

Trusts – Law 463
Fall Term 2013

Lecture Notes No. 1

TRUSTS AND THE FIDUCIARY PRINCIPLE

All trustees are fiduciaries, but not all fiduciaries are trustees.

All trustees owe fiduciary duties, but not all trustee duties are fiduciary in character.

- Fiduciary duties are a special category of obligations that sound in equity rather than common law. Breaching such a duty is a serious matter and courts will order very powerful remedies as a consequence.
- Please note that a *fiduciary* duty proceeds from the recognition that there is a *duty* and that one can then characterize it further as a *fiduciary duty*; if there is no duty at all, then there can be no fiduciary duty.
- The word fiduciary comes from the Latin *fides* (faith or trust). A fiduciary duty is one between a person who owes the duty (the fiduciary) and the person to whom the duty is owed. At the heart of the duty is loyalty.

For example, consider the duties that arise from an employment contract. A senior manager may owe fiduciary duties; a shelf stocker probably not.

- Of course, not all duties are of such a character and as a result one has to be careful in identifying this or that obligation as a fiduciary one. Not all of an employee's duties to his or her employer are *fiduciary* duties.
- Why all the fuss? The nature of a fiduciary duty makes its breach a serious matter. The remedial consequence is powerful. The successful principal may obtain a restitutionary remedy and strip profits from the fiduciary notwithstanding the absence of any loss; moreover, the remedy might take the form of a constructive trust over certain assets which will give the principal priority over any other person in relation to that property (for example, general creditors if the fiduciary is insolvent). Hence, the reluctance to cast any breach of any duty as a 'breach of fiduciary duty'.

An Older View: A Special 'Vulnerability' Gives Rise to the Fiduciary Duty

In *Bristol and West Building Society v Mothew* [1996] 4 All ER 698 (Eng CA), Millet LJ said in respect of the traditional view of fiduciary duties:

The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty. I would endorse the observations of Southin J. in *Girardet v. Crease & Co.* (1987) 11 B.C.L.R. (2d) 361, 362:

"The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth... That a lawyer can commit a breach of the special duty [of a fiduciary]... by entering into a contract with the client without full disclosure... and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words."

These remarks were approved by La Forest J. in *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989) 61 D.L.R. (4th) 14, 28 where he said: "not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty."

- Traditionally, a fiduciary relationship arises where one person has undertaken to act for another in a particular matter and the particular hallmark of that relationship is that trust and confidence is reposed in the fiduciary by the principal.
- Thus, the distinguishing feature has been the obligation on the part of the fiduciary to be loyal to his principal and the actual or presumptive vulnerability of the principal at the hands of the fiduciary. The fiduciary must act in good faith, avoid any apparent or actual conflict of interest, not profit from his position, and generally serve the interests of the principal; *Frame v Smith* [1987] 2 SCR 99, 136 per Wilson J.
- A fiduciary duty then is more than a mere obligation to do this or that act. It is at its core a duty to serve the best interests of the principal and avoid any situation that might cause a conflict of interest between the fiduciary and the principal.

This traditional approach was broadened in *Hodgkinson v Simms*.

A Less Rigid, More Functional Approach

Hodgkinson v Simms
[1994] 3 SCR 377, cb p.79

In this case, the Court considered the nature of the fiduciary principle and how it might apply to what would otherwise appear to be a simple case of negligence or breach of contract. Of particular interest was the Court's division over the use of the traditional

orientation of equity to recognise the needs for its protections based on the 'vulnerability' of the plaintiff.

Here a stock broker wanted an independent professional to advise him respecting tax planning. He hired an accountant, who specialized in providing general tax shelter advice, and specifically, real estate investments. The broker relied heavily on the advice given, a reliance fostered by the accountant. The relationship was such that the broker did not really question him about the reasons underlying the advice. At the same time, the accountant discussed each investment made with the broker: he was given an accurate and fair written description of each development and was aware of the financial projections and the estimated tax savings. The broker met with the developers on more than one occasion and took time for consideration. Finally, he chose to invest. Ultimately, the broker bought into four properties and lost heavily when the value of the four properties fell during a decline in the real estate market. The accountant, it was learned later, was also acting for the developers during the relevant period in the 'structuring' of each of the four projects but did not disclose this to his client. The broker brought an action for breach of fiduciary duty, breach of contract, and negligence to recover all his losses on the four investments recommended by the accountant. The claim in negligence was dismissed at trial and was not pursued on appeal. The trial judge, however, allowed his action for breach of fiduciary duty and breach of contract and awarded him damages. The BCCA upheld the trial judge on the breach of contract issue, but reversed on the issue of fiduciary duty.

