1978 and in 1980, and of the payment of certain management fees. Additionally, the Plaintiff claims that certain dividends paid by Delta Cedar were improperly paid. I am of the view that those payments, in whatever category, were properly paid in good faith and in keeping with the policy established by Wintemute long before he sold a half interest to the Defendants. I do not think the payments were an attempt to strip the company. Wintemute had effective control of the Delta companies and he caused the payments to be made. I accept his evidence in its entirety. The payments were intended to motivate the employees and it is for that purpose only that such payments were made. It is not for this court to criticize Wintemute's long-established policy. Without detailing the particulars of Delta Cedar's declared dividends of $2-1/2 million in 1982, I think it falls into the same category as the other financial transactions referred to. It was not done with a dishonest design. On the contrary, the motives of Wintemute were both reasonable and honourable. It might be thought that since Wintemute had notice of the Plaintiff's pending claim that he ought not to have declared the dividend in 1982. I think the answer is found in Carl Zeiss Stiftung v. Herbert Smith & Co., [1960] 2 All E.R. 367 (C.A.). The court held that knowledge of a claim for the imposition of a constructive trust does not impose a fiduciary duty on a stranger to the trust. The Delta companies could not be considered constructive trustees either when they received payment for their shares in 1972 or when they received notice of the Plaintiff's claim. In the first instance, they took the money from AMCO for full and valuable consideration without notice of the trust and in the second instance, the Plaintiff's lawsuit was merely a notice of a doubtful equity. In the end, there is no basis on the evidence or on the law for considering a claim based upon the highest value of the shares. Without establishing the true value of those shares at the material time, the Plaintiff is left with the AMCO shares in specie.

92 As regards this aspect of the Plaintiff's claim, there will be a declaration that all of the shares in AMCO are held in trust by Andersen, MacKinnon and Binstead for the Plaintiff. There will be an order tracing any funds paid out by AMCO to the benefit of its shareholders. The action against the Delta companies is dismissed. Costs will be on a solicitor/client basis.

93 With respect to the remaining Defendants, there will be judgment for the Plaintiff against those Defendants jointly in the sum of $9,113,091 with costs. There will be a Bullock order. There will be no order as to prejudgment interest. I make no award in this regard as equitable interest has already been awarded. It seems to me that the result would be the same in either case.

94 With regard to the Defendant Scoffham, there will be an order for costs on a solicitor/client scale on the basis of an allegation of wrongdoing which remained until the action against him was dismissed (by consent). The Plaintiff will have a Bullock order with respect to those costs as against the Defendant Binstead.

DOHM J.

qp/s/mes

TAB 6

Maria Elena Hoffstein (Contributor)

Halsbury's Laws of Canada - Trusts

IV. TRUSTS ARISING BY OPERATION OF LAW

2. Constructive Trusts

(3) Circumstances in Which Constructive Trusts Arise

(c) Profits of Wrongs

(ii) Breach of Fiduciary Duty

C. Remedies

HTR-63 Unauthorized profit.

HTR-63 Unauthorized profit. The rule that prohibits a fiduciary from profiting from his or her office applies equally whether the profit is extracted from the beneficiary's property, or the fiduciary's misuse of his or her position to secure a private advantage from a third party.[1] It is a wholly immaterial question whether the beneficiary suffered any loss corresponding to the fiduciary's gain.[2]

Misappropriation. The simplest example of an unauthorized profit occurs when a trustee wrongfully takes property from an express trust under his or her control. If a person is entrusted with the possession or management of property, and then takes the property out of the trust in an unauthorized fashion, a constructive trust will arise in order to preserve the beneficiary's equitable ownership of the asset. In such circumstances, the wronged cestui que trust will be entitled to a constructive trust over the pilfered assets as a matter of course.[3]

Bribery. The situation is similar when an agent accepts a bribe, secret commission, or private advantage of any sort from a third party with whom the agent is dealing on behalf of his or her principal. Where a fiduciary receives such a benefit from a third party, the fiduciary will not be heard to claim beneficial ownership for himself or herself, therefore the fiduciary will be taken to hold it on constructive trust for the beneficiary. If, however, the asset constituting the benefit declines in value after its receipt, the beneficiary may elect a monetary award equal to its value at the time it was wrongfully acquired by the fiduciary.[4] If the agent accepts a bribe in consideration for binding the principal to a contract, the principal may be entitled to rescind the contract.[5]

Indirect bribery. Because a vendor sometimes bribes a fiduciary by providing a conditional or subsidized interest in an asset then sold to the fiduciary's principal, some cases of a fiduciary receiving a bribe also constitute self-dealing. However, the remedy of a wronged principal in such cases is not limited to unwinding the transaction. By acquiring an interest in the asset, the fiduciary appropriates for

himself or herself an opportunity belonging to the beneficiary, and then fraudulently resells his or her interest to the beneficiary. In such circumstances, the false fiduciary's profits from the transaction belong in equity to the beneficiary, as if they were a direct bribe.[6]

Improper seizure of opportunities. Because of his or her responsibilities, a fiduciary sometimes learns of potentially lucrative opportunities,[7] or acquires confidential information from,[8] or on behalf[9] of the principal that presents the fiduciary with an opportunity. Without the **informed consent** of the principal, a fiduciary cannot seize such an opportunity for his or her own benefit without breaching the fiduciary's duty of loyalty.[10] Even if the beneficiary declined to pursue the opportunity, or the opportunity could not have been realized for the benefit of the principal, a fiduciary that seizes such an opportunity without proper authorization must forfeit whatever profits are achieved.[11] The seizure of an opportunity belonging to a beneficiary is analogous to the misappropriation of property, and often involves the acquisition of a specific asset: accordingly, a constructive trust is often the most appropriate remedy. Where the false fiduciary acquires assets by seizing an opportunity that belongs to the beneficiary, a constructive trust may be impressed upon whatever assets the fiduciary has thereby obtained.[12]

Footnote(s)

1 *Sugdan v. Crosslands* (1856), 3 Sm. & Giff. 192, 4 W.R. 343, 65 E.R. 620.

2 *In re Caerphilly Colliery Company (Pearson's Case)* (1877), 5 Ch. D. 336 at 341 (C.A.), *per* Jessell M.R.

3 *Ruwenzori Enterprises Ltd. v. Walji*, [2006] B.C.J. No. 2638 at para. 44, 274 D.L.R. (4th) 696 (B.C.C.A.).

4 *In re Caerphilly Colliery Company (Pearson's Case)* (1877), 5 Ch. D. 336 at 341 (C.A.), *per* Jessell, M.R.

5 *Banque Indosuez v. Canadian Overseas Airlines*, [1990] B.C.J. No. 21 (B.C.S.C.).

6 *Tyrell v. Bank of London* (1862), 10 H.L.C. 26, 11 E.R. 934; *Hitchens v. Congreve* (1829), 1 Russ. & M. 150, 39 E.R. 58.

7 *Canadian Aero Service Ltd. v. O'Malley*, [1973] S.C.J. No. 97, [1974] S.C.R. 592 (S.C.C.).

8 *McLeod v. Sweezey*, [1944] S.C.J. No. 5, [1944] S.C.R. 111 (S.C.C.).

9 *Phipps v. Boardman*, [1964] 1 W.L.R. 993, [1964] 2 All E.R. 187 (Ch. Div.).

10 *Canadian Aero Service Ltd. v. O'Malley*, [1973] S.C.J. No. 97, [1974] S.C.R. 592 (S.C.C.); *Phipps v. Boardman*, [1964] 1 W.L.R. 993, [1964] 2 All E.R. 187 (Ch. Div.); *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223.

11 *Abbey Glen Property Corp. v. Stumborg*, [1978] A.J. No. 712, [1978] 4 W.W.R. 28 (Alta. C.A.).

12 *MacMillan Bloedel Ltd. v. Binstead*, [1983] B.C.J. No. 802, 14 E.T.R. 269 (B.C.S.C.); *Cranewood Financial Corp. v. Norisawa*, [2001] B.C.J. No. 1566, 107 A.C.W.S. (3d) 405

(B.C.S.C.); *Phipps v. Boardman*, [1965] Ch. 992 (C.A.); *Ex parte James* (1803), 8 Ves. 337, 32 E.R. 385.

TAB 7

1991 CarswellOnt 544, 43 E.T.R. 131, 84 D.L.R. (4th) 724, 5 O.R. (3d) 734, 50 O.A.R. 209, 50 O.A.C. 209

1991 CarswellOnt 544, 43 E.T.R. 131, 84 D.L.R. (4th) 724, 5 O.R. (3d) 734, 50 O.A.R. 209, 50 O.A.C. 209

Royal Bank v. Fogler

THE ROYAL BANK OF CANADA v. FOGLER, RUBINOFF

Ontario Court of Appeal

Dubin C.J.O., Blair and Tarnopolsky JJ.A.

Heard: March 5, 1991
Judgment: October 15, 1991
Docket: Doc. CA 205/88

Counsel: *Maurice J. Neirinck*, for appellant.

Hans J.B.A. Dickie, Q.C., for respondent.

Subject: Estates and Trusts

Trusts and Trustees --- Powers and duties of trustees — Duties.

Trusts and Trustees --- Breach of trust — Exemption from liability — Consent or acquiescence of beneficiary.

Trusts and trustees — Breach of trust — Acquiescence by beneficiary — Bank lending funds to client of law firm for purchase of shares — Funds held in firm's trust account but used to cover fees owed by client — Firm in breach of trust — Bank not acquiescing in breach, as bank not fully aware of all circumstances and not approving firm's actions.

Trusts and trustees — Breach of trust — Funds lent by bank to client of law firm to purchase shares — Funds held in firm's trust account and used by firm to cover fees owed by client — Knowledge of details of trust on which funds held to be imputed to firm — Firm in breach of trust and liable to bank for funds.

B, a partner in the respondent law firm, represented K, a businessman, who was attempting to buy out his co-shareholders. To facilitate the transaction and show good faith to the prospective vendors, B suggested that K put $180,000 into the firm's trust account to be applied to the share purchase on completion. The appellant bank (the "bank") loaned K the funds to make the deposit. The understanding between K and the bank was that the funds would be held in trust by the firm and used if completion took place, but would be returned to the bank if completion did not occur.

B drafted a document to be sent to the bank in the form of a direction from K to the firm, stating that the firm held the funds at the direction of K. The bank accepted this document without comment. Subsequently, the relationship between K and the firm deteriorated, and B informed K that $100,000 of the $180,000 held in trust was going to be used to cover fees owed by K to the firm. This was done over K's objections. The balance was sent to K.

Several months later, the bank brought proceedings for the return of the funds. The action was dismissed at first instance on the basis that the bank, by not objecting to the direction which B had sent it, had lost control of the funds. The bank appealed.

Held:

The appeal was allowed.

A trust relationship existed between K and the bank, not merely a debtor-creditor relationship. The law firm knew that the funds were impressed with a trust, although B may have been uncertain as to its exact nature. B had a legal duty to ascertain in what manner he could deal with the funds. As he did not make any inquiries, the information he would have obtained must be imputed to him. By applying $100,000 of the trust moneys to its own account, the firm breached the trust and became liable to the bank as a trustee de son tort.

The direction given by B to the bank did not affect the trust obligation of K to the bank. There was nothing in the direction stating that the moneys could be used for any purpose other than for the purchase of the shares. Further, the firm could not rely on the direction in applying the funds to its own account, as it had received no written direction from K authorizing it to do so, as the direction required.

The silence of the bank over the direction did not constitute acquiescence in, or acceptance of the breach of trust. The bank could only acquiesce in what was done if it was fully informed of all the material facts of the case and had done some positive act indicating approval of what was done.

Cases considered:

Brown v. Brown, [1931] O.R. 759, [1931] 4 D.L.R. 420 (H.C.) [reversed on other grounds [1932] 2 D.L.R. 819 (Ont. C.A.)] — *considered*

Carl B. Potter Ltd. v. Mercantile Bank of Canada, [1980] 2 S.C.R. 343, 8 E.T.R. 219, 11 B.L.R. 193, 112 D.L.R. (3d) 88, 33 N.R. 175, 41 N.S.R. (2d) 573, 76 A.P.R. 573 — *applied*

Inglis v. Beaty (1878), 2 O.A.R. 453 — *applied*

Life Assn. of Scotland v. Siddal; Cooper v. Greene (1861), 3 De G. F. & J. 58, 45 E.R. 800, [1861-73] All E.R. Rep. 892 — *referred to*

Appeal from dismissal of action for damages for breach of trust.

The judgment of the court was delivered by *Dubin C.J.O.*:

1 This is an appeal by the Royal Bank of Canada from the dismissal of its action against the respondent law firm for damages in the sum of $180,000 for breach of trust.

2 The moneys in question came into the possession of the respondent by way of a draft drawn on the Royal Bank of Canada in favour of Fogler, Rubinoff in trust. The draft was delivered to the law firm by a customer of the bank, who was a client of Fogler, Rubinoff.

3 The trial judge held that, when the moneys were received by the law firm, it knew that they were subject to a trust in favour of the bank, the terms of which required that they be used for one specific purpose only, failing which the moneys were to be returned to the bank.

4 In the end, and in a manner inconsistent with the terms of the trust, the moneys were distributed by the respondent by applying over $100,000 of the said sum to the legal fees owed to it by the client and the balance to the client.

5 The trial judge, however, held that the bank had acquiesced in the breach of trust and dismissed the action on that ground.

6 To appreciate the issues on appeal, it is first necessary to outline briefly the evidence and the findings of the learned trial judge.

The Evidence and the Findings of the Trial Judge

7 Richard A. Bain, a partner in the respondent law firm, represented one Maury Kalen. Kalen was the major shareholder in a corporation which owned the Mr. Greenjeans restaurants. In 1983, Kalen was involved in a dispute with his co-shareholders and, in order to resolve the dispute, sought to buy their shares.

8 Negotiations to effect such a transaction were commenced. Bain conducted those negotiations on behalf of Kalen with the solicitors for the other shareholders. In order to facilitate the transaction, and as a demonstration of good faith to the potential vendors, Bain suggested that Kalen put $180,000 into the law firm's trust account to be applied to the purchase price if the transaction were completed.

9 Kalen had previously approached the Royal Bank to request a loan of approximately $2 million to fund the entire purchase of the co-shareholders' interest in the company.

10 On July 29, 1983, Kalen requested that the Royal Bank provide an advance of $180,000 to be paid to and held by Fogler, Rubinoff as part of the total financing package. The understanding between Kalen and the bank was that the moneys would be held in trust by the respondent pending the entering into of an agreement for the purchase and sale of the co-shareholders' shares and, if an agreement were entered into, the moneys would be paid to the co-shareholders as part of the purchase price. If the parties failed to enter into an agreement, the moneys would be returned to the bank.

11 Pursuant to that agreement, the bank issued a draft in the sum of $180,000 payable to "Fogler, Rubinoff in trust." The bank asked Kalen to provide proof that the moneys were being held in trust by Fogler, Rubinoff as agreed upon. Kalen took the draft to Bain.

12 What transpired between Bain and Kalen, and the instructions that Kalen gave to Bain, were a matter of some dispute at trial. On this critical issue the learned trial judge made the following findings:

> Kalen took the draft payable to 'Fogler, Rubinoff in trust' to his solicitor, Bain. Kalen's evidence about the ensuing discussion is rather unclear and I am content to accept Bain's version of what occurred between

them. It is as follows: Kalen told Bain that he had borrowed the money, and that he was accountable for it to the lender. He went on to say that he wanted to show the lender that the law firm held the money in trust; *and asked for an undertaking that Bain would deal with it as the lender directed.* When asked by Bain why he wanted such a document, Kalen said it was his own idea and was intended to make the lender more comfortable. ...

. . . . .

On the basis of Bain's own evidence, I am satisfied that he understood that the bank had lent Kalen money which was to be used only for certain purposes which were clearly delineated and understood; that Kalen adequately communicated that arrangement to Bain; and that the defendant law firm therefore took the money subject to the same limitations that were imposed upon Kalen. ...

[Emphasis added.]

13 Bain did draft a document for Kalen to provide to the bank. This document took the form of a direction from Kalen to the law firm and reads as follows:

Direction

To: Fogler, Rubinoff

Attention: Richard A. Bain, Q.C.

I have today paid to you in trust the sum of $180,000, in contemplation that such sum will constitute the required deposit under the Agreement of Purchase and Sale which you are presently attempting to settle with various other persons.

. . . . .

Except as you may be further directed by me in writing, you are hereby directed and instructed to pay for my account to the Royal Bank of Canada at its Commercial Banking Centre, 110 Eglinton Avenue East, Toronto, any portion of the said sum of $180,000 and any interest thereon which may be payable by you to me, and this shall be your good and sufficient authority for so doing.

Dated at Toronto this 29th day of July, 1983.

'*Maury Kalen*'

Maury Kalen

[Emphasis added.]

14 With respect to Bain's explanation for drafting the direction in terms other than as instructed by his client, the learned trial judge made, in part, the following comments and findings:

I am unable to agree that any or all of these considerations were sufficient to justify Bain's disregard of his client's instructions. *Although those instructions were not expressed with the utmost precision, they were ad-*

> *equate, in my view to convey to Bain the message that Kalen was obliged to ensure that the funds advanced to him by the Royal Bank and made payable directly to Bain's trust account, were impressed with a trust in favour of the lender.* I am equally unimpressed by Bain's emphasis on the fact that Kalen expressed himself as 'wishing' to have the money held at the direction of the Royal Bank, rather than saying that he 'had' to have the money so held. Bain did not ask his client for the precise terms of the loan made by the bank, but merely asked Kalen how much flexibility he desired.
>
> Bain told Kalen that he could not hold the money on terms to be directed by the bank, because the bank might change its mind about the share purchase transaction. If that were a proper consideration, it seems to me that the objection could easily have been met by an undertaking which provided that the money was to be applied to the deposit on the transaction then being negotiated; and otherwise, that the money was to be returned to the Royal Bank.
>
> . . . . .
>
> I find that Bain drew a document which differed in a material way from that arrangement, and from Kalen's request. Instead of providing that Fogler, Rubinoff held the money at the direction of the bank, the document stated that Fogler, Rubinoff held the money at the direction of Kalen, who could accordingly prevent the money from being returned to the bank.

[Emphasis added.]

15 Kalen delivered the direction to Mr. T.J. O'Connell, the account manager of the appellant with whom Kalen had been dealing. There was never any communication between the bank and Bain, or the bank and Kalen, with respect to the contents of the direction.

16 Between September 15, 1983, and October 4, 1983, the relationship between Kalen and the respondent deteriorated as did negotiations between Kalen and his co-shareholders.

17 It was during this period that Bain advised Kalen that, rather than applying the moneys held in trust as a deposit, the moneys would first be applied to cover the legal fees owed by Kalen to the law firm. This was at a time when the negotiations for the purchase of the co-shareholders' shares were still not at an end.

18 The decision by Bain to apply the moneys held in trust to payment of the legal fees was seriously objected to by Kalen, and the following portions of the correspondence between them during this period illustrate what transpired with respect to the disposition of the $180,000.

19 In a letter, dated September 15, 1983, Bain advised Kalen, in part, as follows:

> You have assured me that if we pay the entire $180,000 and accrued interest to you or in accordance with your direction without paying our accounts, our accounts will be paid on closing. I have told you that we are not prepared to rely on your assurances, and that we will deduct from any payment out of trust the amount of our outstanding accounts and will apply the deduction to pay our outstanding accounts.
>
> You said that the $180,000 was only to be used to fund a deposit in connection with the purchase, and accused me of bad faith. I refuted your accusation. I told you that we would have paid the $180,000 out as a deposit, but as you know, an agreement along these lines could not be settled with the other side. You then instructed me to pay the $180,000 to the Vending Parties. I said that your instructions were absurd, that

there was no agreement in existence pursuant to which you could pay the $180,000 to the Vending Parties, but that we would pay the monies to whomever you instructed net of deduction for payment of our accounts. *You* then rescinded those instructions and *told me that you expected that we would pay the $180,000 to the Vending Parties on closing. I said we would deduct our fees and disbursements from the closing payment and observed that this shouldn't upset you as you intended to pay us on closing in any event, so you could pay the amount of the deduction to the Vending Parties.*

. . . . .

Although I told you that I was prepared to not make any deduction from the trust monies on account of current unbilled work, in light of our apparently deteriorating relationship I am now not prepared to continue this arrangement. *If you request us to pay out the trust monies, we will render a final account for unbilled fees and disbursements and also pay this account out of the trust monies.*

[Emphasis added.]

20 On October 4, 1983, Bain advised Kalen that the firm had resigned as his solicitors, and concluded the letter as follows:

We will shortly be rendering further accounts and will pay ourselves all outstanding accounts out of the monies which we are holding in trust. The balance of such monies will be refunded to you.

21 By letter of October 5, 1983, Kalen replied, in part, as follows:

I respectfully suggest that final accounts be prepared and forwarded for consideration and payment. *Under no circumstances are you authorized to convert all or a part of the $180,000 deposited in Trust with you pursuant to your strong suggestions that I must demonstrate good faith and availability of funds. As far as I am concerned and as I've reminded you repeatedly, I remain hopeful that the acquisition can be finalized in the near future. As recently as yesterday I assured an intermediary that the $180,000 remained on deposit with you as consistent with my stated objective to acquire their interests.*

[Emphasis added.]

22 In reply, Bain wrote Kalen on October 6, 1983, in part, as follows:

The $180,000 was deposited by you with us in trust under the following circumstances. The other side said that they did not believe that you had any intention of closing; that you were lying to me and were using the negotiations to prolong your tenure as long as possible, and that they would not continue to negotiate unless you paid *them* the agreed deposit of $180,000, to be forfeited if an agreement was not reached by a predetermined date. *I rejected this request but with your authority offered to have you lodge the $180,000 with us on the understanding that we would pay it out of trust as the deposit when the agreement was settled and executed.* They accepted this offer on the understanding that I would not disburse the funds for any purpose but to fund the deposit unless I first advised them of our intention to do so. You agreed to this and deposited the $180,000 with us.

. . . . .

As stated in my letter to you of October 4, 1983 and an earlier letter, we will shortly be rendering accounts

> covering the unbilled services rendered to you. At that time, we will pay all of our unpaid accounts out of the $180,000 which we are holding in trust for you, and will refund to you the balance of the monies. In accordance with your direction of 29th July, 1983, we will make this refund by paying such balance to Royal Bank of Canada, Commercial Banking Centre, 110 Eglinton Avenue East, Toronto, except to the extent that you may direct us in writing not to do so. If you intend to give us such a direction, do so immediately.
>
> I do not propose to have any further correspondence with you, and any response which you may choose to write me with respect to this letter, or any other letter along the lines of your letter of October 5, 1983, will simply not be answered.

[Emphasis added.]

23 On October 7, 1983, Bain advised Kalen that of the $180,000 held by the respondent in trust, $100,059.93 had been applied to the payment of the legal fees owed by Kalen to the law firm. The letter concluded as follows:

> I have instructed our accounting department to calculate the interest which will have been earned on the balance of the monies through to next Tuesday, and have instructed them to prepare next Tuesday morning a cheque in the amount of that balance made payable to the order of Royal Bank of Canada, Commercial Banking Centre. I will on that date, in accordance with your direction of 29th July, 1983, forward such cheque to Royal Bank of Canada, Commercial Banking Centre, 110 Eglinton Avenue East, Toronto, with a covering letter stating that the payment is being made to them in accordance with your direction and for your account.

24 On October 11, 1983, pursuant to a direction by Kalen, the balance of the money was paid not to the Royal Bank but to Kalen.

25 The bank was not aware until December 1983 that the agreement of purchase and sale had not been completed, and on December9, 1983 the bank wrote Bain as follows:

> We refer to a Letter of Direction issued by Maury Kalen to your firm on July 29th, 1983 with respect to an amount of $180,000 paid in trust as a deposit under an Agreement of Purchase and Sale. We have been advised by Mr. Kalen that the Agreement of Purchase and Sale was not completed. We therefore request that the funds be forwarded to us as instructed in the last paragraph of Mr. Kalen's Direction Letter.

26 No moneys having been received, the bank commenced this action. The action was dismissed on the basis of the silence of the bank on receipt of the direction in July 1983.

27 The learned trial judge concluded as follows:

> In my opinion, O'Connell's silence upon receipt of the 'Direction' recognized that, whatever his original intention was, the bank had no longer any rights in the money and no control over it. A vigorous protest by him might well have recovered the money at once; or resulted in a document which adequately protected the bank.
>
> His silence, however, could only have led Kalen, and the defendant, to believe that the direction adequately expressed the bank's position, and further, in my view, his silence amounted to an acceptance that the terms of the direction accurately represented the bank's position. I do not for a moment condone Bain's refusal to

accede to Kalen's request, nor Bain's effort to rewrite the terms of the loan. On the other hand, in a very real sense, the bank's acceptance of the rewritten terms makes it the author of its own loss.

Issues on Appeal

Relationship between Kalen and the Royal Bank

28 It was submitted by the respondent that the learned trial judge erred in holding that a trust relationship existed between Kalen and the bank. In the absence of such relationship, the respondent could not be liable for breach of trust.

29 The parties were on common ground that the three elements necessary to constitute a trust are:

30 (i) certainty of intention;

31 (ii) certainty of subject matter;

32 (iii) certainty of object.

33 The respondent contended that what was lacking in this case were the certainties of intention and object, and that the relationship of Kalen and the bank was merely that of debtor-creditor. It was submitted that any discussion by Kalen with the bank as to the purpose to which Kalen proposed to put the moneys did not go so far as to create a trust, and that there was no more than a moral obligation on the part of Kalen as to what was to be done with the proceeds of the loan.

34 However, as noted above, the trial judge held that the moneys advanced by the bank to Kalen, and made payable directly to Fogler, Rubinoff in trust, were impressed with a trust in favour of the bank, and that the moneys were to be used only for a specific purpose, failing which the moneys were to be returned to the bank.

35 In my opinion, there was ample evidence at trial to support the learned trial judge's findings, and, on the basis of those findings, the three elements required to constitute a trust were adequately made out.

Relationship of Fogler, Rubinoff and the Bank

36 At trial, and on appeal, the respondent contended that, even if a trust relationship existed between Kalen and the bank, the respondent was unaware of it and thought it was simply holding Kalen's own moneys in trust for him.

37 On this critical factual issue, the trial judge found against the respondent and held that it knew that the moneys advanced by the bank were impressed with a trust in favour of the bank on the terms previously referred to, and that the law firm took the moneys subject to the same limitations that were imposed upon Kalen. In my opinion, there was evidence to support that finding and no basis on which to set it aside, as was urged by the respondent.

38 As has been noted, the moneys came into the hands of the law firm by way of a draft drawn on the bank in favour of the law firm in trust. Putting Bain's evidence at its highest, and apart from the finding of the trial judge as to his specific knowledge, Bain was uncertain as to the exact nature of the trust. That being so, before taking title he was, in my opinion, obliged to make inquiries of the bank in order to ascertain the manner in

which he could deal with the moneys.

39 Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), puts this proposition, at p. 401, as follows:

> *It is what he actually knows or ought as an honest, reasonable man to have known. Though he does not have actual or imputed knowledge (and such knowledge would, of course, bind him), an honest, reasonable man would make enquiries if there are suspicious circumstances surrounding property which is proffered to him, whether or not in the course of trade. Before he becomes the title holder, he wants to know that he is entitled both to take title and to deal with the property as he thinks fit.* Each of these types of person is liable as a constructive trustee, whether or not he himself benefited by administering property as a *trustee de son tort* or on joining in a trustee's fraudulent and dishonest design. *However, if the person challenged as having done either of these things has benefited personally, the courts are likely to examine his state of mind even more scrupulously than when he has not. And, whether or not he has benefited personally, the burden of proof is upon the person challenged to show that, given the circumstances, enquiries by him were not called for or would not have revealed the true state of affairs. This is because the law imposes an objective test of knowledge upon the stranger who has intermeddled, and he must show that he did not fail that test.*

[Emphasis added; footnotes omitted.]

40 Had the respondent made the inquiries which I think it was under a legal duty to make, if it were uncertain as to the true nature of the relationship between the bank and Kalen, such inquiries would have confirmed that the subject funds were indeed trust funds and neither available to Kalen personally nor for the payment of Kalen's legal fees and disbursements. The information that could have been obtained by such inquiries is imputed to the respondent.

41 The respondent made no such inquiries.

42 The respondent does not contest the proposition that, if it knew of the trust, either actually or constructively, and took dominion and control of the trust property and acted inconsistently with the terms of the trust, it could be liable to the beneficiary as a constructive trustee.

43 A useful description of the two basic types of constructive trustee, one of which includes a trustee de son tort is found in Waters, *Law of Trusts in Canada*, supra, at p. 400:

> If he receives 'dominion and control' of trust property and, knowing of the trust, acts inconsistently with its terms or its existence, he will be liable as a trustee *de son tort*. But, if he joins with the trustee in what he knows to be a dishonest and fraudulent design to injure the trust beneficiaries, he is accountable as a constructive trustee whether or not any trust property ever came to his hands. He is now acting contrary to any interests of the true beneficiaries; he is certainly not acting on their behalf. And it is at the moment of the participating in the fraud that the participant is made a constructive trustee. In both cases, either as a trustee *de son tort* or as a participant in a fraudulent design, he assumes the obligation, jointly and severally with the appointed trustees, to make good the loss which the design has caused.

[Footnotes omitted.]

44 In my opinion, by applying $100,000 of the trust moneys to its own account and by advancing the bal-

ance of the moneys directly to Kalen, both contrary to the terms of the trust, and knowing of the terms of the trust, the respondent became liable to the bank as a trustee de son tort, subject to the issue of acquiescence, with which I deal next.

Acquiescence

45 It was on the basis of the bank's silence on receipt of Kalen's direction to the law firm that this action was dismissed. Although the trial judge found that on receipt of the moneys the respondent knew that they were subject to a trust in favour of the bank, he held that the bank's silence on receipt of the direction was a recognition that "the bank had no longer any rights in the money and no control over it," and thus the bank acquiesced in the distribution of the funds in a manner inconsistent with the terms of the trust. With respect, I think the learned trial judge erred in so holding.

46 In my opinion, the trust obligation of Kalen to the bank was not affected by the direction.

47 As I have observed earlier, there was no communication between the bank and the law firm with respect to the direction. At trial, Mr. O'Connell, the bank's account manager with whom Kalen had been dealing, acknowledged that he had read the direction on receipt and noted that, by its terms, it confirmed that the moneys were being held in trust for the specific purpose for which they were advanced. He acknowledged that the direction authorized Kalen to direct the disposition of the moneys in the event that the transaction contemplated was not completed, but the bank was confident that Kalen would honour the terms of the trust agreement. There was nothing in the direction which stated that the moneys would or could be used for a purpose other than the purpose for which the moneys were advanced, and the silence of the bank did not induce the respondent to act in a manner contrary to its own interests.

48 On receipt of the bank's draft, directed to the law firm in trust, it was the duty of the law firm to return the moneys to the bank if it were not prepared to accept the moneys in accordance with the trust obligation to which the moneys were subject, and that obligation could not be varied without the agreement of the beneficiary, either express or implied.

49 Furthermore, the respondent cannot be said to have relied on the direction in applying the funds to its own account. In doing so, it was acting contrary to the terms of the direction since no written direction by Kalen authorized such an application of the funds. Indeed, it was acting contrary to the specific instructions of Kalen, that the moneys were to be used for the purpose of a deposit only.

50 In any event, in my opinion, the learned trial judge erred in holding that the silence of the bank constituted an acquiescence or ac ceptance of the breach of the trust obligation.

51 The nature of the defence of acquiescence in cases of breach of trust is that, in effect, the beneficiary was itself a party to the breach.

52 As stated by Waters, supra, at p. 1009:

> If a beneficiary consents to, or concurs in, a breach of trust prior to its being carried out, or he releases the trust from liability, or in some other way acquiesces in the breach after it has been carried out, he may not subsequently claim from the trustee any compensation to the trust for the loss arising.

53 In this context, in *Brown v. Brown*, [1931] O.R. 759, [1931] 4 D.L.R. 420 (H.C.), at p. 768 [O.R.] this

court defined "acquiescence" as:

> *[A] consent on the part of the persons who have the right to call the trustees to account, that they shall be absolved from liability, and that they will adopt the misapplication of the funds, as having been done under their assent and sanction.*

[Emphasis added.]

54 Before a beneficiary can be held to have consented to a breach of trust, it must be shown that the beneficiary was fully informed of its rights and of all the material facts and circumstances of the case.

55 In *Inglis v. Beaty* (1878), 2 O.A.R. 453, the beneficiary of a trust was held not to have acquiesced in a breach of trust, which would have halved the quantum of his interest, on the ground that he was not apprised fully of the breach. The beneficiary had accepted an inaccurate written statement of the affairs of the trust property (a partnership) some 30 years earlier, while his interest was reversionary. He also had acted in a manner consistent with his acceptance of the false information since that time. The respondent argued that the beneficiary had acquiesced in the variation of trust by accepting the misleading document without protest. This court, quoting in part from the judgment of Lord Justice Turner in the case of *Life Assn. of Scotland v. Siddal; Cooper v. v. Greene* (1861), 3 De G. F. & J. 58, 45 E.R. 800, [1861-73] All E.R. Rep. 892, at p. 73 [De G. F. & J.], stated at p. 460:

> 'It is the duty of the trustee to observe the trust, and to preserve the property for the benefit of those entitled in remainder, and I am not prepared to hold that he can be permitted to escape from the liability incident to that duty by simply informing the *cestui que trust* that he has committed, or intends to commit, a breach of it.' [The Lord Justice] afterwards adds, that he is not prepared to say that where the trust is definite and clear, a breach of trust can be held to have been sanctioned or concurred in by the mere knowledge and non-interference of the *cestui que trust* before his interest has come into possession. *He then points out that, in cases of this sort, acquiescence imports full knowledge, and treats it as a settled rule that a cestui que trust cannot be bound by acquiescence unless he has been fully informed of his rights and of all the material facts and circumstances of the case.*

[Emphasis added.]

56 In this case, the learned trial judge held that the bank was under some duty to ensure that the terms of the trust were observed after having received the direction. However, in *Carl B. Potter Ltd. v. Mercantile Bank of Canada,* [1980] 2 S.C.R. 343, 8 E.T.R. 219, 11 B.L.R. 193, 112 D.L.R. (3d) 88, 33 N.R. 175, 41 N.S.R. (2d) 573, 76 A.P.R. 573, that proposition was rejected. Ritchie J., at p.352 [S.C.R.], stated:

> In the present case the relationship of Potter to the bank was that of *cestui que trust* and trustee and I know of no authority for the proposition that a *cestui que trust* owes a duty to its trustee to ensure that the terms of the trust are observed. Accordingly, I cannot find here any duty on the part of the Potter Company to inquire into the internal accounting of the bank or its dealing with trust moneys.

57 What is stated in Waters, supra, at p. 1010, is applicable here:

> The courts have increasingly emphasized in recent years that there are no fixed rules concerning the knowledge of the beneficiary; it is a question of fact in the circumstances of each case. However, it is a matter of

> law as to what the beneficiary is required to know. He may know what the trustees are proposing to do or have done. Has he to know that such a course of action would be or is a breach of trust? The courts have made it quite clear that it is not necessary for the trustee to show that the beneficiary knew the proposed or perpetrated action or omission constituted a breach of trust. *As to concurrence, he must 'fully understand what he is concurring in', as to acquiescence, he must be 'fully informed of his rights and of all material facts and circumstances of the case.'* In other words, whether the alleged approval comes before or after the breach, there must be no question of the concealment of information by the trustee or the omission to tell the beneficiary facts concerning the matter. It would follow that it is irrelevant that the trustee was himself ignorant of any particular fact; it is the state of mind of the beneficiary that is in question.
>
> However, knowledge itself is not sufficient to constitute consent or acquiescence. *There must be some positive act or words which demonstrate that the beneficiary not only knew, but also approved of what was proposed or had been done. A man cannot be said to consent or acquiesce because, though he knows, he does not interfere.*

[Emphasis added; footnotes omitted.]

