<u>**Trusts & Equity**</u>
Fall Term 2018

Lecture Notes – No. 14

<u>INTRODUCTION TO THE CONSTRUCTIVE TRUST (CONT'D)</u>

Sweet v. Moore
2017 ONCA 182 (Ont. C.A.)

This case is an interesting one dealing with unjust enrichment and remedial constructive trusts. It should be noted that leave to appeal was granted by the SCC. The appeal was argued months ago with judgment being reserved.

Here the proceeds of a policy of life insurance on the life of the deceased were at issue. The proceeds were originally designated in favour of the deceased's separated wife and later the deceased's common law spouse. The separated spouse and the deceased agreed orally that the proceeds would go to the wife if she were to maintain the policy, which she did. It is notable that a written separation agreement between the deceased and his wife which post-dated the oral agreement was silent on the question of the policy of insurance. In any case, the later change in beneficiary designation was not surreptitious and was made by the deceased (according to the applicant) to ensure the applicant's support.

The majority of the Court of Appeal, Strathy C.J.O. and Blair J.A., held that the appeal must be allowed as the Application Judge had decided the case based on the application of the doctrine of equitable assignment which was not raised by either side and was not subject of argument. Beyond, on the question of unjust enrichment, the majority held that the separated wife had no interest in the proceeds of the policy arising by way of unjust enrichment but did have a meritorious claim for return of the premiums that she had paid. Blair J.A. provided an overview:

> **Constructive Trust**
> [62] I begin this portion of the analysis with the observation that this is not one of those cases – in spite of what it may seem at first impression – where the "equities" are heavily weighted in favour of one party or the other.
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> [63] It is the case that Ms. Moore had an oral agreement with Mr. Moore that if she paid the premiums she would receive the proceeds of the Policy. It is the case that she paid the premiums. And it is the case that Mr. Moore breached the agreement by designating Ms. Sweet as the irrevocable beneficiary under the Policy.
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> [64] On the other hand, Mr. Moore was a man of limited means, living in the post-separation period on a disability pension, and suffering from the disabilities associated with his physical, mental and substance abuse issues. Ms. Sweet – who is herself disabled – took care of Mr. Moore and, for practical purposes, provided him with a home, a place to live, and a supportive family during the 13 years of their relationship.

[65] There is little, if any, evidence on the record as to Ms. Moore's present financial needs. She continues to live in the former matrimonial home after Mr. Moore's transfer of his one-half interest at the time of separation. Ms. Sweet would appear from the record to be in financial need. Indeed, her evidence is that she was made a beneficiary of the Policy because Mr. Moore wanted to ensure that she would be able to remain in the apartment home that she had occupied for 40 years by the time of his death.

[66] On these facts, it cannot be said that Ms. Sweet is no more than a volunteer who gave nothing in exchange for being named irrevocable beneficiary, or that she is simply the recipient of a windfall. She was a 13-year spouse with heavier than normal caregiving duties (both she and Mr. Moore were disabled in varying degrees) and was the person primarily responsible for the home that they lived in.

[67] On the application, Ms. Moore's position was that she was entitled to the Policy proceeds on the basis of unjust enrichment. On appeal, her approach was more nuanced. She continued to rely on unjust enrichment but embraced the application judge's finding of equitable assignment in support of the claim, as well. She submitted that the application judge was correct in holding that the irrevocable designation of beneficiary provisions in the Insurance Act did not provide a juristic reason for Ms. Sweet's receipt of the proceeds. In the end, she fell back upon the more expansive view that a constructive trust may be imposed "where good conscience requires it".

[68] I have already concluded that, on the way the case was framed and argued before the application judge and on the record as it currently exists, it is not open for the court to determine whether the oral agreement constituted an equitable assignment. I turn, then, to a consideration of whether the claim for unjust enrichment can otherwise stand or, if not, whether a remedial constructive trust should be found on some other "good conscience" basis in these circumstances.

[69] In my view, Ms. Moore's claim cannot succeed on either basis.

As to the claim in unjust enrichment, the argument fails on the grounds that the beneficiary designation in favour of the common law spouse was an adequate juristic reason to explain why the proceeds should be paid to the designated beneficiary.

As to a "good conscience" trusts, Blair J.A. held:

"Good Conscience" Trusts

[100] There has been considerable debate in the jurisprudence and in academia about whether resort to the remedial constructive trust in Canada is now limited to two categories since the Supreme Court of Canada's decision in *Soulos* – unjust enrichment and wrongful acts – thereby eliminating resort to a more elastic "good conscience" trust, i.e., one based on no more than a sense of fairness to the effect that it would be "against all good conscience" to deny a plaintiff recovery in the circumstances of a particular case. At the end of the day, Ms. Moore submits that good

conscience is satisfied by giving effect to the oral agreement without which the Policy would not have continued to exist.[5]

[101] It has long been accepted that equity is quintessential never-say-never terrain, and that concepts respecting its application develop with the times and to meet the needs of particular circumstances. This long-standing principle may work against establishing a completely closed set of categories as the foundation for imposing a remedial constructive trust.