Held: Appeal allowed (4:3).

Majority (per Laforest J):

The existence of a contract does not necessarily preclude the existence of fiduciary obligations. There are two types of truly fiduciary relationships:

- (a) **the first is those having as their essence discretion, influence over interests, and an inherent vulnerability.** For those, there is a rebuttable presumption that one party has a duty to act in the best interests of the other.
- (b) **the second type occurs when fiduciary obligations, though not innate to a given relationship, arise as a matter of fact from the circumstances. For those, there must be 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. Discretion, influence, vulnerability and trust are some examples of evidential factors to be considered in making this determination.**

A "power-dependency" relationship exists in any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking gains a position of overriding power or influence over another party. The law's response to the plight of vulnerable people in "power-dependency" relationships is evidenced by concepts such as fiduciary duty, undue influence, and unconscionability and unjust enrichment. The existence of a fiduciary duty in a given case depends upon the reasonable expectations of the parties which are based on such factors as trust, confidence, complexity of subject matter and community or industry standards. In seeking to identify the various civil duties which flow from a particular "power-dependency" relationship it is wrong to focus only on

the degree to which the power or discretion to harm another is somehow "unilateral." **The degree of vulnerability does not depend on some hypothetical ability to protect one's self from harm, but rather on the nature of the parties' reasonable expectations.**

per Sopinka J (in dissent):

127 This brings us to the crux of the issue in this case. The relationship between these parties was not a traditional "fiduciary relationship" like trustee and beneficiary or lawyer and client. The question, however, is whether aspects of it assumed a fiduciary character.

128 Our colleague La Forest J., as we understand his reasons, holds that the giving of independent professional advice may give rise to a fiduciary duty toward the person seeking the advice (pp. 28 ff.). The essence of such relationships, he suggests at p. 29, is "trust, confidence, and independence." He states, at p. 33, that "where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor." The facts are looked at in order to determine whether they disclose that the advice was given in the context of a relationship of trust and confidence. As La Forest J. puts it at p. 32, "the common thread that unites this body of law is the measure of the confidential and trust-like nature of the particular advisory relationship, and the ability of the plaintiff to establish reliance in fact."

129 **The difficulty lies in determining *what* measure of confidence and trust are sufficient to give rise to a fiduciary obligation. An objective criterion must be found to identify this measure if the law is to permit people to conduct their affairs with some degree of certainty.** The contexts in which investment advice is given are multitudinous. They range from newspaper advertisements through personal "tips" to cases akin to the classic trust. Clearly they do not all attract fiduciary duties, but where is the line to be drawn? Accepting that a bright line may be elusive, is there some hallmark that provides a reliable indicator of the acceptance of a fiduciary obligation? The vast disparity between the remedies for negligence and breach of contract -- the usual remedies for ill-given advice -- and those for breach of fiduciary obligation, impose a duty on the court to offer clear assistance to those concerned to stay in the former camp and not stray into the latter.

130 **As we have seen, the cases suggest that the distinguishing characteristic between advice simpliciter and advice giving rise to a fiduciary duty is the ceding by one party of effective power to the other. It is this mutual conferring and acceptance of power to the knowledge of both parties that creates the special and onerous trust obligation...**

131 **Vulnerability, in this broad sense, may be seen as encompassing all three characteristics of the fiduciary relationship mentioned in *Frame v. Smith*. It comports the notion, not only of**

weakness in the dependent party, but of a relationship in which one party is in the power of the other. To use the phrase of Professor Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 7, quoted in *Guerin* at p. 384 and in *LAC Minerals* at p. 600, "... 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."

132 Vulnerability does not mean merely "weak" or "weaker". It connotes a relationship of dependency, an "implicit dependency" by the beneficiary on the fiduciary (D.S.K. Ong, "Fiduciaries: Identification and Remedies" (1984), 8 Univ. of Tasmania L. Rev. 311, at p. 315); a relationship where one party has ceded power to the other and is, hence, literally "at the mercy" of the other.

...