58 The bank was never advised that the moneys were not to be used for the purpose for which they were advanced, nor was there any act by the bank demonstrating that the bank not only knew but actually approved of what had been done with the moneys. It cannot be said, in my opinion, that the silence of the bank constituted consent to, or acquiescence in the manner in which the moneys were distributed.

Conclusion

59 The trial judge was correct when he held that the law firm took the moneys subject to a trust in favour of the bank, but, in my opinion, he erred in failing to hold that the trust obligation continued throughout and that, by distributing the moneys in a manner inconsistent with the terms of the trust, the law firm is indebted to the bank for the moneys so distributed.

60 In the result, therefore, I would allow the appeal with costs here and below, set aside the judgment below and in its place grant judgment to the appellant in the sum of $180,000. I would entertain submissions as to pre-judgment interest and the scale of costs.

Appeal allowed.

END OF DOCUMENT

TAB 8

1997 CarswellOnt 3560, 36 B.L.R. (2d) 231

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1997 CarswellOnt 3560, 36 B.L.R. (2d) 231

692331 Ontario Ltd. v. Garay

692331 Ontario Limited and 75 Riverside East Ltd., Plaintiffs and John Garay, 600884 Ontario Limited, John Garay & Associates Limited, John Garay Engineering Limited, Garcon Construction Inc., Ferano, Green and Victoria M. Stuart, Defendants

Ontario Court of Justice, General Division

Festeryga J.

Heard: April 28-30, May 1, 2, 5-7, 12-16 and 20-26, 1997
Judgment: September 8, 1997
Docket: 71615-91Q

Proceedings: affirmed (October 21, 1999), Doc. CA C28450 (Ont. C.A.)

Counsel: *Mr. Benjamin Zarnett* and *Mr. Andrew R. Brodkin*, for the Plaintiffs.

John Garay for John Garay, 600884 Ontario Limited, John Garay & Associates Limited, John Garay Engineering Limited and Garcon Construction Inc.

Mr. Ronald E. Carr, for Ferano, Green and Victoria M. Stuart.

Subject: Corporate and Commercial; Estates and Trusts; Torts; Contracts

Trusts and trustees --- Breach of trust — Administration of trust assets — Misuse of trust funds

Condominium developer entered into joint venture with investors — Escrow agreement provided for deposits by purchasers to be held in trust — Developer was unable to meet $500,000 investment obligation and underestimated cost of construction — Developer withdrew $1,073,060 from trust fund through partner in escrow agents to cover his investment and pay for overrun on construction — Partner also removed $3,257.67 from escrow on firm's account — Investors brought action for breach of trust — Partner failed to get direction from investors to release funds and did not disclose withdrawals to independent auditors — Partners failed to satisfy themselves that other partner in joint venture authorized release of funds — Partner had duty to obtain full and informed consent from investors to act in manner not contemplated by trust — Partner failed to keep and render accurate accounts of trust property — Partner was in breach of trust in administration of escrow — Plaintiffs should be compensated for losses that would not have occurred but for breach of trust and fiduciary duties by all defendants — Defendants jointly and severally liable for damages of $1,829,850.

Corporations --- Directors and officers — Fiduciary duties — Withdrawing moneys without authority

Condominium developer entered into joint venture with investors — Escrow agreement provided for deposits by purchasers to be held in trust — Developer was unable to meet $500,000 investment obligation and underestimated cost of construction — Developer withdrew $1,073,060 from trust fund to cover his investment and pay for overrun on construction — Investors brought action for breach of fiduciary duty — Developer was obligated to act honestly and in good faith, with view to best interests of corporation — Developer did not have actual or implied authority of investors to withdraw funds from trust account — Developer misrepresented that full amount of deposits was in trust account, that he contributed $500,000 in capital, and that he made $721,699.26 loan to joint venture — Developer deliberately misled investors about withdrawals from trust account and overrun on fixed contract price — Developer was in breach of fiduciary duty to joint venture — Plaintiffs should be compensated for losses that would not have occurred but for breach of trust and fiduciary duties by all defendants — Defendants jointly and severally liable for damages of $1,829,850 — Developer and his companies liable for punitive damages of $110,000.

Contracts --- Performance or breach — Breach — General

Condominium developer entered into joint venture with investors — Escrow agreement provided for deposits by purchasers to be held in trust — Developer was unable to meet $500,000 investment obligation and underestimated cost of construction — Developer withdrew $1,073,060 from trust fund through partner in escrow agents to cover his investment and pay for overrun on construction — Investors brought action for breach of contract — Partner failed to get direction from investors to release funds, did not disclose withdrawals to independent auditors, and failed to keep and render accurate accounts of trust property — Developer did not have actual or implied authority of investors to withdraw funds from trust account, and deliberately misled investors about withdrawals and overrun on fixed contract price — Developer manipulated trust funds to pay his construction company — Named corporation was in breach of management agreement — Numbered corporation was in breach of joint venture agreement — Defendants jointly and severally liable for damages of $1,829,850 for breach of trust and fiduciary duty — Developer and his companies liable for punitive damages of $110,000.

Conspiracy --- Nature and elements of tort — General

Condominium developer entered into joint venture with investors — Escrow agreement provided for deposits by purchasers to be held in trust — Developer was unable to meet $500,000 investment obligation and underestimated cost of construction — Developer withdrew $1,073,060 from trust fund through partner in escrow agents to cover his investment and pay for overrun on construction — Investors brought action for civil conspiracy — Partner failed to get direction from investors to release funds, did not disclose withdrawals to independent auditors, and failed to keep and render accurate accounts of trust property — Developer did not have actual or implied authority of investors to withdraw funds from trust account, and deliberately misled investors about withdrawals and overrun on fixed contract price — Elements of tort of civil conspiracy were made out — Defendants jointly and severally liable for damages of $1,829,850 for breach of trust and fiduciary duty — Developer and his companies liable for punitive damages of $110,000.

Fraud and misrepresentation --- Fraudulent misrepresentation — Specific elements — Known falsity

Condominium developer entered into joint venture with investors — Escrow agreement provided for deposits by purchasers to be held in trust — Developer was unable to meet $500,000 investment obligation and underestimated cost of construction — Developer withdrew $1,073,060 from trust fund through partner in escrow agents to cover his investment and pay for overrun on construction — Investors brought action for misrepresentation — Developer deliberately made false statements to investors without honest belief in their truth, and with intention that they be relied upon — Developer misled investors with respect to his investment and payment for cost overruns, knowing that funds came from trust ac-

count rather than his own resources — Developer created unbelievable accounting process whereby he purportedly loaned funds to joint venture — Developer responsible for fraudulent misrepresentation — Defendants jointly and severally liable for damages of $1,829,850 for breach of trust and fiduciary duty — Developer and his companies liable for punitive damages of $110,000.

Fraud and misrepresentation --- Duress and undue influence — Duress — Economic duress — Availability of defence or cause of action

Condominium developer entered into joint venture with investors — Escrow agreement provided for deposits by purchasers to be held in trust — Developer was unable to meet $500,000 investment obligation and underestimated cost of construction — Developer withdrew $1,073,060 from trust fund to cover his investment and pay for overrun on construction — Investors refused to discharge mortgage unless developer resigned as officer and director of joint venture — Developer resigned and claimed he was subject to duress — To allow developer's argument to succeed would offend public policy and good conscience — Developer had no other alternative as direct result of his own wrongdoing — There was no pressure on developer to resign and even if there was, it was legitimate and did not amount to coercion of will — Director voluntarily signed agreement after receiving independent legal advice — Defendants jointly and severally liable for damages of $1,829,850 for breach of trust and fiduciary duty — Developer and his companies liable for punitive damages of $110,000.

Cases considered by *Festeryga J.*:

Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, 47 N.R. 191, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1 (S.C.C.) — considered

Canson Enterprises Ltd. v. Boughton & Co. (1991), [1992] 1 W.W.R. 245, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 131 N.R. 321, 85 D.L.R. (4th) 129, 61 B.C.L.R. (2d) 1, 6 B.C.A.C. 1, 13 W.A.C. 1, [1991] 3 S.C.R. 534, 43 E.T.R. 201 (S.C.C.) — referred to

Carl B. Potter Ltd. v. Mercantile Bank of Canada, [1980] 2 S.C.R. 343, 112 D.L.R. (3d) 88, 11 B.L.R. 193, 8 E.T.R. 219, 41 N.S.R. (2d) 573, 76 A.P.R. 573, 33 N.R. 175 (S.C.C.) — considered

Guerin v. R., [1984] 6 W.W.R. 481, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Canada)* 55 N.R. 161, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1, 59 B.C.L.R. 301 (S.C.C.) — referred to

Hill v. Church of Scientology of Toronto, (sub nom. *Hill v. Church of Scientology)* 30 C.R.R. (2d) 189, 25 C.C.L.T. (2d) 89, 184 N.R. 1, 126 D.L.R. (4th) 129, 24 O.R. (3d) 865 (note), 84 O.A.C. 1, [1995] 2 S.C.R. 1130 (S.C.C.) — considered

Hodgkinson v. Simms, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245 (S.C.C.) — referred to

McKitterick v. Duco, Geist & Chodos (1994), 76 O.A.C. 310 (Ont. C.A.) — considered

Royal Bank v. Fogler, Rubinoff (1991), 84 D.L.R. (4th) 724, 5 O.R. (3d) 734, 50 O.A.C. 209, 43 E.T.R. 131 (Ont. C.A.) — referred to

Smith, Re, [1952] O.W.N. 62 (Ont. H.C.) — referred to

Stott v. Merit Investment Corp. (1988), 19 C.C.E.L. 68, 25 O.A.C. 174, 63 O.R. (2d) 545, 48 D.L.R. (4th) 288 (Ont. C.A.) — applied

Statutes considered:

Condominium Act, R.S.O. 1990, c. C.26

s. 53(1) — referred to

ACTION by plaintiffs for damages for breach of trust, breach of fiduciary duty, breach of contract, civil conspiracy, misrepresentation, and negligence; COUNTERCLAIM by defendants for monies owing.

Festeryga J.:

Introduction

1 I was advised by counsel that they were served with a notice to appear in person with respect to John Garay ("Garay") and his companies and there is an order of the court allowing Garay to represent his companies.

2 At the beginning of the trial counsel advised that the case would take approximately three weeks. Garay informed the court that he did not intend to be in court all of the time. He was told by me that it was advisable that he remain in court, listen to the evidence and cross-examine the witnesses. He told me that he understood this but he could not remain in court all of the time. I informed Garay that the fact that he will not be attending in court during the entire trial is his own choice and that he should not complain at some later time for not being present. He told me that he understood. Garay was absent from time to time.

3 This is a claim by the plaintiff corporations against the defendants for damages for breach of trust, breach of fiduciary duty, breach of contract, civil conspiracy, misrepresentation, negligence and punitive damages.

4 Garay and his companies counterclaim against the plaintiffs for amounts allegedly owing to him and his companies by the plaintiffs. The defendants, Ferano, Green ("FG") and Victoria M. Stuart ("Stuart") cross-claim against Gary and his companies for any amounts that they are required to pay to the plaintiffs.

5 The principal players in the action are Dr. Franz Sels ("Dr. Sels") who represented a group of investors from Germany who had assembled land in Windsor. He had to answer to these investors and the facts, as later discussed, will show that he was very careful in protecting those investors.

6 Dr. Sels was looking for a condominium developer to make use of the land. He eventually met Garay who was an experienced developer in that field, the owner and directing mind of all of the defendants except FG and Stuart.

7 There were a number of agreements that were entered into between the various parties whereby Dr. Sels' group was to transfer the land to the joint venture, 75 Riverside East Ltd. ("Riverside") at an agreed value of $1,560,000. The investment of Garay and his company was to be $500,000 and the construction of the building was to be financed by a bank loan which amounted to $13,000,000. The parties to the JVA were 75 Riverside East Ltd. ("Principal"), 692331 Ontario Limited ("692331"), which was the Sels Group and 600884 Ontario Limited ("600884") which was owned by Garay. There was also a Management Agreement ("MA") between the entities that signed by the Principal and John Garay & Associates Limited ("Garay & Associates") as Manager.

8 A fixed price construction contract for $12,564,000 was entered into between the Principal and Garcon Construction Inc. ("Garcon") which Garay owned and directed.

9 An Escrow Agreement ("Escrow") was entered into between the Principal of the first part, the Mortgage Insurance Company of Canada ("MICC") of the second part and FG and Brans as the escrow agent, of the third part. The escrow agent was to hold the deposits made by the prospective purchasers in trust pursuant to section 53(1) of the *Condominium Act*.

10 Garay fell in love with the property and he was convinced that he was the only person that could complete the project. He tried to move ahead quickly to reach his goal not relying on the procedure set out in the agreements. He alleges that his progress was hampered by the slower moving and careful Dr. Sels and his group. Garay at times felt very frustrated. It would appear that he was lacking liquid assets to complete his part of the bargain of investing $500,000 in the joint venture. It would also appear that he miscalculated the cost of construction and agreed to a fixed contract price. He was more concerned with making a profit on the joint venture.

11 Garay accessed the trust funds through the defendant, Stuart, and MICC the latter relying on brokers, specifically Mr. Joe Wray ("Wray"). There is a major dispute as to whether Stuart acted properly in releasing the funds and whether or not Dr. Sels knew that the trust funds were being released.

12 The Sels group takes the position that they had no knowledge that the trust funds were being released and that they were relying on the funds being held in trust until all the residential condominium units had been sold and the transactions closed. They take the position that they did not learn about the lack of funds in the escrow account until November 1990 when the transactions were about to close and at that point Garay, against the advice of his legal adviser, signed a resignation from the project. His position is that he signed it under duress because the Sels group would not discharge a $1.1 million mortgage which was registered against the property to secure their investment. If the mortgage was not discharged then the transactions could not close. Garay takes the position that he did the proper thing to save the project.

13 In the end the transactions closed and the bank loan was satisfied. However, the plaintiffs take the position that there was not enough money left to cover the profit and interest to which they are entitled.

14 The issues are -

1. Breach of trust.

2. Breach of a fiduciary duty.

3. Breach of contract.

4. Civil conspiracy.

5. Misrepresentation.

6. Tort.

7. Contributory negligence by Dr. Sels.

8. Duress.

9. Damages -

(a) General

(b) Punitive

Facts

The parties and other participants

15 Le Goyeau Holdings Limited ("Le Goyeau") is an Ontario corporation represented by Dr. Sels and his son Clemens Sels. Dr. Sels was responsible to the members of the group that make up Le Goyeau.

16 692331 is an Ontario corporation wholly owned by Le Goyeau.

17 600884 is an Ontario corporation owned by Garay.

18 John Garay & Associates Limited ("Garay & Associates") is an Ontario corporation that is owned by Garay and he is the directing mind.

19 Garcon is an Ontario corporation owned by Garay and he is the directing mind.

20 Principal is an Ontario corporation owned equally by 692332 and 600884.

21 FG is a partnership of lawyers authorized to practice law in Ontario.

22 Stuart was a partner at all material times of FG.

23 MICC is in the bonding business, mostly construction, dealing with the Ontario New Home Warranty Program ("ONHWP"). MICC is a party to the Escrow.

24 Wray is an insurance broker with Wray, Baird & MacGregor Insurance Brokers Ltd. Wray's role was to bring clients to MICC. He introduced Garay to Mr. John Thompson at MICC. In order to sell condominium units the project had to be registered with the ONHWP. The registration required the Escrow naming FG as the escrow agents.

25 In 1984 Le Goyeau had assembled land in Windsor on Riverside Drive. In the Spring of 1986 feasibility studies were done for a condominium project on the land and in June of 1986 Garay was introduced to Dr. Sels and they began negotiations for a joint venture. During those negotiations John Garay represented to Dr. Sels that he and his related companies command all the techniques of land assembly, design, construction, leasing and maintenance. He represented that overruns can not be tolerated. He represented that he was able to offer his clients a guarantee of both construction costs and completion dates. He further represented that he was an experienced builder through his company Garcon with respect to building over tunnels. He built over subway tunnels which, in his opinion, was more difficult because they were closer to the surface than the Detroit/Windsor tunnel. Part of the land in question was over the Detroit/Windsor tun- nel.

26 Garay and Dr. Sels intended to enter into a JVA. Garay wanted his company, Garcon to do the construction work and John Garay Engineering Limited ("Garay Engineering") were to supply the necessary drawings.

27 Garay was very impressed with the location of the land. To use his words he "fell in love with the land" and was very eager to be part of the condominium project. In the course of negotiations he instructed Stuart of FG to prepare a

formal JVA which she did and the first draft was sent to Garay about July 1986. This was sent off to Dr. Sels who performed an investigation of Garay and his companies to satisfy himself that he would be a worthy partner. He did satisfy himself but Dr. Sels preferred to begin with a Letter of Intent. He prepared a draft Letter of Intent and sent it to Garay who, in turn, sent it to Stuart.

28 Eventually a letter of Intent dated September 25, 1986 was signed by Le Goyeau and Garay & Associates, that is found at document book Volume 1, tab 34. Paragraph 17 of that document provided that a formal JVA shall be entered into within 30 days of final execution of the document failing which, the Letter of Intent shall be null and void.

29 The parties were to be 50/50 owners and have 50/50 voting privileges. All cheques in amounts less than $5,000 and in payment of items within the budget amounts required only the signature of Garay's company. However all cheques in excess of $5,000 required the signature of one representative of each of the parties provided that Dr. Sels' designated representative shall be available on 24 hours notice. It also provided that a monthly list of cheques issued shall be circulated. Both Garay and Stuart were familiar with and understood the terms of the Letter of Intent.

30 Garay instructed Stuart to prepare a JVA. However, Dr. Sels preferred the firm of Fogler, Rubinoff ("FR") and they produced a draft JVA and MA. The MA was prepared pursuant to paragraph 16 of the Letter of Intent.

31 Stuart also prepared a draft JVA on behalf of Garay. However, Garay preferred the agreement prepared by FR and in November 1986 Garay, on behalf of Garay & Associates and Dr. Sels on behalf of Le Goyeau executed a letter of agreement confirming that the draft agreement annexed as Schedule A to the letter agreement was a final form of the JVA to be entered into between the nominee companies and that the draft agreement annexed as Schedule B to the letter agreement represents a final development and construction management agreement to be entered into with respect to the development and Stuart received copies of Schedules A and B. These documents are found in document book Volume 3, tab 51.

32 In January 1987 the final JVA and the MA are signed and Garay sends the JVA and the MA to Stuart. Garay and Stuart are familiar with and understand both of those agreements.

33 Under Section 10 of the JVA, in particular 10.01(a) Garay as the owner and directing mind of the party referred to as Ontario of the third part, agreed to advance the funds to the joint venture and was responsible for arranging Hudac registration. Garay agreed to this in the Letter of Agreement dated November 6, 1986.

34 The MA required Garay & Associates to act on the basis that the plaintiffs were placing special reliance, trust and confidence in it and I find in the special reliance, trust and confidence on Garay himself. It also required that they act in a faithful diligent and honest manner. Garay & Associates were to keep accurate, full and complete books and accounts for Riverside and make them available to the auditors. It further required Garay & Associates to indemnify the plaintiffs in respect of any losses resulting from any breach by it of the MA or any wrongful or negligent act or omission of it as Manager.

35 In order to get the project moving Garay enlisted the help of Mr. Warren Green of FG in November 1986 to arrange a bond or an MICC guarantee to replace the letter of credit required by Hudac, known as ONHWP. This project had to be registered with a NHWP in order that sales of the condominiums could be commenced.

36 Part of the requirements of MICC is that an Escrow be arranged and this was done on or about December 15, 1986 between Riverside as Principal and MICC and FG and Brans called the escrow agents. That document is found at tab 79 of Volume 3 of the document book. The document is signed by Dr. Sels and Garay on behalf of the Principal. The

signatory for the law firm was Mr. Brans who handed the duties of administering the agreement on to Stuart.

37 The Escrow provides that the deposits on purchases of the condominium units were to be held in trust by the escrow agent for MICC *and* the Principal in accordance with the terms of the agreement. The emphasis is mine.

38 Stuart gave evidence that this agreement was modified with respect to the use of the deposits. The modification was with the agreement of MICC and Garay. I am satisfied that Dr. Sels, who was the other signing party for the Principal, was never approached about the modification and never authorized anything to change the terms of the agreement. He never appointed Garay as the authorized signing agent for both parties in the joint venture except for cheques under $5,000.00. Although Stuart arranged to have a Direction signed by MICC for the release of funds from the trust deposits, she did not get a similar Direction signed by both parties of the Principal.

39 There was evidence given by both Dr. Sels and Garay about discussions concerning the use of the trust deposits in the construction of the project. It is Garay's position that Dr. Sels agreed on behalf of his group that the deposits could be used in the construction. Dr. Sels acknowledges that there was some discussion but that he never agreed to the use of deposits for construction and I accept the evidence of Dr. Sels because, amongst other things, Garay went to great lengths to hide the fact that he was withdrawing deposits to reimburse himself for part of the $500,000 that he was required to invest under the JVA and pay Garcon more than the fixed contract price. It was Garay's position that he was the person here in Canada who was doing all the work, he was moving the project along and was getting nothing but lack of co-operation from Dr. Sels and his group.

40 On July 13, 1987 the property upon which the condominium was being built was conveyed to Riverside and a Charge was registered in favour of 692331 in the amount of $1,100,000 pursuant to the JVA. A building permit was issued by the City of Windsor on August 25, 1987. It is found at document book Volume 5, tab 184. Prior to the building permit being issued there were discussions between Garay and his representatives and the City of Windsor on the effect of the building on the Detroit/Windsor tunnel. The conditions are set out in the building permit numbering four in total.

41 Notwithstanding that, Garay was aware of the difficulties facing him with respect to the tunnel, he entered into a fixed price construction agreement between Principal and Garcon for $12,564,000 after the building permit is issued. The contract is found at tab 188. He knew that the dates set out on page 5 under Definitions paragraph (c) were not realistic at the time that he signed the agreement but he signed it anyhow since he felt that he could complete the project.

42 By the end of July 1987 Garay had withdrawn from the trust deposits $993,000 payable to Garay & Associates and he also received a cheque for $80,000 payable to the City of Windsor for a total of $1,073,000. Garay did not tell Dr. Sels about these withdrawals. He did not have Dr. Sels actual or implied authority to make those withdrawals. I am satisfied that neither Stuart nor Warren Green had the actual or implied permission from Dr. Sels to release the funds. I find that Warren Green did not read the Escrow Agreement and that he did not know that his law firm was a trustee for the Principal. Having full knowledge of the terms of the Letter of Intent and the JVA, Stuart failed to make adequate inquiry to satisfy herself that she was authorized by the other partner of the joint venture, that is to say Dr. Sels, to release the funds. I find that Stuart admitted that FG owed an obligation to Riverside to administer the funds in the trust account in accordance with the terms of the Escrow.

43 Garay, in accordance with the JVA was to arrange for a loan in order to finance the construction of the building for the fixed price $12,564,000. It was during the discussions between himself and Dr. Sels with respect to this financing that Garay says that Dr. Sels understood that the deposits were to be used for construction. I am satisfied that during the negotiations for the loan Garay always wanted to borrow a great deal more from the bank than the fixed price and to divide the excess between himself and Dr. Sels. I am also satisfied that Dr. Sels never agreed to this. It was Dr. Sels philo-

sophy that he did not want to borrow much more than was needed. He understood that Garay had a belief that it is always better to borrow more than was necessary - in effect to use someone else's money.

44 During the negotiations for the loan from the Toronto Dominion Bank "the Bank"), there is a letter dated May 6, 1987 found in document book Volume 4, tab 140. This is addressed to Garay and it was sent to Dr. Sels for his comment. Under conditions of credit item 1, the Bank requested confirmation that under the MICC/Hudac agreement a minimum of $1,350,000 is available to assist with the financing of the condominium project. Dr. Sels had no problem with that paragraph since he interpreted that to mean that there would be this additional security for the Bank if necessary. The Bank would have a $13,000,000 mortgage registered against the property. With the land and the building, there would be more than enough security for the Bank without looking to the trust deposits.

45 Dr. Sels gave evidence that he did have a question about item 2 and item 7. I accept his evidence that he questioned Garay about them and asked for an explanation but Garay never responded and Dr. Sels never followed up. Not having followed up on the items, the Commitment Letter was signed some time after May 6, 1987 by Clemens Sels on behalf of 692331 and Garay signed for Riverside, 600884 and Garay and Associates.

46 Mr. Barry Rotenberg, solicitor for the Bank, wrote a letter of requisitions dated August 13, 1987 to Mr. Norman May of FR amongst which are items 22 and 23. The letter is found in document book Volume 4, tab 178. Item 22 requests evidence as to the expenses incurred with respect to disbursement of deposits held from purchasers. Item 23 requests delivery to the account at the Bank in Windsor of the balance of the purchasers' deposits including those amounts that have been approved for release by MICC and those governed by the Escrow between FG, MICC and Riverside dated December 15, 1986. I find that those items were not brought to the attention of Dr. Sels. He left the financing up to Garay in accordance with their agreement and any questions having to do with the building or financing were referred to Garay.

47 I find that the solicitors involved in the closing had no information as to whether those two items were ever satisfied. They assumed that they were since the funds were advanced.

48 On September 29, 1987 Stuart wrote to the Bank to the attention of Kevin Scott pursuant to a conversation that they had. That letter is found at document book Volume 5, tab 217. She sent a copy to Garay and Associates. In it she encloses a copy of the agreement made between Garay and Associates and MICC showing the disbursements which will be allowed from their trust account. She stated that a schedule has been confirmed with them by MICC as appropriate. In paragraph 2 she set out the amounts that were paid out. The $40,000 was incorrect, the actual figure was $80,000 for the permit fee. This letter was not brought to the attention of the other partner to the joint venture, Dr. Sels, either by Stuart or Garay.

49 By November 1987 excavation and construction was underway. Under the terms of the agreements Garay was to keep the books for the joint venture which were to include the deposits received and monies disbursed on behalf of the joint venture.

50 In November 1987 Sheldon Carr of Laventhol & Horwath ("L&H") wrote to Principal to the attention of Garay with respect to their engagement as auditors of the joint venture. He explained to Garay that their statutory function as auditors is to examine the annual financial statements of the joint venture and report to the *participants* whether they present fairly the financial position, results of operations and changes in its cash resources. The emphasis is mine. He pointed out that because the audit examination will be planned and conducted primarily to enable them to express a professional opinion on the annual financial statements, it will not be designed to identify and cannot necessarily be expected to disclose defalcations and other irregularities. They go on to say that, of course, the discovery or irregularities may

still result from their examination and should any significant ones be encountered, they will be reported to 75 Riverside East Joint Venture. It was further pointed out that the terms of the engagement as the auditors would remain operative for periods subsequent to December 31, 1986 until amended. There was no such amendment. Garay signed on behalf of Riverside joint venture as agreeing with L&H's understanding of the terms of their engagement as auditors of the company as set out in the letter.

51 Construction draws were made from time to time on the bank loan and the cheques were signed by both Garay and Dr. Sels. Garay complained that it was difficult to get money out of Dr. Sels because he was so slow in responding and Garay needed to act quickly. I find that Dr. Sels, quite properly, was being careful and looking after his investment and that of his group.

52 There were no further payments made out of the trust deposits for the year 1988. I am satisfied that as at December 31, 1987 Garay instructed his bookkeepers to record in the books of the joint venture a misrepresentation that $1,763,060 of deposits was still in the escrow account with no amounts being disbursed and that he had contributed $500,000 capital as required by the JVA and had made a further advance of $721,699.26 as a loan to the joint venture.

53 At document book Volume 6, tab 235, Clemens Sels who was authorized to act in this matter on behalf of his father, Dr. Franz Sels, wrote to Garay on January 15, 1988 enclosing page 14 of the JVA setting out Section 10 wherein Garay had agreed to advance $500,000 into Riverside. According to the agreement Garay was to "top up" his $500,000 by the time that the land was transferred to the joint venture which was back in July 1987. On February 9, 1988 Garay responded to Clemens Sels enclosing a breakdown for the additional investment which misled Clemens Sels to believe that he, Garay, paid this money out of his own resources. No mention is made of access to the trust deposits.

54 In August 1988 L&H conduct their audit of Principal by examining at the books of the joint venture at Garay's office. In order to independently confirm that the amounts shown on the books for trust deposits is accurate, Paul Weisman of L&H sent a letter to Stuart dated August 26, 1988 which is found at document book Volume 6, tab 255. I am satisfied that what Paul Weisman was looking for was the amount on deposit in trust in the escrow account on December 31, 1987 in order to confirm the figures shown in the books being kept by Garay.

55 I am satisfied that Stuart was confused as to what the letter meant. I am satisfied that she did not understand what Paul Weisman was asking. She put the letter aside rather than speaking to Paul Weisman for clarification and I am satisfied that she ignored this letter and became occupied with her other work. By October 21, 1988 she received a call from Garay who was upset that she had not responded to the letter. I find that Garay told her that he had spoken to the accountants and what they wanted was the amount of the deposits as at December 31, 1987 without deducting the disbursements.

56 At tab 262 of document book Volume 6, is a letter dated October 21, 1988 from Stuart to Weisman acknowledging receipt of the letter of August 26, 1988 and confirming that as at December 31, 1987 the sum of $1,763,060 had been received from purchasers with respect to the joint venture and was held in their account. She does not disclose that by the latter part of July 1987 $1,073,000 had been disbursed. A blind copy of that letter went to Garay. I am satisfied that she knew or ought to have known that the auditors were relying on her confirmation letter in order to prepare a balance sheet for the joint venture as at December 31, 1987 which, in fact, showed cash held in trust $1,763,060 and deposits on sales of the same amount on the liability side. I am satisfied that Stuart responded to the letter from the auditors based on what Garay told her. In her cross-examination she gave evidence that it did not strike her as being unusual or strange to take instructions from a person whose figures were being audited. When she was asked why she did not show the auditors that a copy of her letter was going to Garay, her response was that it was the same as sending a fax. This, in

my view, was not an adequate explanation. Although she disagreed that the purpose was to disguise the fact that she was notifying Garay of the response, I find that sending the letter is more consistent with disguise than performing her function as an escrow agent.

57 Stuart was never sent the financial statements, including the balance sheet for the joint venture but Garay did receive them and at trial, looking at the financial statements for the year ended December 31, 1987 he said that a lot of things trouble him now. It bothered him, according to his evidence, that the balance sheet could be read, that the amount of $1,763,060 was still in a trust account. His evidence was that he did not look at the financial statements very closely and did not really understand them. I am not prepared to accept that evidence in view of the fact that he has been a successful and knowledgeable business man and land developer.

58 The financial statements for the year ended December 31, 1987 were forwarded to Dr. Sels as well as Garay as stated earlier. In addition to the $1,763,060.00 being shown as monies held in trust, it also showed that there was a capital contribution by Garay of $500,000 and a loan payable to Garay & Associates of $722,099. Nowhere is it indicated that there were disbursements from the escrow account. Garay's explanation, which I refuse to accept as being credible, was that the money he was taking from the escrow account was recorded on the books of Garay and Associates and shown as a loan to the joint venture. In November 1988 he had also used part of the monies from the escrow account to reimburse himself for the disbursements he made to satisfy his equity portion under the joint venture.

59 I am satisfied that Dr. Sels never agreed that the escrow funds could be used in this fashion. As at December 31, 1988 in fact the amount in the escrow account was $1,926,765.27 less $1,073,000 plus accumulated interest.

60 With respect to the financial statements for the period ending December 31, 1988 Weisman of L&H wrote to Stuart on April 4, 1989 and that is shown in document book Volume 6, tab 274. The letter is in similar wording as the previous letter requesting confirmation on amounts on deposit. It is a *pro forma* "boiler plate" letter used by accountants. The only difference is that they are referring to a fiscal year ending December 31, 1988. By this time Stuart thinks she knows what information they want so she begins to prepare the figures which are set out in her letter of May 17, 1989 as $1,926,765.27 being the amount on deposit as at December 31, 1988. That letter is found at document book Volume 7, tab 301. However, before the letter is sent she received a memorandum from Garay dated May 16, 1989 at 16:18 which is found at document book Volume 7, tab 300. I find that Garay is dictating to her what she should write in response to the independent audit inquiry by L&H. He attached the letter that she wrote October 21, 1988 in response to the request for 1987 and Garay asked her to change December 31, 1987 to December 31, 1988 and change $1,763,060 to $1,926,775.27. Stuart responded to L&H with a figure that was $10 less than what Garay wanted her to say. Her evidence was that she was not concerned that Garay was mandating how she should respond to the inquiry although she denied plaintiffs' counsel's suggestion that she did what Garay told her to do in the memo. I am not prepared to accept that evidence. It did not enter her mind that Garay was influencing her. A copy of the response by Stuart to Weisman was sent to Garay by blind copy. I find that Garay and Stuart acted together in deciding how to respond to the auditors with respect to both letters of enquiry from L&H or Stuart.

61 L&H prepared the audited financial statements for the joint venture for the year ended December 31, 1987 relying on the information received from Garay and Stuart. No disbursements from the escrow account were disclosed. I find that Dr. Sels relied on these financial statements. He had no reason to mistrust Garay nor did he have any reason to doubt the sincerity and trustworthiness of Stuart.

62 In 1989 Garay continued withdrawing trust deposits by writing to Joe Wray, the Broker, on March 7, 1989. That letter is found document book Volume 6, tab 271 - the third page of that tab. He wanted to close the trust account with

FG and based on the maturity of each of the T-Bills in which the trust deposits had been invested, to transfer the remaining deposits as well as earn interest to the construction account with the Bank. Garay gave evidence that he did not mean to say construction account. He wished the money transferred to the joint venture account with the Bank. I reject that evidence. I find that what he wrote to Wray is what he meant since he had been using the trust deposits to construct the project. I might add that he wrote to Wray without the knowledge, authority or consent of Dr. Sels. Pursuant to Garay's request of March 7, 1989, Wray wrote to MICC requesting them to release the remaining $1,037,579 to pay down the interim lender upon maturity of the escrow account T-Bills. He followed that up by another letter dated March 15, 1989 requesting confirmation to release the remaining funds. Those documents are found at tab 271.

63 On March 16, 1989 Kathryn Holmes of MICC wrote to Stuart authorizing - "the release of the balance of deposits to the *principal* or as they direct." The emphasis is mine. With that authorization MICC deems itself released from the terms and conditions of the Escrow.

64 Shortly before the letter from the auditor dated April 4, 1989 asking for the status of the balance of the trust account, Stuart signed a cheque dated March 20, 1989 for $718,000 payable to the Principal. She does this at the request of one of the joint venture partners that is Garay but not with the consent, knowledge or authority of the other joint venture partner, Dr. Sels. A copy of the cheque is found at document book Volume 6, tab 273.

65 On May 11, 1989 Mr. Clemens Sels wrote a letter to Garay found in document book Volume 7, tab 290 and expressed annoyance in not being kept up to date with respect to the expenses on the project. It is significant that he asked for the source from which each item was paid. This information had not been received from Garay. It is significant to note that Garay accessed the trust account again when he was given a cheque dated May 12, 1989 for $312,500 payable to Principal. This was with the authority of Stuart who signed the cheque which is found at tab 291 in the same volume.

66 A letter from Clemens Sels dated May 15, 1989 is referred to in a fax from Garay dated May 15, 1989. The fax trail at the top of tab 296 document book Volume 7 indicates that it is received by Clemens Sels at 18.06 hours. In the last paragraphs of that fax, Garay agrees that the shortfalls in construction are covered by Garay. He also states that on March 20 he put $718,000 into the Bank and he attaches a bank statement marked with an 'x'. Looking at that bank statement which is at the same tab number, he has 'x' beside loan payment. Garay admitted in his direct testimony that he was not able to finance the project in May of 1989. He did not want to default on the bond with MICC and the NHWP as it would hurt his reputation. I find that Garay deliberately misled Clemens Sels that he was putting $718,000 into the Riverside bank account out of his own resources. He did not disclose to Clemens Sels or to Dr. Sels that, in fact, these funds were trust funds. I find that the $718,000 was put into the Bank to mislead Clemens Sels that he was covering the expenses over and above the fixed contract price.