[102] At the same time, McLachlin J. was pretty clear in *Soulos* that, while a constructive trust "may be imposed where good conscience so requires" (para. 34), "[t]he 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" (unjust enrichment and situations where property had been obtained by a wrongful act) (para. 36). It was her view that "[w]ithin 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" (para. 43). Rothstein J. re-affirmed this view in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 (CanLII), [2012] 3 S.C.R. 660, at paras. 144-145.

[103] I do not think it is necessary to resolve this debate for purposes of this appeal.

[104] Most of the authorities in which courts have been willing to override a beneficiary designation can be explained on the basis of an agreement between one of the claimants and the insured that removed the insured's ability to designate a later beneficiary. As noted earlier, Shannon involved a separation agreement in which the insured undertook to name his first spouse as a beneficiary irrevocably. In Bielny, the separation agreement required the insured to name the children of the first marriage as irrevocable beneficiaries. In Fraser v. Fraser, the trial judge found on the facts that the terms of the separation agreement requiring the insured to maintain the plaintiff as beneficiary were tantamount to an irrevocable designation.

[105] Whether these authorities need to be re-examined in light of *Soulos*, as suggested in some authorities – see, for example, *Love v. Love*, 2013 SKCA 31 (CanLII), 359 D.L.R. (4th) 504 – is not something that need be determined here. As I have concluded above, it was not open to the application judge on this record to hold that the oral agreement between the Moores constituted an equitable assignment, or that it was tantamount to an irrevocable beneficiary designation.

[106] Absent those considerations, I do not see anything in the circumstances of this case that would place it in some other "good conscience" category not caught with the rubric of either wrongful act (not asserted here) or unjust enrichment. For that reason, I do not see the need to resolve the foregoing debate about whether *Soulos* has restricted the categories for imposing a remedial constructive trust to unjust enrichment or wrongful act or whether there remains some additional "good conscience" basis.

> [107] Simply because wrongful act is not asserted, and unjust enrichment is unsuccessful, does not mean that some other “good conscience” basis must exist on the facts. To engage in such an exercise, on this record at least, it seems to me, would undermine the rationale for creation of the juristic reason element in the first place.
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> [Footnote omitted.]

Upon this point, Lauwers J.A. dissented. Justice Lauwers wrote:

> [144] In order to contextualize the ruling in *Soulos*, it is necessary to acknowledge a perennial tension in the common law tradition between, on the one hand, the formal demands of the law as dispensed by the old common law courts, and, on the other hand, the mercies of equity dispensed by the old chancery courts. (Indeed, this tension helps explain some of the differences between my colleague and me.)
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> [145] The way equity operated is well known. When the common law courts reached a particularly harsh result flowing from the demands of formality and rigorous logic, chancery courts could intervene and mitigate the result in certain circumstances by exercising authority over the defendant’s conscience and compelling the defendant not to act on his or her full legal rights.
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> [146] Law claims the virtues of certainty and predictability, while equity claims the virtues of doing justice and upholding fairness in particular cases. As my colleague observes, the ancient criticism of equity is that its mercies varied arbitrarily with the length of the Chancellor’s foot. The fundamental tension lives on, even though law and equity have been fused in Ontario since the late 19th century.
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> [147] The constructive trust cases show this tension. Judges imposing constructive trusts sometimes cite the magnanimous words of Lord Denning in *Hussey v. Palmer*, [1972] 3 All E.R. 744 (C.A.), who spoke of a constructive trust, at p. 747, as:
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> [A] trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it.
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> [148] The tension between the legal and equitable impulses is evident in *Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834. Dickson J., at pp. 847-848, speaking for the majority, described the attributes of a remedial constructive trust:
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> 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] 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.... 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. [Citations omitted and emphasis added.]
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> [149] However, Martland J., in dissent, saw the majority's extension of the constructive trust remedy in Pettkus as undesirable, because he found, at p. 859, that: "It would clothe judges with a very wide power to apply what has been described as 'palm tree justice' without the benefit of any guidelines." He then asked: "By what test is a judge to determine what constitutes unjust enrichment?" He answered: "The only test would be his individual perception of what he considered to be unjust." This was what he resisted.

