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DEMYSTIFYING THE FIDUCIARY MYSTIQUE

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Our courts have been examining the theory of fiduciary relationships and the elements involved, and they have been examining and defining the scope and standards of fiduciary duties. This article looks at these developments, compares fiduciary duties with other duties and concludes that fiduciary duties are distinguished from the others only by their remedies.

Nos tribunaux ont examiné la théorie des rapports fiduciaires et les éléments qu'ils mettent en jeu; ils ont également examiné et défini le cadre et les critères des obligations fiduciaires. Cet article étudie ce développement, compare les obligations fiduciaires aux autres obligations et conclut qu'elles ne s'en distinguent que par leurs recours.

Introduction

Are we any closer to a definition of the fiduciary principle? Have we marked any more clearly where fiduciary duties lie; and have we refined the duties? The answer would appear to be yes, in each case, and the happy result is that the mystique of fiduciary law is beginning to melt. This article will attempt to define the theory of the fiduciary principle, compare fiduciary duties with other duties, determine the scope and standards of fiduciary duties and examine some of the restrictive rules and far-reaching remedies.

The origin of the fiduciary concept is to be found in equity. The original fiduciary was the trustee and trusts being creatures of the Court of Chancery came under its exclusive jurisdiction. Because of the dependence and vulnerability that was involved in trust situations, equity imposed special duties on the trustee which were known as fiduciary duties. These

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duties included such rules and obligations as: the trustee must act solely in the interests of the trust, he must avoid all conflict of interest and he is not to profit from the position entrusted. Not to do this would be to invite equitable fraud by way of abuse of power, position or opportunity that belongs to another.¹

Then, over the years, the courts recognized that other relationships, such as partnerships and agency, also involve elements of trust and vulnerability similar to those found in express trusts, and if equitable fraud was to be avoided in these situations similar duties and standards of conduct should be imposed. Thus, the implications of express trusts (the original fiduciary relationship) were extended by analogy to other relationships which were also classified as "fiduciary" relationships.²

What constitutes a fiduciary relationship and what elements are necessary? We recognize that lawyers, agents, executors and partners are fiduciaries, but the real question is not who is a fiduciary but what is a fiduciary. Apart from the types of relationship that have always been classified as fiduciary, it has been historically difficult to determine if a new relationship was a fiduciary one because it has been generally said that a definition of the fiduciary principle is impossible and undesirable.³ As a result, the analysis of the relationship, its elements and characteristics has not been very satisfactory. In actual fact, apart from the traditional categories, it has often seemed as if some sort of mystical invocation were necessary to determine if the new relationship was a fiduciary relationship; and if it was, there then followed some sort of internal laying on of hands which imposed a raft of immovable obligations and duties on to the shoulders of the fiduciary but precisely how this happened remained a mystery. Fortunately, matters have improved.

I. *The Fiduciary Principle*

A legal *paraleipsis* has lurked about the courts when it comes to stating what constitutes a fiduciary relationship. Despite a professed reluctance to define the concept or the underlying principle there have been many statements on what lies at the root of the relationship.

A fiduciary is a person who undertakes to act in the interest of another person. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous.⁴

¹ Equitable fraud or constructive fraud is one of equity's basic concepts. It embraces all activity that is unconscionable and includes such things as undue influence, unconscionable bargains and the like. It is much broader than fraud in common law because there does not have to be any wilful deceit but only behaviour that offends basic justice and good conscience. Equitable fraud, in result, translates into unjust enrichment.

² Fiduciary is the latinized word for trust and comes from the word "fiducia".

³ See text *infra*, at footnotes 5 to 7.

⁴ A.W. Scott, *The Fiduciary Principle* (1949), 37 Calif. L. Rev. 539, at p 540.