67 On June 29, 1989 Garay wrote to Clemens Sels at tab 316, document book Volume 7, discussing the 23rd draw. In that letter Garay represented that the overruns in construction had been paid by Garay & Associates.

68 On July 6, 1989 Stuart wrote to Garay enclosing her account for $3,257.67. She took those funds out of the special Riverside account without the knowledge, consent or authority of Garay's joint venture partner, Dr. Sels. The letter and the account are shown at tab 320, document book Volume 7.

69 Dr. Sels was always concerned about the overruns for construction. Examples of his communications to Garay are at tab 329 and 330 of document book Volume 7, being letters October 17 and 18, 1989. I find that Dr. Sels made it abundantly clear to Garay who was the owner and directing mind of Garcon that the joint venture would not be responsible in any way for anything over and above the $12,564,000 fixed contract price. This position is put quite clearly to Garay at tab 333, document book Volume 7 when he stated - "The overruns are, of course, not the responsibility of the

joint venture but of Garcon Construction Limited which entered into a construction agreement with the joint venture at a fixed price." I am satisfied that Garay has misled Clemens Sols and Dr. Sels to believe that in addition to the $718,000 referred to earlier, Garay injected a further $312,500 of his own funds into the project bringing the total to $1,030,500. I find that the $312,500 was taken from the trust deposits by cheque dated May 12, 1989 signed by Stuart. I also find that Garay did not disclose to Dr. Sels and Clemens Sels that those funds, in fact, came out of trust.

70 When Dr. Sels and Clemens Sols were trying to calculate what funds were available to complete the construction and still remain within the fixed contract price, they relied on the representations of Garay that $1,030,500 was Garay's input for the construction overrun. This is evident from the documents found at document book Volume 7, tab 335 and exhibit 18. This is also evident from tab 350, document book Volume 7. That is a letter dated January 16, 1990 from Dr. Sels to Garay where he refers to the contribution by Garay to the Bank of $1,030,500 to arrive at the balance left to be drawn in favour of Garcon in the amount of $371,649. In that same letter Dr. Sels refers to a cheque for $450,327.35. Garay requested that amount for his 29th draw for construction. That is shown at tab 343 of document book Volume 7. The letter is dated January 9, 1990 and at that date Garay knew that he was over the fixed contract price and continued to mislead Clemens Sels. With that letter Garay enclosed a cheque payable to Garcon dated January 15, 1990 for $450,327.35 for signature by Dr. Sels. Dr. Sels refused to sign that cheque but I find he was considering signing a cheque for $371,649 referred to in his letter of January 16, 1990 at tab 350 of Volume 7. It was agreed between counsel that the cheque for $371,649 was never signed by Dr. Sels although Garay wrote to Dr. Sels on January 23, 1990 enclosing the cheque replacing the cheque for $450,327.35.

71 I am satisfied that as of January 12, 1990 Garay knew that Dr. Sels would not sign the cheque for $450,327.35. This is evident from tab 346, of Volume 7. I find that the cheque was included in "some of the cheques unsigned" referred to in the fax of January 12, 1990.

72 Garay intentionally misled Kevin Scott of the Bank by letter dated January 16, 1990, tab 349, Volume 7 by telling Scott that he was unable to have the cheques signed by his partner who was presently in Germany. At that point Garay knew that Dr. Sels would not sign the cheque for $450,327.35. The funds were released by the Bank since. I am satisfied that Garay remained in a position of trust because of his breach of duty and the breach of duty of Stuart to the joint venture partner, Dr. Sels.

73 The project in my view had to be completed and, therefore, cheques were signed by both joint venture partners subject to arbitration over the cost of delays. On March 12, 1990 Clemens Sels wrote to Garay at tab 373 Volume 8 acknowledging receipt of a sheet declaring that the total and final outstanding amount in the construction as at that date was $501,492 and he referred to a certificate of completion of the architect, Richmond. I find that a cheque for $439,148 was signed subject to arbitration with the belief that Garay had contributed $1,030,500 of his own funds to finance the construction costs overruns.

74 Garay notified Clemens Sels that the condominium project was registered on October 16, 1990 and the parties then started to prepare for the closing of the purchases and distribution of the funds. For the first time in November 1990 Dr. Sels and Clemens Sels found out that the deposits that were to be held in trust until the closings were no longer available. Dr. Sels learned of this and on the eve of the closing of the transactions he refused to discharge the mortgage for $1,100,000 unless Garay resigned. Garay gave evidence that he resigned because he wanted to save the project. I find, however, that there was no other choice available to him and that came about by the direct result of his own wrongdoing which he could not have accomplished if Stuart had not released the funds from the escrow account.

75 On November 14, 1990 Garay willingly signed an agreement found at tab 409, Volume 8, with respect to the dis-

tribution of the funds that were available on closing and, effective November 15, 1990, Garay, 600884 and any company controlled *de jure* or *de facto* by Garay were turned over to 692331 and all legal and administrative functions in connection with the joint venture and Garay forthwith resigned as Secretary and Director of Riverside. He signed this agreement and direction after receiving legal advice not to do so. The next day, that is November 15, 1990 he delivered a letter dated November 14, 1990, found at tab 410, Volume 8, which stated that he had signed the agreement dated November 14, 1990- "solely because it is in the best interest of the joint venture to complete the purchase transactions and have considered myself to have no other alternatives." He went on to say "I am doing this without prejudice to any further positions that I may take."

76 The transactions closed, the purchasers obtained their units and the monies were distributed in accordance with tab 409, Volume 8, which is the agreement of November 14, 1990.

Analysis

1. Breach of Trust

77 I am satisfied that Warren Green and Stuart were in breach of trust with respect to the administration of the Escrow. The partners of FG are vicariously liable for the breach of trust. Warren Green did not administer the Escrow in accordance with its terms when he authorized the release of $80,000 payable to the City of Windsor. He did not obtain the authority of both partners of the Principal for whom he held the funds in trust as a beneficiary. He failed to satisfy himself that he was in fact holding the funds in trust for the Principal named in the agreement. I further find that he failed to satisfy himself that the terms of the Escrow could not be modified in any way without the informed consent of both joint venture partners.

78 I also find that Stuart was in breach of trust for the above reasons and, in addition, having full knowledge of the terms of the JVA and the MA together with the provisions of the Escrow, she was put on her inquiry to satisfy herself that Dr. Sels authorized the release of the trust funds. I find that Stuart knew or ought to have known that the funds that Garay was requesting were used for items which were the responsibility of Garay's company 600884 under the JVA. Stuart testified that she was under the impression that Garay was notifying Dr. Sels of all the disbursements from trust. Stuart and her partners do not escape liability for breach of trust by alleging that Dr. Sels was informed that she had committed or intended to commit a breach of trust. Stuart can be excused if Dr. Sels is fully informed of the specific nature of the breach of trust and of all of his rights arising therefrom. He must know all of the material facts and circumstances surrounding the breach of trust and, then, he must give specific informed approval or consent to the very breach of trust which had occurred, otherwise acquiescence is not a defence. Nor is Dr. Sels under any duty to monitor the activities of Stuart to ensure that the terms of the trust are observed. Rather, it is the obligation of Stuart to observe the terms of the trust. If Stuart wished to obtain the consent of Dr. Sels to act in a manner not contemplated by the trust, or if there is doubt as to whether the conduct is authorized by the trust, it is the duty of Stuart to seek out Dr. Sels and obtain a full and informed consent. She and Warren Green did not do this and, therefore, they are liable for breach of trust.

79 *Royal Bank v. Fogler, Rubinoff* (1991), 43 E.T.R. 131 (Ont. C.A.).

80 *Carl B. Potter Ltd. v. Mercantile Bank of Canada* (1980), 112 D.L.R. (3d) 88 (S.C.C.).

81 For the above reasons, Stuart was also in breach of trust for removing $3,257.67 from the trust account to pay the account of FG on July 6, 1989.

82 Stuart had a duty to keep accurate accounts of the trust property and, when requested, to render accurate accounts

of the trust property including receipts and disbursements. *Smith, Re*, [1952] O.W.N. 62 (Ont. H.C.). Stuart failed to do this when she responded to the inquiries by LH dated August 26, 1988 and April 4, 1989. Since Stuart failed to disclose the disbursements from the trust deposits, wrongful or negligent acts of Garay and his companies were are permitted. It allowed him to reimburse himself for his own monies he had invested as his part of the equity and he was able to misrepresent to Dr. Sels and Clemens Sels that he had deposited funds at the Toronto-Dominion Bank to pay for the cost overruns in construction incurred by Garcon. The failure to disclose by Stuart allowed Garay and his companies to maintain the position of authority which he and the companies could not have maintained if proper disclosure had been made. I am satisfied that if Dr. Sels had learned the truth, Garay would not have been allowed to occupy those positions or been considered trustworthy.

83 Garay, Garay & Associates, 600884 and Garcon were not parties to the Escrow but knew of it and its terms through Garay. They had duties to the joint venture not to receive or use the trust account, contrary to the terms of the trust. Persons who know of the existence of a trust and take dominion and control of the trust property and act inconsistently with the terms of the trust, are liable to the beneficiary of the trust in the same manner and to the same extent as the original trustee. Equally, persons who participate in a fraudulent design to injure the beneficiary are accountable, in the same manner and to the same extent as the original trustee, as constructive trustees, whether or not the trust property ever came into their hands. Garay, Garay & Associates, 600884 and Garcon are, therefore, in my view in breach of trust. *Royal Bank v. Fogler, Rubinoff*, supra.

84 Before I proceed further I find that a case has not been proven against Garay Engineering.

2. Breach of a fiduciary duty

85 A trustee is a fiduciary. All of the obligations imposed by the courts of equity upon fiduciary also apply to trustees. A trustee is required to act in a selfless manner, for the sole benefit of the beneficiary; the trustee is prevented from preferring his or her own interest or the interest of any third party to that of the beneficiary; the trustee must make full disclosure to the beneficiary of all material facts; the trustee must not personally deal with a trust property to his or her benefit. *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.).

86 For the reasons given above under the breach of trust section of my judgment, I find that there was a fiduciary duty owed to Dr. Sels. Warren Green and Stuart of the FG partners were in breach of that duty. I further find that duties as trustees and fiduciaries arose because of the contract, that is the Escrow. They were in breach of contract.

87 As a director of Principal, Garay was obligated to it to act honestly and in good faith and with a view to the best interests of the corporation. As a director of the corporation he was subject to the duties and obligations imposed by the courts of equity upon fiduciaries among them the requirement to act in a completely selfless manner for the benefit of Principal. I, therefore, find that he was in breach of his fiduciary duties to the joint venture.

88 Garay & Associates was in a relationship of Principal and agent with the plaintiffs and, a relationship which subjects the agent to the obligations imposed by the courts of equity upon fiduciaries. The fiduciary relationship can arise notwithstanding that there is a contract between the parties. In fact, the existence of a contract such as the MA appointing Manager or agent itself gives rise to fiduciary expectations, as stated earlier, especially when a contract specifically refers to the concepts of reliance, trust and confidence which are the hallmarks of the fiduciary relationship.

3. Breach of contract

89 For the aforesaid reasons, I find that all of the defendants except Garay Engineering are in breach of their respect-

ive agreements with the plaintiffs. With respect to Garcon, Garay, the owner and directing mind of that company, by his manipulating the trust funds was able to be paid more than the fixed contract price. 600884 was in breach of the JVA and Garay & Associates was in breach of the MA. This all came about my misrepresentations of Garay.

4. Civil conspiracy

90 In *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.* (1983), 145 D.L.R. (3d) 385 (S.C.C.), the Supreme Court of Canada held that where the conduct of the defendant is unlawful, the conduct is directed towards the plaintiff alone or together with others and the defendant should know, in the circumstances that injury to the plaintiffs is likely to and does result then the tort of conspiracy will be found to exist. It is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiffs. That intent will be derived from the fact that the defendants should have known that injury to the plaintiffs would ensure.

91 In the case at bar I find that the conduct of all of the defendants except Garay Engineering was unlawful because of the removal of the trust funds. I am satisfied that this conduct was directed towards the plaintiffs and that the said defendants should have known that the plaintiffs would not receive the benefit of the full $500,000 equity contribution by Garay and that Garay and Garcon would be paid more than the fixed contract price.

5. Misrepresentation

92 I have no hesitation in saying that Garay knowingly made false statements to Dr. Sels without an honest belief in their truth. He intended that Dr. Sels and Clements Sels rely on the statements.

93 As stated earlier his prime concern was the completion of the project, no matter how he accomplished it. He was not prepared to wait for a decision by a committee. He misled Dr. Sels and Clemens Sels with respect to the payment of the $500,000 equity contribution because he knew that the funds were not coming out of his own resources but out of the trust funds. He created an unbelievable accounting process whereby he took money from trust, put it on the books of his own company and then purportedly loaned the funds to the joint venture. He misled Dr. Sels and Clemens Sels that he deposited $1,030,500 into the Bank out of his own resources to pay for the cost overruns. Finally in a reckless act of desperation he convinced the Bank to cash a cheque for $450,327.35 payable to Garcon when he knew that Dr. Sels would not sign the cheque.

94 Garay is, therefore, responsible to the plaintiffs for fraudulent misrepresentation.

6. Tort

95 I find that Stuart was negligent and that she conspired with Garay as stated earlier and that the partnership is vicariously liable. She failed to satisfy herself that Dr. Sels authorized the withdrawals from the trust account and she further failed to satisfy herself with respect to the information that was requested by the auditors.

96 Garay is responsible for the torts of misrepresentation, conspiracy and fraud as stated above and his companies are vicariously liable for his actions.

7. Contributory negligence by Dr. Sels

97 I have already found that Dr. Sels had no reason to question the competence and trustworthiness of Garay or Stu- art.

98 The Supreme Court of Canada held in *Carl B. Potter Ltd. v. Mercantile Bank of Canada*, supra that contributory negligence is not available as a defence to, or to reduce any amounts claimed against, a trustee for breach of trust. Nor is it available as a defence or to reduce amounts claimed in an action for breach of fiduciary obligation. In view of the above findings it follows that this defence is not available to the defendants against whom I found a breach of trust and fiduciary duty.

8. Duress

99 In my view for Garay to argue that he was subject to coercion or duress which caused him to sign the agreement of November 14, 1990 found at Document book Volume 8, Tab 409 is totally unacceptable. To allow such an argument to succeed would offend public policy and good conscience. He was the one who created the situation that put him "between a rock and a hard place", to use the language of the streets.

100 When Garay was being cross-examination by Mr. Zarnett, Garay's memory was refreshed by reference to examination for discovery of September 2, 1993 at which time Garay acknowledged that he spoke to his lawyer, Mr. Raphael, on the telephone before he signed the agreement and Mr. Raphael advised him not to sign it. I find that he had legal advice before he signed the agreement. I also find that in that same cross-examination Garay admitted that it was not likely that he would get anything out of the closing anyway. He agreed that any funds received from the closing of the condominiums would be paid in accordance with a specific order set forth in the agreement of November 14, 1990. He resigned as an officer and director of Riverside and from any management position with the joint venture.

101 Garay and his companies benefited from the closings because he had given a guarantee with respect to the repayment of the loan to the Bank and Garay & Associates had given a guarantee to MICC in connection with the bond in favour of the ONHWP. The bond would be in default if the units did not close. I find that Garay had other projects on the go at that time and he did not want to be in default under the bond with the ONHWP.

102 The Ontario Court of Appeal in *Stott v. Merit Investment Corp.* (1988), 63 O.R. (2d) 545 (Ont. C.A.) at page 561 held that if there is pressure, which I do not find there to be, it must be a pressure which the law does not regard as legitimate and it must be applied to such a degree as to amount to a "coercion of the will". In this case, even if there were pressure it was legitimate. I find that Dr. Sels had every right to refuse to discharge the mortgage if Garay did not resign. There was no coercion of the will because Garay freely and voluntarily signed the agreement after receiving independent legal advice. I, therefore, find that the agreement is valid and not subject to being set aside on the grounds of duress. Garay did not expect to get any monies out of the closings and he is not entitled to any recovery.

9. Damages

(a) General

(i) The Law

103 The obligation of a trustee is to make restitution of the amounts improperly disbursed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter. The inquiry in each instance would appear to be whether the loss would have happened if there had been no breach. These principles have been established in *Guerin v. R.* (1984), 13 D.L.R. (4th) 321 (S.C.C.) and *Canson Enterprises Ltd. v. Boughton & Co.* (1991), 85 D.L.R. (4th) 129 (S.C.C.)

104 In *McKitterick v. Duco, Geist & Chodos* (1994), 76 O.A.C. 310 (Ont. C.A.), the Ontario Court of Appeal held

that where a fiduciary breaches his duty by failing to advise of relevant conduct on the part of an individual and that individual is allowed to maintain a position of authority which he would not have maintained if proper disclosure had been made, the fiduciary is liable for subsequent acts of dishonesty by that individual, as such acts flow from the breach.

105 As stated earlier Stuart, FG and the remaining defendants other than Garay Engineering, were in breach of trust and breach of fiduciary duties. The actions of Stuart allowed Garay to maintain a position of authority and in that position was able to convince the Manager of the Bank to cash the cheque for $450,327.35.

(ii) Quantum

106 On the facts that I have found and applying the law as I understand it, the plaintiffs shall be compensated for the losses that would not have occurred on November 15, 1990 if there had not been a breach of trust and fiduciary duties. The losses are made up of three items. The shortfall in the capital contribution by Garay, the overpayment of Garcon under the construction contract, the account of FG for $3,874 and applicable interest. I accept the calculations as set out in the report of Arthur Andersen, Exhibit 11, and the alternative calculations in Exhibit 14.

107 I assess the damages as follows.

Shortfall in capital	$196,570.00
Interest if shortfall had remained in the trust account	152,420.00
Total shortfall capital contribution including interest	$348,990.00
Overpayment of Garcon under the construction contract	1,294,838.00
Interest	182,148.00
Total of excess of overpayment of Garcon including interest	1,476,986.00
Monies drawn from trust account to pay account of FG	3,257.00
Interest	617.00
Total for account of FG and interest	3,874.00
Total	$1,829,850.00

108 The plaintiffs shall therefore have judgment against Garay, 600884, Garay & Associates, Garcon, FG and Stuart jointly and severally in the amount of $1,829,850.00 together with prejudgment interest at 7% per annum calculated from November 15, 1990 to the date of judgment.

109 With respect to the counterclaim of Garay and his companies I find that there is no evidence to support a claim for Garay Engineering in the sum of $4,900 and, therefore, that portion of the counterclaim is dismissed. The remaining portions of the counterclaim shall be dismissed because of the actions of Garay for whom his companies are vicariously liable and because of the agreement that he signed on November 14, 1990.

110 With respect to the cross-claim by FG and Stuart as against Garay and his companies, it is dismissed because of my findings of breach of trust and fiduciary duty. I repeat that but for the actions of Stuart, Garay could not have remained in a position of authority and because Stuart conspired with Garay and his companies in failing to disclose the amounts drawn out of trust to Dr. Sels and to the auditors L & H. The partners of FG are vicariously responsible for Stuart and Garay's companies are vicariously responsible for Garay's actions.

(b) Punitive

111 The law on punitive damages was decided by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4th) 129 (S.C.C.). At page 185 the court stated the following -

> Punitive damages may be awarded in situations where the defendants, misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasise that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

In my view, this is a proper case for award for punitive damages but only as against Garay and his companies other than Garay Engineering. In my view the acts of Stuart were not malicious, oppressive or high-handed. I am unable to categorize her conduct as egregious on the facts before me.

112 The conduct of Garay amounted to fraudulent misrepresentation and he high-handedly proceeded without due consideration for the provisions of the various agreements.

113 The plaintiffs shall have judgment against Garay and his companies except Garay Engineering in the amount of $110,000 for punitive damages.

Conclusion

114 The plaintiffs shall have judgment against Garay, 600884, Garay & Associates, Garcon, FG and Stuart, jointly and severally, in the amount of $1,829,850.00 together with prejudgment interest at 7% per annum from November 15, 1990.

115 The plaintiffs shall have judgment against Garay, 600884, Garay & Associates, and Garcon in the amount of $110,000 for punitive damages together with prejudgment interest at 7% from November 15, 1990.

116 The action of the plaintiffs as against Garay Engineering is dismissed.

117 The counterclaim of Garay and his companies as against the plaintiffs is dismissed.

118 The cross-claim of FG and Stuart as against Garay and his companies is dismissed.

Costs

119 The parties may make submissions in writing of no more than three pages to be exchanged between counsel and Garay, schedule to be agreed upon by them, the last submission to be received by me no later than September 30, 1997. I shall not require oral submissions from counsel and Mr. Garay.

Order accordingly; action against engineering company dismissed; counterclaim dismissed.

END OF DOCUMENT

TAB 9

1992 CarswellOnt 841, 14 C.C.L.T. (2d) 1, 142 N.R. 321, 96 D.L.R. (4th) 289, 57 O.A.C. 321, [1992] 3 S.C.R. 6, J.E. 92-1644, EYB 1992-67549

1992 CarswellOnt 841, 14 C.C.L.T. (2d) 1, 142 N.R. 321, 96 D.L.R. (4th) 289, 57 O.A.C. 321, [1992] 3 S.C.R. 6, J.E. 92-1644, EYB 1992-67549

M. (K.) v. M. (H.)

K.M. v. H.M.; WOMEN'S LEGAL EDUCATION AND ACTION FUND (Intervenor)

Supreme Court of Canada

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: November 8, 1991
Judgment: October 29, 1992
Docket: Doc. No 21763

Subject: Torts; Family; Civil Practice and Procedure; Estates and Trusts

Limitation of Actions --- Actions in tort — Specific actions — Trespass to person — Sexual assault or abuse.

Limitation of Actions --- Actions in tort — Statutory limitation periods — When statute commences to run — Actions involving infant.

Limitation of Actions --- Actions in tort — Statutory limitation periods — When statute commences to run — Victims of sexual assault or domestic violence.

Trespass — Trespass to person — Assault and battery — Incest by father against daughter — No discrete tort of incest existing but misconduct being within ambit of assault and battery.

Fiduciary duty — Parent-child relationship — Incest being gross breach of fiduciary responsibility of parent — Equitable compensation appropriate in circumstances.

Limitation of actions — Reasonable discoverability principle being applied — Effluxion of time not being bar to recovery in incest case — Time not running until causal nexus between past incestuous conduct and present psychological sequelae actually or constructively realized. .

The plaintiff was the victim of sexual abuse at the hands of her father, abuse which began when she was eight. By the time she was 10, she was being subjected to frequent sexual intercourse. The child's silence was coerced by threats and reinforced with rewards; her attempts to seek help from her mother, her high school guidance counsellor, and the school psychologist were unsuccessful. She later married and had children, but her marriage failed as she slipped deeper into a state of clinical depression. Only when she finally sought out and became in-

volved in a self-help group for incest victims in 1984 did she begin to realize that her various psychological problems as an adult were not, as she had previously thought, attributable to stupidity on her part, but were the sequelae of her sexual history in childhood, and the overwhelming sense of guilt she bore. The meetings of the self-help group, and consequential therapy, finally brought the plaintiff to the realization that her father was to blame for her present psychological and emotional problems. Finally, in 1985, at the age of 28, she sued her father for damages for the incest and for breach of his parental fiduciary duty.

A jury found the allegations of sexual assault to be true and assessed tort damages of $50,000. The trial judge, however, dismissed the action as statute-barred by s. 45 of the *Limitations Act* (Ont.). An appeal against this ruling was dismissed. The plaintiff appealed to the Supreme Court of Canada. In so doing, she alleged that incest represents a discrete tort, not subject to any limitation period; that a breach of fiduciary duty, likewise subject to no limitation period, had been proven; and that any limitation period relevant was postponed by the "reasonable discoverability" principle.

Held:

The appeal was allowed.

Per La Forest J. (Gonthier, Cory and Iacobucci JJ. concurring)

Incest is both tortious (involving, in this case, both assault and battery) and a breach of fiduciary duty. The tort claims, though subject to statutory limitation periods, did not accrue until the plaintiff was reasonably capable of discovering the wrongful nature of the defendants' acts and the nexus between those acts and her injuries. It was neither necessary nor doctrinally correct to assert that incest was a discrete tort, distinct from the familiar concepts of assault and battery. It was unnecessary in these circumstances to pursue constitutional arguments centred upon s. 15 of the *Charter of Rights and Freedoms* , which, it had been argued, was infringed by the *Limitations Act* , insofar as it purported to bar incest claims.

The latent nature of much of the psychological harm suffered by incest, and the natural delay in the victim's ability to make the causal connection between the incest and present psychological distress, made a rigid application of limitation statutes particularly unjust and impolitic. The reasonable discoverability principle affords a just and flexible mode for applying the *Limitations Act* , provided it is realized that discovery may be a gradual process. Time should not be deemed to run until the plaintiff is aware both of the harm and its likely causal connection to the defendant's acts. Only then does the cause of action crystallize. Before time will begin to run against an incest victim suing in battery, he or she must be aware both of the wrongful nature of the perpetrator's act, and the causal nexus between those acts and the plaintiff's present sufferings. Scientific evidence suggests that the necessary redirection of responsibility would not ordinarily occur unless or until psychotherapy was undertaken; a rebuttable presumption should be recognized to this effect. That presumption should be applied in this case. Applying these principles, the *Limitations Act* should not be deemed to have barred the tort claim.

The alternative argument of "fraudulent concealment", raised by the plaintiff as another reason for postponing the limitation period, was insufficiently pleaded and should not accordingly be accepted as an independent ground of appeal. Nonetheless, it should be held that the broad equitable doctrine of fraudulent concealment now applies in Canada in common law contexts, tolling the limitation of legal or equitable claims until a plaintiff might reasonably discover her cause of action. Moreover, fraudulent concealment might frequently be a feature of incest cases, given the diverse means whereby the incestuous party commonly conceals and preserves the secrecy of his actions by abusing his position of trust and authority.

The equitable doctrine of laches did not apply in this case because there was no evidence either of implicit acquiescence by the plaintiff, or of circumstances making unreasonable or oppressive the prosecution of her suit. Acquiescence suggests knowledge by the plaintiff of her rights, a circumstance only recently supervening in this case. There was no acquiescence here, such as to suggest laches.

Quite distinct from the tort claims in this case was the claim for breach of the fiduciary relationship between parent and child, for which compensation was sought. Simply because common law redress was available in this case, the court should not automatically overlook or ignore the concurrent equitable avenue of redress. It was self-evident both that the parent-child relationship is a fiduciary one, and that incestuous abuse is a gross breach of the resultant obligation. The essence of the parental obligation is simply to refrain from inflicting personal injuries on the child.

The jury's award of $10,000 as general damages, though somewhat low, should not be disturbed; the further award of $40,000 as punitive damages should also stand. Since the policy objectives to be served by the common law and equity were essentially identical in this case, there was no warrant for the awarding of any further equitable compensation in addition to the common law damages. Therefore the appeal should be allowed and judgment entered for the plaintiff in the sum of $50,000.

Per L'Heureux-Dubé J. (concurring)

Although the comments of McLachlin J. with respect to remedies were agreed with, the reasoning of La Forest J. was concurred in.

Per Sopinka J. (concurring)

The judgment of La Forest J., though acceptable in its result and in most of its reasoning, should not have created any presumption that an incest victim should be deemed unaware of the injury done to her until she undergoes therapy. Presumptions are uncertain in their legal effect and would tend in the present context to create difficulties for trial judges and litigants. It was unclear whether the presumption was supposed to affect the evidentiary or the legal burden of proof. No justification had been put forth for any such shifting of the legal burden of proof, especially where, as here, the effect would be to enhance a party's efforts to secure exemption from the normal operation of the statute of limitations and where the plaintiff was in a better position than her adversary to explain her state of awareness at all material times.

Per McLachlin J. (concurring)

The "presumption of unawareness" component in the majority judgment is an innovation of doubtful correctness. While the quantum of damages awarded by the jury should not be disturbed, that was because the issue of quantum was not before the court; it should not be taken as an indication that the court approved it as adequate. It may be doubted whether in this case the proper quantum of equitable compensation was identical with the sum recoverable as damages in assault or battery. Breaches of fiduciary duty involved damages to the trust relationship, and might well raise considerations of deterrence alien to the common law torts.

Cases considered:

By La Forest J. (Gonthier, Cory and Iacobucci JJ. concurring)

A'Court v. Cross (1825), 3 Bing. 329, 130 E.R. 540 — *referred to*

Aquaculture Corp. v. New Zealand Green Mussel Co., [1990] 3 N.Z.L.R. 299 (C.A.) — *referred to*

Armstrong v. Milburn (1886), [1886-90] All E.R. Rep. 596 (C.A.) — *referred to*

Blundon v. Storm, [1972] S.C.R. 135, 20 D.L.R. (3d) 413 — *referred to*

Canada Trust Co. v. Lloyd, [1968] S.C.R. 300 — *referred to*

Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, 9 C.C.L.T. (2d) 1, [1992] 1 W.W.R. 245, 61 B.C.L.R. (2d) 1, 85 D.L.R. (4th) 129, 131 N.R. 321, 43 E.T.R. 201, 39 C.P.R. (3d) 449, 6 B.C.A.C. 1, 13 W.A.C. 1 — *considered*

Central & Eastern Trust Co. v. Rafuse, (sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, 37 C.C.L.T. 117 , 42 R.P.R 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321 [varied [1988] 1 S.C.R. 1206, 44 C.C.L.R. xxxiv] — *applied*

Cholmondeley (Marquis) v. Clinton (Lord) (1820), 2 Jac. & W. 1, 37 E.R. 537 (Ch.) [on appeal (1821), 4 Bli. 1 (H.L.)] — *considered*

Deaville v. Boegeman (1984), 48 O.R. (2d) 725, 30 M.V.R. 227, 47 C.P.C. 285, 6 O.A.C. 297, 14 D.L.R. (4th) 81 (C.A.) — *referred to*

DeRose v. Carswell, 242 Cal. Rptr. 368 (Ct. App., 6 Dist., 1987) — *considered*

Doe v. Labrosse , 588 A.2d 605 (R.I., 1991) — *referred to*

Doe d. Duroure v. Jones (1791), 4 Term Rep. 300, 100 E.R. 1031 — *referred to*

Dundee Harbour Trustees v. Dougall (1852), 1 Macq. 317 (H.L.) — *referred to*

E.W. v. D.C.H. , 754 P.2d 817 (Mont., 1988) — *referred to*

Emery v. Emery , 289 P.2d 218 (Cal., 1955) — *considered*

Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218, 27 W.R. 65 (H.L.) — *considered*

Evans v. Eckelman, 265 Cal. Rptr. 605 (Ct. App., 1 Dist., 1990) — *applied*

Fitzgerald v. Newark Morning Ledger Co. , 267 A.2d 557 (N.J., 1970) — *referred to*

Follis v. Albermarle (Township), [1941] O.R. 1, [1941] 1 D.L.R. 178 (C.A.) — *referred to*

Frame v. Smith, [1987] 2 S.C.R. 99, 42 C.C.L.T. 1, 70 N.R. 40, 9 R.F.L. (3d) 225, 23 O.A.C. 84, 42 D.L.R. (4th) 81 — *applied*

Franklin v. Albert , 411 N.E.2d 458 (Mass., 1980) — *referred to*

Gibbs v. Guild (1882), 9 Q.B.D. 59 , [1881-85] All E.R. Rep. Ext. 1655 (C.A.) — *considered*

Gray v. Reeves, 10 C.C.L.T. (2d) 32, 64 B.C.L.R. (2d) 275, [1992] 3 W.W.R. 393, 89 D.L.R. (4th) 315

(S.C.) — *considered*

Guerin v. R., [1984] 2 S.C.R. 335, 36 R.P.R. 1, 20 E.T.R. 6, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Canada)* 55 N.R. 161 — *referred to*

Hammer v. Hammer , 418 N.W.2d 23 (Wis. Ct. App., 1987) — *considered*

Henderson v. Johnston, [1956] O.R. 789, 5 D.L.R. (2d) 524 (H.C.) [affirmed [1957] O.R. 627, 11 D.L.R. (2d) 19 (C.A.) , affirmed [1959] S.C.R. 655, 19 D.L.R. (2d) 201] — *referred to*

Hovenden v. Annesley (Lord) (1806), 2 Sch. & Lef. 607, 9 R.R. 119 (Ch. (Ireland)) — *considered*

Howlett, Re, [1949] Ch. 767, [1949] 2 All E.R. 490 — *referred to*

International Corona Resources Ltd. v. LAC Minerals Ltd., [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57 — *considered*

Johnson v. Johnson, 701 F.Supp. 1363 (N.D. Ill., 1988) — *considered*

Kaiser v. Milliman , 747 P.2d 1130 (Wash. Ct. App., 1988) — *referred to*

Kitchen v. Royal Air Forces Assn., [1958] 1 W.L.R. 563, [1958] 2 All E.R. 241 (C.A.) — *considered*

Knox v. Gye (1872), L.R. 5 H.L. 656 — *considered*

Legh v. Legh, [1930] All E.R. Rep. 565 (K.B.) — *considered*

Levitt v. Carr, 12 C.C.L.T. (2d) 195, 66 B.C.L.R. (2d) 58, [1992] 4 W.W.R. 160, 8 C.P.C. (3d) 101, 12 B.C.A.C. 27, 23 W.A.C. 27 (C.A.) [leave to appeal to S.C.C. refused 142 N.R. 160 (note), [1992] 6 W.W.R. lviii (note), 70 B.C.L.R. (2d) xxxiii (note)] — *considered*

Lewis v. Cook, [1951] S.C.R. 830, [1952] 1 D.L.R. 1 — *applied*

Lindabury v. Lindabury , 552 So.2d 1117 (Fla. Ct. App., 3 Dist., 1989) — *referred to*

Lindsay Petroleum Co. v. Hurd (1874), L.R. 5 P.C. 221, 22 W.R. 492 — *considered*

Lynn v. Bamber, [1930] 2 K.B. 72 — *referred to*

Mary D. v. John D., 264 Cal. Rptr. 633 (Ct. App., 6 Dist., 1989) — *considered*

McInerney v. MacDonald, [1992] 2 S.C.R. 138, 12 C.C.L.T. (2d) 225, 137 N.R. 35, 7 C.P.C. (2d) 269, 93 D.L.R. (4th) 415 — *considered*

Meiers-Post v. Schafer , 427 N.W.2d 606 (Mich. Ct. App., 1988) — *referred to*

Menick v. Goldy , 280 P.2d 844 (Cal. Ct. App., 2 Dist., 1955) — *referred to*

Metropolitan Bank v. Heiron (1880), 5 Ex. D. 319, 29 W.R. 370 (C.A.) — *referred to*

Mouat v. Boyce (March 11, 1992), Cooke P. (N.Z. C.A.) [unreported] — *considered*

Neilsen v. Kamloops (City), [1984] 2 S.C.R. 2, 29 C.C.L.T. 97, [1984] 5 W.W.R. 1, 26 M.P.L.R. 81, 8 C.L.R. 1, 10 D.L.R. (4th) 641, 54 N.R. 1 — *considered*

Nicolette v. Carey, 751 F.Supp. 695 (W.D. Mich., 1990) — *referred to*

Norberg v. Wynrib, [1992] 2 S.C.R. 226, 12 C.C.L.T. (2d) 1, [1992] 4 W.W.R. 577, 68 B.C.L.R. (2d) 29, 138 N.R. 81, 9 B.C.A.C. 1, 19 W.A.C. 1, 92 D.L.R. (4th) 449 [additional reasons at [1992] 2 S.C.R. 318, [1992] 6 W.W.R. 673, 74 B.C.L.R. (2d) 2] — *considered*

Oelkers v. Ellis, [1914] 2 K.B. 139 — *referred to*

Ohio Casualty Insurance Co. v. Mallison , 354 P.2d 800 (Or., 1960) — *referred to*

Osland v. Osland , 42 N.W.2d 907 (N.D., 1989) — *considered*

Petersen v. Bruen , 792 P.2d 18 (Nev., 1990) — *referred to*

Piggott v. Nesbitt Thomson & Co., [1939] O.R. 66, [1938] 4 D.L.R. 593 (C.A.) , affirmed [1941] S.C.R. 520, [1941] 4 D.L.R. 353 — *referred to*

R. v. L. (W.K.), [1991] 1 S.C.R. 1091, [1991] 4 W.W.R. 385, 124 N.R. 146, 6 C.R. (4th) 1, 64 C.C.C. (3d) 321, 4 C.R.R. (2d) 298 — *considered*

Raymond v. Eli Lily & Co. , 371 A.2d 170 (N.H., 1977) — *considered*

Raymond v. Ingram , 737 P.2d 314 (Wash. Ct. App., 1987) — *referred to*

Soar v. Ashwell, [1893] 2 Q.B. 390 , [1891-94] All E.R. Rep. 991 (C.A.) — *referred to*

Stubbings v. Webb, [1991] Q.B. 197, [1991] All E.R. 949 (C.A.) — *considered*

Taylor v. Davies, [1920] A.C. 636 (P.C.) — *referred to*

Taylor v. Wallbridge (1879), 2 S.C.R. 616 — *referred to*

Tyson v. Tyson , 727 P.2d 226 (Wash., 1986) — *considered*

Underwriters' Survey Bureau Ltd. v. Massie Renwick Ltd., [1938] Ex. C.R. 103, 5 I.L.R. 65, 69 C.C.C. 342, [1938] 2 D.L.R. 31 , varied [1940] S.C.R. 318, 7 I.L.R. 19, [1940] 1 D.L.R. 625 [special leave to appeal refused [1940] S.C.R. 219n] — *considered*

Urie v. Thompson, 337 U.S. 163 (1949) — *referred to*

Whatcott v. Whatcott , 790 P.2d 578 (Utah Ct. App., 1990) — *referred to*

447927 Ontario Inc. v. Pizza Pizza Ltd. (1987), 16 C.P.C. (2d) 277 (Ont. H.C.) — *referred to*

By Sopinka J.