Lauwers J.A. went on to describe the creative nature of equity and a reading of the jurisprudence in the Supreme Court of Canada that should not be read as limiting constructive trusts to wrongs and unjust enrichment. Lauwers J.A. wrote:

> [175] In *Soulo*s, McLachlin J. worked through the history of constructive trusts in order to discern whether and how to recognize a remedial constructive trust for wrongful acts, which was the particular problem in the case before her. In my view she did not purport to restate and reframe the law of constructive trusts for all purposes, and she said nothing to close the categories of constructive trusts. Had she intended to abolish good conscience constructive trusts beyond the categories of unjust enrichment and wrongful acts, then one would have expected clear and definitive language to that effect, but there is none. Instead, McLachlin J.'s choice of language justifies the conclusion that the court expected constructive trust law to continue to develop beyond the categories of unjust enrichment and wrongful act.
> [176] Justice McLachlin disagreed with the position that a constructive trust cannot be imposed where there has been no unjust enrichment, at para. 16, which was the real issue in the case. She stated, at para. 17:
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> 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.
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> [177] Justice McLachlin made several other pertinent observations of more general application, at paras. 20-22:
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> Canadian courts have never abandoned the principles of constructive trust developed in England. They have, however, modified them.
> …

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, … describes the ratio of *Pettkus v Becker* as a "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".

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.

[Emphasis added.]

[178] Justice McLachlin also noted, at para. 17, that the law of England and Canada could well be diverging:

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.

She embarked on a review of English law, noting, at para. 24: "In sum, the old English law remains part of contemporary Canadian law and guides its development."

[179] Justice McLachlin was well aware that English law was evolving. She described the opposition in England to Lord Denning's expansive view of constructive trust, at paras. 30-31. She added, at para. 37, that: "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." She also surveyed the law in New Zealand and the United States.

[180] Justice McLachlin expressed a critical conclusion, at para. 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.

[181] This led McLachlin J. to the heart of the matter, at paras. 34-35:

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.

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.

[Emphasis added.]

[182] These statements, in my view, decisively refute the appellant's argument that a court can impose a constructive trust now in only two categories of cases: to remedy an unjust enrichment or a wrongful act.

(5) Concluding Observations on *Soulos*

[186] In my view, the Supreme Court left open four routes by which a court could impose the "ancient and eclectic institution" of a constructive trust: (1) unjust enrichment; (2) wrongful acts or wrongful gain; (3) circumstances where its availability has long been recognized" (para. 21), such as "situations where a constructive trusts have been recognized in the past" (para. 34) or "other situations where courts have found a constructive trust" (para 35); and (4) otherwise, where good conscience requires it. In relation to this last point, the *Soulos* court anticipated that the law of remedial constructive trusts would continue to develop, consistent with the words of Dickson J. in *Pettkus*, at p. 847-848: "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."

[187] I see no other way to give meaning to the words of McLachlin J. in *Soulos*, at para. 21: "This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as *Pettkus* should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized." See also BNSF Railway Company v. Teck Metals Ltd., 2016 BCCA 350 (CanLII), 89 B.C.L.R. (5th) 274, at paras. 45-55.

[Emphasis in original; footnotes omitted.]

After reviewing some of the jurisprudence on constructive trusts and particularly remedial constructive trusts, Lauwers J.A. held as follows:[1]

Analysis

[1] 2017 ONCA 182 at Paras. 265-276 (Ont. C.A.).

[265] The disappointed beneficiary cases utilize the rubric of unjust enrichment but gloss over the structural difference. This approach exemplifies the common law's inclination to use old tools for new tasks, even if they do not quite fit. We will always be feeling our way. As McLachlin J. noted in *Soulos* at para. 35: "The goal is but a reasoned, incremental development of the law on a case-by-case basis." That method is part of the genius of the common law.

[266] In managing the deployment of remedial constructive trusts in aid of good conscience, the discipline of particularity is important, as McLachlin J. noted. To repeat her words in para. 35 of *Soulos*: "Particularity is found in the situations in which judges in the past have found constructive trusts." She noted: "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." She saw this careful approach as essential to "a reasoned, incremental development of the law on a case-by-case basis."

[267] I recapitulate the findings that must be made for a court to impose a constructive trust on life insurance proceeds, which have emerged so far in the cases involving disappointed beneficiaries. These serve as limits to discipline judicial discretion. First, the defendant has been enriched and the plaintiff deprived in a family context, not in the market world. Second, the deceased's ruling intent, before resiling, was to benefit the plaintiff. That intent can be found in an oral agreement, a separation agreement or in a court order, but it must comprise an obligation. Third, there is a proprietary link between the plaintiff and the life insurance proceeds. It is this life insurance policy that is in issue, not some other. Finally, providing the plaintiff with the remedy of a constructive trust does not breach any law. Experience with constructive trusts in the disappointed beneficiary context would undoubtedly add other refinements.

[268] The disappointed beneficiary cases represent a distinct type of case in which the constructive trust remedy is disciplined by the common structure and elements of the dispute, which ought to serve to assuage the concern that equity is off on a frolic of its own, paying no attention to the law. Equity follows the law; the imposition of a constructive trust does not block the law's operation, which in this case is the operation of the Insurance Act; it imposes an obligation in conscience on the appellant the moment her entitlement to the proceeds attaches, one that requires her to hold the proceeds in trust for the respondent.

[269] To my mind, the disappointed beneficiary cases constitute a genus in which a constructive trust can be imposed on life insurance proceeds consistently with the reasoning of McLachlin J in *Soulos*. They are situations in which courts have found a constructive trust.

