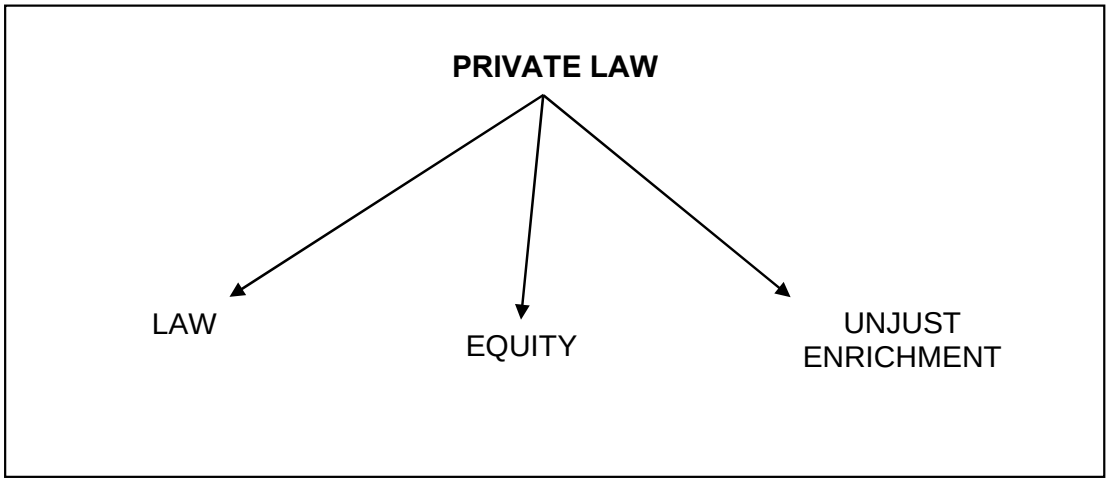
Trusts – Law 463
Fall Term 2024

LECTURE NOTES NO. 1

I. INTRODUCTION

1. "EQUITY"



Trusts are a part of that area of law known as "equity."

'Equity' in this context does not mean social fairness, its contemporary meaning. Rather, equity refers to a body of principles that are enforced by courts having a formal jurisdiction to do so. It is an old part of the English law received into the law of the common law provinces and is a separate jurisdiction from common law.

Equity was derived in large measure from moral principles and was a jurisdiction that was personal ('in personam'), rather than merely being tied up in the protection of property ('in rem'). Thus, injunctions (a court order compelling a person to do or abstain from doing something) are equitable in origin. At common law, for example, a land owner could seek damages for trespass at law but would require an injunction in equity to prevent future trespass.

The *Courts of Justice Act*, RSO 1990, c C.43, provides in part:

> 11. (2) The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.
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> …
>
> *Rules of law and equity*

> 96 (1) Courts shall administer concurrently all rules of equity and the common law.
>
> *Rules of equity to prevail*
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> (2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.
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> *Jurisdiction for equitable relief*
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> (3) Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

(i) Equity's Evolution

The English common law at its earliest stages was quite rigid, requiring the application of a flexible jurisdiction in equity to cure its harsh application. The jurisdiction fell to the Chancellor, and the nature of the office dictated the nature of the institutionalisation of equity in England.

The earliest Chancellors were monks who came from Rome to England with Augustine in the 6th century. These were in effect royal scribes. It was not until after the Norman Conquest that Chancellors began to fulfil judicial duties. These earlier Chancellors, though, filled two important roles: first, they were literate and as such they were keeper's of the 'King's Seal'. Second, as chaplains of the King, they were keepers of the 'King's conscience.' After the Norman conquest, the Chancellors became something of tax collectors as the Norman kings consolidated their power. Indeed, the office was sold by the King during this time with the Chancellor recouping his investment from charges for use of the Royal Seal.

The office was reformed during the chancellorship of Thomas à Becket, commencing in 1154. When he was appointed Archbishop of Canterbury in 1157 he resigned the office, suffering much the same misgivings as Thomas More was to do later as to the nature of the office. After Magna Carta in 1215, equity became rigid; the closed system of writs was the hallmark of equitable formalism.

The latter half of the 15th century was the return to the influence of religion through the great ecclesiastical Chancellors. Canon law was influential. The climax came with Wolsey (1515-1529) was saw equity as higher than law and seemingly based decisions on his own will. After Wolsey, chancellors were common law lawyers and equity became reconciled with law.