National Trust Co. v. Wong Aviation Ltd., [1969] S.C.R. 481, 3 D.L.R. (3d) 55 — *referred to*

By McLachlin J.

Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, 9 C.C.L.T. (2d) 1, [1992] 1 W.W.R. 245, 61 B.C.L.R. (2d) 1, 85 D.L.R. (4th) 129, 131 N.R. 321, 43 E.T.R. 201, 39 C.P.R. (3d) 449, 6 B.C.A.C. 1, 13 W.A.C. 1 — *referred to*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 15

Courts of Justice Act, 1984, S.O. 1984, c. 11 [R.S.O. 1990, c. C.43 —

s. 121(2) [am. S.O. 1989, c. 55, s. 20(2), (3)] [R.S.O. 1990, c. C.43, s. 108(2)]

Criminal Code, R.S.C. 1985, c. C-46/Code criminel, L.R.C. 1985, ch. C-46 —

s. 155(1)

Judicature Act, 1873 (U.K.), 36 & 37 Vict., c. 66.

Limitation Act, 1623 (U.K.), 21 Ja. 1, c. 16.

Limitation Act, 1939 (U.K.), 2 & 3 Geo. 6, c. 21 —

s. 26

s. 26(*b*)

Limitation Act, R.S.B.C. 1979, c. 236 —

s. 3(4)

s. 6(3)

Limitation Amendment Act, 1992, S.B.C. 1992, c. 44.

Limitation of Actions Act, R.S.A. 1980, c. L-15 —

s. 4(1)(*g*)

s. 6

Limitation of Actions Act, The, R.S.M. 1987, c. L150, C.C.S.M., c. L150 —

s. 2(1)(*n*)

Limitation of Actions Act, R.S.N.B. 1973, c. L-8 —

s. 6

Limitation of Actions Act, The, R.S.S. 1978, c. L-15 —

s. 3(1)(*j*)

Limitations Act, R.S.O. 1980, c. 240 [R.S.O. 1990, c. L.15] —

Pt. II [R.S.O. 1990, c. L.15, Pt. II]

s. 2 [R.S.O. 1990, c. L.15, s. 2]

s. 42 [R.S.O. 1990, c. L.15, s. 42]

s. 43 [R.S.O. 1990, c. L.15, s. 43]

s. 43(1) "trustee" [R.S.O. 1990, c. L.15, s. 43(1) "trustee"]

s. 43(2) [R.S.O. 1990, c. L.15, s. 43(2)]

s. 45 [R.S.O. 1990, c. L.15, s. 45]

s. 45(1)(*j*) [R.S.O. 1990, c. L.15, s. 45(1)(*j*)]

s. 47 [R.S.O. 1990, c. L.15, s. 47]

Municipal Act, R.S.B.C. 1960, c. 255.

Real Property Limitation Act, 1833 (U.K.), 3 & 4 Will. 4, c. 27.

Statute of Limitations, R.S.P.E.I. 1988, c. S-7 —

s. 2(1)(*g*)

51 Am. Jur. 2d § 83.

54 C.J.S. Limitations of Actions § 36.

Appeal by plaintiff from judgment of Ontario Court of Appeal (November 14, 1989), Doc. CA 130/88, Howland C.J.O., Houlden J.A. and Anderson J. (ad hoc), dismissing appeal from judgment of Maloney J. rejecting as statute-barred action for damage sustained as long-term consequence of incestuous abuse.

Subject:

***La Forest J. (Gonthier, Cory* and *Iacobucci JJ.* concurring):**

1 This case concerns the procedural obstacles facing victims of childhood incestuous abuse who attempt to vindicate their rights in a civil action for damages against the per petrator of the incest. While the problem of incest is not new, it has only recently gained recognition as one of the more serious depredations plaguing Cana-

dian families. Its incidence is alarming and profoundly disturbing. The damages wrought by incest are peculiarly complex and devastating, often manifesting themselves slowly and imperceptibly, so that the victim may only come to realize the harms she (and at times he) has suffered, and their cause, long after the statute of limitations has ostensibly proscribed a civil remedy. It has been said that the statute of limitations remains the primary stumbling block for adult survivors of incest, and this has proved to be the case thus far for the appellant in the present action. The appellant commenced this action for damages occasioned as a result of recurrent sexual assaults between the ages of eight and sixteen when she was twenty-eight. A jury found that the respondent committed sexual assault upon the appellant and assessed damages at $50,000, but her action was dismissed on the basis of a statute of limitations.

Background

2 The appellant testified at trial that the abuse began when she was eight when the respondent, her father, asked her about her knowledge of the female genital and breast areas and the male genital area. It progressed to the respondent touching her body and telling her that "if he played with [her] breasts that they would grow big". Intercourse began when she was between ten and eleven and continued thereafter two or three times a week. Her cooperation and silence were elicited by various means: the respondent reportedly threatened that disclosure would cause her mother to commit suicide, the family would break up, nobody would believe her, and finally that he would kill her. The appellant had good reason to take these threats seriously, inasmuch as she was told that her mother had been hospitalized for attempting to harm her when she was an infant by cutting her wrists; her father pointed out the scars on her wrist as proof. The appellant's mother, who was also named as a defendant in the action, confirmed the incident, but attributed it to depression. The appellant also gave evidence that her mother regularly exhibited irrational behaviour when she was upset, such as pulling her hair and screaming.

3 In addition to the threats, the respondent induced his daughter to submit to the abuse silently; he rewarded her with pop, potato chips and money. In time, he gave her the responsibility for initiating sexual contact. She was instructed to leave her bedroom light on when she wanted him, and she complied out of fear that he would turn to her younger sister for gratification. Eventually, she turned on the light because "that was the way for [her] to do it". Her mental process during the act of intercourse was to imagine herself as an inanimate object, for example a door handle or carpet. This process took place against an emotional backdrop of fear — fear of him and fear of discovery.

4 At the age of ten or eleven the appellant tried to tell her mother what was occurring by obliquely referring to a white substance that appeared on her genital area, but she testified that her mother ignored the complaint. Her mother denied that she was unresponsive, and testified that she gave her daughter a book on menstruation. When the appellant was sixteen she told a high school guidance counsellor that her father was having sex with her. She made the disclosure because she thought she could trust the counsellor and that she would be removed from the home so as to be "safe" from her father. Although she was not certain that having sex with her father was wrong, she knew she did not want him to do it to her any more. She was ultimately referred to a psychologist at the Kitchener-Waterloo Hospital, Dr. McKie, and she recalls that he seemed to disbelieve her complaint since he kept sending her home. His report, dated July 16, 1973, indicates that after interviewing the appellant and respondent separately, both came to see him and told him that "it was all a lie and things are fine now", whereupon no further steps were taken. The appellant does not remember this, but testified that her father brought her to see a lawyer for the local school board and forced her to tell the lawyer that she had been lying about her allegations of incest.

5 Later that year the appellant left home to live with another family as their babysitter. She told her employer of the incest, but nothing came of it. The following year she obtained employment as a waitress, where she met Steven. They were married a short while later. Her evidence was that she married him so that she could visit her siblings at the family home without being assaulted by the respondent. She harboured the belief that she was protected from further incestuous abuse because she thought her husband now "owned" her and therefore enjoyed an exclusive right to have sex with her, and that he had thus replaced her father as her owner. She also disclosed the incest to her husband, and although there was some conflict in the evidence as to what his response was, the matter went no further.

6 Over the next few years the appellant had three children and continued to work at a series of low-paying jobs. In the fall of 1982 the appellant and her husband separated because she could no longer tolerate sexual relations with him. She sought counselling for depression and her marital problems in the spring of 1983, and was referred to Dr. Voss, a psychologist at the Kitchener-Waterloo Hospital. He read the hospital file on her consultation with Dr. McKie in 1973, and the subject of incest was accordingly raised during one of their sessions. However, the appellant did not want to talk about the incest and Dr. Voss did not feel it prudent to pursue the subject, in light of his professional opinion that the requisite degree of trust between patient and therapist had not been established to deal effectively with the problem, and because her current problems did not appear to be directly connected to her history of incest.

7 Later in 1983 the appellant met Peter, to whom she became engaged to be married. Shortly after they met, she told him of the incestuous abuse because, in her words, she "didn't want to lose him and I wanted him to know right away what I had done". As a result of their discussion, she made enquiries about self-help groups for incest victims and found one in Kitchener. It was during the course of attending meetings of this group in 1984 that the appellant began to recall many of her childhood experiences and to make the connection between that history and her psychological and emotional problems. Until then she believed that her phobias, including a fear of strangers and difficulties coping with her children, were attributable to her own stupidity. She was only able to overcome her overwhelming feelings of guilt for causing the incest once she came to the realization that it was her father who was responsible for her abuse. Beginning in 1985 she has continued in therapy with a marital and family therapist, Ms. Pressman, who also testified at the trial.

8 In Ms. Pressman's opinion, the appellant would have been unaware of the connection between the incest and her psychological and emotional injuries until she understood that she was not responsible for her childhood abuse, and had assigned the blame to her father. Although she had a constant, if vague, awareness of the fact of incest, the appellant repressed or blocked out much of it and was thus unaware that her level of functioning was related to those earlier events in her life. This repression originally took the form of dissociation, whereby the appellant would imagine herself as some inanimate object during the course of the incestuous assaults. The appellant's later disclosure of the incest to a number of people did not detract from Ms. Pressman's opinion in this regard. Similarly, Dr. Mausberg, a psychiatrist retained by the appellant in contemplation of this litigation, testified that the earlier disclosures indicated some awareness of the incest and its consequences, but it was not until the appellant began therapy that she could make a connection between the two. Although there may at times have been an intellectual awareness of the correlation between cause and effect, the appellant did not have an emotional awareness of the connection. In other words, she was unable to assess her situation rationally. Dr. Mausberg also stressed the great feelings of guilt engendered by the appellant's perceived role in instigating the sexual contact by turning on the light, and how she came to believe that this was part of growing up. Even as she came to realize how untrue this was, she still felt responsible for the abuse. His clinical assessment was that the appellant was suffering major depression resulting from incestuous activity that occurred from childhood into

adolescence.

9 The respondent, on the other hand, retained a psychologist, Dr. Langevin, to conduct an assessment of the appellant. He questioned Dr. Mausberg's findings, but conceded that the appellant had suffered depression at different times in her adult life. He doubted that the appellant would repress an emotional awareness of the incest and its consequences while having an intellectual awareness of it. For him, dissociation would normally entail a lack of awareness of the total cognitive or thought processes and emotions surrounding the anxiety-producing situation. Dr. Langevin did agree that the best response that can be hoped for in an incest victim is for her to fix responsibility for the abuse on the perpetrator.

10 In 1985 the appellant sued her father for damages arising from the incest, or in the alternative for the infliction of mental distress. Further damages were claimed for breach of a parent's fiduciary duty to care for and minister to his child. The claims of mental distress and breach of fiduciary duty were also made against the appellant's mother. Before the trial began, counsel for the respondent moved for dismissal of the action on the ground that it was barred by the passage of time pursuant to s. 45 of the *Limitations Act* , R.S.O. 1980, c. 240. It reads:

> 45. (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
>
> .....
>
> (*j*) an action for assault, battery, wounding or imprisonment, within four years after the cause of action arose; ...

However, s. 47 of the Act postpones the limitation period if the plaintiff is under a legal disability — i.e., is a minor, mental defective, mental incompetent or of unsound mind, and the appellant had pleaded that she had been of unsound mind until she underwent therapy. It reads:

> 47. Where a person entitled to bring an action mentioned in section45 or 46 is at the time the cause of action accrues a minor, mental defective, mental incompetent or of unsound mind, the period within which the action may be brought shall be reckoned from the date when such person became of full age or of sound mind.

The trial judge postponed the limitations motion until the end of the trial, so that it could be decided in light of all the evidence.

11 The jury found that the respondent had sexually assaulted his daughter, and awarded $50,000 in damages. However, Maloney J. allowed the respondent's limitations application, and found that ac tion statute barred. He ruled that the appellant had been of sound mind from the age of majority, in that she had been capable of retaining and instructing counsel. Moreover, assuming that her cause of action only accrued when it was reasonably discoverable, Maloney J. found that from the age of sixteen the appellant was aware that she had been wronged and had suffered adverse effects. Accordingly, her cause of action was reasonably discoverable at that time, and the subsequent lapse of time before commencing the action contravened the *Limitations Act* .

12 By endorsement the Ontario Court of Appeal dismissed an appeal of the limitations decision. Leave to appeal to this court was granted on November 15, 1990 and the Women's Legal Education and Action Fund (LEAF) was subsequently granted leave to intervene.

Issues

13 Several issues were argued by the appellant, and for the sake of completeness, I will enumerate them all here: (1) incest is a separate and distinct tort which is not subject to any limitation period; (2) incest constitutes a breach of fiduciary duty by a parent and is not subject to any limitation period; (3) if a limitation period applies, the cause of action does not accrue until it is reasonably discoverable; (4) the appellant was of unsound mind pursuant to s. 47 of the *Limitations Act* ; (5) the tort is continuous in nature and the limitation period does not begin to run until the plaintiff is no longer subjected to parental authority and conditioning; and (6) the equitable doctrine of fraudulent concealment operates to postpone the limitation period.

14 For the reasons that follow, I am of the view that this appeal should be allowed. Incest is both a tortious assault and a breach of fiduciary duty. The tort claim, although subject to limitations legislation, does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and her injuries. In this case, that discovery took place only when the appellant entered therapy, and the lawsuit was commenced promptly thereafter. The time for bringing a claim for breach of a fiduciary duty is not limited by statute in Ontario, and therefore stands along with the tort claim as a basis for recovery by the appellant. As for the other issues raised by the appellant, I am of the view that incest does not constitute a distinct tort, separate and apart from the intentional tort of assault and battery, and the continuous nature of the tort need not be decided in this case. Similarly, I do not find it necessary to deal with the question of whether the appellant was of unsound mind, although it seems to me that such a pejorative term is inappropriate in this context. Fraudulent concealment was not considered by the courts below, and the respondent argued that additional evidence might have been adduced had the issue been raised in those courts. As such, I make no finding on that issue, but I would not foreclose considering its availability for postponing limitation periods in other cases.

15 The intervener, LEAF, argued that the *Limitations Act* , insofar as its provisions bar incest claims, violates s. 15 of the *Canadian Charter of Rights and Freedoms* . It submits that the provisions bar claims of women in a disproportionate fashion and so constitutes discrimination on the basis of sex. Alternatively, it submits that the *Limitations Act* should be interpreted in a manner consistent with the *Charter* in effecting a liberal application of the limitations provisions as they affect incest victims. In view of the result I have arrived at, it is unnecessary to pursue these constitutional arguments.

Recovery in Tort

Incest and the Cause of Action

16 Incest is defined in the *Criminal Code* , R.S.C. 1985, c. C-46, s. 155, as follows:

> 155. (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

That definition narrowly prescribes the necessary degree of consanguinity and sexual conduct for the purposes of criminal liability. The civil action may well admit of a wider ambit of relationship and sexual activity. However, it is not necessary for the purposes of this case to stray outside of the criminal law definition, since both elements of consanguinity and sexual intercourse are present in this case.

17 There is no question, of course, that incest constitutes an assault and battery, which can be compendi-

ously defined as causing another person to apprehend the infliction of immediate harmful or offensive force on her person coupled with the actual infliction of that harmful or offensive force; see Atrens, "Intentional Interference with the Person", in Linden, ed., *Studies in Canadian Tort Law* , 1988, at p. 392, and G.H.L. Fridman (1990), *Fridman on Torts* , at pp. 118-119. Although a necessary element of the tort of assault and battery is intention on the part of the defendant with respect to the consequences of his wrongful act, the following dictum of Cartwright J. in *Lewis v. Cook*, [1951] S.C.R. 830 , at p. 839, concerning onus of proof of intention has not since been doubted:

> ... where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove "that such trespass was utterly without his fault." In my opinion *Stanley v. Powell* rightly decides that the defendant in such an action is entitled to judgment if he satisfies the onus of establishing the absence of both intention and negligence on his part.

In the present case no evidence of the respondent's intention was adduced, since the theory of the defence was that no assault had occurred. I am therefore satisfied, based on the jury's verdict, that all of the requisite elements of assault and battery were proved. The battery is self-evident from the jury's finding of fact, and the evidence going to the respondent's pattern of conduct makes it abundantly clear that the appellant was conditioned to be alert to the circumstances which presaged the battery, such that she had a reasonable apprehension of imminent offensive contact, thereby constituting an assault.

18 Assault and battery can only serve as a crude legal description of incest, and in order to understand fully the fundamental elements of the tort in this context, it is necessary to examine the unique and complex nature of incestuous abuse and its consequential harms. Considerable expert evidence was presented at trial, and while there was some disagreement concerning the dynamics of incest, there was substantial agreement on the more significant aspects of the phenomenon. Much of the evidence was in accord with the scientific and legal literature on the subject, most of which comes from the United States. For example, Dr. Gelinas in her article "The Persisting Effects of Incest" (1983), 46 *Psychiatry* 312, describes the secrecy conditioning that typifies the incestuous relationship. She observes, at pp. 313-314:

> It is easy to gain the compliance of a young child by misrepresenting sex as affection or training, by threats and bribes, and by exploiting the child's loyalty, need for affection, desire to please, and especially trust of the parent.

Similarly, Dr. Summit in his article "The Child Sexual Abuse Accommodation Syndrome" (1983), 7 *Child Abuse & Neglect* 177, at p. 181, describes the child victim as entirely dependent on the abusive parent for whatever reality is assigned to the experience. "Of all the inadequate, illogical, self-serving, or self-protective explanations provided by the adult," he states, "the only consistent and meaningful impression gained by the child is one of danger and fearful outcome based on secrecy."

19 Incest instills feelings of guilt and shame in the child, and these negative connotations become incorporated into the child's self-image; see Finkelhor and Browne, "The Traumatic Impact of Child Sexual Abuse: A Conceptualization" (1985), 55 *Amer. J. Orthopsychiat.* 530, at p. 532. What is vitally important to recognize at this stage is the sense of responsibility that is conferred on the abused child for both instigating the incestuous activity and maintaining silence to ensure family stability. The child is given the power to destroy the family and the responsibility to keep it together. Dr. Mausberg, in his evidence, thus described it:

> Imagine yourself in the role of a child with an abusive father or sibling and you can't tell the secret as to

> what happens between the two of you because if you reveal it the family will be destroyed, they will all scatter away, your mother might kill herself or suffer an illness of devastating proportions, your father, who is the perpetrator of this, will reject you and not love you. You, as a child of eight or nine or ten, become in one sense a person of authority in this family, you control what is going to happen to you and everyone else.
>
> . . . . .
>
> Imagine being a child of eight or nine or ten and facing these awesome powers you have been entrusted with and, at the same time, being so dependent on your father for his love, his money, his shelter, his food, so you can't defy him even if you choose to.

This respresents but a sampling of the various psychological and emotional harms that immediately beset the victim of incest. However, much of the damage is latent, only manifesting later in adulthood.

20 The victim's feelings of guilt, helplessness, isolation and betrayal are reinforced when her attempts at disclosure to persons in authority are met with scepticism, incredulity and anger; see Summit, supra, at p. 178, and Finkelhor and Browne, supra, at p. 532. With respect to the long-term damages that can normally be expected, the most commonly observed effects are thus summarized by Handler in "Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle" (1987), 15 *Fordham Urb. L.J.* 709, at pp. 716-717:

> The most commonly reported long-term effects suffered by adult victims of incest abuse include depression, self-mutilation and suicidal behavior, eating disorders and sleep disturbances, drug or alcohol abuse, sexual dysfunction, inability to form intimate relationships, tendencies towards promiscuity and prostitution and a vulnerability towards revictimization.

Dr. Langevin, the psychiatrist called by the respondent, conceded that the appellant's clinical pathology might be attributable to incestuous abuse. Her symptoms included depression, hysterical anxiety, family disturbance, suspiciousness, confusion and withdrawal from other people. In short, there is ample evidence that the psychological sequelae from incestuous abuse can be, and in the present case have been, extremely debilitating.

The Limitations Act and Reasonable Discoverability

21 The appellant argues that her cause of action did not accrue until she went through a form of therapy, because her psychological injuries were largely imperceptible until later in her adult life and thus not reasonably discoverable until she was able to confront her past with the assistance of therapy. During the hearing, counsel for the respondent conceded that the doctrine of reasonable discoverability had application to an action grounded in assault and battery for incest. He submitted, however, that the appellant was aware of her cause of action no later than when she reached the age of majority. In order to determine the time of accrual of the cause of action in a manner consistent with the purposes of the *Limitations Act* , I believe it is helpful to first examine its underlying rationales. There are three, and they may be described as the certainty, evidentiary, and diligence rationales; see Rosenfeld, "The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy" (1989), 12 *Harv. Women's L.J.* 206, at p. 211.

22 Statutes of limitations have long been said to be statutes of repose; see *Doe d. Duroure v. Jones* (1791), 4 Term Rep. 300, 100 E.R. 1031 , and *A'Court v. Cross* (1825), 3 Bing. 329, 130 E.R. 540 . The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reas-

onable expectation that he will not be held to account for ancient obligations. In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context. While there are instances where the public interest is served by granting repose to certain classes of defendants, for example the cost of professional services if practitioners are exposed to unlimited liability, there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.

23 The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim; see *Dundee Harbour Trustees v. Dougall* (1852), 1 Macq. 317 (H.L.) , and *Deaville v. Boegeman* (1984), 48 O.R. (2d) 725 (C.A.) . However, it should be borne in mind that in childhood incest cases the relevant evidence will often be "stale" under the most expedient trial process. It may be ten or more years before the plaintiff is no longer under a legal disability by virtue of age, and is thus entitled to sue in her own name; see *Tyson v. Tyson* , 727 P.2d 226 (Wash. 1986), at p. 232, per Pearson J. (dissenting). In any event, I am not convinced that in this type of case evidence is automatically made stale merely by the passage of time. Moreover, the loss of corroborative evidence over time will not normally be a concern in incest cases, since the typical case will involve direct evidence solely from the parties themselves.

24 Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. This rationale again finds expression in several cases of some antiquity. For example in *Cholmondeley (Marquis) v. Clinton (Lord)* (1820), 2 Jac. & W. 1, 37 E.R. 527 (Ch.) , the Master of the Rolls had this to say in connection with limitation periods for real property actions, at p. 140 and p. 577, respectively:

> The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility. *Interest reipublicae ut sit finis litium* , is a favorite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. *The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right* ... [Emphasis added.]

There are, however, several reasons why this rationale for a rigorous application of the statute of limitations is particularly inapposite for incest actions.

25 As I mentioned earlier, many, if not most, of the damages flowing from incestuous abuse remain latent until the victim is well into adulthood. Secondly, and I shall elaborate on this further, when the damages begin to become apparent, the causal connection between the incestuous activity and present psychological injuries is often unknown to the victim; see DeRose, "Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages" (1985), 25 *Santa Clara L. Rev.* 191, at p. 196. This court has already taken cognizance of the role that the perpetrator plays in delaying the reporting of incest; see *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091 . That case concerned a stay of criminal proceedings, arising out of alleged childhood sexual abuse, commenced after a lengthy delay. Stevenson J., speaking for the court, observed, at p. 1101:

> For victims of sexual abuse to complain would take courage and emotional strength in revealing those personal secrets, in opening old wounds. If proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting.
>
> That delay in reporting sexual abuse is a common and expected consequence of that abuse has been recognized in other contexts. In the United States, many states have enacted legislation modifying or extending the limitation period for the prosecution of sexual abuse cases, in recognition of the fact that *sexual abuse often goes unreported, and even undiscovered by the complainant, for years* ... Establishing a judicial statute of limitations would mean that *sexual abusers would be able to take advantage of the failure to report which they themselves, in many cases, caused* . This is not a result which we should encourage. There is no place for an arbitrary rule. [Emphasis added.]

Needless to say, a statute of limitations provides little incentive for victims of incest to prosecute their actions in a timely fashion if they have been rendered psychologically incapable of recognizing that a cause of action ex- ists.

26 Further, one cannot ignore the larger social context that has prevented the problem of incest from coming to the fore. Until recently, powerful taboos surrounding sexual abuse have conspired with the perpetrators of incest to silence victims and maintain a veil of secrecy around the activity. The cogency of these social forces would inevitably discourage victims from coming forward and seeking compensation from their abusers. The English Court of Appeal in *Stubbings v. Webb*, [1991] 3 All E.R. 949 (C.A.) , recently acknowledged that the social climate during the mid-1970s was not at all conducive to bringing an action of this nature. That case involved a remarkably similar fact situation to that in the present case. Although the relevant statute of limitations is quite different from the Ontario Act, the following remarks made by Sir Nicolas Browne-Wilkinson V.-C., at p. 960, are nevertheless telling:

> The question is whether, in 1975, the plaintiff acted reasonably in not then suing Mr. Webb and Stephen Webb for the serious wrongs alleged to have been done to her. In my judgment it is important not to consider the question by reference to the social habits and conventions of 1991. Over recent years, for the first time civil actions have been brought by victims of adult rape against their assailants. As to actions against child abusers, this is apparently the first case in which the alleged victim has sought to sue her abusers. In the present climate and state of knowledge it would in my judgment be very difficult, if not impossible, for a plaintiff coming of age in the late 1980s to establish that she acted "reasonably" in not starting proceedings alleging child abuse within three years of attaining her majority. But we are concerned with the reasonableness of the plaintiff's be haviour in the period 1975-78. At that time civil actions based on sexual assaults were unknown in this country. In my judgment, it was accordingly reasonable for the plaintiff not to have considered the injuries done to her sufficiently serious to justify starting proceedings against her adoptive father and brother. In 1975 such proceedings were unthought of and it was therefore reasonable for her not to have started such proceedings.

I would adopt these comments as a reasonable description of the situation in this country at that same time.

27 The foregoing discussion has examined the policy reasons for limitations from the perspective of fairness to the potential defendant. However this court has also said that fairness to the plaintiff must also animate a principled approach to determining the accrual of a cause of action. In *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2

, one of the issues that arose was whether the plaintiff's action was statute-barred by the British Columbia *Municipal Act* , R.S.B.C. 1960, c. 255, where the plaintiff first became aware of the damage after the one year prescription. Wilson J., writing for the majority, observed that the injustice which statute-bars a claim before the plaintiff is aware of its existence takes precedence over any difficulty encountered in the investigation of facts many years after the occurrence of the allegedly tortious conduct.

28 This principle was later adopted in *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 , where the court held that the reasonable discoverability rule was as applicable to cases involving professional negligence as it was to actions involving injury to property. Le Dain J. thus articulated the general rule, at p. 224:

> ... a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence ...

That essentially mirrors the delayed discovery doctrine developed in the United States, where the rationale most often cited is the plaintiff who is "blamelessly ignorant" of his injury; see *Urie v. Thompson*, 337 U.S. 163 (1949).

29 American courts have also refined the rule to meet different circumstances and harms. In *Raymond v. Eli Lily & Co.* , 371 A.2d 170 (N.H. 1977), the court set out the gradations of accrual as follows, at p. 172:

> There are at least four points at which a tort cause of action may accrue: (1) When the defendant breaches his duty; (2) when the plaintiff suffers harm; (3) when the plaintiff becomes aware of his injury; and (4) when the plaintiff discovers the causal relationship between his harm and the defendant's misconduct.

Kenison C.J. rightly observed that in the typical tort case all of these events occur simultaneously so that the moment of accrual is clear. He also reconciled the apparent conflict in American jurisprudence in which some courts have stated the rule in terms of discoverability of injury while most others have framed the rule in terms of the plaintiff's discovery of the causal relationship between his injury and the defendant's conduct. The former line of cases can be explained on the basis that the relevant injury was of a kind that put the plaintiffs on immediate notice that their rights had been violated. However, many courts have applied the latter rule which requires knowledge of the harm and its likely cause; see for example *Franklin v. Albert* , 411 N.E.2d 458 (Mass. 1980).

Application of the Discoverability Rule to Incest

30 In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes. I am in complete agreement with Professor Des Rosiers that the causal link between fault and damage is an important fact, essential to the formulation of the right of action, that is so often missing in cases of incest; see "Les recours des victimes d'inceste et d'agression sexuelle" to be published in Legrand, ed., *Common law d'un siècle à l'autre* (1992). What is more, I am satisfied that the weight of scientific evidence establishes that in most cases the victim of incest only comes to an awareness of the connection between fault and damage when she realizes who is truly responsible for her childhood abuse. Presumptively, that awareness will materialize when she receives some form of therapeutic assistance, either professionally or in the general community. I have come to this conclusion after studying the expert evidence in this case and the American jurisprudence which has wrestled with this problem

over the past decade. The presumption will, of course, be displaced when the evidence establishes that the victim discovered the harm and its likely cause at some other time.

31 The psychological manifestations of incest suffered by adult survivors have been the subject of considerable academic study in recent years. Researchers have uncovered behaviourial patterns commonly referred to as an "accommodation syndrome" or a "post-incest syndrome"; see Summit, "The Child Sexual Abuse Accommodation Syndrome", supra. The academic findings are well summarized by Lamm in "Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule" (1991), 100 *Yale L.J.* 2189, at pp. 2194-2195, in the following passage:

> The classic psychological responses to incest trauma are numbing, denial, and amnesia. During the assaults the incest victim typically learns to shut off pain by "dissociating," achieving "altered states of consciousness ... as if looking on from a distance at the child suffering the abuse." To the extent that this defense mechanism is insufficient, the victim may partially or fully repress her memory of the assaults and the suffering associated with them: "Many, if not most, survivors of child sexual abuse develop amnesia that is so complete that they simply *do not remember that they were abused at all* ; or ... they minimize or deny the effects of the abuse so completely that they cannot associate it with any later consequences." Many victims of incest abuse exhibit signs of Post-Traumatic Stress Disorder ("PTSD"), a condition characterized by avoidance and denial that is associated with survivors of acute traumatic events such as prisoners of war and concentration camp victims. Like others suffering from PTSD, incest victims frequently experience flashbacks and nightmares well into their adulthood.
>
> Experts have also noted a strong correlation between incest and long-term damage: severe anxiety and depression, sexual dysfunction, and multiple personality disorder. Additionally, the internalization of the anger and anxiety that the incest victim has not been allowed to express frequently results in a profound self-hatred that causes self-destructive behavior later on: incestuous childhood victimization commonly leads to other abusive relationships, self-mutilation, prostitution, and drug and alcohol addiction.
>
> Finding that the coexistence of these psychological and emotional disorders is unique to and characteristic of incest victims, experts have joined them under the heading "Post-Incest Syndrome". Those suffering from this syndrome will "persistently avoid any situation, such as initiating a lawsuit, that is likely to force them to recall and, therefore, to re-experience the traumas." *Although the victim may know that she has psychological problems, the syndrome impedes recognition of the nature and extent of the injuries she has suffered, either because she has completely repressed her memory of the abuse, or because the memories, though not lost, are too painful to confront directly. Thus, until she can realize that her abuser's behavior caused her psychological harm, the syndrome prevents her from bringing suit. Often it is only through a triggering mechanism, such as psychotherapy, that the victim is able to overcome the psychological blocks and recognize the nexus between her abuser's incestuous conduct and her psychological pain* . Such understanding may develop in stages over a period of time during which the incest victim breaks through the layers of denial and repression in a painful process. Typically, full recognition that she has been tortiously injured occurs after the victim has reached majority, long after the wrongful acts were committed. [Emphasis added.]

The key role of professional intervention as a triggering mechanism for uncovering the nexus between fault and damage is the subject of recurring comment in the literature; see Allen, "Tort Remedies for Incestuous Abuse" (1983), 13 *Golden Gate U.L. Review* 609, at pp. 630-631, and Nabors, "The Statute of Limitations; A Procedural Stumbling Block in Civil Incestuous Abuse Suits" (1990), 14 *Law & Psychology Rev.* 153. However, even dur-

ing therapy misplaced feelings of loyalty towards an incestuous parent can elicit "defense of a parent, resistance with concomitant increase in guilt in the patient, or actual flight from treatment"; see Gelinas, "The Persisting Negative Effects of Incest", supra, at pp. 328-329.

32 While there appears to be a consensus on "post-incest syndrome" within the medical community, the American judiciary has been slow to recognize the legal ramifications of this doctrine. However, recent decisions exhibit a tendency to mold the delayed discovery rule to accommodate medical reality. At first, only certain aspects of the syndrome were recognized under the rule, but recent decisions demonstrate a wholehearted acceptance of the doctrine. To make sense of these cases I should note that American courts have divided incest claims involving the delayed discovery rule into two categories: (1) those where the plaintiff concedes that she has always known and remembered the sexual assaults, but that she was unaware that other physical or psychological problems were caused by the abuse; and (2) cases where the plaintiff claims that because of the trauma of the experience she had no recollection of the abuse until shortly before an action was commenced. The courts have in fact adopted a "convenient rubric" of "Type 1" and "Type 2" cases; see *Johnson v. Johnson*, 701 F.Supp. 1363 (N.D. Ill. 1988), at p. 1367; *Mary D. v. John D.*, 264 Cal. Rptr. 633 (Cal. App. 6 Dist. 1989), at pp. 636-637. A useful review of the American case law from a Canadian perspective is provided by Professor Des Rosiers, "Limitation Periods and Civil Remedies for Childhood Sexual Abuse" (1992), 9 *C.F.L.Q.* 43, at pp. 51-56.

33 The starting point in a review of the American experience must be *Tyson v. Tyson* , supra. This 1986 case is apparently the first in which the delayed discovery rule was asserted by an incest victim. There the Supreme Court of Washington by a narrow majority (5-4) refused to apply the rule. According to the preceding taxonomy of incest victims, Ms. Tyson fell into the second category; she claimed to have blocked all memory of her childhood incestuous abuse, which allegedly occurred between the ages of three and eleven, until she entered therapy at the age of twenty-six. The majority ruled that objective, verifiable evidence of the wrongful act and the resulting damage was a prerequisite to any application of the delayed discovery rule. In that case the plaintiff's complaints were entirely "subjective" and would not be made less so by the testimony of treating psychologists or psychiatrists. Hence, the majority found that a literal reading of the limitations statute struck the proper balance between the evidentiary problems inherent in stale claims and the victim's right to bring an action.