[270] I do not agree with the appellant's argument that those disappointed beneficiary cases in which the court granted a remedial constructive trust have been overtaken by *Soulos* and are not good law, for several reasons.

> [271] First, I am not persuaded by the obiter in *Ladner* and *Love* that the British Columbia Court of Appeal's reasoning in *Roberts* is to be doubted in light of *Soulos*. Neither court explained the basis for the doubt apart from the lack of a mention of *Soulos* in the decisions under review.
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> [272] Second, I would distinguish *Ladner* itself on two bases. The case proceeded under the rubric of wrongful act, which has a detailed set of elements according to *Soulos* that do not apply to the unjust enrichment rubric. Further, the proprietary connection between the new and old insurance policies that was missing in Ladner was very much present in this case between the policy and the payment of the premiums by the respondent.
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> [273] Finally, in light of the limits I discussed earlier, I do not share the *Ladner* court's underlying concern that constructive trusts would become unmanageable.
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> [274] Equity asks a pertinent question in the difficult dilemma posed in the disappointed beneficiary cases: which of the two claimants has the superior claim to the life insurance proceeds? Equity's answer, all things being equal, is to assist the one with the superior right in equity, as McKinlay J. pointed out in *Shannon*. In this case, that is the respondent, as the application judge found.
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> **(3) Conclusion on Unjust Enrichment**
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> [275] In my view, the application judge did not err in finding that the respondent's deprivation consisted of the life insurance proceeds. He also did not err in finding that the deceased's irrevocable designation in the appellant's favour under s. 191 of the *Insurance Act*, given his prior oral agreement with the respondent, did not provide a juristic reason to oust the availability of a constructive trust over the life insurance proceeds, despite the *Richardson Estate* decision.
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> [276] But I would go further and add that, to the extent that they fit awkwardly under the rubric of unjust enrichment, the disappointed beneficiary cases are perhaps better understood as a genus of cases in which a constructive trust can be imposed via the third route in *Soulos* – circumstances where the availability of a trust has previously been recognized – and the fourth route – where good conscience otherwise demands it, quite independent of unjust enrichment.

Moore v. Sweet will be a very important decision when it is heard and decided by the Supreme Court of Canada. What divided the majority and dissent in the Court of Appeal goes to the heart of the developing jurisdiction in unjust enrichment and how to approach the development of the remedial constructive trust outside of wrongs and straight-forward unjust enrichment claims. The difficulty, however, may be that the state of the record does not provide adequately to enable one to base the outcome on the nature of the oral agreement between the deceased and the separated spouse. Regardless, it will be interesting to see whether the Supreme Court of Canada sees fit to provide controlling criteria to the use of constructive trusts outside controlling categories.

CONSTRUCTIVE TRUSTS AND EQUITABLE WRONGS - BREACH OF CONFIDENCE

The constructive trust has been ordered traditionally as a response to equitable wrong-doing.

The jurisdiction in confidence its modern form is a flexible and *sui generis* jurisdiction that is exercised based on principles of conscience and good faith, and the interest in maintaining confidentiality is balanced with other appropriate public interests in appropriate circumstances.

There are two broad requirements:

First, the information must be regarded as protectable subject-matter in the sense of being *objectively confidential*. Confidentiality for these purposes is usually found through such negative factors as the information in question is not vague or trivial or useless (though it need not be novel), and is not within the public domain (in the sense of not being generally known, available or accessible to those who would find it relevant though it need not be more than '"relatively secret"'). Regardless of the wide variance in language used, most cases consistently approach objective confidentiality as a requirement that is not especially onerous, consistent with protection being framed as an *in personam* obligation rather than an *in rem* entitlement.

Second, the information in question must be disclosed in circumstances disclosing an express or implicit undertaking to respect confidentiality. The existence of an implied obligation, obviously the more difficult scenario, is determined by an objective evaluation of the circumstances of the disclosure to determine whether an obligation was imported thereby – - that is, that the confidant knew that the information was impressed with an obligation of confidentiality when disclosed to him or her, or, ought to have known that an obligation was implicit as would have any '"reasonable person"' or person of '"average intelligence and honesty"'. The simplest scenario is one whereby the confider discloses to the confidant for a limited purpose; both the existence and content of the duty can be easily determined. Other usual circumstances are those such that arise from the nature of the relationship between the parties, co-operative commercial ventures, commercial negotiations over new inventions, and through industry convention; indeed the question is really one more of fact than law, but proceeds from a consensual disclosure by the confider in the usual case.

International Corona Resources Ltd. v. Lac Minerals Ltd.
[1989] 2 S.C.R. 574

One mining company disclosed results of soil testing to another mining company, on the understanding that the two would be entering into a joint venture for the development of the property in the region. Instead, the second mining company bought the property in the region, and effectively excluded the first company from the venture. What separated the majority and dissent was the view that the constructive trusts was available as a remedy; **here the nature of the remedy ordered was proprietary notwithstanding that the subject-matter itself had no proprietary character**.