In *Standard Investments Limited v. Canadian Imperial Bank of Commerce*,⁵ Griffiths J. at trial stated:

Although the courts have refrained judiciously from attempting a general definition of the fiduciary relationship, the common elements that must be present are the reposing of trust and confidence in one who undertakes to act for or on behalf of the person reposing the trust. Equity then imposes a duty on the fiduciary to act in good faith and with due regard to the interests of the one imposing the confidence. It is the undertaking to act for and on behalf of another which imports the fiduciary responsibility. The conflict of duty and interest rule applies not simply because of the placing of trust and confidence but, in my view, because of the undertaking of the fiduciary to act for or on behalf of his principal.

In *Lloyds Bank Ltd. v. Bundy*,⁶ where a fiduciary duty was imposed on a bank manager in advising a customer, Sir Eric Sachs said that it was neither feasible nor desirable to attempt closely to define the relationship, or its characteristics, or the demarcation line showing the exact transition point where a relationship that does not entail that duty passes into one that does, and while disclaiming any intention of seeking to catalogue the elements of such a relationship he noted some of them which, in the past, have frequently been found to exist where the relationship was found to exist:⁷

Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, the benefit from the transaction or has some other interest in its being concluded.

In addition, he referred to the element of "confidentiality", which he said must be shown to exist. He said that it is this element that is so impossible to define, but it is intended to convey the meaning of "confidential relationship". The necessity of this element is questionable as will be seen in the section of this article entitled *Misconceptions*.⁸

Is discretion a necessary ingredient? The "hallmark of a fiduciary relationship is that the relative legal positions are such that one party is at the mercy of the other's discretion".⁹ Where there is a fiduciary obligation:

there is relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.¹⁰

These words of Ernest Weinrib were quoted in *Guerin v. The Queen*¹¹ by Dickson C.J.C. who went on to say:

⁵ (1983), 5 D.L.R. (4th) 452, at p. 483 (Ont. H.C.).

⁶ [1975] Q.B. 326, at p. 341 (C.A.).

⁷ *Ibid.*

⁸ *Infra*, p. 7.

⁹ E. Weinrib, *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7.

¹⁰ *Ibid.*, at p. 4.

¹¹ [1984] 2 S.C.R. 335, at p. 384.

I make no comment upon whether the description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

The discretion definition clearly covers the role of an executor, an agent, or a director, but when we move away from these traditional fiduciary roles, it is often difficult to find a discretion in the usual sense of the word. For example, in the bank manager cases, the banker's duty involves giving advice and guidance and does not generally involve a discretion to act on behalf of the customer; and in the case of an express trust, it may be that only defined duties are imposed on the trustee without any leeway of action. In each of these cases there is a power but no discretion, at least not in the usual sense of the word. It must be concluded that power in a fiduciary situation may, but does not have to include a discretion.

The word "power" was put forth by Shepherd.¹² He suggests the formulation as follows:¹³

A fiduciary relationship exists whenever any person receives a power of any type on condition that he also receive with it a duty to utilize that power in the best interest of another, and the recipient of the power uses that power.

Recently members of the High Court of Australia expressed a general test which might be used to determine the existence of the relationship. It can be put as follows. If one person undertakes to act in relation to a particular matter in the interests of another, and has been entrusted with a power or discretion to affect the other's interests, in a legal or practical sense, so that the other is in a position of vulnerability, then a fiduciary duty exists.¹⁴ Mason J. said:¹⁵

The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

¹² Law of Fiduciary Obligations (1981).

¹³ *Ibid.*, p. 356.

¹⁴ *Hospital Products Limited v. United States Surgical Corp.* (1984), 55 A.L.R. 417 (H.C. Aust.), per Gibbs C.J., at p. 432, and Mason J., at p. 454. Professor R.P. Austin has analyzed the case in a commentary, *The Corporate Fiduciary: Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1986-87), 12 C.B.L.J. 96. See also *Burns v. Kelly Peters & Associates Ltd.* (1987), 41 D.L.R. (4th) 577, 41 C.C.L.T. 257 (B.C.C.A.).