134 **Phrases like "unilateral exercise of power", "at the mercy of the other's discretion" and "has given over that power" suggest a total reliance and dependence on the fiduciary by the beneficiary. In our view, these phrases are not empty verbiage. The courts and writers have used them advisedly, concerned for the need for clarity and aware of the draconian consequences of the imposition of a fiduciary obligation. Reliance is not a simple thing. As Keenan J. notes in *Varcoe v. Sterling* at p. 235, "The circumstances can cover the whole spectrum from total reliance to total independence." To date, the law has imposed a fiduciary obligation only at the extreme of total reliance.**

135 This is in accordance with the concepts of trust and loyalty which lie at the heart of the fiduciary obligation. The word "trust" connotes a state of complete reliance, of putting oneself or one's affairs in the power of the other. The correlative duty of loyalty arises from this level of trust and the complete reliance which it evidences. Where a party retains the power and ability to make his or her own decisions, the other person may be under a duty of care not to misrepresent the true state of affairs or face liability in tort or negligence. But he or she is not under a duty of loyalty. That higher duty arises only when the person has unilateral power over the other person's affairs placing the latter at the mercy of the former's discretion.

What divided the Court? A reluctance on the part of Sopinka J to introduce a looser construction of fiduciary obligations into the commercial context.

The Need for an Obligation:

Galambos v Perez 2009 SCC 48

The facts of this case are bizarre. The plaintiff employee lends money to her employer. The employer tells her to pay herself back from company funds (she manages the accounts). She doesn't. The employer becomes insolvent and the plaintiff finds herself

an unsecured creditor. She then sued, *inter alia*, for breach of fiduciary duty on the theory that free legal services were part of her employment and that no services were provided when she gratuitously advanced funds to the firm as a loan. She lost (and rightly so).

Cromwell J held:

[36] Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J., at p. 646. These categories are sometimes called *per se* fiduciary relationships. There is no doubt that the solicitor-client relationship is an example. It is important to remember, however, that not every legal claim arising out of a *per se* fiduciary relationship, such as that between a solicitor and client, will give rise to a claim for a breach of fiduciary duty.

[37] A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary: *Lac Minerals*, at p. 647. This point is important here because not all lawyers' duties towards their clients are fiduciary in nature. Sopinka and McLachlin JJ. (as the latter then was) underlined this in dissent (but not on this point) in *Hodgkinson*, at pp. 463-64, noting that while the solicitor-client relationship has fiduciary aspects, many of the tasks undertaken in the course of the solicitor-client relationship do not attract a fiduciary obligation. Binnie J. made the same point in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 34: "Not every breach of the contract of retainer is a breach of a fiduciary duty." The point was also put nicely by R. M. Jackson and J. L. Powell, *Jackson & Powell on Professional Liability* (6th ed. 2007), at para. 2-130, when they said that any breach of any duty by a fiduciary is not necessarily a breach of fiduciary duty.

[38] The launching pad for Ms. Perez's submissions based on the solicitor-client relationship is that there was a general solicitor-client relationship between her and the firm for all necessary legal work during the time that she advanced funds to the firm. As noted earlier, the judge made a finding against her on this point: he found, on conflicting evidence, that it was not a term of Ms. Perez's employment that the firm would provide her with all necessary legal services and that the cash advances were not within the terms of any of the specific and limited retainers which the firm undertook on her behalf. The Court of Appeal agreed. It concluded that whatever fiduciary obligations arose from the limited solicitor-client relationship, they did not extend to the cash advances. As the Court of Appeal put it:

While a solicitor-client relationship existed between the parties at certain times and for certain purposes, I question whether that aspect of their relationship, standing alone, would provide a foundation for

imposing fiduciary obligations in this case. Unlike the situation in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, (a case which both parties rely on as authority for the extent of the duties of lawyers to their clients where there is a conflict of interest), it appears to me that the nature of the relationship between Mr. Galambos and Ms. Perez and the trust and confidence that formed between them cannot be fully encompassed or explained by their interactions as solicitor and client. I agree with the trial judge that although it was reasonable for the appellant to expect the firm to offer its services for certain discrete transactions, it was not implicit as a term of her employment that the firm would provide free legal services on all matters or act as her lawyer generally. Even if this were the case, I question whether that alone would constitute a sufficient basis on which to impose fiduciary obligations. As the trial judge noted, it is common practice for law firms to act for their employees on discrete, simple matters. Generally speaking, acting on such discrete matters would not alone found a fiduciary relationship giving rise to fiduciary obligations in all dealings with all such employees. [para. 48]

[39] I am not persuaded that there is any basis to interfere with the trial judge's conclusion, endorsed by the Court of Appeal, that the retainers were unrelated to the cash advances and that no obligation arose on the part of Mr. Galambos and his firm to act solely in Ms. Perez's interest in relation to the advances. I conclude that the judge did not err in finding that there had been no breach of the *per se* fiduciary obligations that arose from the solicitor-client relationship.