LaForest J (for the majority):

> 142 **Having established that Lac breached a duty of confidence owed to Corona, the existence of a fiduciary relationship is only relevant if the remedies for a breach of a fiduciary obligation differ from those available for a breach of confidence. In my view, the remedies available to one head of claim are available to the other, so that provided a constructive trust is an appropriate remedy for the breach of confidence in this case, finding a fiduciary duty is not strictly necessary…**
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> Remedy
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> 182 The appropriate remedy in this case cannot be divorced from the findings of fact made by the courts below. As I indicated earlier, there is no doubt in my mind that but for the actions of Lac in misusing confidential information and thereby acquiring the Williams property, that property would have been acquired by Corona. That finding is fundamental to the determination of the appropriate remedy. Both courts below awarded the Williams property to Corona on payment to Lac of the value to Corona of the improvements Lac had made to the property. The trial judge dealt only with the remedy available for a breach of a fiduciary duty, but the Court of Appeal would have awarded the same remedy on the claim for breach of confidence, even though it was of the view that it was artificial and difficult to consider the relief available for that claim on the hypothesis that there was no fiduciary obligation.
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> 183 **The issue then is this. If it is established that one party, (here Lac), has been enriched by the acquisition of an asset, the Williams property, that would have, but for the actions of that party been acquired by the plaintiff, (here Corona), and if the acquisition of that asset amounts to a breach of duty to the plaintiff, here either a breach of fiduciary obligation or a breach of a duty of confidence, what remedy is available to the party deprived of the benefit? In my view the constructive trust is one available remedy, and in this case it is the only appropriate remedy.**
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> 184 In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment. When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by Lac, Corona would have acquired the property. In Air Canada v. British Columbia, [1989] 1 S.C.R. 1161, at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain

the [defendant] made at the [plaintiff's] expense." [Emphasis added.] In my view the fact that Corona never owned the property should not preclude it from the pursuing a restitutionary claim: see Birks, An Introduction to the Law of Restitution, at pp. 133-39. Lac has therefore been enriched at the expense of Corona.

185 That enrichment is also unjust, or unjustified, so that the plaintiff is entitled to a remedy. There is, in the words of Dickson J. in Pettkus v. Becker, [1980] 2 S.C.R. 834, at p. 848, an "absence of any juristic reason for the enrichment". The determination that the enrichment is "unjust" does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the courts will grant relief. Restitution is a distinct body of law governed by its own developing system of rules. **Breaches of fiduciary duties and breaches of confidence are both wrongs for which restitutionary relief is often appropriate. It is not every case of such a breach of duty, however, that will attract recovery based on the gain of the defendant at the plaintiff's expense. Indeed this has long been recognized by the courts.** In In re Coomber, [1911] 1 Ch. 723, at pp. 728-29, Fletcher Moulton L.J. said:

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them.

186 In breach of confidence cases as well, there is considerable flexibility in remedy. Injunctions preventing the continued use of the confidential information are commonly awarded. Obviously that remedy would be of no use in this case where the total benefit accrues to the defendant through a single misuse of information. An account of profits is also often available. Indeed in both courts below an account of profits to the date of transfer of the mine was awarded. Usually an accounting is not a restitutionary measure of damages. Thus, while it is measured according to the defendant's gain, it is not measured by the defendant's gain at the plaintiff's expense. Occasionally, as in this case, the measures coincide. In a case quite relevant here, this Court unanimously imposed a constructive trust over property obtained from the misuse of confidential information: Pre-Cam Exploration & Development Ltd. v. McTavish,

[1966] S.C.R. 551. More recently, a compensatory remedy has been introduced into the law of confidential relations. Thus in Seager v. Copydex, Ltd. (No. 2), [1969] 2 All E.R. 718 (C.A.), an inquiry was directed concerning the market value of the information between a willing buyer and a willing seller. The defendant had unconsciously plagiarized the plaintiff's design. In those circumstances it would obviously have been unjust to exclude the defendant from the market when there was room for more than one participant.

187 **I noted earlier that the jurisdictional base for the law of confidence is a matter of some dispute. In the case at bar however, it is not suggested that either the contractual or property origins of the doctrine can be used to found the remedy. Thus while there can be considerable remedial flexibility for such claims, it was not argued that the Court may not have jurisdiction to award damages as compensation and not merely in lieu of an injunction in the exercise of its equitable jurisdiction**, and since I am of the view that a constructive trust is in any event the appropriate remedy, I need not consider the question of jurisdiction further.

188 In view of this remedial flexibility, detailed consideration must be given to the reasons a remedy measured by Lac's gain at Corona's expense is more appropriate than a remedy compensating the plaintiff for the loss suffered. In this case, the Court of Appeal found that if compensatory damages were to be awarded, those damages in fact equalled the value of the property. This was premised on the finding that but for Lac's breach, Corona would have acquired the property. Neither at this point nor any other did either of the courts below find Corona would only acquire one half or less of the Williams property. While I agree that, if they could in fact be adequately assessed, compensation and restitution in this case would be equivalent measures, even if they would not, a restitutionary measure would be appropriate.