¹⁵ *Hospital Products Limited v. United States Surgical Corp.*, *ibid.*, at p. 454.

More recently, it was said by Wilson J. in the Supreme Court of Canada that the relationship possesses three general characteristics:¹⁶

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Two matters deserve comment. The first is the reference to vulnerability: it is not an element leading to a fiduciary relationship, but rather, it is a characteristic of the result of the relationship. In other words, the vulnerability is the natural result of the reliance by the principal on the undertaking given by the fiduciary. It is nothing more than a description of the victim's situation when the fiduciary can affect his lawful interests by exercising his position of power. However, vulnerability may be present in advance and frequently is (for example, an infant in relation to a guardian), but it does not have to be present, as in the case of a sophisticated businessman who takes in a junior partner.

The second matter to be commented on is the distinction drawn between "legal" and "practical" interests: one may quarrel with this. Is "legal" restricted to proprietary interests or is it broad enough to cover all interests that the law will recognize and protect? Are practical interests less than this? The distinction is not clear, although in support of it Wilson J. said that fiduciary duties are frequently imposed on those who are capable of affecting not only the legal interests of a beneficiary but also the beneficiary's vital non-legal or "practical" interests, and she used as an example the British army sergeant in *Reading v. Attorney General*¹⁷ who used his uniform to assist smugglers in Egypt at the expense of the Egyptian government, as being offensive to the Crown's "practical" or even "moral" interest that the uniform should not be used in a corrupt way. Another example used was that of a corporate director whose fiduciary duties extend not only to corporate property but also to financial well-being and even to image and reputation. With deference, it is submitted that the distinction is unnecessary and misleading because the interests to be served are as defined or understood by the parties, no matter what they are called, provided that it is an interest that the law will recognize and view as worthy of protection.

The introduction of "practical" and "legal" interests is the result of stretching the fiduciary concept into shapes that were never originally intended; and this is one of the reasons for the difficulty that we have had in achieving a workable definition of the relationship. Too often we

¹⁶ *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 136, (1987), 42 D.L.R. (4th) 81, at p. 99. Wilson J. was in dissent but without disagreement or comment on this point by the majority.

¹⁷ [1951] A.C. 507 (H.L.).

have permitted the fiduciary concept to drift from its conceptual moorings and to become mixed up with the unjust enrichment concept when the two are really quite distinct. For example, the British army sergeant who used his uniform to assist the smugglers in Egypt at the expense of the Egyptian government was classified as a fiduciary in order to require him to hand over to the British government what had been paid to him by the smugglers on the ground that he was a fiduciary. Another example is the classification of a thief as a fiduciary to his victim to enable tracing.¹⁸ To classify these individuals as fiduciaries is to strain the concept in the first case and is a sheer fabrication in the second. In the case of the army sergeant, it was done because there is no general doctrine of unjust enrichment in England, and so, in order to provide a remedy for repayment resort was had to classifying him as a fiduciary.¹⁹ In the second case, the funds were in the hands of another and it was then thought that a tracing remedy required, as a prerequisite, a fiduciary base.²⁰

These fictions are not necessary in Canada because the ill-gotten gains will be caught up by the broad net of the unjust enrichment principle which we now recognize, and, in particular, by that part which says that the product of wrongful acts must be disgorged. We accept a general principle of unjust enrichment, independently of any fiduciary relationship, and we also hold that the remedies of constructive trusts and tracing do not depend on fiduciary relationships.²¹

Although we no longer have to stretch the meaning of "fiduciary" in order to ensnare unjust enrichments, it will not be surprising that

¹⁸ *Goodbody v. Bank of Montreal* (1974), 47 D.L.R. (3d) 335, 4 O.R. (2d) 147 (Ont. H.C.).

¹⁹ Lord Diplock said in *Orapko v. Manson Investments Ltd.*, [1978] A.C. 95, at p. 104 (H.L.), that "there is no general doctrine of unjust enrichment recognized in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law".