St. Germain's treatise *Doctor and Student* (1523) was a systematic attempt to describe how equity ought to be used and developed in the form of a dialogue between a theologian and student of the law. St. Germain's contribution to equity was promotion of a system of precedent rationalised to the internal structure of law rather than external sources. By 1616, St. German's ideas were largely accepted by Lord Ellesmere in the *Earl of Oxford's Case* (1615), 21 ER 485 (Ch), by which equity became seen as a supplement to law and something in itself quite like law. This led in many ways to the

decay of equity on the 18th and 19th centuries as equity became increasingly rigid, bound up with an equally narrow conception of property rights in law. Certainly wide-ranging equitable doctrines based on moral arguments did not attract much approval in an age of commerce which prized certainty and predictability.

Modern equity, as we shall see, has become much more flexible.

(ii) The 'Maxims of Equity'

The 'maxims of equity' have operated like the 'canons of construction' in statutory interpretation – principles that the court can look to in deciding upon rules and their application. Case law remains important but the principle of precedent is much more flexible and the maxims remain important.

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.

- **WHEN THE EQUITIES ARE EQUAL THE LAW PREVAILS**

Where two people have equally claims in equity, the claim that is supported by a common law claim (i.e. based on title to the property), prevails. Similarly, when there are two such competing claims, the claim made first has priority ('when the equities are equal, the first in time prevails').

- **HE WHO SEEKS EQUITY MUST DO EQUITY**

A person coming to equity cannot seek an advantage to the detriment of the defendant; for example, by seeking an accounting of profits made but leaving the defendant to suffer a tax burden alone based on an earlier transaction.

- **HE WHO COMES TO EQUITY MUST COME WITH CLEAN HANDS**

The court retains a discretion to refuse equitable relief where the plaintiff has acted improperly (say by breaching a contract in the same matter).

- **EQUITY IS EQUALITY**

Absent other considerations, those similarly situated enjoy equity's protection in equal shares.

- **EQUITY ASSISTS THE DILIGENT NOT THE TARDY**

This is similar to the principle that equity promotes self-reliance: "[i]t is not the function of equity to give relief to plaintiffs from their own folly and neglect, but to restrain defendants taking unfair advantage of them;" *Tufton v. Sperni* [1952] 2 TLR 516, 519; *Allcard v. Skinner* (1887), 36 Ch.D. 145, 182, 188. However, the traditional attitude is for equity to restrain injustice rather than to do justice, per Lord Evershed MR writing extra-judicially in (1954), 70 LQR 326,329.

- **EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE**

This deals with equity's ability to regard a private transaction as intended or to regard an equitable obligation as taking effect when it is most just in the circumstances.

- **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. THE TRUST CONCEPT

The concept itself is difficult to define. Consider this dicta in *Green v Russell* [1959] 2 QB 226, 241:

> "a trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation."

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.

(i) Classification of Trusts

There is no authoritative system of classification of trusts. The conventional orthodoxy is to group trusts (other than charitable trusts) as express, resulting and constructive:

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.

(ii) Advantages of a Trust

The advantages of the trust are many. The settlor can adjust ownership of the property with a high degree of flexibility, strong enforcement mechanisms, and very effective means of manipulating property. Thus, *ownership* can be separated from *control* (or *management*) of the trust property and the benefits distributed to different people, at different times, and under different conditions.

One can point to a number of instances in which the trust is especially useful:

- *the promotion of charitable purposes*: whilst a charity may wish to incorporate or form an unincorporated association, the trust allows for funds to be collected in relation to a single-occurrence or on a more permanent basis with little fuss or organisation. Those funds can be applied for different but related purposes in appropriate circumstances where the original purposes have lapsed, become redundant, etc. Whilst law may allow the parties to act, trusts makes the operation simpler and more effective.

- *commercial uses of the trust*: The use of the *Quistclose trust* (wherein what would ordinarily be regarded as a loan for a specific purpose that has not been achieved – for example, to pay a specific third party creditor - is regarded as a trust) allows commercial actors to effect commercial transactions with security. Some argue that this type of trust is contrary to the policy underlying the insolvency laws, however equity has taken the position that the trust is especially useful and supports an interest in commerce which is especially useful for smaller businesses that are in fact close to bankruptcy but can be saved by continued trading, made possible in part through the *Quistclose trust*.

- *the secret trust and testamentary dispositions:* though controversial, the trust allows for flexible disposition of property upon the settlor's death which allows S to make provision for persons privately and discretely. Whilst many argue that this unjustifiably dispenses with the rules respecting wills and risks fraud, the benefits to beneficiaries of such trusts (.e.g. illegitimate children) are very useful indeed.

In all of these areas, legal devices cannot compare with the trust concept for ease, flexibility, and adaptability.

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.**
>
> **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 (S.C.C.) 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 managed 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.

…

[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.**
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> …
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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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> …
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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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> …
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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.