Trusts & Equity
Fall Term 2024

Lecture Notes – No. 15

IX. 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 (S.C.C.); cb, p.760

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…**
>
> 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.

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.**

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.**

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.

Canson Enterprises Ltd v Boughton & Co
[1991] SCR 534 (S.C.C.); cb, p.780

Here a solicitor acted for the purchasers in a land transaction and in the preparation of a joint venture agreement to develop it. Unknown to the purchasers, an intermediate company had bought the land from the vendors and resold it to the purchasers at a substantially higher price (they ‘flipped’ the land). The solicitor also acted for the intermediate company in its purchase and resale of the land, but did not disclose to the purchasers that the land was not being purchased directly from the vendors. The purchasers then proceeded with development of the property but suffered substantial losses when piles supporting a constructed warehouse began to sink. They obtained judgment against the soils engineers and pile-driving company they had retained, but were left with a large shortfall when these defendants could not pay. The purchasers then sued the solicitor on an agreed statement of fact. The parties agreed that the purchasers would not have purchased the property or entered into the joint venture had they known of the involvement of the intermediate company. The solicitor was held liable for breach of fiduciary duty for failing to disclose the intermediary’s purchase. The issue then was damages – *was the solicitor liable for more than the secret profit or the whole of the defendant’s loss*?

Trial:

> Secret profit, as well as consequential damages of the expenses incurred on the warehouse project prior to the wrongful acts of the engineers and pile-drivers.

Court of Appeal:

> A fiduciary who mishandles trust property and causes a loss is liable in damages to be calculated by analogy to trust law. The shortfall was not recoverable because such damages did not flow from the breach of fiduciary obligation but were the unrelated fault of the soils engineers and pile-driving contractor.

SCC:

> The majority held that while equitable compensation is compensatory and are on par with common law damages to some extent, the principles of forseeability and remoteness play no role in respect of breach of trust (although they may in respect of breach of fiduciary duty outside breach of trust). Thus the solicitor was liable merely for returning the secret profit.
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> The minority held rejected the distinction between two types of fiduciary obligation and factoring in remoteness in calculating the damages – the beneficiary was entitled to be made whole again. However, causation is relevant as a matter of common sense – hence, the negligence of the engineers was not caused by the solicitor's breach of fiduciary duty.

LaForest J (for the majority) held:

> 82 **What is important for our purposes is the manner in which the Court of Appeal dealt with compensation, and in particular the question whether the compensation could be reduced in respect of the second investment in 1977 because of Day's contributory negligence. Like the trial judge, it concluded that it was proper to apportion the loss. In its view, not only was this justifiable on the basis of equitable principles, but law and equity had become so merged in this area that the principles of contribution should apply.** As well, judge-made law was quite properly affected by legislative action, there the Contributory Negligence Act, and by other current trends. Having reviewed a number of cases where there was an intermingling of common law and equitable principles, Cooke P. continued, at p. 451:

‘These developments accord with what is probably the most authoritative modern exposition of the effect that should be accorded to the Judicature Acts in England, namely the speech of Lord Diplock in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 924-927. As Lord Diplock put it, law and equity have mingled now; the Acts did not bring to a sudden halt the whole process of development of the common law of England that had been so notable a feature of the preceding decades; the legislation placed no ban upon further development of substantive rules by judicial decision. I respectfully subscribe to such views, as will be apparent from *Hayward v Giordani* [1983] NZLR 140, 148:

> ‘**Compensation or damages in equity were traditionally said to aim at restoration or restitution, whereas common law tort damages are intended to compensate for harm done; but in many cases, the present being one, that is a difference without a distinction.** There is, however, the more significant historical difference that Courts of equity were regarded as having wider discretions than common law Courts. Equitable relief was said to be always discretionary. Its grant or refusal was influenced by ideas expressed in sundry maxims. He who seeks equity must do equity. He who seeks equity must come with clean hands. Delay defeats equity. These are merely examples. Further, relief could be granted on terms or conditions.
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> ‘Whether or not there are reported cases in which compensation for breach of a fiduciary obligation has been assessed on the footing that the plaintiff should accept some share of the responsibility, there appears to be no solid reason for denying jurisdiction to follow that obviously just course, especially now that law and equity have mingled or are interacting. It is an opportunity for equity to show that it has not petrified and to live up to the spirit of its maxims. Moreover, assuming that the Contributory Negligence Act does not itself apply, it is nevertheless helpful as an analogy, on the principle to which we in New Zealand are increasingly giving weight that the evolution of Judge-made law may be influenced by the ideas of the legislature as reflected in contemporary statutes and by other current trends: compare *Dominion Rent A Car Ltd v Budget Rent a Car Systems* (1970) Ltd [1978] 2 NZLR 395, citing *Erven Warnink v J Townend & Sons (Hull) Ltd* [1979] AC 731, 743 per Lord Diplock.’