34 In a vigorous dissent, Pearson J. opined that "objective, verifiable evidence" had never been a necessary condition for the application of the delayed discovery rule; the true test, he stated, was fundamental fairness in balancing the harm of depriving a victim of her remedy against the prejudice suffered by a defendant who is sued on a stale claim. In striking the balance in incest cases, he proffered the traditional factors applied in other delayed discovery cases. First, the plaintiff was unaware of the breach of any duty owed to her by her father; she knew as a child that she did not want the sexual contact with her father, but she could not know that this constituted sexual abuse causing permanent damage until adulthood when she confronted her childhood experiences. Secondly, the father betrayed his child's trust, and the courts cannot ignore the exploitation of a child for sexual gratification. Thirdly, the defendant had sole control over the facts giving rise to his daughter's claim; the abuser always knows his actions are wrongful, but the victim may never realize this.

35 Pearson J. cited a final factor in applying the delayed discovery rule: the existence of some triggering event that makes the plaintiff aware of the defendant's potential liability. He found that the plaintiff's psychotherapy was such an event, and made the general observation, at p. 235, that "[o]ften it is only through therapy that the victim is able to recognize the causal link between her father's incestuous conduct and her damages from incest trauma". He rebutted the majority's views regarding stale evidence by noting that the earliest a civil claim

could have been brought was at the age of majority of the victim, at which point the evidence would already be stale.

36 A number of decisions since *Tyson* have preferred Pearson J.'s dissent and have applied the delayed discovery doctrine, at least with respect to Type 2 victims. Initially, in several Type 1 cases, courts refused to apply the rule because the plaintiff had always remembered the abuse. In *DeRose v. Carswell*, 242 Cal. Rptr. 368 (Cal. App. 6 Dist. 1987), the plaintiff alleged that her step-grandfather sexually abused her between the ages of four and eleven, and argued that the discovery rule should apply to her cause of action because she was unable to recognize the causal connection between the abuse and subsequent emotional difficulties, even though she was aware of the assaults (hence, a "Type 1" victim). Brauer J., writing for the court, noted that an assault by definition is perceived as unconsented to and offensive, and causes harm as a matter of law. Since the plaintiff averred that she felt great fear at the time of the assaults and acceded to the defendant's acts owing to her perception of his greater size and strength, she had suffered cognizable and compensable harm at the time, and therefore the delayed discovery rule did not apply. However, the court explicitly left open the possibility that the discovery rule could apply in Type 2 cases, where a plaintiff alleges that she repressed her memories of the sexual assaults. See also *E.W. v. D.C.H.* , 754 P.2d 817 (Mont. 1988); cf. *Lindabury v. Lindabury* , 552 So.2d 1117 (Fla. App. 3 Dist. 1989).

37 Following this lead, several courts faced with Type 2 claims applied the delayed discovery rule. In the 1988 case of *Johnson v. Johnson* , supra, a federal district court recognized the dichotomy between the two classes of plaintiffs, but seemed to suggest that even in Type 1 cases the rule could be applied. In 1989, a California court of appeal developed the dicta from *DeRose* , supra, and applied the delayed discovery rule to toll the statute of limitations for a plaintiff who claimed incestuous abuse occurring until the age of five and repression of that memory until entering therapy in adulthood; *Mary D. v. John D.* , supra.

38 The Wisconsin Court of Appeals in *Hammer v. Hammer* , 418 N.W.2d 23 (Wis. App. 1987), broke new ground by applying the rule to a plaintiff who claimed to know of the sexual assault, but was unaware of the causal link between the abusive activity and later psychological and emotional injuries. In *Hammer* the plaintiff alleged that she had been sexually abused by her father on an average of three times a week between the ages of five and fifteen. The abuse was accompanied by threats and assertions that she had caused the incestuous activity and that it was her fault. Disclosure of the abuse to her mother was to no avail, and the plaintiff developed coping mechanisms and symptoms of psychological distress, including shame, embarrassment, guilt, self-blame, denial, depression, and dissociation from her experiences. Although the plaintiff never claimed she had forgotten the period of abuse, and despite harbouring some subjective doubts about the normality of her father's actions, "she had no information to a reasonable probability of the nature of her injuries or the facts with respect to their cause" (at p. 26). Indeed, it was only after the triggering event of her father's seeking custody of her minor sister that the plaintiff began to consider the nexus between the incest and her ongoing psychological problems. At that point she sought psychological counselling and began to understand the past and present impact of her father's abuse.

39 The court observed that the plaintiff had been misinformed and misled by the authority figure on whom she reasonably relied, and continued, at p. 27:

> The policy justification for applying the statute of limitations to protect defendants from "the threat of liability for deeds in the past" is unpersuasive in incestuous abuse cases ... Victims of incest have been harmed because of a "most egregious violation of the parent/child relationship." ... To protect the parent at the ex-

> pense of the child works an "intolerable perversion of justice." ... Further, "the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions."

As a matter of law, the court found that a cause of action for incestuous abuse will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, the fact and cause of the injury. However, the court stopped short of deciding whether the facts in the case supported the application of the delayed discovery doctrine, preferring to remit this issue to the trial judge. See also *Doe v. LaBrosse* , 588 A.2d 605 (R.I. 1991).

40 In a 1989 decision, the Supreme Court of North Dakota upheld a trial judgment applying the delayed discovery rule in what appears to be a Type 1 situation; see *Osland v. Osland* , 442 N.W.2d 907 (N.D. 1989). The Supreme Court agreed with the trial judge who had found that severe emotional trauma experienced by the plaintiff resulted in her being unable to fully understand or discover her cause of action during the statutory limitations period. Accordingly, the court applied the discovery rule and allowed the action to proceed. In *Osland* the court expressly disapproved the majority judgment in *Tyson* , and declined to follow it. However, courts have been far from unanimous in rejecting the *Tyson* approach. Courts in Washington continue to follow *Tyson* ; see *Raymond v. Ingram* , 737 P.2d 314 (Wash. App. 1987), and *Kaiser v. Milliman* , 747 P.2d 1130 (Wash. App. 1988). Courts in some other states also continue to be reluctant to apply the delayed discovery rule in Type 1 cases; see *Whatcott v. Whatcott* , 790 P.2d 578 (Utah App. 1990). Finally, a Nevada decision has followed an approach similar to the majority in *Tyson* , by demanding "clear and convincing evidence" of the sexual assault; see *Peterson v. Bruen* , 792 P.2d 18 (Nev. 1990).

41 In addition, there is another line of cases that falls outside the emerging typology genre. These cases arise in Michigan, and apply the disability provisions of the limitations statute to prevent tolling. The disability definition includes insanity, and these cases extend insanity to cover memory repression by incest victims; see *Meiers-Post v. Schafer* , 427 N.W.2d 606 (Mich. App. 1988), and *Nicolette v. Carey*, 751 F.Supp. 695 (W. D. Mich. 1990).

42 A recent case from California appears to reject the dichotomy between Type 1 and Type 2 cases, and suggests a new approach: awareness of the wrongfulness of the defendant's incestuous conduct. In *Evans v. Eckelman*, 265 Cal. Rptr. 605 (Cal. App. 1 Dist. 1990), the plaintiffs brought an action for childhood sexual abuse allegedly suffered at the hands of their foster parents. The court found that the discovery rule for an action based on a parent or parental figure's sexual abuse will postpone the accrual of the cause of action until the plaintiff discovers or ought to have discovered the acts of molestation "and the wrongfulness of the conduct". In that case there were no allegations that the plaintiffs suppressed all memory of their childhood experiences, only that the psychological "blocking mechanisms" prevented them from perceiving the psychological injuries and their causal connection to the defendants' acts.

43 The court had this to say in respect of the special circumstances attending cases of incestuous abuse, at pp. 608-609:

> It has been widely recognized that the shock and confusion engendered by parental molestation, together with the parent's demands for secrecy, may lead a child to deny or block the traumatic events from conscious memory, or to turn the anger and pain inward so that the child blames himself for the events ... Even where memory of the events themselves is not suppressed, it may be some time before the victim can face the full impact of the acts.

. . . . .

> As a practical matter a young child has little choice but to repose his or her trust with a parent or parental figure. When such a person abuses that trust, he commits two wrongs, the first by sexually abusing the child, the second by using the child's dependency and innocence to prevent recognition or revelation of the abuse. This may be accomplished by enforcing secrecy around the acts or even by teaching the child that the sexual acts are normal or necessary to the relationship. As in the professional negligence cases, application of the delayed discovery rule would serve to prevent the molester from using the child's ignorance and trust to conceal the primary tort.

The court distinguished the prevailing California precedent, *DeRose* , supra, on the basis that it had not addressed the central point of whether the plaintiff was aware of the wrongfulness of the defendant's acts. It held that an awareness of wrongdoing is a prerequisite to accrual of the action under the delayed discovery rule.

44 In my view the approach taken by the court in *Evans v. Eckelman* cuts to the heart of the matter: when does the plaintiff become aware of the wrongful nature of the defendant's acts? Battery consists of wrongful touching, and it is the wrongfulness of the contact and its consequential effects that are the material facts the plaintiff must discover before her cause of action accrues. Much of the expert evidence given at trial in the present case was directed to the question of when the plaintiff, after reaching the age of majority, remembered or became aware of her childhood abuse. There was conflicting evidence as to whether the plaintiff could have an intellectual, but not an emotional awareness of the abuse. To my mind, no useful purpose is served by engaging in this metaphysical debate on the epistemology of discovery. In the end I am satisfied that the issue properly turns on the question of when the victim becomes fully cognizant of who bears the responsibility for her childhood abuse, for it is then that she realizes the nature of the wrong done to her.

45 I would note that a similar approach has recently been taken by a Canadian court. In *Gray v. Reeves* (1992), 64 B.C.L.R. (2d) 275 (S.C.) , Hall J. concluded that the victim's recognition of the nexus between her injuries and the earlier incest is the point when time should begin to run against the victim. In that case the plaintiff was sexually assaulted by her uncle on approximately fifteen occasions between the ages of four and twelve. She commenced action at the age of thirty, after receiving therapy which identified the true cause of certain psychological problems suffered by the plaintiff during her adult life. This is clearly a "Type 1" case, as the plaintiff always remembered the assaults, had revealed the incestuous abuse to her family, and indeed had fought continuously to have her uncle excluded from family gatherings during her adult life. Nevertheless, the trial judge found as follows, at p. 306:

> Here, the plaintiff Ms. Gray knew from a very early age that the assaultive behaviour of her uncle, the defendant, was disgusting to her. She knew at least from the time when she was a teenager that these acts were wrong and she sought to protect younger children from any assaults by the defendant. I am of the view that the evidence in the case discloses that, although the plaintiff was repelled by the assaults, she had no reason to believe and did not believe that she had suffered any material harm, mental or physical, from the assaults. While she had these feelings of revulsion or repugnance to the activities of the defendant concerning herself or others, I am quite unable to find that she was able, until a point in time after the commencement of her therapy with Dr. Way in 1988, to perceive any link between the earlier wrongful conduct of the plaintiff and her depression and inability to establish a satisfactory relationship with a member of the opposite sex.

46 British Columbia's limitations legislation is very different from the statute before us in the instant case. It

creates a form of statutory reasonable discoverability test, and I note with interest that this legislation emphasizes the importance of professional treatment and advice by stating the test (s.6(3)) as the knowledge of a reasonable person "having taken the appropriate advice". [The meaning of this provision has most recently been considered by British Columbia's Court of Appeal in *Levitt v. Carr* (1992), 66 B.C.L.R. (2d) 58 .] Despite the differences in legislation, the conclusions of Hall J. in *Gray v. Reeves* , at p. 309, are worthy of note:

> ... it seems to me that the hypothetical reasonable person in the shoes of the plaintiff here would not have been acting sensibly in commencing an action until such a person came to appreciate that a wrong or wrongs that had occasioned significant harm to her wellbeing could be established.

This is essentially the test I propose in the instant case.

47 It is clear from the evidence and the scientific literature that a misapplied sense of responsibility is instrumental in conditioning the child victim to submit silently to the abuse, while at the same time serving as the catalyst for much of the consequential psychological and emotional damages that emerge over time. More importantly, though, it is the redirection of responsibility for the abuse to whom it properly belongs that initiates the therapeutic process, such that the victim becomes aware of the causal connection between her childhood history and resulting injuries. Dr. Summit, supra, put it succinctly in his article, at p. 183:

> Without a consistent therapeutic affirmation of innocence, the victim tends to become filled with self-condemnation and self-hate for somehow inviting and allowing the sexual assaults.

In short, the issue of responsibility plays a pivotal role in both the genesis and the cessation of the harms caused by incestuous abuse.

48 The close connection between therapy and the shifting of responsibility is typical in incest cases. In my view, this observed phenomenon is sufficient to create a presumption that certain incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy. I base this proposition on the scientific evidence presented at trial and to this court which confirms a post-incest syndrome amongst incest survivors. If the evidence in a particular case is consistent with the typical features of this syndrome, then the presumption will arise. Of course, it will be open to the defendant to refute the presumption by leading evidence showing that the plaintiff appreciated the causal link between the harm and its origin without the benefit of therapy.

Application to the Present Case

49 After hearing the evidence, the trial judge concluded that from the age of sixteen the appellant was aware that she had been wronged and had suffered adverse effects. I will not expound on the role of an appellate court when reviewing findings of fact. Here, in my view, the trial judge did not address himself to the critical issue — i.e., when did the appellant discover her cause of action in the sense of having a substantial awareness of the harm and its likely cause? With respect, the trial judge made no finding that the appellant had made the necessary connection at any time before entering therapy.

50 In my view, this is a case in which it can be presumed that the nexus between the appellant's injuries and incest was discovered only when the appellant received therapy. The evidence presented at trial shows the appellant to be a typical incest survivor. Her experiences as a child and later in life correspond closely to the symptoms of post-incest syndrome. As a child, she was subjected to the threats and bribes that enforce secrecy on the

assaults. Her mental defence mechanism was dissociation, typical in incest cases. Later in life, her attempts at disclosure were met with scepticism, denial and evasion, again a typical feature of post-incest syndrome. As an adult she suffers from depression and difficulty with intimate relationships, which are classic symptoms of the syndrome.

51 Aside from the presumption available to the appellant, the evidence overwhelmingly indicates that she did not make the causative link between her injuries and childhood history until she received therapeutic assistance, and the evidence proffered to the contrary was entirely speculative. In any event there was no direct evidence to overcome the presumption that the appellant's therapy was the triggering event for discovering her cause of action. As such, the statute of limitations did not begin to run against her until that time, and this action was commenced within all relevant statutory limitation periods. On this basis, together with the reasons which follow, I would allow the appeal and restore the jury's verdict both as to liability and damages.

52 I cannot leave this topic without adding my voice to the chorus calling for reform in this area of limitations law. I note that a recent consultation draft prepared by the Attorney General of Ontario has proposed the abolition of limitation periods in cases of incestuous sexual assault: A Consultation Draft of the General Limitations Act, s. 18(h), in "Recommendations for a New Limitations Act", report of the Limitations Act Consultation Group (Toronto: Ministry of the Attorney General, March 1991). As well, British Columbia has recently amended its *Limitation Act* to permit survivors of childhood sexual abuse to pursue legal action at any time; see *Limitation Amendment Act, 1992* , S.B.C. 1992, c. 44. In light of the existing evidence on the nature and extent of the problems faced by incest survivors, these are welcome developments.

Fraudulent Concealment

53 The appellant raises for the first time in this court the ground of fraudulent concealment as an alternative basis for postponing the limitations period. The respondent counters that this argument should be rejected because it was not advanced before the trial judge, and because the Court of Appeal declined to add the issue as a ground of appeal. The respondent argues that the Court of Appeal was correct in so deciding for two reasons. First, the trial might have been conducted differently if the allegation of concealment had been put in issue. As well, the respondent agreed to exclude certain evidence from the record both before the Court of Appeal and in this court on the basis that fraudulent concealment would not be put in issue.

54 I share the concern of the Court of Appeal that a fresh issue should not be raised for the first time on appeal unless the evidence at trial can fairly support the appellate court's consideration of that issue. It decided this point in a judgment prior to the hearing on the other issues, and a separate judgment was rendered. That judgment has not been appealed to this court. Moreover, the appellant's application for leave to appeal does not mention fraudulent concealment as a ground of appeal. Indeed, the respondent received notice of this issue only upon receipt of the appellant's appeal factum. Given the respondent's apparent belief that this issue had been abandoned, it would be unfair to entertain the issue at this stage.

55 Although fraudulent concealment is not available to the appellant as an independent ground of appeal, it is still open to this court to consider the factual question of concealment as it relates to both the reasonable discoverability question considered earlier and to the breach of fiduciary duty to be discussed later. To the extent that concealment is relevant to these issues, it is not unfair to the respondent that it be considered at this stage. At trial, once the jury had found as a fact that sexual abuse had occurred, certain evidence on concealment then became relevant to the limitations motion heard by the trial judge, and it was open to the respondent to refute or

challenge this evidence at that time. I am referring here in particular to the plaintiff's testimony that her father had never admitted the wrongfulness of his conduct to her, and to Dr. McKie's report showing that the respondent had denied the incest and forced the appellant to lie to Dr. McKie to assist in the concealment.

56 While not of assistance to the appellant in this instance, the doctrine of fraudulent concealment may impact on limitations questions in other incest cases. For this reason, I propose to comment on the issues argued before us, with a view to clarifying the law. In my view, two doctrinal issues must be resolved. The first concerns the scope of fraudulent concealment. Does it apply only to actions in equity, or can it also assist a plaintiff who seeks to postpone a limitation period at common law? The question is of some importance in incest cases, where the plaintiff may claim both in tort and for breach of a fiduciary duty. The second issue is the meaning of fraudulent concealment, and in particular whether incest cases fall within its compass.

57 To understand the scope of fraudulent concealment in modern times, it is necessary to delve into its origins. Historically, both common law and equity took account of fraudulent concealment when applying limitation periods. If the plaintiff was unaware of his cause of action owing to the wrong of the defendant, both courts would refuse to allow a limitations defence. I should perhaps draw attention to the fact (more fully discussed later) that limitation periods did not in earlier times in strictness apply to equity. It was not until 1833 that any English statute imposed express limitations on equitable actions; see *Halsbury's Laws of England* (2nd ed., vol.20, para.1041, note (p)). But equity applied them by analogy in certain circumstances. In both courts, the basis for injecting fraudulent concealment into the limitations analysis was the underlying jurisdiction over fraud claimed by both common law and chancery. Fraud was more central to equity's jurisdiction, as says the famous couplet attributed to Sir Thomas More: "Three things are apt to be helpt in Conscience, Fraud, Accident and things of Confidence"; see Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (2nd ed. 1984), at p. 326. Not surprisingly then, equity developed fraud well beyond its common law parameters. Inevitably, fraudulent concealment in equity came to be considerably broader in scope than its common law equivalent. Before the fusion of the courts of equity and common law, this disparity created problems in cases where a concurrent remedy was available from either court. The problem is thus explained in *Halsbury's* , supra, para.771, note (c):

> Before the Judicature Act, 1873 (36 & 37 Vict. c. 66), there was a variance between courts of law and courts of equity as to the effect of the fraudulent concealment of the cause of action in those cases where there was a concurrent remedy both at common law and in equity; the courts of common law holding that in spite of such concealment the statute ran from the time when the cause of action arose, except when the concealment was of itself an actionable wrong ... the courts of equity holding that the statute in such cases ran from the time of discovery only ...

Thus the application of fraudulent concealment varied depending upon which court entertained the claim. The common law courts would only achieve the same result as in equity in those cases where the concealment itself was actionable fraud. Given the narrow conception of "fraud" at common law, an equivalent result was relatively rare.

58 After the *Judicature Act* , the fused courts at first maintained a distinction between equitable and common law fraudulent concealment, but this dichotomy gradually broke down. The sequence of events is well described in *Halsbury's* , supra, vol.20, para.771, note (c). It began with *Gibbs v. Guild* (1882), 9 Q.B.D. 59 (C.A.) , where it was held that the effect of fusion was to cause the equitable rule to prevail in all cases in which before the *Judicature Act* there had been a concurrent remedy at common law and equity. This settled the issue for concurrent causes of action, but left uncertain the application of the equitable rule in actions falling solely within

common law jurisdiction. However, in a series of later cases the courts moved to the broader conclusion that the equitable rule applied in all cases; see *Armstrong v. Milburn* (1886), 54 L.T. 723 (C.A.) ; *Oelkers v. Ellis*, [1914] 2 K.B. 139 ; *Lynn v. Bamber*, [1930] 2 K.B. 72 . In *Legh v. Legh* (1930), 143 L.T. 151 (K.B.) , Mackinnon J. reviewed this progression of cases, and remarked, at p. 153:

> ... the result of the *Judicature Act 1873* , s. 24 (sub.-sect. (4) in particular) was that the common law imported the equitable doctrine that where delay had been due not to mere laches on the part of the plaintiff but to the fact that he had been ignorant of the cause of action because of the fraud of the defendant, then the statute would only run against him from the time when he discovered the existence of the cause of action.

An excellent discussion of this history is found in a contemporary text, Brunyate, *Limitation of Actions in Equity* , c. 2; see also Brunyate, "Fraud and the Statute of Limitations" (1930), 4 *Cambridge L.J.* 174. These scholarly works trace the shift towards equity's dominant role, although the author expresses reservations about the technical basis for these developments.

59 Canadian courts wholeheartedly adopted the emerging English position, and in several cases the equitable doctrine was imported into the common law. In *Underwriters' Survey Bureau Ltd. v. Massie Renwick Ltd.*, [1938] 2 D.L.R. 31 (Ex. Ct.) , Maclean J. considered the English cases and applied the equitable doctrine in what was clearly an action at law for conversion and copyright infringement. On appeal to this court, the application of fraudulent concealment was approved ([1940] S.C.R. 218). A similar approach is revealed in *Piggott v. Nesbitt Thomson & Co.* (1938), [1939] O.R. 66 (C.A.) , affirmed [1941] S.C.R. 520 .

60 In Canada and England, then, the importation of the equitable doctrine into the common law is settled. I am aware, of course, that there appears to be continuing uncertainty in certain parts of the Commonwealth. In Australia, for example, at least one text suggests that fraudulent concealment remains a purely equitable doctrine with no application to the common law; see Meagher, Gummow and Lehane, supra, at pp. 746-749. However, as noted, there are no such reservations here. The English and Canadian authorities demonstrate that concealment at common law long ago merged with the substance of equitable concealment. The least that can be said is that it has developed to the point of being consistent with it. Such mingling of law and equity is entirely appropriate, as I argued in a different con text in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 , at pp. 587-588. It is desirable, indeed inevitable, for the two great branches of our judicial law systems to borrow from one another to achieve just and reasonable results and consistency over time.

61 One final point needs to be added to this historical sketch. In 1939 England's *Limitation Act, 1939* , 1939 (Eng.), c. 21, codified the existing law of fraudulent concealment, and s. 26 reads as follows:

> 26. Where, in the case of any action for which a period of limitation is prescribed by this Act ...
>
> . . . . .
>
> (*b*) the right of action is concealed by the fraud of [the defendant or his agent]
>
> . . . . .
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud ... or could with reasonable diligence have discovered it ...

Thus in England plaintiffs at common law have since 1939 by statute been entitled to benefit from the equitable doctrine of fraudulent concealment. Similar legislation has been enacted in several Canadian jurisdictions (e.g., s. 6 of Alberta's *Limitation of Actions Act* , R.S.A. 1980, c. L-15) but not in Ontario. In light of this development, a reading of cases since 1939 must be approached with caution; typically, they speak of "fraudulent concealment" in its statutory sense. As we shall see, however, the English courts have applied the old equitable doctrine in interpreting this new legislation. The current situation in England is thus expressed in *Halsbury's Laws of England* , 4th ed., vol. 28, para. 916, at p. 411:

> Before the fusion of courts of law and equity there was a variance between them as to the effect of fraudulent concealment of a cause of action in those cases where there were concurrent remedies at law and in equity; at law the limitation period in personal actions or contract ran from the time when the cause of action arose unless its concealment was an actionable wrong, but in equity time ran only from the date of discovery of a cause of action fraudulently concealed. After the fusion of the courts of law and equity the equitable doctrine applied in all cases, and it has not been expressly negatived by the *Limitation Act 1939* , although the relevant provisions of that Act substantially supersede the equitable doctrine.

In the result, whether proceeding under a statute like s. 26 of the English *Limitation Act, 1939* or under the common law, fraudulent concealment (when applicable) will toll the limitation of either a common law or equitable claim until the time the plaintiff can reasonably discover her cause of action.

62 There remains the issues of determining the meaning of fraudulent concealment, and its application to cases of incest. In my view, incest cases will often be amenable to the application of fraudulent concealment as an answer to a limitations defence. Incest takes place in a climate of secrecy, and the victim's silence is attained through various insidious measures. As we have seen, these actions by the perpetrator of the incest condition the victim to conceal the wrong from herself. The fact that the abuser is a trusted family authority figure in and of itself masks the wrongfulness of the conduct in the child's eyes, thus fraudulently concealing her cause of action. On this basis, I am satisfied that fraudulent concealment can be applied in incest cases.

63 The leading modern authority on the meaning of fraudulent concealment is *Kitchen v. Royal Air Forces Assn.*, [1958] 2 All E.R. 241 (C.A.) , where Lord Evershed, M.R., stated, at p. 249:

> It is now clear ... that the word "fraud" in s. 26(b) of the *Limitation Act, 1939* , is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465 , that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that *the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other* . [Emphasis added.]

While stated in the context of statutory "fraud", I have no doubt that this formulation is drawn from the ancient equitable doctrine and is applicable to today's common law concept of fraudulent concealment. I note also that Lord Evershed's formulation has been adopted by this court; see *Guerin v. R.*, [1984] 2 S.C.R. 335 . What is clear from *Kitchen* and *Guerin* is that "fraud" in this context is to be given a broad meaning, and is not confined to the traditional parameters of the common law action.

64 The factual basis for fraudulent concealment is described in *Halsbury's* , 4th ed., vol. 28, para. 919, at p. 413, in this way:

> It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the *fraudulent concealment may arise from the manner in which the act which gives rise to the right of action is performed* . [Emphasis added.]

In my view incest falls within the second category outlined in this passage, i.e., concealment arising at the time the right of action arises. As I have stated, it is the very nature of an incestuous assault that tends to conceal its wrongfulness from the victim.

65 There is an important restriction to the scope of fraudulent concealment, which *Halsbury's* , 4th ed., vol. 28, para. 919, at p. 413, describes as follows:

> In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts.

In cases of incest there is, of course, a grievous abuse of a position of confidence. I will have more to say later about the fiduciary nature of the parent-child relationship, but for now it is enough to say that incest is clearly an abuse of a confidential position. As the authorities make clear, incest is really a double wrong — the act of incest itself is followed by an abuse of the child's innocence to prevent recognition or revelation of the abuse; see *Evans v. Eckelman* , supra. I should add that given the nature of the concealment in abuse cases, namely, that the abuser compels the complicity of the victim in denying the harm done to her, it may be that the doctrine can operate in a tort as well as fiduciary context to toll the limitation period because of the deliberate attempts at concealment on the part of the abuser.

66 American authors who have commented on incest and the limitations problem advocate the application of fraudulent concealment in the manner I propose; see DeRose (1985), 25 *Santa Clara L. Rev.* 191, supra, at pp. 197-199; Handler, 15 *Fordham Urb. L.J.* , supra, at pp. 722-729; Rosenfeld (1989), 12 *Harv. Women's L.J.* 206, supra, at pp. 216-219; Salten, "Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy" (1984), 7 *Harv. Women's L.J.* 189, at pp. 208-211. As I understand the American law, fraudulent concealment is there viewed as a sub-set of the larger doctrine of equitable estoppel, by which a person is precluded by his own prior conduct from asserting a defence that he might otherwise have had; see in particular Handler, supra, at p. 723. In Canada such a broad application of equitable estoppel has not thus far been recognized, but I would observe that the underlying premise of the American approach is the same as our own: the courts will not allow a limitation period to operate as an instrument of injustice.

Recovery for Breach of Fiduciary Obligation

67 The appellant argues that incest constitutes not only the tort of assault and battery, but is also a breach of the fiduciary relationship between parent and child. The appellant submits that Ontario's *Limitations Act* does not apply to fiduciary duties, and as such the plaintiff's delay is no defence to the fiduciary action. I agree. Incest is a breach of both common law and equitable duties, and the latter claim is not foreclosed by the Act. Certain equitable defences may, however, be available to the respondent.

68 Before turning to these questions in detail, it is useful to first review the history of these proceedings as regards the equitable claim, as it is partially in light of this history that I deem it appropriate to consider the fi-

dicuary question in this case. The appellant's statement of claim seeks damages for incest occasioned as a result of reoccurring sexual assaults. In addition the appellant claims damages for her father's breach of his fiduciary duty to care for and minister to his child. Of course, the proper term for the equitable relief sought would be compensation, but this defect in the pleadings is of no great moment. In the result, the pleadings present neatly compartmentalized concurrent common law and equitable claims.

69 At trial, the judge remitted to the jury only the factual issue of whether sexual assault was committed, along with the assessment of damages for the tort of sexual assault. The claim for breach of fiduciary duty was not referred to the jury, which was appropriate given s. 121(2) of Ontario's *Courts of Justice Act, 1984* , S.O. 1984, c. 11, which requires issues of fact and the assessment of damages regarding claims for equitable relief to be tried without a jury. In this case, it was for the trial judge to decide the issue of fiduciary duty; see *447927 Ontario Inc. v. Pizza Pizza Ltd.* (1987), 16 C.P.C. (2d) 277 (Ont. H.C.) . However, the trial judge did not rule on this question: my review of the trial transcript suggests that the issue was simply overlooked by counsel and by Maloney J. On appeal, the question of fiduciary obligation was apparently argued, but the Court of Appeal does not refer to the issue in its brief endorsement.

70 Consequently, it is left to this court to consider the question of fiduciary duty. In my view, the issue must be addressed even though the tort action has survived the limitations defence. It was fully argued by the parties, and there may well be cases where the limitations statute cannot be circumvented but where the fiduciary claim is unaffected by the statute. Moreover, the equitable remedy available to the appellant may vary from the common law award established by the jury. The importance of considering any equitable cause of action has recently been stated by Justice McLachlin in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at p. 290-291:

> These examples underline the importance of treating the consequences of this relationship on the footing of what it is — a fiduciary relationship — rather than forcing it into the ill-fitting molds of con tract and tort. Contrary to the conclusion of the court below, characterizing the duty as fiduciary *does* add something; indeed, without doing so the wrong done to the plaintiff can neither be fully comprehended in law nor adequately compensated in damages. [Emphasis in original.]

In *Norberg* , McLachlin J. and I differed on the path to be followed in upholding recovery. She chose the route of the fiduciary claim whereas I preferred the route afforded by common law tort of battery because in the circumstances of that case there might be difficulties concerning the applicability of fiduciary obligations, an issue I did not find it necessary to decide. I could do this because I did not consider the common law molds to be ill-fitting in that case. Nor, as I will attempt to demonstrate, do I think they are ill-fitting in the present circumstances. Nonetheless, I agree with my colleague that a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent common law claims. The point is simply stated by Cooke P. of the New Zealand Court of Appeal in *Mouat v. Boyce* , unreported, March 11, 1992, at p. 11: "For breach of these duties, now that common law and equity are mingled the court has available the full range of remedies, including damages or compensation and restitutionary remedies such as an account of profits. What is appropriate to the particular facts may be granted."

71 In the present case, the lower courts have not ruled on the question of fiduciary obliation. As such, this court must assume the role of finder of fact in equity, but in this case that burden poses no difficulty. We have a jury's verdict on the fact of sexual assault, and it is easy enough to apply that finding to the equitable claim. What remains is the legal issue of whether the assaults constitute a breach of fiduciary duty. I turn now to that issue.

1992 CarswellOnt 841, 14 C.C.L.T. (2d) 1, 142 N.R. 321, 96 D.L.R. (4th) 289, 57 O.A.C. 321, [1992] 3 S.C.R. 6, J.E. 92-1644, EYB 1992-67549

Fiduciary Obligation of a Parent

72 It is intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a grievous breach of the obligations arising from that relationship. Indeed, I can think of few cases that are clearer than this. For obvious reasons society has imposed upon parents the obligation to care for, protect and rear their children. The act of incest is a heinous violation of that obligation. Equity has imposed fiduciary obligations on parents in contexts other than incest, and I see no barrier to the extension of a father's fiduciary obligation to include a duty to refrain from incestuous assaults on his daughter.

73 Over the past decade, this court has explored the scope of fiduciary obligations, and we have perhaps reached the point where a "fiduciary principle" can be applied through a well-defined method. The process was started in *Guerin v. R.* , supra, where Dickson J. (as he then was) found that certain obligations owed by the federal government to an Indian band were fiduciary in nature. In the course of his reasons, Dickson J. confirmed certain broad principles with respect to fiduciary obligations, at p. 384:

> Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discre- tion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.
>
> It is sometimes said that the nature of the 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.

I would go one step further, and suggest that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary. In the present case, however, it is sufficient to say that being a parent comprises a unilateral undertaking that is fiduciary in nature. Equity then imposes a range of obligations coordinate with that undertaking.

74 The next step in the evolution of the fiduciary principle came with *Frame v. Smith*, [1987] 2 S.C.R. 99 . In this case the dissenting judgment of Wilson J. elaborates on the approach established by Dickson J. in *Guerin* . Although the majority held that the remedy of fiduciary obligation did not apply in the circumstances of that case, Wilson J.'s mode of approach was later held to apply in the circumstances that arose in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 ; see also the concurring reasons in *Canson Enterprises Ltd. v. Boughton & Co.* , supra. Recognizing that the categories of fiduciary relationships are not closed, Wilson J. proposed the following approach for their identification, at p. 136:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characterist- ics:
>
> (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.

Even a cursory examination of these indicia establishes that a parent must owe fiduciary obligations to his or her child. Parents exercise great power over their children's lives, and make daily decisions that effect their welfare. In this regard, the child is without doubt at the mercy of her parents.

75 The factual context of *Frame v. Smith* is of some relevance to the present case. The court was there considering a family law matter, in which a non-custodial parent claimed that his right of access to his children had been frustrated by the custodial parent. The interest purporting to attract the protection of equity was the parent's relationship with his child, but opposing counsel argued that this personal interest fell outside the traditional categories of fiduciary obligation which, it was argued, had the common feature of protecting purely economic interests. Wilson J. rejected this proposition in the following terms, at p. 143:

> To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the exteme. In contract law equity recognizes interests beyond the purely economic when, instead of awarding damages in the market value of real estate against a vendor who has wrongfully refused to close, it grants specific performance. Other non-economic interests should also be capable of protection in equity through the imposition of a fiduciary duty. I would hold, therefore, that the appellant's interest in a continuing relationship with his or her child is capable of protection by the imposition of such a duty.

Similarly, the non-economic interests of an incest victim are particularly susceptible to protection from the law of equity.

76 In *International Corona Resources Ltd. v. LAC Minerals Ltd.* , supra, I suggested a further refinement of the process by which fiduciary relationships could be uncovered. In particular, I identified three senses of the term "fiduciary" in an effort to clarify its import in given situations. The first sense of the term was as used by Wilson J. in *Frame v. Smith* , which I characterized as follows, at pp. 646-647:

> There the issue was whether a certain class of relationship, custodial and non-custodial parents, was a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be decribed as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable,

> but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. ...
>
> It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded.

It is the first usage of the term "fiduciary" which arises in the present case. The inherent purpose of the family relationship imposes certain obligations on a parent to act in his child's best interests, and a presumption of fiduciary obligation arises.

77 In *LAC Minerals* I stressed the point, which also emerges from *Frame v. Smith* , that the substance of the fiduciary obligation in any given case is not derived from some immutable list of duties attached to a category of relationships. In other words, the duty is not determined by analogy with the "established" heads of fiduciary duty. Rather, the nature of the obligation will vary depending on the factual context of the relationship in which it arises. Recently, I had occasion to return to this point in the context of a doctor-patient relationship in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 . I there stated, at p. 149:

> In characterizing the physician-patient relationship as "fiduciary", I would not wish it to be thought that a fixed set of rules and principles apply in all circumstances or to all obligations arising out of the doctor-patient relationship. As I noted in *Canson Enterprises Ltd. v. Boughton and Co.*, [1991] 3 S.C.R. 534 , not all fiduciary relationships and not all fiduciary obligations are the same; these are shaped by the demands of the situation. A relationship may properly be described as "fiduciary" for some purposes, but not for others.