189 **The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions. Likewise with the protection of confidences. In the modern world the exchange of confidential information is both necessary and expected. Evidence of an accepted business morality in the mining industry was given by the defendant, and the Court of Appeal found that the practice was not only reasonable, but that it would foster the exploration and development of our natural resources.** The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties. The approach taken by my colleague, Sopinka J., would, in my view, have the effect not of encouraging bargaining in good faith, but of encouraging the contrary. If by breaching an obligation of confidence one party is able to acquire an asset entirely for itself, at a risk of only having to compensate the other for what the other would have received if a formal relationship between them were concluded, the former would be given a strong incentive to breach the obligation and acquire the asset. **In the present case, it is true that had negotiations been concluded, Lac could also have acquired an interest in the Corona land, but that is only an expectation and not a certainty. Had Corona acquired the Williams property, as they would have but for Lac's breach, it seems probable that negotiations with Lac would have resulted**

in a concluded agreement. However, if Lac, during the negotiations, breached a duty of confidence owed to Corona, it seems certain that Corona would have broken off negotiations and Lac would be left with nothing. In such circumstances, many business people, weighing the risks, would breach the obligation and acquire the asset. This does nothing for the preservation of the institution of good faith bargaining or relationships of trust and confidence. The imposition of a remedy which restores an asset to the party who would have acquired it but for a breach of fiduciary duties or duties of confidence acts as a deterrent to the breach of duty and strengthens the social fabric those duties are imposed to protect. The elements of a claim in unjust enrichment having been made out, I have found no reason why the imposition of a restitutionary remedy should not be granted.

Per Sopinka J (dissenting on the issue of remedy):

Constructive Trust or Damages

73 The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is sui generis relying on all three to enforce the policy of the law that confidences be respected. See Gurry, Breach of Confidence, at pp. 25-26, and Goff and Jones, The Law of Restitution (3rd ed. 1986), at pp. 664-67.

74 This multi-faceted jurisdictional basis for the action provides the Court with considerable flexibility in fashioning a remedy. The jurisdictional basis supporting the particular claim is relevant in determining the appropriate remedy. See Nichrotherm Electrical Co. v. Percy, [1957] R.P.C. 207, at pp. 213-14; Gurry, op. cit., at pp. 26-27; and Goff and Jones, op. cit., at pp. 664-65. A constructive trust is ordinarily reserved for those situations where a right of property is recognized. As stated by the learned authors of Goff and Jones, op. cit., at p. 673:

> In restitution, a constructive trust should be imposed if it is just to grant the plaintiff the additional benefits which flow from the recognition of a right of property.

Although confidential information has some of the characteristics of property, its foothold as such is tenuous (see Goff and Jones, op. cit., at p. 665). I agree in this regard with the statement of Lord Evershed in Nichrotherm Electrical Co. v. Percy, supra, at p. 209, that:

> ... a man who thinks of a mechanical conception and then communicates it to others for the purpose of their [page616] working out means of carrying it into effect does not, because the idea was his (assuming that it was), get proprietary rights equivalent to those of a patentee. Apart from such rights as may flow from the fact, for example, of the idea being of a secret process communicated in confidence or from some contract of partnership or agency or the like which he may enter into with his collaborator, the originator of

> the idea gets no proprietary rights out of the mere circumstance that he first thought of it.

> 75 As a result, **there is virtually no support in the cases for the imposition of a constructive trust over property acquired as a result of the use of confidential information. In stating that such a remedy is possible, the Court of Appeal referred to Goff and Jones, op. cit., at pp. 659-74. The discussion of proprietary claims commences at p. 673 with the statement which I have quoted above and thereafter all references to constructive trust pertain to an accounting of profits. No reference is made to any case in which a constructive trust is imposed on property acquired as a result of the use of confidential information.**

CONSTRUCTIVE TRUSTS AND EQUITABLE WRONGS - BREACH OF FIDUCIARY DUTY

As we have seen already, the trustee owes a general duty of care to the beneficiaries in respect of his or her administration of the trust. The trustee is also a fiduciary.

The Extensive Nature of the Obligations of the Trustee as Fiduciary

A fiduciary should not place herself in actual or apparent conflict with the interests of their principal. Where there is an actual or apparent conflict, equity has traditionally regarded any profit taken by the fiduciary as a breach of her duties and imposed a constructive trust over them.