...

[66] In my view, **while a mutual understanding may not always be necessary (a point we need not decide here), it is fundamental to *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party. In other words, while it may not be necessary for the beneficiary in all cases to consent to this undertaking, it is clearly settled that the undertaking itself is fundamental to the existence of an *ad hoc* fiduciary relationship.** To explain why I have reached this conclusion, I need to go back to some basic principles of fiduciary law.

...

[71] I return to the Court of Appeal's holding that a fiduciary duty may arise in "power-dependency" relationships without any express or implied undertaking by the fiduciary to act in the best interests of the other party. I respectfully disagree with this approach, for two reasons: "power-dependency" relationships are not a special category of fiduciary relationships and the law is, in my view, clear that fiduciary duties will only be imposed on those who have expressly or impliedly undertaken them.

...

[77] The fiduciary's undertaking may be the result of the exercise of

statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty.

This, then, was an attempt to use proprietary relief to remedy a breach of fiduciary duty to change the nature of the transaction itself – from a simple improvident loan to much more. Lesson: the law won't extricate people from problems of their own making through the use of equitable principles.

The Crown as *ad hoc* Fiduciary?

Alberta v Elder Advocates of Alberta Society 2011 SCC 24

This was a class action brought against the Crown in right of Alberta by a class of 12,500 long-term care residents, half of whom were over age 85 and all of whom were disabled or mentally incapable and had extensive physical needs. A variety of claims were brought to challenge the level of 'accommodation charges' levied by the provincial government for housing and meals arguing, in essence, that the charges were so excessive that they represented a subsidy of medical services in contravention of the regime established under the Canada Health Act. One question was whether the provincial Crown owed a fiduciary duty to the plaintiff class.

In approaching the question, McLachlin C.J.C. held for the Court that the while the private law claim might be pressed against the Crown, the principles governing the fiduciary principle are the same in both the private law and public law contexts. Given that the Court recognized (and here confirmed) that vulnerability alone would not suffice to attract fiduciary obligations, **one looks to the following principal points in determining whether an *ad hoc* obligation arises in the circumstances:**

[30] **First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary:** *Galambos*, at paras. 66, 71 and 77-78; and *Hodgkinson*, per La Forest J., at pp. 409-10. As Cromwell J. wrote in *Galambos*, at para. 75: "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her."

...

[33] **Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties.** *Per se*, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-*cestui qui trust*, executor-beneficiary, solicitor-client, agent-

principal, director-corporation and guardian-ward or parent-child. By contrast, *ad hoc* fiduciary relationships must be established on a case-by-case basis.

...

[34] Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary: *Frame*, per Wilson J., at p. 142.

...

[36] In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

Here the question really was political rather than legal; the Court held that there was no mutual understanding and that the courts should be loathe to bind the Crown to a segment of the general population merely based on need.

Discussion Question

A large law firm has a number of partners. Each partner is entitled to a minimum fixed yearly share of profits. Over that minimum entitlement, a Compensation Committee decides what share each partner is entitled to in any given year based on a Compensation Policy. The Policy is decided by the Managing Partner and the Executive Committee of the partnership. The Compensation Policy was tweaked in 2010 for implementation last year. At the time of the change, the Executive Committee advised that the new Policy would be explained to all affected. One partner argues that his share of the profits has diminished and that the Policy was never reviewed with him by the Managing Partner, a member of the Executive Committee, or a member of the Compensation Committee. He says that he has suffered a substantial loss in his share of the profits over the previous version of the Policy and that he has lost the opportunity to leave the partnership which would have been more financially advantageous to him under the firm's policies governing retirement from the partnership. Has there been a breach by the law firm of any fiduciary duty owed to the lawyer?