In certain parent-child contexts, equity has recognized a parental duty to protect the *economic* interests of his child. However, this case law does not limit the range of the obligations that may attach to other aspects of the parent-child relationship.

78 Canadian cases have recognized the parent-child relationship as a traditional head of fiduciary obligation, albeit in obiter. These include *Follis v. Albemarle (Township)*, [1941] 1 D.L.R. 178 (Ont. C.A.) , *Henderson v. Johnston* (1956), 5 D.L.R. (2d) 524 (Ont. H.C.) , at p. 533, and notably, *LAC Minerals* , supra, at p. 606, per Justice Sopinka. Similarly, academic authorities have placed the relationship in this class; see Shepherd, *The Law of Fiduciaries* (1981), at p. 30. As I earlier suggested, the content of the obligation has most often been determined in the context of contractual relations between a parent and child, where it gives rise to a presumption of undue influence. The extensive case law on this point is cited in Meagher, Cummow and Lehane, *Equity Doctrines and Remedies* , supra, at p. 374. Of course, the intervention of equity will vary when the context changes from that of intra-familial economic relations to the more insidious conduct at issue in this case.

79 A similar approach can be found in the United States, where a fiduciary parent-child relationship has been judicially recognized to protect the economic interests of the child: see *Menick v. Goldy* , 280 P.2d 844 (Cal. App. 2 Dist. 1955); *Ohio Casualty Insurance Co. v. Mallison* , 354 P.2d 800 (Or. 1960); *Fitzgerald v. Newark Morning Ledger Co.* , 267 A.2d. 557 (N.J. 1970). However, the obligations of a parent go much further, as is evident from the following comments of the Supreme Court of California in *Emery v. Emery* , 289 P.2d 218 (Cal. 1955), at p. 224:

> Since the law imposes on the parent a duty to rear and discipline his child and confers the right to prescribe a course of reasonable conduct for its development, the parent has a wide discretion in the performance of his parental functions, but that discretion does not include the right wilfully to inflict personal injuries bey-

> ond the limits of reasonable parental discipline.

These comments were made in the context of parental immunity from tort actions, but they are equally apposite in describing the fiduciary basis of the obligation. Indeed, the essence of the parental obligation in the present case is simply to refrain from inflicting personal injuries upon one's child.

80 In *Evans v. Eckelman* , supra, the parent's fiduciary obligation as regards incest was considered, and the court there found that an obligation to protect the child's health and well-being was at stake. The court in turn found that the fiduciary nature of the relationship impacted on the application of the delayed discovery rule to the limitations defence at issue in that case. It stated, at p. 608:

> Two common themes run through the cases applying the dis covery rule of accrual. First, the rule is applied to types of actions in which it will generally be difficult for plaintiffs to immediately detect or comprehend the breach or the resulting injuries. ...
>
> Second, courts have relied on the nature of the relationship between defendant and plaintiff to explain application of the delayed accrual rule. The rule is generally applicable to confidential and fiduciary relationships. ... The fiduciary relationship carries a duty of full disclosure, and application of the discovery rule "prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure".

81 Thus the fiduciary nature of the relationship supports a liberal application of the discovery rule. This usage of the fiduciary relationship is supported by American commentators, who advance fiduciary obligation as a justification for a generous application of the delayed discovery rule: DeRose, (1985), 25 *Santa Clara L.R.* 191, supra, at pp. 203-208, or as the basis for the doctrine of fraudulent concealment: Hartnett, "Use of a Massachusetts Discovery Rule by Adult Survivors of Father/Daughter Incest" (1990), 24 *New Eng. L. Rev.* 1243, at pp. 1263-1265. See also Jorgenson and Randles, "Time Out: The Statute of Limitations and Fiduciary Theory in Psychotherapist Sexual Misconduct Cases" (1991), 44 *Okla. L. Rev.* 181.

82 As in Canada, most American jurisdictions have enacted a general limitations provision that encompasses actions in equity: 54 C.J.S. Limitations of Actions § 36; 51 Am. Jur. 2d § 83. As such, establishing a breach of fiduciary obligation will not circumvent limitations legislation as conveniently as is the case in Ontario. Indeed, as we shall see, Ontario is relatively unique in this regard. As fiduciary duties are caught by the legislation in most states, the commentaries and court decisions referred to above have restricted themselves to an assessment of the impact of the fiduciary relationship within the statutory limitations model. In this case, of course, we are not so limited.

83 By way of summary, fiduciary obligation has apparently not been raised in previous incest cases as an independent head of liability. However, it is clear that such an option is available subject to statutory and other limitation defences specific to equitable claims. It is to these defences that I now turn.

Defences

84 As with the appellant's claim in tort, her delay in bringing the claim for breach of fiduciary duty raises several possible defences. The first is limitations legislation; the second is the application of that legislation by analogy, and finally there is the equitable doctrine of laches. In my view, none of these defences is made out in this case, and the appellant's claim should stand. As will become apparent, many of the factors activating the

reasonable discoverability principle in tort are also applicable in assessing these equitable defences. While there is some overlap, there are also different considerations that arise solely in the realm of equity.

Limitations Legislation

85 Ontario's *Limitations Act* is one of the few remaining limitations statutes in Canada that is not made applicable to civil actions in general. Such provisions capture any common law or equitable claim, and reference can be made to six provincial statutes in this regard: *Limitation Act* , R.S.B.C. 1979, c. 236, s. 3(4); *Limitation of Actions Act* , R.S.A. 1980, c.L-15, s. 4(1)(*g*); *The Limitation of Actions Act* , R.S.S. 1978, c. L-15, s. 3(1)(*j*); *Statute of Limitations* , R.S.P.E.I. 1988, c. S-7, s. 2(1)(*g*); *The Limitation of Actions Act* , R.S.M. 1987, c. L150, s. 2(1)(*n*); *Limitation of Actions Act* , R.S.N.B. 1973, c. L-8, s. 6. In Ontario, by contrast, the Act applies only to a closed list of enumerated causes of action. Counsel for both parties have apparently conceded that this list does not include fiduciary obligations, and it is therefore unnecessary to consider this question in great depth. However, some comment on the issue may be helpful in understanding the next defence under consideration, namely, limitation by analogy to the statute.

86 Section 2 of the Ontario *Limitations Act* reads as follows:

> 2. Nothing in this Act interferes with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act.

This section makes clear that the Act does not exhaust the defences available to a defendant because of the passage of time. Thus, certain actions expressly made subject to the *Limitations Act* may not yet be out of time under the terms of that statute, but may be precluded by equitable defences that apply notwithstanding the terms of the Act. The section also gives rise to the inference that there is a category of equitable claims not subject to the Act at all, and that the equitable defences survive in those cases. Such is the case here. The Act does not apply to fiduciary obligations, but the respondent may nonetheless argue that the equitable defence of laches is available to the respondent.

87 Part II of the Act limits certain actions against trustees, and pursuant to s. 42 the Part applies to express or statutory trusts. This obviously does not encompass fiduciary obligations. However, s. 43 defines "trustee" to include a "trustee whose trust arises by construction or implication of law". However, this definition does not include a fiduciary obligation; a trust is a distinct catetory of equitable obligation. As Dickson J. observed in *Guerin* , supra, at pp. 386-387, it is a concept separate and apart from fiduciary relationship, although the two arise from the same equitable source. In *Canson* , supra, at p. 578, I commented on this distinction from a remedial perspective. Consistently with this approach, cases considering the scope of the term "trustee" under s. 43 of the Act have limited its application to express or constructive trustees; see *Soar v. Ashwell*, [1893] 2 Q.B. 390 (C.A.) ; *Taylor v. Davies*, [1920] A.C. 636 (P.C.) .

88 In an abundance of caution, counsel for the appellant cited s. 43(2) of the Act, which has the effect of denying protection to a trustee where the action is based on the trustee's fraudulent breach of trust. This really goes to fraudulent concealment, discussed earlier, and it is unnecessary to consider at this stage because Part II of the Act clearly does not apply to fiduciary relationships.

Statutory Limitation by Analogy

89 While a breach of fiduciary duty is not expressly limited by Ontario's *Limitations Act* , can it be said that

equity should apply the Act by analogy to bar the appellant's claim? That is, should the limitation period applicable to tortious assault be applied on the fiduciary side because both claims arise out of the same facts? There is a short answer to this question. Having already found that the limitation period was tolled by the reasonable discoverability principle, analogous application of the statute is, of course, not fatal to the appellant's claim in equity. But even apart from this, I think the same result would follow. While there is no doubt that in some cases equity will operate by analogy and adopt a statutory limitation period that does not otherwise expressly apply, in my view this is *not* such a case. And this for several reasons. First, equity has rarely limited a claim by analogy when a case falls within its exclusive jurisdiction, as in this claim for breach of fiduciary duty. Moreover, even if it is appropriate to analogize from the common law, the analogy will be governed by the parameters of the equitable doctrine of laches. More will be said about laches later when it will become evident that it is of no assistance to the respondent. Finally, any analogy drawn in this case would be nullified by the doctrine of fraudulent concealment.

90 The concept of limitation by analogy is as old as limitation statutes themselves, and some appreciation of its history is helpful in understanding the true scope of the doctrine. In this regard, Brunyate's *Limitation of Actions in Equity* , supra, is again an invaluable source. As he explains, at pp. 1-22, the first English statutes of limitations applied only to actions at common law, and it was only centuries later in 1833 that some equitable actions were so limited; see *Limitation Act, 1623* , (Eng.), 21 Ja. 1, c. 16; *Real Property Limitation Act, 1833* , (Eng.), 3 & 4 Will. 4, c. 27. In the interim, the chancery courts were often called upon to decide purely legal claims within an equitable proceeding, and a practice evolved whereby the statutes could be applied even though the proceeding was technically in equity. In the seminal case of *Hovenden v. Annesley (Lord)* (1806), 2 Sch. & Lef. 607, 9 R.R. 119 (Ch. (Ireland)), at p. 630 and p. 120 respectively, Lord Redesdale explained the practice in this way:

> But it is said that courts of equity are not within the statutes of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies: but they are within the spirit and meaning of the statutes, and have always been so considered. I think it is a mistake in point of language to say that courts of equity act merely by analogy to the statute; § they act in obedience to it. The statute of limitations, applying itself to certain legal remedies, for recovering the possession of lands, for recovering of debts, & c. Equity, which in all cases follows the law, acts upon legal titles, and legal demands, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies: nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law.

In the result, when acting within its auxiliary jurisdiction, equity decided legal claims as an incident of a larger equitable proceeding, or exercised its supervisory jurisdiction, it was compelled to "follow the law" and apply the statutory limitation period.

91 Over time, Lord Redesdale's remarks were used as the basis for a broader jurisdictional approach to the doctrine of limitation by analogy. Brunyate described the emerging method, at pp. 11-12 of his text:

> Suits within the auxiliary jurisdiction of equity are within the very words of the Statute of Limitations so that in applying the statute to them the Court is acting in obedience to it; suits within the concurrent jurisdiction are perhaps within the words of the statute (there is some doubt whether they were included or not); suits within the sole jurisdiction are not within the words of the statute and to them the statute is applied if at all by analogy.

Brunyate criticizes this new approach as a misreading of *Hovenden v. Annesley* , but the approach appears to have survived the *Judicature Act* . Typical is the often-quoted test established by the House of Lords in *Knox v. Gye* (1872), L.R. 5 H.L. 656 , at pp. 674-675:

> ... where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the *Statute of Limitations* , a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation.
>
> . . . . .
>
> Where a Court of Equity frames its remedy upon the basis of the Common Law, and supplements the Common Law by extending the remedy to parties who cannot have an action at Common Law, there the Court of Equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords.

In other words, concurrent actions in equity will be subjected by analogy to the limitations statute. However, equity in this instance is not *bound* to follow the law, and its residual discretion may be employed through the doctrine of laches. Brunyate thus described this distinction, at p. 16:

> Thus the substantial difference between cases where the Court acts in obedience to a Statute of Limitations and cases where it acts by analogy with the statute is that in the former the limitation is p[e]remptory whereas in the latter it is part of the law of laches.

92 Today, the doctrine retains certain remnants of its old jurisdictional foundations, even though the distinction between the exclusive, concurrent and auxiliary jurisdictions is now technically obsolete. Fortunately the notion of acting in "obedience" to the statute appears to have fallen into disfavour; see *Halsbury's Laws of England* , 4th ed., vol. 16, para. 934, at p. 837, notes 2 and 3; Meagher et al., supra, at p. 744. I have grave doubts about the continuing vitality of this aspect of the doctrine, for it seems distinctly inequitable for a court of conscience to be compelled to apply by inference or analogy a statutory provision that takes no account of the justice of each case.

93 The surviving authorities maintain a blurred distinction between concurrent and exclusive actions in equity. From the outset it has been difficult to maintain a principled distinction, since even some early cases arising solely in equity were subjected to the limitations period; see Brunyate, at p. 20. Nonetheless, it is appropriate to view concurrent actions as being most susceptible to the analogy doctrine; after all, these actions have historical roots in the common law. At the same time actions arising solely in equity will rarely be comparable to a common law analogue.

94 The present case involves a breach of fiduciary duty, which falls solely within the realm of equity. As such, it is not in my view readily amenable to limitation by analogy to some common law action. However, even if an analogy *could* be drawn that is not to say that it *must* be applied. As I noted earlier, equity retains a residual discretion on this point, which is the point of distinction from acting in obedience to the statute. In this respect the analogy takes on the character of laches, a point explicitly recognized by Brunyate. A more detailed consideration of laches follows, but for now it is enough to note the following proposition advanced by Brunyate, supra, at p. 17:

> Where a Court of Equity is applying the statute as part of the law of laches it may reasonably allow any ex-

> ceptions that are allowed in the law of laches. ... since delay by a plaintiff who has been ignorant of his right of action will not amount to laches, we should expect that, where the Court is acting by analogy to the statute, time will not run until the plaintiff is aware of his right of action.

This reasoning would appear to be the basis of the judgment in *Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319 (C.A.) .

95 In a similar vein, any analogy that might be drawn in this case is also refuted by the respondent's fraudulent concealment of the appellant's cause of action. I have already discussed fraudulent concealment as a discrete response to the limitations problem in incest cases, and held that it was not procedurally available for that purpose in this case. Here, however, I do not raise fraudulent concealment to counter the express application of the statute, but in relation to the analogy doctrine. In my view it would be unfair to consider the analogy without at the same time considering all possible responses to it. In this case, the evidence overwhelmingly suggests that the respondent's incestuous conduct, together with his later acts of concealment, were sufficient to constitute fraudulent concealment. In the result, any analogous limitation period applicable to this case will be tolled by this concealment.

Laches

96 Historically, statutes of limitation did not apply to equitable claims, and as such courts of equity developed their own limitation defences. Limitation by analogy was one of these, but the more important development was the defence of laches. While laches must be considered here as in any delayed equitable claim, in my view it does not afford the respondent redress.

97 The leading authority on laches would appear to be *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 , in which the doctrine is explained as follows, at pp. 239-240:

> ... the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

This explanation was approved by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218 (H.L.) , where, after quoting the above passage, he comments, at pp. 1279-1280:

> I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject

> to uncertainty; but that, I think, is inherent in the nature of the inquiry.

In turn, this formulation has been applied by this court; see *Canada Trust Co. v. Lloyd*, [1968] S.C.R. 300 ; *Blundon v. Storm*, [1972] S.C.R. 135 .

98 The rule developed in *Lindsay* is certainly amorphous, perhaps admirably so. However, some structure can be derived from the cases. A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, supra, at pp. 755-765, where the authors distill the doctrine in this manner, at p. 755:

> It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (*a*) acquiesced in the defendant's conduct or (*b*) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb.

Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

99 In this case, there is no question of the respondent's "altering his position" because of the appellant's delay. Such considerations obviously do not arise in a case such as this. Further, there is nothing about the delay's here rendering further prosecution of the case unreasonable. Therefore, if laches is to bar the appellant's claim, it must be because of acquiescence, the first branch of the *Lindsay* rule.

100 Acquiescence is a fluid term, susceptible to various meanings depending upon the context in which it is used. Meagher, Gummow and Lehane, supra, at pp. 765-766, identify three different senses, the first being a synonym for estoppel, wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing. This has been referred to as the primary meaning of acquiescence. Its secondary sense is as an element of laches — after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived. This, of course, is the meaning of acquiescence relevant to this appeal. The final usage is a confusing one, as it is sometimes associated with the second branch of the laches rule in the context of an alteration of the defendant's position in reliance on the plaintiff's inaction.

101 As the primary and secondary definitions of acquiescence suggest, an important aspect of the concept is the plaintiff's *knowledge* of her rights. It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: *Re Howlett*, [1949] Ch. 767 . However, this court has held that knowledge of one's claim is to be measured by an objective standard; see *Taylor v. Wallbridge* (1879), 2 S.C.R. 616 , at p. 670. In other words, the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim.

102 It is interesting to observe that in practical terms the inquiry under the heading of acquiescence comes very close to the approach one takes to the reasonable discoverability rule in tort. As we have seen, the latter focuses on more than mere knowledge of the tortious acts — the plaintiff must also know of the wrongfulness of those acts. This is essentially the same as knowing that a legal claim is possible. That the considerations under law and equity are similar is hardly surprising, and is a laudable development given the similar policy imperat-

ives that drive both inquiries.

103 In the present case, was it reasonable for the appellant to know the facts of her abuse and yet be unable to determine that her father was in the wrong and that a suit in equity could be launched? I believe that in the circumstances of the typical survivor the failure to know that one has been wronged is entirely reasonable. I have already discussed the medical evidence which indicates a post-incest syndrome of denial, memory repression, and self-guilt. The very existence of this syndrome is evidence that the reasonable incest survivor is incapable of appreciating her rights in equity or in law, and as such is incapable of acquiescing to the conduct that has breached those rights.

104 As is now apparent, the considerations outlined in detail under the common law discoverability doctrine must also be considered under the rubric of acquiescence. However, I would not wish to be taken as suggesting that an inquiry under the common law will reach the same result as in equity in every case. Rather, there is an important distinction between the two that has not yet been considered. As I have stated, both doctrines share the common requirement of knowledge on the part of the plaintiff. However, a consequence of that knowledge is that the reasonable discoverability inquiry is at an end, and the statutory limitations period begins to run. In equity, however, there is a residual inquiry: in light of the plaintiff's knowledge, can it reasonably be inferred that the plaintiff has acquiesced to the defendant's conduct? That question depends on the circumstances of each case, but in my view it would require particularly compelling evidence to demonstrate that an incest victim had "acquiesced" to the sexual assaults made against her. In this case I need not consider this second inquiry, as the appellant did not have real knowledge of the wrongfulness of the respondent's conduct until shortly before commencing this action. However, I see nothing in the facts of this case to suggest that the appellant truly acquiesced to her father's abuse.

Remedies

105 The jury in this case found that the respondent had sexually assaulted the appellant, and assessed general damages of $10,000 and punitive damages of $40,000. Though the punitive damages are within the general range of such awards, the general damages seem rather low. The jury, howevr, had the whole matter before it, and its award should not lightly be disturbed. At all events, the quantum was not disputed on this appeal. However, as I have found that a breach of fiduciary duty has also occurred, it raises the issue whether some additional remedy in equity is necessary to compensate the appellant fully and properly.

106 Recently, I have had occasion to consider the relationship between equitable and common law remedies, and in particular compensation for breach of fiduciary obligation; see *Canson Enterprises Ltd. v. Boughton & Co.* , supra. In equity there is no capacity to award damages, but the remedy of compensation has evolved. The distinction between damages and compensation is often slight, and as I noted in *Canson* , the courts have tended to merge the principles of law and equity when necessary to achieve a just remedy. There I was speaking of the relationship between remedies for tortious misstatement and breach of fiduciary duty, but the underlying principles are equally ap plicable in this case. Of particular relevance are my comments beginning at p. 581, and particularly the following passages at pp. 581 and 586-587 respectively:

> The truth is that barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.
>
> .....

> Only when there are different policy objectives should equity engage in its well-known flexibility to achieve a different and fairer result. The foundation of the obligation sought to be enforced ... is "the trust or confidence reposed by one and accepted by the other or the assumption to act for the one by that other." That being so, it would be odd if a different result followed depending solely on the manner in which one framed an identical claim. What is required is a measure of rationalization.

The question in this appeal is whether there are different policy objectives animating the breach of a parent's fiduciary duty as compared with incestuous sexual assault. In my view, the underlying objectives are the same. Both seek to compensate the victim for her injuries and to punish the wrongdoer. The jury award of general damages was made with full knowledge of the injuries suffered by the appellant and her rehabilitative needs. The same concerns would apply in assessing equitable compensation, and as such I would decline to provide any additional compensation for the breach of fiduciary obligation. The punitive damages award should also not be varied in equity. Of course, equitable compensation to punish the gravity of a defendant's conduct is available on the same basis as the common law remedy of punitive damages; see *Aquaculture Corp. v. New Zealand Green Mussel Co.*, [1990] 3 N.Z.L.R. 299 (C.A.) , at p. 301.

107 In the result, I am of the view that the jury award of $50,000 is an appropriate remedy for both the equitable and the common law claims.

Disposition

108 For the foregoing reasons, I would allow the appeal, set aside the judgment of the trial judge and order that judgment be entered in favour of the appellant in the amount of $50,000.

***L'Heureux-Dubé J.* (concurring):**

109 Although I agree with Justice McLachlin's comments as regards the remedies, i.e., the nature and quantum of damages associated with a breach of fiduciary duty as opposed to those which underlie the torts of battery and assault, a question which, as she notes, is not before us, I fully agree with Justice La Forest's reasons and I concur in the result.

***Sopinka J.* (concurring):**

110 I agree with the result reached by my colleague Justice La Forest and with his reasons with one exception. I would not resort to the use of a presumption that a plaintiff who is typical of the syndrome is unaware of the injury done to her until she undergoes therapy. There are two reasons for this position. The first is based on the inadvisability, in general, of using presumptions because of the uncertainty as to their legal effect. The second rests on the difficulties which this presumption will create for the trial judge and the litigants in a case of this kind.

111 In *McCormick on Evidence* , 3rd ed., the author states at p. 965 that "presumption is the slipperiest member of the family of legal terms, except its first cousin the burden of proof." The reason for this is that the evidentiary effect of the many different types of presumptions is so varied that their use almost invariably leads to confusion. It is usually preferable to define the legal result sought to be achieved instead of using a label that will mislead rather than define.

112 My colleague provides a partial definition of the evidentiary effect of the presumption of awareness that he advocates but I am of the opinion that it will create difficulties in the conduct of a trial and reverse the ordinary burden of proof without any justification. The presumption proposed would arise when the evidence shows that the plaintiff displays features consistent with those that are typically associated with the syndrome. This would require a determination at least on a prima facie basis. Upon this determination being made it would be presumed that the plaintiff was unaware of the elements of her cause of action until she had the benefit of therapy. The defendant would be able to refute this presumption by leading evidence. Presumably from that point on the legal burden of proof is restored to the plaintiff. It is not clear whether this creates an evidentiary burden merely, or a legal burden. The former would only require the defendant to lead some evidence tending to blunt the presumption while the latter would reverse the legal burden of proof so that the defendant would bear the risk of non persuasion. I would conclude that the latter is the result intended by reason of the use of the term "refute."

113 Apart from the practical problem of shifting the legal burden of proof on the basis of an assessment of the evidence in the middle of a trial, I question the justification for reversing the legal burden of proof from the plaintiff to the defendant in respect of the issue of reasonable discoverability. The rationale for the rule that the burden of proof rests with the plaintiff is two-fold: first the legal burden is generally imposed on the party who asserts a proposition. Secondly, the legal burden with respect to an issue is placed on the party who is in the best position to prove the issue. Since the plaintiff is presumed to know her case and the defendant does not, the burden rests with the plaintiff to prove the elements of the cause of action. The legal burden may be reversed, however if the rational for its allocation is absent. See for example *National Trust Co. v. Wong Aviation Ltd.*, [1969] S.C.R. 481 .

114 The basic criteria for the allocation of the burden of proof apply to justify maintaining the legal burden of proof with respect to reasonable discoverability on the plaintiff. It is the plaintiff who is seeking an exemption from the normal operation of the statute of limitations asserting that she was not aware of her cause of action for many years after the statutory period would otherwise have commenced to run. Moreover the plaintiff is in the best position to adduce evidence of her lack of awareness and the defendant is not. The lack of awareness will be established largely on the basis of the plaintiff's own testimony bolstered by the evidence of experts whose testimony will likewise depend on personal information supplied by the plaintiff. In most of these cases the defendant will have ceased all contact with the plaintiff for many years and have no knowledge of the plaintiff's circumstances during that period. Moreover, the definition of awareness which my colleague adopts is highly subjective and the second rationale for the allocation of the burden of proof applies a fortiori. I, therefore, see no reason to reverse the traditional burden of proof in this case. In other respects, however, I fully agree with the reasons of my colleague and would dispose of the appeal as he proposes.

McLachlin J. **(concurring):**

115 I agree with the reasons of my colleague Justice La Forest, subject to the following comments.

116 I would question whether it is necessary to introduce the notion of a presumption of the plaintiff's discovering a cause of action when a therapeutic relationship begins (pp. 25 and 39) [of original judgment; paras. 30-31 and 47-48, supra]. First, I would prefer to leave the question as a matter of fact to be determined in all the circumstances. A presumption is appropriate in special circumstances, as where the facts are largely in the possession of the opposing party on an issue. I see no such circumstances here. Second, I see no magic in the com-

mencement of a therapeutic relationship. In particular, I am concerned that some incest survivors may not discover their cause of action until after lengthy therapy or several therapeutic relationships, and that such a presumption might inure to their disadvantage. I would prefer to view the commencement of the relationship as one of a number of factors which should be considered in determining when the limitation period begins to run.

117 Third, I would not wish to be taken as sharing the view that the award which the jury made was adequate. The jury was asked only to assess damages for the tort of battery and assault. It did so, and the appellant has not appealed from that award, asking only that the jury's award be reinstated. In these circumstances the question of whether the award was appropriate or not does not arise on this appeal. I would dispose of the appeal as proposed by La Forest J., but on the ground that the question of the quantum of the award was not before us.

118 Having said that, I add that were I to enter on the matter of the quantum of damages, I would find myself unable to agree that the measure of damages for battery and assault would necessarily be the same as compensation for breach of fiduciary duty. As I see it, the question is whether the wrong encompassed by the cause of action is the same. The wrong encompassed by the torts of battery and assault may be different from the wrong encompassed by the action for a breach of fiduciary duty. The latter encompasses damage to the trust relationship, for example, which the former does not. The action for breach of fiduciary duty may also be more concerned with imposing a measure which will deter future breaches; as I noted in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 , at pp. 587-588, trustees have always been held to highest account in a manner stricter than that applicable to tortfeasors. In short, while agreeing with my colleague that where the same policy objectives underlie two different causes of action similar measures of compensation may be appropriate (pp. 80-81 [of unreported judgment; paras. 105-106, supra]), I would not conclude that the policy objectives or the wrong involved in breach of fiduciary duty of this nature are necessarily the same as those which underlie the torts of battery and assault.

119 Subject to these observations, I concur in the reasons of La ForestJ.

Appeal allowed.

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TAB 10

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation

Victoria Order of Nurses for Canada and Victorian Order of Nurses for Canada — Ontario Branch, Applicants and Greater Hamilton Wellness Foundation, Respondent

Ontario Superior Court of Justice

Robert N. Beaudoin J.

Heard: May 12-14; August 2-4, 2011
Judgment: September 27, 2011[FN*]
Docket: Ottawa 09-46843

Proceedings: additional reasons at *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation* (2011), 2011 ONSC 6801, 2011 CarswellOnt 12731 (Ont. S.C.J.)

Counsel: David Sherriff-Scott, Peter C.P. Thompson, Q.C., for Applicants

Henry G. Blumberg, Ronald S. Segal, Scott Chambers, for Respondent

Dana De Sante, for Public Guardian and Trustee

Subject: Estates and Trusts; Civil Practice and Procedure; Corporate and Commercial

Estates and trusts --- Charities — General principles — Charitable purposes — Purposes beneficial to community

Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — VH was exclusive beneficiary under Foundation's corporate object based on proper interpretation of objects in Letters Patent — VO was VH's successor — Original object clause required Foundation to make distributions of property to VH or its successor for charitable or educational purposes related to patient and health care — Object clause did not authorize Foundation to distribute its funds to any entity so long as their purposes were consistent with purposes of VC — Objects clause included name of VC specifically — Solicitation material represented that donations were to be used for VC

programs — VH was source of Foundation's initial funding.

Estates and trusts --- Trusts — Purpose trust — Charitable purpose

Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — VH was exclusive beneficiary under Foundation's corporate object based on proper interpretation of objects in Letters Patent — VO was VH's successor — Original object clause required Foundation to make distributions of property to VH or its successor for charitable or educational purposes related to patient and health care — Object clause did not authorize Foundation to distribute its funds to any entity so long as their purposes were consistent with purposes of VC — Objects clause included name of VC specifically — Solicitation material represented that donations were to be used for VC programs — VH was source of Foundation's initial funding.

Estates and trusts --- Charities — Administration of charities

Fiduciary duty and trust obligations of directors — Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were expected to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — Foundation breached its fiduciary duty and trust obligations to VH and VO — It did not become impossible or impracticable for Foundation to carry out its original object, so it could not significantly amend its objects — Original Letters Patent did not provide for any exercise of discretion with respect to funding of VH.

Estates and trusts --- Charities — Miscellaneous issues

Remedy for breach of duty — Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were expected to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — Foundation breached its fiduciary duty and trust obligations to VH and VO — Remedy for breach required clean break between Foundation and VO — Foundation was ordered to transfer all of its as-

sets to another entity in trust — Assets were transferred to VO in trust to be used in accordance with Foundation's original objects — VO was legal successor to VH, and had not acted inappropriately — Adding another party at this time would cause further delay and add administrative costs.

Estates and trusts --- Charities — Practice and procedure — Miscellaneous issues

Standing — Charities.

Civil practice and procedure --- Parties — Standing

Charities.

Estates and trusts --- Gifts — Types of gifts — Inter vivos gift — Conditional gifts

Breach of conditions precedent and subsequent.

Estates and trusts --- Trusts — Resulting trust — Creation — Miscellaneous issues

No proof of gift.

Cases considered by *Robert N. Beaudoin J.*:

Adolph Lumber Co. v. Meadow Creek Lumber Co. (1919), 58 S.C.R. 306, 45 D.L.R. 579, [1919] 1 W.W.R. 823, 1919 CarswellBC 24 (S.C.C.) — referred to

Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre (2002), 22 B.L.R. (3d) 182, 2002 CarswellOnt 517, 44 E.T.R. (2d) 155 (Ont. S.C.J.) — considered

Christian Brothers of Ireland in Canada, Re (2000), 17 C.B.R. (4th) 168, 33 E.T.R. (2d) 32, 6 B.L.R. (3d) 151, 47 O.R. (3d) 674, 2000 CarswellOnt 1143, 132 O.A.C. 271, 184 D.L.R. (4th) 445 (Ont. C.A.) — considered

Hoefle v. Bongard & Co. (1945), [1945] 2 D.L.R. 609, 1945 CarswellOnt 98, [1945] S.C.R. 360 (S.C.C.) — referred to

Investors Compensation Scheme Ltd. v. West Bromwich Building Society (1997), [1998] 1 All E.R. 98, [1998] 1 W.L.R. 896, [1997] UKHL 28 (U.K. H.L.) — considered

Johnson v. Crocker (1954), 1954 CarswellOnt 195, [1954] O.W.N. 352, [1954] 2 D.L.R. 70 (Ont. C.A.) — referred to

Kentucky Fried Chicken Canada v. Scott's Food Services Inc. (1998), 1998 CarswellOnt 4170, 41 B.L.R. (2d) 42, 114 O.A.C. 357 (Ont. C.A.) — followed

Ontario (Public Guardian & Trustee) v. AIDS Society for Children (Ontario) (2001), 39 E.T.R. (2d) 96, 2001 CarswellOnt 1971 (Ont. S.C.J.) — followed

Ontario (Public Trustee) v. Toronto Humane Society (1987), 1987 CarswellOnt 649, 60 O.R. (2d) 236, 40 D.L.R. (4th) 111, 27 E.T.R. 40 (Ont. H.C.) — considered

Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society (2010), 100 O.R. (3d) 340,

2010 ONSC 608, 2010 CarswellOnt 384 (Ont. S.C.J.) — referred to

Pecore v. Pecore (2007), 2007 SCC 17, 2007 CarswellOnt 2752, 2007 CarswellOnt 2753, 32 E.T.R. (3d) 1, 37 R.F.L. (6th) 237, 361 N.R. 1, 224 O.A.C. 330, 279 D.L.R. (4th) 513, [2007] 1 S.C.R. 795 (S.C.C.) — considered

Rowland v. Vancouver College Ltd. (2000), 78 B.C.L.R. (3d) 87, [2000] 8 W.W.R. 85, 34 E.T.R. (2d) 60, 2000 BCSC 1221, 2000 CarswellBC 1667 (B.C. S.C.) — considered

Rowland v. Vancouver College Ltd. (2001), [2001] 11 W.W.R. 416, 205 D.L.R. (4th) 193, 94 B.C.L.R. (3d) 249, 2001 BCCA 527, 2001 CarswellBC 2243, 41 E.T.R. (2d) 77, (sub nom. *Rowland v. Christian Brothers of Ireland in Canada (Liquidation))* 159 B.C.A.C. 177, (sub nom. *Rowland v. Christian Brothers of Ireland in Canada (Liquidation))* 259 W.A.C. 177 (B.C. C.A.) — referred to

Schilthuis v. Arnold (1996), 95 O.A.C. 196, 1996 CarswellOnt 4230 (Ont. C.A.) — referred to

Toronto Aged Men's & Women's Homes v. Loyal True Blue & Orange Home (2003), 68 O.R. (3d) 777, 2003 CarswellOnt 6169 (Ont. S.C.J.) — considered

Women's Christian Assn. of London v. McCormick Estate (1989), 34 E.T.R. 216, 1989 CarswellOnt 533 (Ont. H.C.) — referred to

Statutes considered:

Charities Accounting Act, R.S.O. 1990, c. C.10

Generally — referred to

s. 1(2) — considered

s. 4 — considered

s. 6 — considered

s. 6(1) — considered

s. 10 — considered

s. 10(1) — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 39.01(5) — considered

Words and phrases considered:

Victorian Order of Nurses for Canada

The Victorian Order of Nurses for Canada ("VON" or "VON Canada") is a national non-profit, registered charity since 1899. VON currently delivers programs and services, through six nominee regional corporations, at 52 sites across Canada. Its activities include the operation of adult day centers, home visiting programs, meals on wheels, educational health services, and services to women at shelters and children at risk. It also provides in-home nursing, personal support, therapy and palliative care services. VON operates flu clinics, blood pressure testing clinics, primary healthcare clinics, respite care programs, and provides school health services. It delivers private nursing and personal support worker services.

Victorian Order of Nurses for Canada — Ontario Branch

Victorian Order of Nurses for Canada — Ontario Branch ("VON Ontario") is one of VON Canada's six nominee regional corporations . . . . VON Ontario is responsible for delivering VON programs and services at 21 sites in Ontario . . .

The Victorian Order of Nurses Hamilton-Wentworth Branch

[The Victorian Order of Nurses Hamilton-Wentworth Branch] was incorporated in January of 1969 as an amalgamation of two Hamilton area VON Branches. The Branch provided VON programs and services in the Hamilton area prior to the transfer of its operations to VON Ontario in 2003 and is hereinafter referred to as "VON Hamilton Branch" or "the Branch".

Greater-Hamilton Wellness Foundation

The Greater-Hamilton Wellness Foundation ("GHWF") was formed in December 2009, shortly after its rights to operate under the auspices of VON [Victorian Order of Nurses] trademarks and banners were terminated by VON Canada. The GHWF operates as a general fundraiser in the Hamilton area since December 2009. It was previously known as the VON Hamilton Foundation.