An extreme aspect of the general principle is the rule in **Keech v Sandford (1726) Sel Cas King 61**. Here the trustee took a lease for himself personally when the lessor refused to renew a lease in favour of a minor beneficiary; notwithstanding that the benefit of the lease could not be taken for the beneficiary directly from the lessor, the trustee was held to be liable in breach of his fiduciary duty. The court held that the rule against a fiduciary profiting was intentionally strict and rigid; a bright-line rule was thought necessary to protect the beneficiary from being exploited. In the case itself, the lease was to be held for the beneficiary.

Thus, in **Bray v Ford [1896] AC 44**, Lord Hershell said:

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, 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. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services.

It is important to note two variations.

The Self-Dealing Rule**:** this holds that if a trustee purchases trust property, the transaction is voidable by B regardless of the price unless it was implied or authorized under the terms of the settlement, by leave of the court, by pre-existing contract, or with the beneficiary's acquiescence.

The Fair-Dealing Rule: This holds that where the trustee purchases the beneficiary's interest the transaction can be set aside if there was non-disclosure by the trustee. The onus is on the trustee to show that the transaction is fair and honest. In Tito v Waddell [1977] Ch 106, 249, Megarry J said that the rule is one of general equity application: '… the fair-dealing rule is essentially a rule of equity that certain persons (including trustees) are subject to certain consequences if they carry through certain transactions without, where appropriate, complying with certain requirements. The rule seems to me to be a general rule of equity and not a specific part of the law of trusts which lays down the duties of a trustee. Trusteeship is merely one of the categories of relationship which brings a person within the rule.'

Note that not every misdeed is a breach of fiduciary duty:

Southin J. in **Girardet v. Crease & Co. (1987) 11 B.C.L.R. (2d) 361:**

> 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."

How far does the no-conflict rule operate – is it an absolute bar on any possible conflict, or, does it apply more flexibly?

In the following cases, a bright-line ruling against fiduciaries taking opportunities to earn personal profits has been softened somewhat based on context-specific findings of honesty, good faith, and reasonableness. The extent of the softening of the stricter code of conduct of fiduciaries in respect of conflicts may well not accord with contemporary policy on point.

Tornroos v Crocker
[1957] SCR 151

Here shares in a company were owned in equal shares by three parties held subject to the condition that any shareholder who wished to sell or transfer his shares was required to give written notice to the directors who would thereupon give the other shareholders a first opportunity to purchase the shares. A died with his shares forming part of the residue of his estate; the residue was to be held on trust with the trustees being A's widow and C (another shareholder). B (yet another shareholder) died and the executor of his estate offered his shares to A's estate and to C. A's estate refused to purchase on the reasoning that the shares were not authorized investments; C purchased the shares from B personally. After C retired as a trustee, A's widow (as trustee) and the new trustee sued C for breach of fiduciary duty.

It was held in the SCC that there was no breach of fiduciary duty by C because A's estate could not buy the shares – *Keech v Sandford* was softened on the facts of the case on the reason that since A settled the shares knowing that they would be unauthorized investments for the trustees to purchase (and which de-barred the Court from allowing their purchase to effect a 'salvage' the trust property), he must have permitted the trustee to act as he did and purchase the property personally. Thus Kellock J held:

> In drawing his will, the testator clearly had present to his mind his shareholding in the company in question, as he specifically mentions these shares. He must equally be taken to have been well aware of the provisions of the articles of the company, of which he was one of the founders, and that in the event of the death of either Dietrich or Crocker occurring while his own estate was undergoing administration, the shares of either might be offered for sale, in which event his trustees would be entitled to buy. In settling the terms of his will and giving directions to his trustees, it is plain he did not desire that his estate should exercise the right to purchase but was content that his own shares should continue as a minority holding in a company controlled by the one or other of his former business associates, in whom he had such confidence that he desired they should be his trustees. This being so, the case is entirely outside the rule…

Boardman v Phipps
[1967] 2 AC 46 (H.L.)

The Phipps family trust had Boardman as a solicitor. Boardman and a beneficiary under the trust decided to try and rescue a company in which the trust held shares. With the consent of the trustees, they bought shares to control the company. They were able to benefit the trust and take a personal profit. Other beneficiaries sued in breach of fiduciary duty. It was held that it is a fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust, nor place himself in a position where his interest might conflict with his duty to the trust. Though the fiduciaries (here agents of the trustees) acted openly, honestly, and were motivated by the best interests of the beneficiaries did not prevent liability is respect of their personal profits – although they were entitled to payment on a liberal scale for their work and skill. A minority of the

House of Lords held that the conduct of the trustees was so impeccable (and the trust had itself refused to purchase) that there was no breach of fiduciary duty.

There were various reasons advanced:

Lords Hodson and Guest preferred a strict reading of the rule in *Keech v Sandford*. Lord Guest said:

> In the present case the knowledge and information obtained by Boardman was obtained in the course of the fiduciary position in which he had placed himself. The only defence available to a person in such a fiduciary position is that he made the profits with the knowledge and assent of the trustees. It is not contended that the trustees had such knowledge or gave such consent.