> 83 I agree with this approach. As I have attempted to demonstrate, it would be possible to reach this result following a purely equitable path. I agree with Cooke P. that the maxims of equity can be flexibly adapted to serve the ends of justice as perceived in our days. They are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice. Viscount Haldane reminded us in *Nocton v. Lord Ashburton* of the elasticity of equitable remedies. **But in this area, it seems to me, even the path of equity leads to law. The maxim that "equity follows the law" (though I realize that it has traditionally been used only where the Courts of Chancery were called in the course of their work to apply common law concepts) is not out of place in this area where law and equity have long overlapped in pursuit of their common goal of affording adequate remedies against those placed in a position of trust or confidence when they breach a duty that reasonably flows from that position. And, as I have indicated, willy-nilly the courts have tended to merge the principles of law and equity to meet the ends of justice as it is perceived in our time.** That, in effect, is what was done in *Jacks v. Davis*, supra, and by the courts below in the instant case. As I see it, this is both reasonable and proper. It is worth observing that while the breakthrough in *Hedley Byrne & Co. v. Heller & Partners Ltd*., supra, took place in a common law context, it finds its roots in equitable principles; see Gummow in Equity, Fiduciaries and Trusts, supra, at pp. 60-61; Davidson, supra, at pp. 370-71.

<u>McLachlin J (minority) held at para 84:</u>

> **… compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach. Where the trustee's breach permits the wrongful or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss**

> **will be recoverable. Where there is no such link, the loss must be recovered from the third parties.**

[subsequently quoted with approval by Binnie J. for the Court in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, para. 93. The point is accepted in the next case].

Tornroos v Crocker
[1957] SCR 151 (S.C.C.); cb, 797

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.); cb, p.806

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 (H.L.); cb, p.811

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."

Matic v Waldner
2016 MBCA 60 (Man. C.A.); cb, p.815

This case deals with the often occurring problem in fiduciary law – the liability of a corporate officer or director taking advantage of business opportunities personally where the opportunity properly "belongs" to the corporation, and, the appropriate remedial response.

This dispute involved who might properly bid on a construction project. Matic and Waldner purchased an existing business, Springhill Lumber. Waldner had the majority interest, Matic a minority interest and was agreed to act as Springhill's general manager. Both Matic and Waldner were Directors. Relations between the two deteriorated and Matic was dismissed as general manager. Litigation ensured involving claims in contract and for oppression; Waldner alleged Matic breached his fiduciary duty by successfully obtaining the construction opportunity for a corporation (Callidus) that Matic owned.

Pfuetzner J.A.:

> [121] A director or officer is a fiduciary to his or her corporation...
>
> …
>
> [123] The duty to avoid conflicts of interest with the corporation includes not only the director's personal interests, but those of any other corporation in which the director is interested. See *Canadian Aero Service Ltd v O'Malley*, 1973 CanLII 23 (SCC), [1974] SCR 592 at 607; and Jordan Inc et al v Jordan Engineering Inc et al, [2004] OTC 687 (Sup Ct J) at para 34.
>
> …
>
> [125] The "corporate opportunity doctrine" arises out of the fundamental obligation of a fiduciary not to allow a conflict of his or her duty with his or her own interests.
>
> [126] In the leading decision in *Canadian Aero*, Laskin J, as he then was, repeatedly stressed that there is a strict ethic in this area of the law (see pp 607, 610). He reviewed the principles that limit the ability of those who owe a fiduciary duty to a corporation to take advantage of business opportunities that might otherwise be available to them in the absence of the fiduciary relationship.

[127] Laskin J wrote that the doctrine precludes a fiduciary from (at pp 606-7):

[O]btaining 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.

Nature of a Corporate Opportunity

[128] Key to the analysis is the determination of whether the opportunity "belonged" to the corporation. This requires a contextual analysis and various overlapping tests have been referred to in the case law and academic authority. In Dr Leonard I Rotman, Professor, Fiduciary Law (Toronto: Thomson Carswell, 2005), the author refers to American jurisprudence and describes three primary formulations which assist in determining when corporate opportunities exist (at p 435):

[I]t appears that courts have opened or closed the business opportunity door to corporate managers upon the facts and circumstances of each and by application of one or more of three variant but often overlapping tests or standards: (1) The "interest or expectancy" test, which precludes acquisition by corporate officers of the property of a business opportunity in which the corporation has a "beachhead" in the sense of a legal or equitable interest or expectancy growing out of a preexisting right or relationship; (2) the "line of business" test, which characterizes an opportunity as corporate whenever a managing officer becomes involved in an activity intimately or closely associated with the existing or prospective activities [of] the corporation; and (3) the "fairness" test, which determines the existence of a corporate opportunity by applying ethical standards of what is fair and equitable under the circumstances.