Victorian Order of Nurses Hamilton-Wentworth Foundation

The Victorian Order of Nurses Hamilton-Wentworth Foundation was founded on December 8, 1981. Its name was subsequently changed to Victorian Order of Nurses Hamilton Foundation. . . . The Foundation itself has never been a health care services provider.

Charities Accounting Act

The *CA Act* [the *Charities Accounting Act*, R.S.O. 1990, c. C.10] is Ontario's statutory instrument for the supervision of charitable corporations. It provides a mechanism for the courts to control the behaviour of charities, including how they solicit, handle and disburse donations. The statute gives the power to the courts to ensure that a charity complies with its objects, the directions of donors, the interests of beneficiaries and the public at large.

APPLICATION by charities for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation.

***Robert N. Beaudoin J.*:**

Relief Sought in this Application

1 The applicants seek an order requiring that the Foundation assets be transferred to the applicant VON Ontario to be held in trust and distributed in an orderly way to benefit programs and services provided by VON Ontario at its Hamilton site in accordance with the original objects of the Foundation. The applicants had initially sought an order winding up the Foundation but did not pursue that relief in their final argument.

The Parties

VON Canada

2 The Victorian Order of Nurses for Canada ("VON" or "VON Canada") is a national non-profit, registered charity since 1899. VON currently delivers programs and services, through six nominee regional corporations, at 52 sites across Canada. Its activities include the operation of adult day centers, home visiting programs, meals on wheels, educational health services, and services to women at shelters and children at risk. It also provides in-home nursing, personal support, therapy and palliative care services. VON operates flu clinics, blood pressure testing clinics, primary healthcare clinics, respite care programs, and provides school health services. It delivers private nursing and personal support worker services.

VON Ontario

3 Victorian Order of Nurses for Canada — Ontario Branch ("VON Ontario") is one of VON Canada's six nominee regional corporations as described in greater detail below. VON Ontario is responsible for delivering VON programs and services at 21 sites in Ontario, including Hamilton.

4 In the Hamilton area, VON programs and services are delivered by about 57 full-time and 85 part-time workers supported by about 885 volunteers. The resources located in Hamilton are supported by additional VON centralized resources located elsewhere. The VON Ontario operating division providing programs and services at the Hamilton site after 2003 is hereinafter referred to as "VON Hamilton".

VON Hamilton Branch

5 VON Hamilton's predecessor was The Victorian Order of Nurses Hamilton-Wentworth Branch. The Branch was incorporated in January of 1969 as an amalgamation of two Hamilton area VON Branches. The Branch provided VON programs and services in the Hamilton area prior to the transfer of its operations to VON Ontario in 2003 and is hereinafter referred to as "VON Hamilton Branch" or "the Branch". VON Canada was a member of the Hamilton Branch.

Greater-Hamilton Wellness Foundation

6 The Greater-Hamilton Wellness Foundation ("GHWF") was formed in December 2009, shortly after its rights to operate under the auspices of VON trademarks and banners were terminated by VON Canada. The GHWF operates as a general fundraiser in the Hamilton area since December 2009. It was previously known as the VON Hamilton Founda- tion.

VON Hamilton Foundation

7 The Victorian Order of Nurses Hamilton-Wentworth Foundation was founded on December 8, 1981. Its name was subsequently changed to Victorian Order of Nurses Hamilton Foundation. Its Letters Patent, describe the Foundation's corporate objects as follows:

> 3. (a) To receive and maintain a fund or funds and to apply from time to time all or part thereof and the income therefrom for such charitable or educational purposes related to patient and health care, of the Victorian Order of Nurses Hamilton-Dundas Branch or its successor or any other Branch of the Victorian Order of Nurses in Ontario, which, in the discretion of its Directors, needs assistance.

The dissolution clause provides:

> 6. (d) Upon the dissolution of the Corporation and after the payment of all debts and liabilities, its remaining property shall be distributed or disposed of to any Victorian Order of Nurses' purposes in Ontario or to other organizations which carry on their work solely in the Province of Ontario for charitable and educational purposes related to patient and health care.

Finally, the Letters Patent specify:

> 6. (f) No person shall be elected as a director unless his or her election has the prior approval (expressed as a resolution) of the Board of Management of the Victorian Order of Nurses Hamilton-Dundas Branch or its successor.

The Foundation itself has never been a health care services provider.

Relationship between the Foundation and the Branch

8 It is evident on the record before me that the Foundation was created as a parallel fundraiser by and for the Hamilton Branch. That the Foundation existed to meet the expectations of the Branch was recognized at its inaugural meeting of Directors held on May 12, 1988 where, in his opening remarks, the then Vice-President asks "that the directors consider the question of what the VON wants and expects from the Foundation." Initially, the Foundation did not raise funds and its September 27, 1988 Minutes state: "All agreed that the role of this Foundation will be to receive funds and hold them as capital and disburse the income from that capita as needed by the Branch."

9 At a June 28, 1996 meeting, the Board of Directors agreed that the Foundation would assume a more active role in the fundraising area. This is corroborated by the financial summary prepared by counsel for the respondent which discloses no fundraising revenue for the Foundation until 1997.

10 By 1999, the Branch and Foundation had developed a Statement of Operating Principles described in the 2000 revision of the Branch's Bylaw as follows:

> As outlined in the Statement of Operating Principles adopted between the Branch and the Foundation, the Foundation exists to provide resources to the corporation to assist it in meeting its mission, vision and obligations to the community as established by the Branch Board of Directors. Provision for representation on each other's Board also shall be made in the By-laws of both the corporation and the Foundation to facilitate this partnership and to enhance communication.

11 The Foundation's June 21, 2001 By-law described its function as follows:

> The corporation is mandated to raising, investing and managing funds which will be used to support the programs of the Local Branch.

12 According to its financial statements, the Foundation was dormant until it commenced operations in 1989. For approximately 20 years and until December 15, 2009, the Foundation exclusively conducted its fundraising communica-

tions with the public on the basis that it raised money for VON programs and services and it funded only VON programs and services.

The Public Guardian and Trustee

13 The Public Guardian and Trustee ("PGT") appears in this proceeding to safeguard the public's interest, and to afford advice and assistance to the court. At common law, the Attorney General acted on behalf of the Crown in representing the objects of a charity, a role now assumed by the PGT as more recently re-stated in *Toronto Aged Men's & Women's Homes v. Loyal True Blue & Orange Home* (2003), 68 O.R. (3d) 777 (Ont. S.C.J.) at paras. 5-6:

> [5] ... Whether or not the Attorney General might still have, in some circumstances, a residual role to play, the powers and responsibilities traditionally attached to that office are now, for most, if not all, practical purposes exercised in matters of charity by the Public Guardian and Trustee pursuant to the provisions of the Public Guardian and Trustee Act, R.S.O. 1990, c. P.51 and the *Charities Accounting Act*, R.S.O. 1990, C.10.
>
> [6] Traditionally, the role of the Attorney General was limited to making inquiries with respect to particular charities, instituting legal proceedings where this was considered to be warranted, and aiding and assisting the court in their determination...

14 The PGT's duties under the *Charities Accounting Act* are engaged when a proceeding may involve a potential misapplication of charitable funds or breach of fiduciary duties. The PGT supports the position of the applicants in this proceeding.

Events Leading to the Application

Preliminary comments on the affidavits filed in support of this application

15 Diane McLeod ("Ms. McLeod") has set out the events leading to this application in her affidavit of January 8, 2009 and her reply affidavit of April 19, 2010. Ms. McLeod is currently the Executive vice-president of VON Canada. She has spent her entire working career with VON, first in her capacity as a nurse and later in positions of management including executive level positions. She has direct knowledge of the matters to which she deposes and where her evidence is based on information and belief she has carefully set out the source of that information.

16 The respondent relies on the affidavit of Kate Bursey ("Ms. Bursey"), currently the Chair of the Foundation. She has been in that position since June of 2007. She was previously a director of the Foundation since 2004. Her direct knowledge of the events is limited to that period of time. Ms. Bursey's affidavit is problematic. First, it offends r. 39.01(5) of the *Rules of Civil Procedure* and the Rules of Evidence generally in that much of the evidence she offers on contentious matters is pure hearsay. Her affidavit is also replete with insinuation, argument and opinion. Counsel for the Foundation countered the court's concerns by arguing that the parties agreed that this would be a "paper trial". That may be so, but I am unaware of any agreement that the parties would ignore the Rules of Evidence.

17 Ms. Bursey's affidavit reveals a tendency to make inflammatory statements that are not supported by any evidence other than her own self-serving analysis such as this statement at para. 29: "In total, the applicant, through VON — Ontario Branch, effected the removal of more than $1,000,000.00 from local Hamilton control as part of its implementation of the applicant's Centralization Strategy." She relies on e-mail communications between others to support an allegation that "there is a money grab at play." At para. 24, she claims: "Since 2002, the applicant has systematically removed from local Hamilton control more than $1,000,000.00 of funds ...".

18 These events took place at a time when she was not herself a director of the Foundation. At para. 23 she refers to the Asset Transfer Agreement ("ATA") entered into in 2003 wherein she alleges that the applicant "orchestrated the transfer of all current assets of the local VON corporation to its nominee." The Foundation was not a party to that agreement. She has no direct knowledge of it and she does not offer any source for that comment other than her own opinion.

19 In support of her views, she consistently refers to e-mail communications between Sandra Edrupt ("Ms. Edrupt"), a former Chair of the Foundation, and VON and between other third parties and she offers these communications for the truth of their contents. Ms. Edrupt, who was involved in many of these events, did not provide an affidavit. Without being qualified to do so, Ms. Bursey proceeds to offer her own *expert* opinion on VON Canada's solvency.

20 More troubling are Ms. Bursey's assertions that are completely contradicted by the Foundation's own documents. At para. 101 of her affidavit she claims that VON Canada would not approve a Bylaw approved by the Foundation's directors on October 31, 2006. The Foundation's own Minutes of November 28, 2006 indicate the very opposite:

> C. Young clarified that the Bylaws were accepted by VON Canada. All Bylaws need to be redone in the spring to meet VON Canada's new guidelines. It is expected that the ByLaws of the Branch Foundation Board will fully meet these guidelines.

21 Perhaps the most troubling allegations contained in Ms. Bursey's affidavit are those that focus on her allegations that VON Canada wanted the Foundation to amend its objects clause in its Letters Patent so as to remove the Directors' exercise of discretion and requiring them to abandon their fiduciary responsibilities to their donors. This point was emphasized by the Foundation's counsel in argument. This is how Ms. Bursey described the proposed new objects for the Foundation at para. 21 of her affidavit:

> To receive and maintain a fund or funds and to apply all or part of the principal and income therefore, from time to time, <u>to</u> the Victorian Order of Nurses for Canada and/or the VON Canada Foundation, which are registered charities under the *Income Tax Act*, Canada.
>
> [Emphasis added.]

22 In fact, the proposed new objects clauses in question were much broader in scope than what is suggested by either Ms. Bursey or by the Foundation's counsel in his *factum*. There are nine paragraphs in total and they read as follows:

> **SECTION 15 — ESSENTIAL OBJECTS OF THE COMMUNITY CORPORATION**
>
> 15.1 . . .
>
> (1) To receive and maintain a fund or funds and to apply all or part of the principal and income therefore, from time to time, to the Victorian Order of Nurses for Canada and/or the VON Canada Foundation, which are registered charities under the *Income Tax Act*, Canada;
>
> (2) To fund research and needs assessments for the purposes of identifying unmet health care and social support needs in the Local Community and **select and fund** the Charitable Programs to be delivered in the Local Community by VON Canada to meet these needs; [emphasis added]
>
> (3) To fund health and support services to be provided by VON Canada to persons with debilitating diseases, illnesses and other health conditions for the purpose of preventing disease and promoting good health;

(4) To carry out Local Community capacity development activities and to build partnerships in the Local Community;

(5) To advance the development of new health care and social program initiatives to be provided by VON Canada in the Local Community;

(6) To promote awareness and educate the public for the purposes of:

(a) encouraging changes and/or new developments in delivery of health and social services in the Local Community; and

(b) developing meaningful responses to health and social issues and unmet or emerging needs to be provided by VON Canada in the Local Community;

(7) To solicit and receive donations, bequests, legacies and grants and to enter into agreements, contracts and undertakings incidental thereto;

(8) To prudently invest the funds of the Community Corporation; and

(9) To ensure that, upon dissolution of the Community Corporation and after payment of all debts and liabilities, its remaining property is distributed or disposed of to Victorian Order of Nurses for Canada or the VON Canada Foundation, to be used in the Local Community.

23 As can be seen, the language of the proposed objects refers to the Foundation's authority to "select and fund" charitable programs once it entered into a new Association Agreement with VON Canada. There are no fewer than seven references to the local community. Later in this decision I will refer to the discretionary authority that was allegedly being removed from the Foundation's directors.

24 In her reply affidavit, Ms. McLeod identifies the inaccuracies in Ms. Bursey's affidavit under 15 separate topic headings. Given my own concerns about the misrepresentations in Ms. Bursey's affidavit, I accept the version of events as set out by Ms. McLeod. In any event, the background facts as I have set them out herein are not materially in dispute.

Restructuring of Von

Background

25 Historically, VON delivered its services through a decentralized structure which included local Branches, which were separately incorporated, non-profit corporations that were also registered charities. These Branches provided operational services to their communities. In turn, they reported to provincial VON corporate entities. The provincial organizations acted as a liaison between individual Branch corporate entities and VON at the national level. VON nationally administered overall operations and established policy and direction for the organization.

26 VON's decentralized structure caused it to begin losing business and activity opportunities throughout the late 1980s and 1990s as private sector health care providers began to play an increased role in community health services traditionally served by VON. Accordingly, in the late 1990s and following, VON developed a strategy to maintain its position in the health care and charitable services area.

27 This strategy was called the "National Vision Achievement Strategy" ("NVAS") and its eventual implementation

had a significant impact on local corporate Branch structures. All provincial VON corporations were dissolved and VON incorporated a series of "regional VON corporations" which had Boards of Directors mirroring that of VON. In Ontario this resulted in the creation of the Victorian Order of Nurses — Ontario Branch. Regional VON corporations assumed all of the operational contracts, responsibilities and duties as well as assets, liabilities and employees of each individual Branch corporation. All Branch operational activity was assumed by VON regional corporations. The former Branch ceased all activity except for: (a) strategic plan development for local communities; (b) advocacy activities; (c) fundraising; and (d) community development activities. In Hamilton, it was expected that these activities were to be assumed by the Foundation.

28 Resources were restructured and rationalized to provide centralized payroll, financial reporting and auditing functions. Other resources and functions including human resources, namely, recruitment, hiring, termination, benefits, management and labour relations, were also centralized. Every VON site was charged a percentage amount of its revenues for services it receives from centralized VON resources located elsewhere.

29 These restructuring initiatives involved extensive communication and consensus building with the local Branches. The Foundation Directors were kept informed of VON Canada's consultations with the Hamilton Branch which commenced in the latter half of 2000. Hamilton Foundation and Branch staff occupied the same office space and information was shared informally as well.

The Hamilton Branch Transfers its Assets and Liabilities to VON Ontario — Asset Transfer Agreement dated February 14, 2003

30 As part of the NVAS, the transfer of assets to VON Ontario needed to be sufficient to cover the liabilities it was assuming by acquiring responsibility for the provision of VON services in the Hamilton area. The Hamilton Branch executed an initial Asset Transfer Agreement dated February 14, 2003. The Foundation was made aware of this.

31 This is where Ms. Bursey complains about the "restructuring costs" which she infers was a "money grab" even though the Foundation is not a party to the ATA and she herself was not involved in the transaction. These facts do not deter her from offering her own opinion as to the nature of the transaction and to my knowledge Ms. Bursey is not qualified as an accountant. Article 2.02(4) of the Agreement discloses how the amount of $613,226 of restructuring cost was calculated. The Agreement specified that the accrued expense was to cover the one-time cost of implementing the arrangements, including without limitations, "severance cost, infrastructure, setup cost, initial training and installation cost of new systems, the cost of software licenses required to consolidate operations and unexpected contingencies." A system-wide accounting of expenditures was subsequently provided. It is clear from a review of that document that any transfer of Branch funds to VON Ontario was to discharge an agreed upon liability and not a money grab as alleged.

Lands and Building

32 The lands and building at 400 Victoria Avenue, Hamilton, were not included within the ambit of the ATA of 2003. The Branch's "residual assets", including the land and building, were to be dealt with later. The building at 400 Victoria Avenue houses the Adult Day Care ("ADC") Centre which is a key program provided by VON Hamilton. The ADC provides daily and overnight respite services, including social services and entertainment programs for the families of those who are caring for persons suffering from cognitive impairments. The transfer documents reveal that the Branch had acquired the 400 Victoria Avenue property in 1986 for $850,000 long before the Foundation began raising money. The Foundation was not involved in the initial acquisition of the property.

The Memo of Intent

33 Internal friction developed between Branch and Foundation staff as a result of the transfer of the Branch operations to VON Ontario. The issues were resolved following a meeting on September 11, 2003, that concluded with a written Memo of Intent between VON Canada and the Foundation. The Memo of Intent reads as follows:

STRICTLY CONFIDENTIAL
FINAL VERSION
MEMO OF INTENT
between
VON [CANADA] AND VON HAMILTON FOUNDATION
RE: NATIONAL VISION ACHIEVEMENT STRATEGY

Present at the meeting:

Sandra Edrupt, Chair
Cathy Young, Vice-Chair
Maggie Carr, Past President
Ralph Hayman
Bob Simpson
Lois O'Sullivan
Keith Augustine
Adam Capelli
Lois Murray
Dennis Lugowy
Joe White
Ron Farrell, CEO VON Canada
Lynn Bessey, Chair Elect VON Canada
Jim McCaw, Treasurer VON Canada

1) The Hamilton Board retain the name VON Hamilton Foundation. All directors resign immediately from the legacy Hamilton Branch Board in order that VON Canada Executive can assume responsibility for dissolving the Branch corporation. The branch's only asset (the adult day centre on Victoria Street) is to be gifted to the Hamilton Foundation Board. Details for this arrangement have to be finalized but the intent is that VON Canada will continue operating the day centre as in the past and that VON Hamilton Foundation will not charge VON Canada for the use of the building.

2) The VON Hamilton Foundation not be an employer. The Foundation's OPSEU staff be transferred to the VON Canada bargaining unit. It is understood that the Foundation is in the process of assessing their fundraising support staff requirements and that one or both of the support staff may not be required.

The contract with the Foundation's Executive Director be converted to a term appointment with VON Canada. Assuming a successful transfer VON Canada agrees to appoint the current Foundation Director as the dedicated senior fundraising resource for VON Hamilton Foundation for the length of the term appointment (subject to satisfactory performance management reviews for which the Foundation Board provides input).

3) The VON Hamilton Foundation to create new bylaws, to be approved by VON Canada, which clarify its role as a public foundation to undertake strategic planning, community development, public relations, advocacy, and fundraising. Proceeds from the Hamilton Foundation's fundraising initiatives be used at the discretion of the Hamilton Foundation Board, and be intended to support programs in the Hamilton community, as delivered by VON Canada's Hamilton Branch.

4) The Hamilton Foundation agrees to the provision of support services — staff, equipment, space, financial services — by VON Canada. The Foundation will retain an independent auditor for at least the current year. The use of an independent auditor will be reviewed by the Foundation Board at that time. Service level agreements will be promptly developed to include mechanisms for determining fair market value, performance expectations and conditions for termination of service.

With respect to financial services VON Canada agrees to have the VP of Finance oversee bringing the Hamilton Foundations financial information up to date as quickly as possible in order to mitigate any director liability, and to ensure timely and accurate information in the future.

With respect to fundraising the service agreement must include provision for one full time senior person dedicated to fundraising in Hamilton. This person is to be a member of senior management in the Hamilton Branch operation with appropriate title and office location and office space. The Foundation Board is to provide input to the job description, appointment, performance expectations and performance evaluation of the senior fundraiser.

5) When VON Canada Foundation has a formal proposal for pooling investment funds the Hamilton Foundation will consider it at that time.

A timetable for action needs to be developed in order to implement this agreement as quickly as possible.

September 11, 2003

34 The applicants submit that 400 Victoria Avenue was to be gifted to the Foundation in accordance with the Memo of Intent on two conditions. The first, a condition precedent, was that the Foundation would enact new bylaws, to be approved by VON Canada, to clarify its role and to assure that the proceeds from its fundraising are used to support programs in the Hamilton community delivered VON Hamilton. The second, a condition subsequent, was that VON Hamilton would continue to occupy the premises at 400 Victoria Avenue rent-free.

35 While the respondent's counsel now argues that the Memo of Intent is of no effect because it is unsigned, the Foundation's then President, Ms. Edrupt, was present at the meeting and in her e-mail of February 25, 2005 to VON Canada, she specifically acknowledges that there was an agreement. Moreover, the evidence shows that the parties acted in accordance with the Memo of Intent.

Implementation of Memo of Intent

36 Following the Memo of Intent, the then Directors of the Branch Board resigned and VON Canada representatives were established as Branch Directors so that VON Canada could proceed to wind up the residual assets of the Branch. On October 30, 2003, VON Canada representatives were named as Directors of the Branch Board.

37 An October 4, 2004 e-mail from VON Canada prompted Ms. Edrupt to question VON Canada's plans with respect to the residual assets of the Branch and, in particular, the lands and building at 400 Victoria Avenue. That e-mail exchange led to a meeting on November 1, 2004, between the Foundation Directors and the Chief Executive Officer of

VON Canada. It was confirmed that the lands and building would be gifted to the Foundation once it had enacted bylaws that complied with the requirements of the September 11, 2003 Memo of Intent. Ms. Edrupt later reported to the Foundation Directors on January 11, 2005 that "the deed to the VON Adult Daycare Centre property would be released once the Branch Foundation Board has established bylaws based on the template for the National Vision Achievement Strategy for Branches."[FN1]

38 The Minutes of the Meetings of the Foundation Directors between January 2005 and October 2006 further reflect the steps taken by the Foundation to comply with the Bylaw Enactment condition precedent to the gift of the 400 Victoria Avenue property to it. The Foundation and VON Ontario entered into a Purchased Services Agreement on March 4, 2005. VON and the Foundation entered into a Trademark License Agreement on April 1, 2006.

ByLaw Enactment

39 To comply with the by-law enactment condition of the gift, on October 31, 2006, the Foundation enacted and ratified ByLaw No. 1. This recognized the commitments made in the September 11, 2003 Memo of Intent to allocate funds to VON Hamilton and to include VON Canada as a Foundation Board member. The bylaw was executed by the Chair and the Vice-Chair of the Board who, at that time, was Ms. Bursey. The bylaw states that it was:

> Unanimously Confirmed, Ratified and Approved by the Directors of the Corporation at a General Meeting assembled for that purpose this 31st day of October, 2006.

40 The Minutes of the Foundation's Meeting of October 31, 2006 further comment on the bylaws at item 5.4:

> J. North reported that K. Bursey and C. Young met briefly with Esther Shainblum, Director of Corporate Support & General Counsel VON Canada at the VON Canada AGM. There was discussion regarding the Hamilton Foundation ByLaws and the transfer of the ADC building to the Foundation.
>
> In this Board's view, VON Canada has accepted the ByLaws as prepared as they were returned to Hamilton without statement and they are consistent with the new template for Branch Foundation Board Bylaws.

41 The Minutes reveal that there was a motion by Ms. Bursey, that the bylaws as presented be unanimously confirmed and approved. That motion was carried. At the next meeting, on November 28, 2006, Board member Cathy Young clarified that the bylaws were accepted by VON Canada.

42 The Foundation then acted in accordance with the intent of the bylaw provisions by treating VON Hamilton as one of its members and providing it with notice of all Foundation meetings. According to VON Hamilton, its reliance on these circumstances, as further evidence of the Foundation's commitment to the September 11, 2003 Memo of Intent, led to the transfer of the 400 Victoria Avenue property to the Foundation on June 4, 2007.

Further Bylaw Re-Alignment and Association Agreement

43 In the summer of 2007, VON Canada notified all Branches and the Foundation that they would be required to sign "Association Agreements" to clarify their roles under the NVAS including the agreed upon roles of the delivery of strategic planning and community development advocacy and fundraising. In its November 28, 2006 Minutes, the Foundation previously recognized that the October 31, 2006 bylaws would need to be revised in the spring of 2007 to meet VON Canada's new guidelines. While the Foundation's initial response to the proposed Association Agreement was positive, as time passed, its resistance to the proposed Association Agreement hardened.

The Subsequent Chain of Events

Ms. Bursey's Conflict with VON Canada

44 In June 2008, VON held a National Board Meeting to set deadlines for the execution of Association Agreements and to discuss the need for the Foundation to sign such an Agreement. At VON's June 2008 Board Meeting, Ms. Bursey, who was then both the Chair of the Foundation's Board and a member of the National Board of VON, opposed the idea that the Foundation would be required to sign an Association Agreement.

45 The Foundation then attempted to re-invigorate the defunct Hamilton Branch and to re-populate its Board of Directors with members of the Board of Directors of the Foundation. The objective of this action was to have this new entity carry out the roles of advocacy, community development and strategic planning which the Foundation was to carry out in the Association Agreement. This action was inconsistent with the NVAS which was designed to discourage the proliferation of VON entities as well as the agreement between VON — Ontario and the Foundation.

Termination of the Purchased Services Agreement

46 In July 2008, the Foundation insisted that VON Ontario fire an employee who was on maternity leave. This employee had provided all her services to the Foundation under the Purchased Services Agreement. When this matter was not resolved to the satisfaction of the Foundation, it arbitrarily and abruptly terminated the Purchased Services Agreement on August 11, 2008 and refused to enter into the dispute resolution procedures set out therein. The Foundation then withheld payment to VON Ontario of hundreds of thousands of dollars in fees that were owed pursuant to the Purchased Services Agreement. These were not paid in full until there was threat of litigation.

Foundation's Departure from 414 Victoria Avenue

47 The Foundation had shared space with VON Ontario at 414 Victoria since the Foundation began its operations in the late 1980s. It continued to occupy this space pursuant to the Purchased Services Agreement. Within two days of its termination of the Purchased Services Agreement, the Foundation moved out of the 414 Victoria Avenue premises after hours without notice. Files relating to confidential and donor information were removed. Ms. Bursey acknowledged that the Foundation had the files and claimed that these belonged to the Foundation.

Ms. Bursey's Further Conflict with VON Canada

48 At the September 2008 Meeting of VON Canada's Board of Directors, Ms. Bursey refused to recognize the conflict of interest in which she found herself and now strenuously objected to the requirement for the Foundation to sign an Association Agreement. The VON Canada Directors found her to be in conflict of interest and rejected her submissions on the issue. Shortly thereafter, on or about November 21, 2008, Ms. Bursey submitted her resignation as a Director of VON Canada.

Foundation Demands Lease from VON Ontario

49 Within days of the rejection of Ms. Bursey's September 2008 submission to VON Canada's Board of Directors, VON Hamilton received a demand from the Foundation that it pay annual rent in the amount of $86,000.00 subject to annual increases for its occupation of the 400 Victoria Avenue premises. The Foundation advised that no off-setting funding would be provided. Branch staff were no longer invited to Foundation meetings.

Foundation Decides to Broaden its Objects

50 The Minutes of the Meeting of Foundation Directors held on October 28, 2008 record that Ms. Bursey stated that the Foundation was free to change its Letters Patent at its discretion, as long as they did not contravene Canada Revenue Agency guidelines. At the November 25, 2008 meeting, a motion was passed to change the Letters Patent to enable the Foundation to disburse to other organizations. In particular, the Foundation was exploring how it could assist the McMaster University Gerontology Program. Minutes of the Meeting of Foundation Directors on November 25, 2008 read as follows:

> The current Letters Patent state that **all funds must flow back to VON in Ontario** for charitable or educational purposes (patient and health care). They need to be changed to reflect the ability to disburse to other organizations as long as it is related to patient and health care.
>
> [Emphasis added.]

Foundation Changes its Approach to Funding

51 VON Ontario attempted to work with the Foundation during this time. At the meeting of Foundation Directors on January 27, 2009, Ms. Bursey expressed a need for the Foundation to carefully outline what kind of information it requires to consider VON Hamilton's funding requests. Shortly thereafter, the Foundation imposed for the first time more stringent requirements for requests for funding from VON Hamilton. In January of 2009, VON Hamilton submitted its funding request in the amount of $202,700. The Foundation refused $69,723 of that funding request. The Foundation maintains that it was simply using appropriate procedures to review funding requests as part of their fiduciary responsibilities to its donors.

52 In argument, the Foundation's counsel suggests that not all of VON Hamilton's requests related to charitable programs. This argument makes no sense. Counsel could not adequately explain the distinction as to which of a registered charity's programs were charitable and which were not. For example, he could not explain why monies used to express appreciation to the many volunteers who deliver the VON's charitable programs such as "Meals on Wheels" was not a charitable purpose. More importantly, Ms. Bursey makes no mention of this lack of charitable purpose in her affidavit as a justification for the rejecting the funding requests.

53 These new requirements were completely at odds with the Foundation's own Charitable Giving Policy and Procedural Guidelines established in May 1999. Under those Guidelines, all that the former Branch had to do was submit a budget or a memo and the Foundation would transfer the requested funds. There never was an exercise of a discretion that Ms. Bursey and her counsel now claim was so critical. The original objects clause only permitted an exercise of discretion when the Foundation chose to fund VON programs outside of Hamilton — elsewhere in the Province. There was no exercise of discretion when it came to funding VON Hamilton Branch's requests.

The Commencement of these Proceedings

54 The developments led to unsuccessful negotiations between the parties through their solicitors. In May 2009, VON served notice that it would terminate the Trademark License Agreement pursuant to which the Foundation was entitled to use VON's name and trademarks unless there was some resolution of outstanding issues. By letter dated October 15, 2009, the Foundation's counsel repudiated the commitments the Foundation had made in the September 11, 2003 Memo of Intent and subsequently. Counsel asserted that VON was not a member of the Foundation and was not entitled to have a Director on the Foundation's Board of Directors. At this time, the applicants' solicitors learned that the Foundation had filed an application for Supplementary Letters Patent to change its corporate objects. They also learned of the Foundation's plan to donate funds for McMaster University.

55 The Foundation's Supplementary Letters Patent now allowed the Foundation to use its monies to fund any "other charitable organizations in Ontario registered under the *Income Tax Act* (Canada)." In early October 2009, the applicants' solicitors notified the Foundation, its Directors, and the Public Guardian and Trustee of their concerns with the actions taken by the Foundation and of the plan to commence legal proceedings.

56 The application was issued in November 2009. VON terminated the Trademark License Agreement with the Foundation effective December 15, 2009. On or about December 21, 2009, the Foundation changed its name to GHWF. The Foundation ceased to operate as a VON-specific fundraiser in December 2009 and since that date it has purported to operate as a general fundraiser in the Hamilton area.

Events Susbsequent to the Initiation of the Application

57 On January 28, 2010, I issued a Consent Order containing, *inter alia*, injunctive relief and asset preservation provisions that prohibited the Foundation from continuing to act on the basis that it is a VON entity. That order enjoined the Foundation from dispersing or transferring any assets or monies that it had raised or received prior to December 15, 2009, to any non-VON entities as follows:

> 16. THIS COURT FURTHER ORDERS that the Foundation will be bound by an interim injunction, pending the disposition of the Application, restraining it from disbursing or in any way transferring any money (other than for the purpose of overhead and administrative costs) or assets raised or received by it prior to December 15, 2009 to any non-VON entity. For greater certainty, the Foundation will be restrained, in this regard, from disbursing or transferring any assets or monies (other than for the purpose of overhead and administrative costs) raised or received by it prior to December 15, 2009 to any registered charity, qualified donee or other person or organization other than VON Ontario Branch, the Applicant herein or any other VON entity.

58 The Order established a schedule for the provision by the Foundation and its solicitors of certain specific information, the delivery by the Foundation of its responding materials, and the delivery by VON Canada of reply evidence. The Order called for a mediation to be held and for cross-examinations to be conducted in the event the matter could not be settled.

59 Initially, VON Canada was the sole applicant and the respondent was described as VON Central Ontario Foundation. On consent of the parties, the title of the proceedings was amended to add the Victoria Order of Nurses for Canada — Ontario Branch and the respondent's current name was substituted.

60 The Foundation has refused to deliver to the applicants the list of donors it compiled during its 20 years of activity as a VON-specific fundraiser.

61 The funding requests made by VON Hamilton to the Foundation in 2010 and 2011 were also subjected to the new approval process resulting in further denials of VON Hamilton's requests.

62 The Foundation continues to use a "break open ticket" funding mechanism that is licensed by the Ontario Alcohol and Gaming Commission. This funding mechanism was used to raise funds prior to December 15, 2009, to support VON Hamilton. A "break open ticket" is a device made of cardboard that has perforated cover window tabs which have symbols revealed by tearing open the cover tab. The winning combination of symbols is specified on the back of the ticket. "Break open tickets" are also known as "Nevada tickets" or "pull tabs". The Ontario Alcohol and Gaming Commission issues a license to an eligible charity or religious organization in circumstances where the licensed charitable organization has a provincial mandate. The license that the Foundation continues to use was granted to support VON Hamilton. The

funds the Foundation currently holds that are attributable to this funding mechanism total slightly in excess of $18,000. There appears to have been little activity in that account for some time.

63 Throughout 2010, although it avoided a specific use of VON's trademarks, the Foundation continued to represent itself as being associated with the programs and services that it has funded since 1981, being the very programs and services provided by VON Hamilton.

64 On or about October 25, 2010, a representative of the applicants asked the Foundation to consent to a minor zoning variance pertaining to the ADC Centre at 400 Victoria Avenue, Hamilton, to increase the capacity of the Overnight Respite ("ONR") program from four to six beds. The Foundation's consent was necessary since title was registered in its name. Officials from the Hamilton-Niagara-Haldimand-Norfolk Local Health Integration Network ("LHIN") have been urging VON Hamilton to increase the ONR bed capacity since the beginning of 2010. Initially, the Foundation refused to execute the minor zoning variance request and demanded the execution of a lease by VON Hamilton. This was resolved on a without prejudice basis during the course of the hearing of this application.

Relief Sought

65 As the successor to the VON Hamilton Branch, VON Ontario claims it is beneficially entitled to all of the funds the Foundation currently held as of December 15, 2009. Moreover, VON Ontario claims it is beneficially entitled to the lands and building at 400 Victoria Avenue because all of the money used to acquire the lands and premises either belonged to the Branch or was raised by the Foundation for the purposes of benefiting the Branch. The entitlement of VON Ontario to the lands and building is further claimed on the principles of resulting trust and conditional gift.

The Issues

Issue 1: *Do the applicants have standing to seek the relief in this application?*

Issue 2: *Is VON Hamilton beneficially entitled to the Foundation's assets including real property accumulated to December 15, 2009, and the income attributable thereto?*

Issue 3: *Has the Foundation breached its fiduciary and/or trust obligations to VON Hamilton and, if so, what is the appropriate remedy?*

Issue 1: Do the applicants have standing to seek the relief in this application?

66 Section 6(1) of the *Charities Accounting Act*, R.S.O. 1990, c. C.10 ("*CA Act*") states that:

> **Any person** may complain as to the manner in which a person or organization has solicited or procured funds by way of contribution or gift from the public for any purpose, or as to the manner in which any such funds have been dealt with or disposed of.
>
> [Emphasis added.]

67 Section 10(1) of the *CA Act* enlarges the court's supervisory powers by providing that:

> Where any two or more persons allege a breach of trust created for a charitable purpose or seek the direction of the court for the administration of a trust for a charitable purpose, they may apply to the Superior Court of Justice and the court may hear the application and make such order as it considers just for the carrying out of the trust under the

law.

[Emphasis added.]

68 As noted, prior to the amendment to these pleadings, there was a single applicant. The requisite number of persons was in place prior to the hearing of this application and there is no issue as to standing.

Issue 2: Is VON Hamilton beneficially entitled to the Foundation's assets including real property held at December 15, 2009, and income attributable thereto?