Lord Cohen held that the conflict of interest was one that would occur in the future, and said:

> … an agent is, in my opinion, liable to account for profits he makes out of trust property if there is a possibility of conflict between his interest and his duty to his principal. Mr. Boardman and Tom Phipps were not general agents of the trustees but they were their agents for certain limited purposes. The information they had obtained and the opportunity to purchase the 21,986 shares afforded them by their relations with the directors of the company - an opportunity they got as the result of their introduction to the directors by Mr. Fox - were not property in the strict sense but that information and that opportunity they owed to their representing themselves as agents for the holders of the 8,000 shares held by the trustees. In these circumstances they could not, I think, use that information and that opportunity to purchase the shares for themselves if there was any possibility that the trustees might wish to acquire them for the trust. Mr. Boardman was the solicitor whom the trustees were in the habit of consulting if they wanted legal advice. Granted that he would not be bound to advise on any point unless he is consulted, he would still be the person they would consult if they wanted advice. He would clearly have advised them that they had no power to invest in shares of the company without the sanction of the court. In the first phase he would also have had to advise on the evidence then available that the court would be unlikely to give such sanction: but the appellants learnt much more during the second phase. It may well be that even in the third phase the answer of the court would have been the same but, in my opinion, Mr. Boardman would not have been able to give unprejudiced advice if he had been consulted by the trustees and was at the same time negotiating for the purchase of the shares on behalf of himself and Tom Phipps. In other words, there was, in my opinion, at the crucial date (March, 1959), a possibility of a conflict between his interest and his duty.

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

Regal sued its former directors to recover from them profits on the acquisition and sale by them of shares in a subsidiary company. The shares had been acquired so as to allow Regal to take up business opportunities, and Regal itself was a shareholder. The subsidiary was sold (and the directors profited). Regal was sold and the new directors sued the old directors, who were held liable to account for their profits to Regal.

Per 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 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* per Lord King The rule, however, applies to agents, as, for example, solicitors and directors, when acting in a fiduciary capacity.

Per Lord Russell:

> 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* 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. Though 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. Lord King L.C. said:
>
> "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 the 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* decided by Lord Eldon L.C. That was a case of a purchase of

> a bankrupt's estate by the solicitor to the commission, and Lord Eldon L.C. refers to the doctrine thus:
>
> "This doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principles 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."

Peso Silver Mines Ltd. v. Cropper
[1966] S.C.R. 673

A company sued a former executive director for purchasing shares in a mining venture personally after the company had refused the purchase. It was held that the subsequent offer to purchase made to the defendant was persona to him and did not involve his appointment with the company; there was no breach of fiduciary duty. It was held that Regal (Hastings) Ltd. v Gulliver could be distinguished as the opportunity could be regarded as coming freshly to the defendant outside the terms of his fiduciary duty; good faith and reasonableness seemed to work to soften the harsh no-conflict rule.

Canadian Aero Service v O'Malley
[1974] SCR 592

Here faithless corporate directors resigned from the company and took a commercial opportunity (that they had been working on for the company) for themselves personally.

Per Laskin J:

> … O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. **Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer 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 advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.**
>
> An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation

where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

…

I need not pause to consider whether on the facts in *Regal (Hastings) Ltd. v. Gulliver* the equitable principle was overzealously applied... What I would observe is that the principle, or, indeed, principles, as stated, grew out of older cases concerned with fiduciaries other than directors or managing officers of a modern corporation, and I do not therefore regard them as providing a rigid measure whose literal terms must be met in assessing succeeding cases. In my opinion, neither the conflict test, referred to by Viscount Sankey, nor the test of accountability for profits acquired by reason only of being directors and in the course of execution of the office, reflected in the passage quoted from Lord Russell of Killowen, should be considered as the exclusive touchstones of liability. In this, as in other branches of the law, new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting.

The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of *Boardman et al. v. Phipps*, [1967] 2 A.C. 46 which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest. Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is *Industrial Development Consultants Ltd. v. Cooley*, [1972] 2 All E.R. 162, a judgment of a Court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company and where he does obtain it without disclosing his intention.

What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special

meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgment of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour.

…

It is a mistake, in my opinion, to seek to encase the principle stated and applied in Peso, by adoption from *Regal (Hastings) Ltd. v. Gulliver*, in the straight-jacket of special knowledge acquired while acting as directors or senior officers, let alone limiting it to benefits acquired by reason of and during the holding of those offices. As in other cases in this developing branch of the law, the particular facts may determine the shape of the principle of decision without setting fixed limits to it. So it is in the present case. Accepting the facts found by the trial judge, I find no obstructing considerations to the conclusion that O'Malley and Zarzycki continued, after their resignations, to be under a fiduciary duty to respect Canaero's priority, as against them and their instrument Terra, in seeking to capture the contract for the Guyana project. They entered the lists in the heat of the maturation of the project, known to them to be under active Government consideration when they resigned from Canaero and when they proposed to bid on behalf of Terra.

In holding that on the facts found by the trial judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.