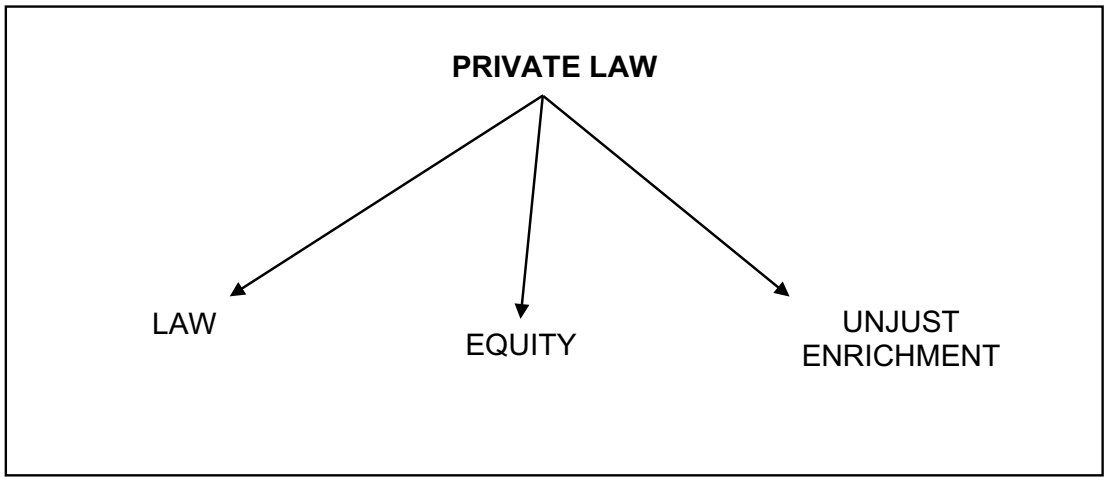
Trusts & Equity – Law 463
Fall Term 2022

LECTURE NOTES NO. 1

I. THE TRUST AS AN INSTITIUTION OF EQUITY

1. 'EQUITY'



LAW: *In rem* (against a "thing") jurisdiction. Statues, regulations, common law. Example: property rights.

EQUITY: *In personam* (against a person) jurisdiction of the Court. Wrongs, obligations, remedies, and other applications. Example: a trust.

UNJUST ENRICHMENT: A developing area of law which seeks to address unjustified transfers of value from one person to another with a corresponding deprivation to the transferring party without an adequate legal justification and with no parasitic reliance on a legal or equitable doctrine.

'MAXIMS OF EQUITY'

Some maxims of particular relevance:

- EQUITY ACTS *IN PERSONAM*

The maxim *Equity Acts in Personam* means that a court of equity has a jurisdiction over a specific person; it is thus a personal jurisdiction. Historically this meant that equity was not exercised over the person because he or she owned something (held title) but because of their conduct; thus, equity acts on the conscience of the defendant and prevent that person from acting unconscionably.

Equitable remedies and interests, then, generally operate against only the person subject of the court's order which is enforceable though the threat of imprisonment for contempt. For example, a common law judgement vesting title in property in A is traditionally considered as 'good against the world' – A enjoys rights *in rem* – whilst the order of a court in equity enforcing an equitable interest enforces a beneficial interest in the property in the hands of the defendant regardless of legal ownership. Thus, whilst the equitable interest can be enforced against a person with legal title to the property, it can also be enforced against a person never having had either legal title or possession of the property (a third party accessory to breach of trust) where the court's jurisdiction can be invoked. The only person consistently to defeat the beneficial interest enforced by the court is a *bona fide purchaser for fair value* ('equity's darling') of the title who has no notice of the beneficial interest – his conscience is not affected and equity will refrain from exercising its jurisdiction over him.

- **EQUITY FOLLOWS THE LAW**

A person who comes to equity for relief against interference with a property right gains no more rights in equity than enjoyed at law, whether framed merely as a matter of the width of an equitable remedy or the recognition of a legal interest as an interest protected in equity.

- **EQUITY WILL NOT PERFECT AN IMPERFECT GIFT**

Equity will not usually order a gratuitous transfer. This will be considered in detail later in the course.

- **EQUITY WILL NOT ALLOW A STATUTE TO BE USED AS AN INSTRUMENT OF FRAUD**

Formal statutory provisions intended to protect an interest cannot be manipulated outside their rationale to provide equitable relief.

2. TRUSTS ARE A PART OF EQUITY

The orthodox view of property stems from trusts, and not the other way round.

Terminology

Settlor - the person who set up a trust (in a 'settlement') by contributing property to the trust and vesting ownership in the trustee.

Trustee - an individual or trust institution that holds legal title to property in trust for the benefit of the trust beneficiaries.

Beneficiary - the person for whose benefit the trust is created. The beneficiary has an equitable interest in the trust property which can be enforced against the trustee.

Classification of Trusts

Express trusts:

- Such trusts are created by express or inferred intention of the settlor *inter vivos* or the testator as a testamentary disposition of property. That intention must be expressed in relation to certain property and in favour of certain people. These are known as the 'three certainties' (certainty of intention, certainty of property, certainty of beneficiaries).

- Such trusts may be either "bare trusts" (the trustee has no active management duties, and merely holds for the beneficiary) or active trusts.

- Express trusts might be fixed or discretionary, or even settled for charitable purposes. A fixed trust has specific beneficiaries who have set beneficial interests without any room for discretion on the part of the trustee to select beneficiaries or set their equitable entitlements.

Resulting trusts:

These are trusts that arise by operation of law based on the presumed, but rebuttable, intention of the settlor to settle a trust on behalf of herself. For example, a failed gift is held on resulting trust for the transferor.

Constructive trusts:

Here the trust arises by operation of law without respect to the intent of the settlor, and in opposition to the intent of the current legal owner. It is often a remedial device.

3. THE FIDUCIARY PRINCIPLE

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* (fidelity or loyalty). A fiduciary duty is one between a person who owes the duty (the fiduciary) and the person to whom the duty is owed (the principal, beneficiary, etc.). The duty might arise conventionally, say in contract (for example, an employment contract). At the heart of the duty is loyalty. Again, 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.

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

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.

Why all the fuss? The nature of a fiduciary duty makes its breach a serious matter. The remedial consequence is powerful. The successful plaintiff 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'.

Galambos v Perez
(2009) SCC 48 (S.C.C.)

The facts of this case are bizarre.

The plaintiff employee loaned money to her employer. The employer told her to pay herself back from company funds (she manages the accounts). She didn't. The employer became insolvent and the plaintiff found 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).

Read the judgment to understand the fiduciary principle and the two situations in which it arises: categorically (e.g. between and lawyer and his or her client) and on an ad hoc basis ("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").

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.
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> [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.
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> [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.

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[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.

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[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.**

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> [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.

Alberta v Elder Advocates of Alberta Society
(2011) SCC 24 (S.C.C.)

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."
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> [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.

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> [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.
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> **[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.