69 With respect to this issue, VON Ontario's position at law may be summarized as follows:

(a) As the successor to the VON Hamilton Branch, VON Ontario has been and is the beneficial owner of all of the money and property historically held and raised (including all accruals thereon), by the Foundation;

(b) VON Ontario position as beneficial owner arises because:

- VON's predecessor created the Foundation through Letters Patent which endowed it with specific corporate objects. Under those objects, VON Hamilton Branch was to be the exclusive beneficiary of all of the Foundation's fundraising activities;

- the conduct of both VON Hamilton Branch and the Foundation, including the Foundation's representations to the public, during the Foundation's active, corporate life, demonstrated that VON Hamilton Branch and later VON Ontario were intended to be exclusively, beneficially entitled to all of the assets raised by the Foundation;

- both VON Hamilton Branch and the Foundation shared a mutual assumption that VON Hamilton Branch was beneficially entitled to all of the money raised by the Foundation;

- the *Charities Accounting Act* of Ontario deems the Foundation to be a trustee and its Directors to be fiduciaries of and in relation to the assets held beneficially for VON Hamilton Branch and its successor. VON Ontario is entitled to enforce those obligations under the *Charities Accounting Act*;

- the Foundation holds all or some of its assets in trust, at law for VON Ontario;

- the Foundation holds all or some of its assets beneficially for VON Ontario pursuant to special charitable purposes trusts;

- the Foundation is the constructive trustee of its assets for the benefit of VON Ontario;

- the assets of the Foundation, and in particular the real property owned by it, are held on a resulting trust in favour of VON Ontario;

- the Foundation's real property was, moreover, conditionally gifted to it by VON Hamilton Branch. The conditions of that gift failed with the result that the property must revert to VON Hamilton.

70 While the applicants claimed beneficial "ownership" of the Foundation's assets in their initial application, they are in fact seeking beneficial or equitable "entitlement". Their use of the word "ownership" in their original application may have initially confused the respondent's understanding of the equitable claims in issue but by the time of the hearing

of this application, the nature of these claims was very clear. Regardless of whether the equitable interest of the Applicants' stems from what might be characterized as a trust, constructive trust, resulting trust, near trust, fiduciary relationship, and/or something else, the end result is the same. While the applicants assert various bases in support of their claims that are amply supported by the evidence and the applicable law, I have concluded the applicant VON Ontario's claims to an equitable entitlement to the Foundation's assets can be resolved solely on the basis of the interpretation of the Foundation's original objects.

71 I propose to review the law with respect to charitable corporations including the jurisdiction of this Court to deal with this application and then to focus on the interpretation of the Foundation's objects as of December 15, 2009. Finally I will deal with the transfer of the property at 400 Victoria. Although I have come to the conclusion that the Foundation held all of its assets, including its real property, beneficially for VON Ontario, I will also address the alternate basis for the applicants' claim to 400 Victoria since this was the focus of much argument on the application. Finally, I will decide if the directors of the Foundations are in breach of their fiduciary responsibilities and, if so, the appropriate remedy

Charitable Corporations

72 Two relatively recent decisions, one in Ontario and the other in British Columbia; namely, *Christian Brothers of Ireland in Canada, Re* (2000), 47 O.R. (3d) 674 (Ont. C.A.) and *Rowland v. Vancouver College Ltd.*, [2000] 8 W.W.R. 85 (B.C. S.C.) affirmed (2001), 205 D.L.R. (4th) 193 (B.C. C.A.) affirm the principle that a charitable corporation holds its corporate assets beneficially to be used only and strictly in accordance with its charitable objects. In this context, a charity's directors have fiduciary obligations to ensure that a charitable corporation's assets are applied in accordance with its corporate objects

73 In *Ontario (Public Guardian & Trustee) v. AIDS Society for Children (Ontario)* (2001), 39 E.T.R. (2d) 96 (Ont. S.C.J.) Haley, J. observed that charitable corporations owe fiduciary duties to the beneficiaries of its charitable objects and further "that a charitable corporation owes a fiduciary duty to the public in general which supports the privileges extended to charitable corporations and to the public in particular which turns over its money to the charitable corporation for the charitable purposes it wishes to support."[FN2]

74 It has also been held that a breach of trust occurs when a charitable corporation applies its property to purposes that are beyond the scope of its objects. This principle applies regardless of whether those other purposes to which property has been diverted to are charitable or non-charitable.[FN3]

75 As noted by the PGT, courts have recognized that there are substantive differences between a corporation and a trust. The existence of bylaws, statutory corporate remedies, members, and corporate governance requirements, are but some of the factors which distinguish an incorporated charity from a trust. A charitable corporation nonetheless may be in a position analogous to a trustee in relation to its corporate assets when the corporate machinery is insufficient to protect the charitable assets. The court has exercised supervisory inherent equitable jurisdiction over incorporated charities to restrain directors from receiving remuneration either in their capacity as a director or for professional services, unless court approval is first obtained. Similarly, the court has intervened in the administration of incorporated charities to direct and oversee the election of directors, require an accounting, appoint an interim receiver or to direct a *cy pres* scheme in respect of surplus assets of a defunct incorporated charity that has been directed to be wound up.

76 As Justice Anderson said in *Ontario (Public Trustee) v. Toronto Humane Society* (1987), 60 O.R. (2d) 236 (Ont. H.C.) at p. 243:

> ... is a charitable corporation a trust and, second, are its directors trustees?

> ... In Ontario, the question cannot be examined without some regard for the Charities Accounting Act. ... It is not in dispute that the Society is subject to the provisions of this Act. It is clear, therefore, that for certain purposes the Society is a trustee and its property is trust property...

77 In his article, The Charitable Corporation: A "Bastard" Legal Form Revisited", The Philanthropist (2000) Vol. 17, No. 1, p. 17 at p.29, Maurice Cullity comments on the *PGT v. THS* decision:

> It is suggested that the decision in the *Toronto Humane Society* case was landmark in the development of the law of charity in this jurisdiction in the following respects:
>
> (1) It recognized that the internal affairs and the regulation of the finances of incorporated charities are not governed exclusively by corporate law and the provisions of Part III of the *Corporations Act.* Advice and directions under the *Trustee Act*, generally and with respect to compensation, can be given and the inherent jurisdiction of the court in matters of charity is applicable;
>
> (2) The jurisdiction may justify intervention both in the internal affairs of an incorporated charity with respect to its governance and election of its directors, and with respect to the expenditures of its fund on non-charitable or borderline purposes;
>
> (3) However, generally, the affairs of an incorporated charity may be left to its members and the intervention of the court will be limited to cases where corporate law is inadequate to protect the interests of charity; and
>
> (4) Statutory provisions applicable to trustees may be applied to incorporated charities and their governing bod- ies.

Charities Accounting Act

78 As noted, charities are considered to have trust obligations and their directors to be fiduciaries with respect to the management of their assets. These obligations are enforceable through the court's inherent jurisdiction and, in addition, in Ontario, under the *CA Act.*

79 The *CA Act* is Ontario's statutory instrument for the supervision of charitable corporations. It provides a mechanism for the courts to control the behaviour of charities, including how they solicit, handle and disburse donations. The statute gives the power to the courts to ensure that a charity complies with its objects, the directions of donors, the interests of beneficiaries and the public at large.

80 Subsection 1(2) of the *CA Act* contains a "deeming" provision which provides that a charity "shall be deemed to be a trustee" and that "any real and personal property acquired by it" is deemed to be held as trust "property" within the meaning of this *Act.*

81 Section 4 of the *CA Act* allows for an application to the court where executor or trustee in default:

> **4.** If any such executor or trustee,
>
> (a) refuses or neglects to comply with section 1, 2 or 3, or with any of the regulations made under this Act;
>
> (b) is found to have misapplied or misappropriated any property or fund coming into the executor's or trustee's hands;

(c) has made any improper or unauthorized investment of any money forming part of the proceeds of any such property or fund; or

(d) is not applying any property, fund or money in the manner directed by the will or instrument,

a judge of the Superior Court of Justice upon the application of the Public Guardian and Trustee, may make an order,

(e) directing the executor or trustee to do forthwith or within the time stated in the order anything that the executor or trustee has refused or neglected to do in compliance with section 1, 2 or 3, or with the regulations made under this Act;

(f) requiring the executor or trustee to pay into court any funds in the executor's or trustee's hands and to assign and transfer to the Accountant of the Superior Court of Justice, or to a new trustee appointed under clause (g), any property or securities in the hands or under the control of the executor or trustee;

(g) removing such executor or trustee and appointing some other person to act in the executor's or trustee's stead;

(h) directing the issue of an attachment against the executor or trustee to the amount of any property or funds as to which the executor or trustee is in default;

(i) fixing the costs of the application and directing how and by whom they shall be payable;

(j) giving such directions as to the future investment, disposition and application of any such property, funds or money as the judge considers just and best calculated to carry out the intentions of the testator or donor;

(k) imposing a penalty by way of fine or imprisonment not exceeding twelve months upon the executor or trustee for any such default or misconduct or for disobedience to any order made under this section;

(l) appointing an executor or trustee in place of an executor or trustee who has died, or has ceased to act, or has been removed, or has gone out of Ontario, even if the will or other instrument creating the trust confers the power to make such an appointment upon another executor or trustee or upon any other person. R.S.O. 1990, c. C.10, s. 4; 1999, c. 12, Sched. B, s. 1 (1, 2); 2000, c. 26, Sched. A, s. 2 (4).

82 Section 6 of the *CA Act* gives the court the authority to ensure that charitable donations are disbursed in a way which is consistent with any restriction or special purpose imposed by a donor. As well, s. 6 of the *CA Act* gives authority to the courts to ensure that donations are dealt with in a manner which is consistent with how a charity has represented to the public that donations will be used.

83 Section 10. (1) provides:

10. (1) Where any two or more persons allege a breach of a trust created for a charitable purpose or seek the direction of the court for the administration of a trust for a charitable purpose, they may apply to the Superior Court of Justice and the court may hear the application and make such order as it considers just for the carrying out of the trust under the law. R.S.O. 1990, c. C.10, s. 10 (1); 1999, c. 12, Sched. B, s. 1 (5).

84 The breadth of the power identified under both s. 10 of the *CA Act* and the court's own, broad, inherent jurisdiction to regulate charities was further described in this way:

> [39] ... the relief requested by these two applicants, who allege a breach of trust by the THS of its charitable purpose, must be considered by the court within its broad, historic jurisdiction to supervise the activities of a charitable corporation to ensure that they accord with its charitable purpose and to intervene if the charity is not administered in accordance with its purpose or if charitable funds are misapplied.[FN4]

85 I accept the applicants' submissions that both the court's broad, inherent jurisdiction and s. 10 of the *CA Act* allow this court to make any order that "is just" must include, without limitation, all of the powers described in s. 4 of the *CA Act*, such as the power to remove from a charity all or any of its property, the payment of such money or property into court, or into the hands of a new trustee, the removal of any trustee or director and the appointment of a substitute, the power to make orders as to how to deal with money and its disposal in order to best ensure that the intentions of donors and the purposes of the charity are respected.

86 In summary:

> (a) The *CAA* deems a charity to be a trustee and its directors to be fiduciaries for the implementation of a charity's objects and the management and disbursement of donations both in accordance with the directions of donors as well as the representations made by the charity to the public about how donations are sought and how they are to be used;
>
> (b) The *CAA* deems property received by a charity to be trust property;
>
> (c) The *CAA* provides a mechanism which allows anyone, including beneficiaries of a deemed trust under the *CAA*, or any other trust at law, to apply to the Superior Court of Justice to enforce the trust; and
>
> (d) The courts possesses an inherent jurisdiction to supervise charities as well the extremely broad powers conferred under the *CAA*, to make any order it considers to be just. This allows a court to wind up a charity, to remove from it all or any of its property, to remove and replace any of its officers or directors, to appoint substitute trustees and to provide any other appropriate relief.

Interpretation of Objects

87 Courts will apply well recognized rules of construction to assist in the interpretation of written documents. These rules are applicable to letters patent and are summarized in *Palmer's Company Law*[FN5] as follows:

> • The whole document must be read and considered.
>
> • The expressed intention is to have effect; we are not to speculate as to what the parties intended, but to ascertain it from the words used, for the expressed meaning is to be taken to indicate the intention.
>
> • The "golden rule" must be observed, namely, that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity, or some repugnance or inconsistency with the rest of the instrument, ...
>
> • Popular words are to be taken *prima facie* to be used in their popular sense, and technical words in their technical sense; but in each case the *prima facie* sense may be displayed or qualified by the context.
>
> • The words used must be read with reference to the subject-matter.
>
> • The *ejusdem generis* rule and the maxim *expressio unius est exclusio alterius* are also at times applicable.

88 As noted by the House of Lords in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*

(1997), [1998] 1 W.L.R. 896 (U.K. H.L.) at p. 912, these rules of interpretation must now be read in light of the modern rules of construction. Under the modern approach, interpretation is the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time the document was executed.

89 Modern principles of construction require the court to have regard for the background, the context of the document and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result. The Court of Appeal expressed agreement with this approach in *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357 at 363 (Ont. C.A.), holding that "the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance."

90 If there is any ambiguity in the Letters Patent, all of the surrounding circumstances, including the conduct of the parties themselves after the Foundation was incorporated, are admissible to derive the true meaning of the objects since "there is no better way of seeing what they intended, than seeing what they did under the agreement [objects] in dispute." [FN6]

VON Hamilton is the Exclusive Beneficiary under the Foundation's Corporate Objects

91 The Foundation's objects are repeated here:

> To receive and maintain a fund or funds and to apply from time to time all or part thereof and the income therefrom for such charitable or educational purposes related to patient and health care, of the Victorian Order of Nurses Hamilton-Dundas Branch or its successor or any other Branch of the Victorian Order of Nurses in Ontario, which, in the discretion of its Directors, needs assistance.

92 The applicants submit that the original object clause required the Foundation to make distributions of its corporate property to the Hamilton Branch or its successor, for its charitable or educational purposes related to patient and health care, or for any other VON Branch that the Foundation considered to be in need of assistance. The object clause did not authorize the Foundation to distribute its funds to any entity so long as their purposes were consistent with certain purposes of the VON. The PGT supports this interpretation of the object clause.

93 The Foundation submits that under its original objects, its corporate assets were beneficially held for particular *purposes* consistent with those of the VON, and that it was not obliged to make distributions to a VON entity as long as it applied its funds to those particular objects in the Hamilton area. The Foundation invites a comparison to the decision of Pitt J. in *Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre* (2002), 22 B.L.R. (3d) 182 (Ont. S.C.J.).

94 In that case, the directors of the then Bloorview Childrens Hospital had transferred its unrestricted funds ($10,000,000.00) to a foundation since they concluded that the good health of the hospital's balance sheet would be an impediment to their receipt of funds from the Ministry of Health. That foundation's objects were as follows:

> (1) Primarily, to apply the funds for the benefit of the patients of Bloorview Childrens Hospital, including capital expenditures;
>
> (2) Secondly,
>
> (i) to use the funds for the improvement of patient care or other charitable activities related to disabled

young persons carried on by hospitals or organizations or other persons, which are registered charities, elated to the health of disabled persons in Canada; and

(ii) to apply finds to the advancement of health care education including research related to disabled persons in Canada.

[Emphasis added.]

95 The main issue in that case was the ownership of the funds which the hospital now wanted to use in order to finance new construction. In reference to the objects clause, Justice Pitt noted that the focus was on the patients of the hospital and extended to disabled persons across Canada. The focus was not on the hospital. The object clauses in that case were much broader in scope than the narrow objects clause that is in issue here; one that makes specific reference to the charitable and educational programs of VON Hamilton-Wentworth. Moreover, that court did not have the mountain of evidence that has been put before me to establish how the parties themselves interpreted the charitable objects of the Foundation.

96 I agree with the position taken by the applicants and the PGT for the following reasons:

(a) The ordinary and grammatical meaning of the object clause. If the intention had been to authorize the Foundation to distribute its funds to any entity whose purposes were consistent with certain purposes of the VON, the object could have simply stated the particular VON objects, namely, for charitable or educational purposes related to patient and health care. There would have been no need to reference VON. Similarly, there would have been no need to authorize the Foundation to make distributions to other VON entities in need of assistance;

(b) The inclusion of "VON" in the original name of the Foundation;

(c) The voluminous representations in fundraising and solicitation material of the Foundation that donations shall be used for VON programs. A selection of these comprises an entire volume of documents. As recently as January 2008, Ms. Bursey as Chair of the Foundation published a giant "Thank You" in the *Hamilton Spectator* expressing the Foundation's appreciation for the community's support for VON programs. Many of the publicity items do not differentiate between the Foundation and the Branch; they simply refer to VON Hamilton. Where the Foundation is named in a fundraising announcement, there is usually a reference that proceeds from any fundraising will benefit only VON's charitable programs. The Foundation's letterhead uses the VON Canada trademark and lists the programs it funds; these are all VON programs and services;

(d) The Hamilton Branch was the source of the initial funding provided to the Foundation. The Foundation's own financial documents disclose an operating surplus in 1996 in excess of one million dollars. The Branch was the source of these funds as the Foundation had yet to commence its own fundraising;

(e) The dissolution clause of the Foundation states that it may dispose of its assets to VON purposes or to other organizations which carry on charitable or educational purposes related to patient and health care. This clearly states the Foundation's assets may be distributed to a non-VON entity. If the Foundation's object clause was intended to be as broad, then the same or similar wording could have been used in the object clause;

(f) By 1999, the Branch and Foundation had developed a Statement of Operating Principles described in the 2000 revision of the Branch's Bylaw as follows:

> As outlined in the Statement of Operating Principles adopted between the Branch and the Foundation, the Foundation exists to provide resources to the corporation to assist it in meeting its mission, vision and obligations to the community as established by the Branch Board of Directors. Provision for representation on each other's Board also shall be made in the By-laws of both the corporation and the Foundation to facilitate this partnership and to enhance communication.

(g) When the Foundation amended its Letters Patent, its corporate Minutes of November 25, 2008 constitute an admission that the applicants' interpretation is correct:

> The current letters patent state that all funds must flow back to VON in Ontario for charitable or educational purposes (patient and health care).They need to be changed to reflect the ability to disburse to other organizations as long as it is related to patient and health care.

(h) Historically, the Foundation only provided funding to VON entities; until the events leading to this application, the Foundation has never funded or considered funding any other organization;

(i) The Letters Patent of the Foundation granted the Hamilton Branch or its successor, a veto power over whom may be elected as a director of the Foundation. (While there may be a question about the legal validity of this provision, it nonetheless indicates that the intention of parties at the time of incorporation was to enable the Hamilton Branch to control the Foundation's Board);

(j) The financial statements of the Foundation and the Annual Information Returns of the Foundation filed with the Canada Revenue Agency and in Minutes the Foundation Directors disclose:

(a) Its Financial Statements from 1989 to 2000 said:

> The Victorian Order of Nurses, Hamilton-Wentworth Foundation was incorporated on December 8, 1981 to receive and maintain funds for charitable or educational purposes related to patient and health care of the Victorian Order of Nurses, Hamilton-Wentworth Branch.

(b) In 2003 the Foundation added the additional following text to its Financial Statements:

> During the year, the Victorian Order of Nurses Hamilton-Wentworth Branch transferred its operations to Victorian Order of Nurses Canada Ontario Branch — Hamilton ("the Branch").
>
> **This statement acknowledged VON Hamilton as the successor to the Hamilton Branch. The Foundation's Financial Statements maintained the same statement until 2007.**
>
> [emphasis added.]

(c) In 2007 the Foundation's Financial Statement said:

> Victorian Order of Nurses Hamilton Foundation (the Foundation) was incorporated December 8, 1981 to receive and maintain funds for the charitable purposes of the Victorian Order of Nurses Canada — Ontario to be used solely in Hamilton.

(d) In 2008 the Foundation's Financial Statements declared:

> VON South Central Ontario Foundation (formerly Victorian Order of Nurses Hamilton Foundation), the

Foundation, was incorporated December 8, 1981 to receive and maintain funds for the charitable and educational purposes related to patient and healthcare of the Victorian Order of Nurses Canada — Hamilton Site (the Hamilton Site), to be used solely in Hamilton.

(e) Tax returns of the Foundation for the years 2000 to 2003 declared:

The purpose of the foundation is to fundraise for specific programs of the Victorian Order of Nurses — Hamilton-Wentworth branch.

(f) From 2004 to 2006 the Foundation's Tax Returns declared:

Provides funds for specific programs of the Victorian Order of Nurses Hamilton branch.

(g) The Foundation's 2007 Tax Returns stated:

Provides funds for specific programs of the Victorian Order of Nurses Canada — Ontario to be used solely in Hamilton.

(h) In 2008 the Foundation's Tax Returns declared;

Provides funds for specific programs of the Victorian Order of Nurses Canada — Hamilton site.

(i) The Foundation's 2009 Tax Return stated:

Receive and maintain funds for the charitable and educational purposes related to patient and healthcare of the VON Ontario Ltd. — Hamilton or any other branch/site of the VON Ontario Ltd.

(j) VON Hamilton Branch began reporting in its Financial Statements that it "controlled" the assets of the Foundation from 1998 to 2002. The Minutes of the Foundations Annual General Meeting of June 17, 1998 refer to the "controlling relationship that exists between the Branch and the Foundation."

(k) The close relationship between the Foundation and the Hamilton Branch prior to the restructuring, in which the Branch and the Foundation shared office space at the same location. Representatives of the Branch were active participants in the meetings of Foundation Directors. The presentation of Branch budgets and Foundation funding decisions were traditionally made during the course of a single meeting of the Foundation's Directors.

97 I am satisfied that a proper interpretation of the Foundation's corporate objects in its Letters Patent made VON Hamilton Branch and its successor VON Ontario the exclusive beneficiary of the Foundation's fundraising activities. I am further satisfied that VON Ontario is the Branch's successor. Both the Foundation and VON Hamilton conducted themselves for nearly 20 years on the basis of shared assumptions of law and the fact that VON Hamilton was the exclusive beneficiary of the Foundation's fundraising activities.

Transfer of 400 Victoria

98 While VON Ontario relies on the Interpretation of the Objects clause as set out above to claim its beneficial entitlement to the premises at 400 Victoria, VON Ontario further submits that title to 400 Victoria should revert to it on the basis of the doctrines of Resulting Trust and of Conditional Gifts.

99 Historically, the Hamilton Branch owned two buildings situated side by sided at 400 and 414 Victoria in the City of Hamilton. 414 Victoria was sold in the late 1990s in exchange for 10 years of rent-free occupation. That building houses the management and administrative offices of VON Ontario. From the time the Foundation began its fundraising operations on behalf of the Hamilton Branch, it shared offices with the Branch at 414 Victoria. During the restructuring, the Foundation's continued use of the space was formalized through the Purchased Services Agreement.

100 The 400 Victoria Avenue building was acquired by the Branch in 1986. This was before the Foundation began its fundraising activities. It has always been used for the Adult Day Care Program. It is acknowledged that in excess of $750,000 of funds that were held by VON Ontario as deferred revenues were used to fund renovations to 400 Victoria Avenue. While Ms. Bursey claims that the Foundation pressured VON Ontario to release these funds, the possibility of using these funds for the renovation of the building had been an item of discussion of the Branch and the Foundation since late 2002.[FN7] In accordance with the Memo of Intent, the 400 Victoria Avenue Building was transferred to the Foundation on June 4, 2007 for the nominal consideration of $1.00. The affidavit of Land Transfer Tax describes the transaction as a "gift".

101 The applicants submit that 400 Victoria Avenue was to be gifted to the Foundation in accordance with the Memo of Intent on two conditions. The first, a condition precedent, was that the Foundation would enact a new Bylaw to be approved by VON Canada to clarify its role and to assure that the proceeds from its fundraising are used to support programs in the Hamilton community delivered by VON Hamilton. The second, a condition subsequent, was that VON Hamilton would continue to occupy the premises at 400 Victoria Avenue rent-free.

Conditional Gifts

102 Gifts of money or property, including land can be made subject to conditions. In this regard, there are two kinds of conditions: conditions precedent and conditions subsequent. The operation of these conditions and what they mean has been described as follows:

> A condition precedent is one to be performed before the gift takes effect. A condition subsequent is one to be performed after the gift has taken effect, and, if the condition is unfulfilled, will put an end to the gift; but if a condition subsequent is void, the gift remains good.[FN8]

103 It has been held that if a condition precedent is not satisfied, the gift fails. It must then be returned to the party with original title. Similarly, where a condition subsequent is unsatisfied, a gift fails and the property reverts to the original owner.[FN9]

104 In this case, the Memorandum of Intent reveals that the transfer of VON Hamilton's real property was made subject to a condition precedent, that the Foundation amend its bylaws in a certain way and a condition subsequent, that it provide rent-free occupancy of the real property.

105 The Foundation breached both conditions. While the Foundation commenced the process of bylaw amendment by enacting ByLaw No. 1, it refused to further re-align its ByLaw to meet VON Canada's guidelines. The Foundation then demanded the VON Ontario pay rent for the ADC site. The real property must therefore revert to the Branch's successor, VON Hamilton.

Resulting Trust

106 Equity recognizes and reinforces the distinction between legal and beneficial ownership of property. The benefi-

cial owner of property has been described as "the real owner of property even if it is in someone else's name".[FN10]

107 A resulting trust arises when title to the property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner. This is because "equity does not assume gifts."[FN11]

108 As discussed by the Supreme Court of Canada in *Pecore v. Pecore* at pp. 806 — 807:

> Whenever A transfers property gratuitously into the hands of B, a legal presumption of a resulting trust arises. This will allocate the legal burden of proof to the transferee to demonstrate that a gift was intended. This presumption, therefore, alters the general practice and places the onus on the transferee to rebut the presumption that a resulting trust was intended and has been established.
>
> The court went on to hold at pp. 813-814 that:
>
> Rebutting the presumption of a resulting trust requires the transferee to tender specific evidence establishing that a full, unrestricted gift was intended. That evidence must meet the civil standard of proof on a balance of probabilities in order to defeat the presumption.

109 The Foundation has failed to tender any admissible evidence on this issue. Ms. Bursey relies on another hearsay e-mail document between Janis North, a former Executive Director, to herself dated January 18, 2008 and a self-serving exchange between Ms. Edrupt and VON Canada to argue the intention of the parties. In short, the respondent's sole argument is that the transfer documents specify that the transfer of 400 Victoria was made on the basis of a gift and that no other evidence is admissible. This fails to fails to address the equitable arguments in issue.

110 As a result of the Foundation's agreement to amend its bylaws and provide VON Hamilton with rent-free occupancy, VON Hamilton transferred its real property to its sister Foundation for nominal consideration. The Foundation has failed to meet the legal burden of proof to establish that an outright gift was intended and, as such, it holds the real property pursuant to a resulting trust and must return it to the Branch's successor VON Hamilton.

Issue 3: Has the Foundation breached its fiduciary and/or trust obligations to VON Hamilton and, if so, what is the appropriate remedy?

111 The Foundation submits that following the restructuring of VON branches:

(i) Funds distributed by the Foundation to the VON Ontario were reportedly improperly accumulated;

(ii) A portion of funds paid by VON Ontario to VON Canada were reportedly diverted to fund restructuring costs of VON Canada;

(iii) The Foundation was unable to meet its disbursement *quota* in 2009, as required by provisions of the *Income Tax Act* (Canada) in force at that time;

(iv) VON Canada's request that the Foundation to amend its Letters Patent was incompatible with the Directors fiduciary responsibilities to its donors by removing its exercise of discretion over funds;

(v) The Foundation had concerns about VON Canada's solvency; and

(vi) The Foundation purportedly found it necessary to amend its object clause by Supplementary Letters Patent dated

May 1, 2009, to clarify that it was indeed authorized to make distributions to non-VON entities.

112 The PGT submits that it must have become impossible or impracticable for an incorporated charity to carry out the originally intended objects for it to amend its objects with a significant departure from their original intent. I accept that submission and I agree that no significance can be attached to the fact that its office administratively approved the Supplementary Letters Patent in error. That approval did not confer authority on the Foundation that it itself did not pos- sess.

113 In this case, there is no convincing evidence that the Foundation's property was not being used by VON entities to benefit patients and health care in Hamilton or that the Foundation's funds were being used to pay VON Canada's re-structuring cost, or that VON Canada is insolvent. While the Foundation purportedly may have been unable to meet its disbursement *quota* in 2009, it had the option of distributing its funds to other VON entities to meet its disbursement *quota*, or to ask for a waiver for that year from Canada Revenue Agency. In any event, the relevant part of the disburse-ment *quota* was repealed in March 2010 thereby making this issue moot.

114 The Foundation's concerns about the requested changes to its Letters Patent are without any merit. The original Letters Patent did not provide for any exercise of discretion with respect to funding the local Branch. The Foundation's own policies and guidelines do not provide for the exercise of any discretion. In the nearly 20 years of funding programs, Ms. Bursey cannot indentify a single instance of any such exercise of discretion. The Branch requested funds by submit-ting a memo or a budget and the Foundation transferred the funds. In contrast, the proposed objects clause would have given the Foundation the opportunity to select the charitable programs to be funded; thereby conferring even more dis-cretion than it previously had.

115 The Foundations' concern about the threats to its fiduciary responsibilities is somewhat ironic. I am satisfied from a review of Ms. Bursey's affidavit and its references to "a money grab" and "orchestration of the removal of funds" that the Foundation held an unfounded belief that local funds were going to be absorbed into VON Canada's overhead and restructuring costs. As a result, the Foundation's Directors manufactured a breakdown of the relationship and resor-ted to the rarely sanctioned strategy of "self-help" in removing the Foundation's assets from VON. In doing so, they breached their fiduciary responsibilities to VON Hamilton and the Foundation's historic donors. Had the Foundation held genuine concerns about the impact of VON's reorganization on its charitable assets, it could have sought the assistance of the PGT and sought the remedies available under the *CA Act.*

116 There was no basis upon which the Foundation could apply its expanded objects to its corporate funds already on hand. In the result, corporate property held by the Foundation as of December 15, 2009 continues to be held benefi-cially for the Foundation's original objects together with all of the income therefrom.

117 I accept the submissions of the applicants that the following constitutes a long list of the Foundation's breaches of its fiduciary and trust obligations to VON Ontario:

(a) Its failure to adhere to the commitments made in the September 11, 2003 Memo of Intent;

(b) Its failure to abide with the bylaw enactment and rent-free conditions of the gift to it of the lands and building at 400 Victoria Avenue, Hamilton;

(c) Its arbitrary and abrupt termination of the Purchased Services Agreement, including a failure to pay significant sums of money owing thereunder for a lengthy period of time;

(d) Its sudden after hours departure from 414 Victoria Avenue, Hamilton, including the removal of files without no- tice;

(e) Its exclusion of VON Hamilton representatives from Foundation Board meetings;

(f) Its refusal to execute an Association Agreement reflecting the commitments it made in the September 11, 2003 Memo of Intent;

(g) Its unilateral broadening of its corporate objects to enable it to support charities other than VON Ontario with funds raised under the VON banner and trademarks;

(h) Its adoption of stringent funding criteria and the subsequent refusals to advance funds requested by VON Ontario;

(i) Its refusal to deliver the VON Hamilton donors list;

(j) Its continuing demands for a lease from VON Hamilton without the provision of off-setting funding;

(k) Its refusal to consent to a minor zoning variance pertaining to the ADC Centre at 400 Victoria unless VON Ontario signed a lease. This would have allowed VON to increase the capacity of the Overnight Respite program from four to six beds. The Foundation only agreed to this when the court suggested that it could do so on a without prejudice basis;

(l) The continued allegations of wrongdoing and misappropriation by Ms. Bursey in her affidavit material;

(m) The Foundation continues to use the "break open ticket" funding mechanism;

(n) Despite acknowledging in its Financial Statements that VON Ontario is the successor to the Branch and despite my order prohibiting the Foundation from continuing to act on the basis that it is a VON entity, the Foundation's solicitors wrote to the Executors of the Stanley Mills Memorial Fund claiming that the Foundation is the successor to the Branch.

The Appropriate Remedy

118 Relying on this Court's broad inherent equitable jurisdiction in charitable matters to make such transfers, I am of the view that a clean break must be accomplished by requiring the Foundation to transfer all of its assets as at December 15, 2009 to another entity in trust for its Hamilton site. In anticipation of such a ruling, the respondent allowed that it would not object to the transfer of the assets to a new appointee or fiduciary subject to judicial supervision. The applicants themselves suggested this possibility in supplemental submissions.

119 In final argument, both the applicants and the PGT submit that the assets should be transferred to VON Ontario in trust to be used in accordance with the Foundation's original objects. This does appear to be the most appropriate recourse. I have concluded that VON Ontario is the legal successor to the Branch. There is no evidence that VON Ontario has acted inappropriately at any time. Adding another party at this stage would cause further delay and add administrative costs which will further deplete the resources that can be made available to the community.

120 Relying on this court's broad inherent equitable jurisdiction in charitable matters I therefore order as follows:

(i) The Foundation will transfer to VON Ontario in trust for the Foundation's charitable objects all of its corporate

property as at December 15, 2009, including land and buildings and any accumulated interest and investment income thereon, less any funds that may have been transferred to VON funds in response to its funding requests and any amounts properly authorized to be deducted as administrative and overhead costs. I understand that the parties agree that the amount held by the Foundation as of December 15, 2009 was $1,470,670.60. It is also acknowledged by the applicants that the Foundation made two payments to VON Hamilton in the amount of $97,253.00 on March 31, 2010 and a second payment of $30, 281.00 on March 31, 2011. If the parties cannot agree on the allowable administrative and overhead costs, they are to make additional submissions in writing within 20 days of the release of this decision.

(ii) VON Ontario shall not dispose of any real property without court approval sought on notice to the PGT.

(iii) The Foundation will immediately transfer to VON Ontario its donors list as it existed as at December 15, 2009.

(iv) The Nevada license should be amended to show the holder is the Greater Hamilton Wellness Foundation and any reference to VON should be deleted. The Foundation shall account for any proceeds from their use of the "break open tickets" and transfer to VON Ontario all funds received until such time as the license has been amended;

(v) The current asset preservation order continues in effect until all documents necessary to give effect to the judgment have been executed. Any remaining funds should stay with the Foundation.

121 Unless there are any further submissions with regard to paragraph 120(i) above, the applicants are to make their written submissions as to costs within 20 days of the release of this decision, The Respondent is to make its submissions within a further period of 20 days and the applicants will have a further 10 days to deliver reply submissions if they so choose.

Application granted.

FN* Additional reasons at *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation* (2011), 2011 ONSC 6801, 2011 CarswellOnt 12731, 75 E.T.R. (3d) 207 (Ont. S.C.J.).

FN1 Minutes of Meetings of Foundation Directors January 11, 2005.

FN2 *at para 26*

FN3 *Weinberg et al v the Grey Bruce Humane Society et al.* (1999) (Ont. G.D.) unreported.

FN4 *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society* (2010), 100 O.R. (3d) 340 (Ont. S.C.J.) at para. 39.

FN5 C. Schmitthoff, *Palmer's Company Law*, vol. 1, 25th ed., (London: Sweet & Maxwell, 1995) at p. 2126, para. 2.607.

FN6 *Hoefle v. Bongard & Co.*, [1945] S.C.R. 360 (S.C.C.) at p. 377; *Johnson v. Crocker*, [1954] 2 D.L.R. 70 (Ont. C.A.); and *Adolph Lumber Co. v. Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306 (S.C.C.) at p. 307.

FN7 Minutes of Foundation Directors meeting on September 18, 2002, Item 6.0.

FN8 *Halsbury's Laws of England, supra*, at para. 50, p. 33

FN9 *Women's Christian Assn. of London v. McCormick Estate* (1989), 34 E.T.R. 216 (Ont. H.C.); *Schilthuis v. Arnold* (1996), 95 O.A.C. 196 (Ont. C.A.) at p. 197

FN10 *Pecore v. Pecore*, [2007] 1 S.C.R. 795 (S.C.C.), at pp. 805-806. Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005) pp 362-368.

FN11 *Waters' Law of Trusts in Canada, supra, at pp. 363.*

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