[129] In Canadian Aero, Laskin J also reviewed American authority, including "line of business" cases. He ultimately concluded that one "cannot pretend that there is any one consistent line of approach" and that (at p 612):

What emerges from a review of the American case law is an imprecise ethical standard "which prohibits an executive—here defined to include either a director or an officer—from appropriating to himself a business opportunity which in fairness should belong to the corporation".

[130] Laskin J explained that the question of corporate opportunity must be "tested in each case by many factors" and that it would be "reckless to attempt to enumerate [those factors] exhaustively" (at p 620). One of the articulated factors (the only one referred to by the trial judge in this case), was whether the impugned activities involved a "maturing business opportunity" which the company is "actively pursuing". He stated, "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" (at p 607).

[131] Laskin J identified the following additional factors for consideration (at p 620):

[T]he 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.

[132] The list of factors is not closed. However, the factors noted in Canadian Aero provide a useful foundation for the necessary contextual analysis in this case. The determination of whether a director has taken an opportunity belonging to the corporation is a fact-intensive exercise. For example, Mark Vincent Ellis, Fiduciary Duties in Canada (Toronto: Carswell, 2013) (loose-leaf, release 5) ch 15 at 25 writes, "[T]he complexity of factual analysis [in corporate opportunity cases] contrasts with the simplicity of the statement that a corporate director or senior officer may not usurp a corporate opportunity".

Mature Business Opportunity

[133] There is some divergence in the case law after Canadian Aero in respect of whether, and to what extent, a business opportunity must be "mature" for its diversion to constitute a breach of the doctrine.

[134] Some decisions, employing a strict application of the wording in Canadian Aero, have found there was no breach when the corporate opportunity did not involve a "mature" or "ripe"

opportunity. In Physique Health Club Ltd v Carlsen et al (1996), 1996 ABCA 358 (CanLII), 193 AR 196 (CA), for example, the Alberta Court of Appeal found there was no breach as the opportunity was "merely an idea" which the record showed was not developed by the company (at para 6).

[135] Other cases that have adopted a narrow interpretation of the concept of a "maturing" business opportunity have sometimes articulated additional criteria, such as the opportunity being "immediately available". See Tracey v Tracey, 2012 ONSC 3144 at para 56, 293 OAC 15; and Donor Gateway Inc v Passero (2007), 2007 CanLII 3677 (ON SC), 28 BLR (4th) 309 (Ont Sup Ct).

[136] In contrast, there is considerable authority for the view that the strict ethic imposed on fiduciaries applies to "potential" opportunities as well as maturing ones. See Slate Ventures Inc v Hurley (1997), 1997 CanLII 14707 (NL CA), 156 Nfld & PEIR 304 at para 34 (Nfld CA).

…

[138] A potential conflict must be a real sensible possibility and more than a theoretical conflict. In Queensland Mines Limited v Ernest Roy Hudson and others, [1978] UKPC 2, the Privy Council defined the phrase "possibly may conflict" by adopting the dictum of Lord Upjohn in Phipps v Boardman, [1967] 2 AC 46 (HL) (at p 124):

In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.

Active Pursuit

[139] A factor related to the maturity of the opportunity is the extent to which the corporation is actively pursuing the opportunity.

[140] In Slate Ventures, Gushue CJN observed that the director in that case would have been in breach of his duty whether

or not the corporation had expressed an active interest in the opportunity (see paras 36-37).

[141] Other courts have also questioned the importance of whether a corporation is "actively pursuing" a corporate opportunity.

[142] I agree with and adopt the view of Sigurdson J in Pan Pacific Recycling Inc v So, 2006 BCSC 1337 (CanLII) (at para 175):

To the extent that these terms suggest that fiduciaries are only barred from taking opportunities that the corporation is actively pursuing, they are probably misleading. The question of whether a fiduciary has breached his duty by taking a particular opportunity is a question of fact that can turn on many factors, some of which are set out by Laskin J. in Canadian Aero at p. 620.

[143] See also First Majestic Silver Corp v Davila, 2013 BCSC 717 (CanLII) at paras 150-52, aff'd on other grounds 2013 BCCA 458, 344 BCAC 262.

[144] Due to the strict ethic that is imposed on directors, a breach of fiduciary duty can occur when the diverted opportunity is a potential, rather than a mature opportunity, or one that the corporation is not actively pursuing. Again, as noted in Canadian Aero, there is no strict formula to apply, and the existence of a corporate opportunity will depend upon the particular facts.