²⁰ *In Re Diplock*, [1948] 1 Ch. 465 (C.A.), held that a fiduciary relationship was a pre-condition for equitable tracing but this has been dropped as a pre-requisite in Canada and apparently for the same reason that a fiduciary relationship is not a pre-requisite for a constructive trust. A tracing order is a remedy matter and not a matter of substantive property or trust law. See *B.C. Teachers' Credit Union v. Betterly* (1975), 62 D.L.R. (3d) 755 (B.C.S.C.); *Simpson Sears Ltd. v. Fraser* (1974), 54 D.L.R. (3d) 225, 7 O.R. (2d) 62 (Ont. H.C.); D.W.M. Waters, *Law of Trusts* (2nd ed., 1984), p. 386 *et seq.*

²¹ *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.), held that a constructive trust remedy requires the presence of a fiduciary relationship before it could be granted. This is because in England the constructive trust—by analogy with the express trust—is viewed as a matter of substantive law. The principal-beneficiary is the equitable owner of the property. In Canada, however, the constructive trust is viewed as a remedy to overcome unjust enrichment. The equitable principle on which the remedy of constructive trust rests is to prevent unjust enrichment in whatever circumstances it occurs: *Pettkus v. Becker*, [1980] 2 S.C.R. 834, (1980), 117 D.L.R. (3d) 257; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, (1986), 29 D.L.R. (4th) 1; and see R. Goff and G. Jones, *The Law of Restitution* (2nd ed., 1978), p. 54

because the meaning was stretched for this purpose in the past, strange ingredients were added to the stew pot, and we have had problems coming up with a unified and workable recipe. However, if we remove the stretched, the synthetic and the fictional fiduciaries and if we can define an express trust situation, it should not be too difficult to come up with an acceptable definition of the fiduciary principle.

An express trustee is of course a fiduciary, and he or she is distinguished from the plain fiduciary, in a technical sense, in that the trustee holds legal title to something on behalf of the beneficiary whereas the fiduciary, although being in a similar position of trust, does not hold legal title. If this be the case, why do we find the fiduciary concept so difficult to define?

Whether or not we can settle on a universal, all-purpose definition of fiduciary relationship, we can go at least this far. A fiduciary relationship will occur where a person undertakes, either expressly or by implication, to act in relation to a matter in the interests of another, in a manner that is defined or understood by them, and is entrusted with a power to affect such interests. The other person relies on or is otherwise dependent on this undertaking, and, as a result, is in a position of vulnerability to the exercise of such power; and the first person knows, or should know, of such reliance and vulnerability. The nature and circumstances giving rise to the undertaking are such that loyalty and good faith are intrinsic elements of the consequent duty.

It must be remembered that in all of this we are talking about relationships between people, and relationships between people arise as a result of the interaction of the parties. The existence and extent of a fiduciary relationship will depend on the facts and circumstances involved. Was such a relationship understood, agreed and relied upon by the parties, either expressly or by implication? If so, to what extent? There are repeated statements to the effect that determining the existence of a fiduciary relationship depends on an examination of the facts. "Everything depends on the particular facts. . ."²² Evidence of the power, the reliance, the undertaking and the defendant's knowledge of the plaintiff's reliance and vulnerability are critically important just as similar elements are important in a duty of care action based on the *Hedley Byrne* principle.

II. Misconceptions

In discussing the fiduciary principle, a number of matters should be clarified. These include: the significance of particular classes of rela-

²² Sir Eric Sachs in *Lloyds Bank Ltd. v. Bundy*, *supra*, footnote 6, at p. 341; Lord Scarman in *National Westminster Bank Plc v. Morgan*, [1985] A.C. 686, at pp. 708-709, [1985] 1 All E.R. 821, at pp. 830-831 (H.L.); *Burns v. Kelly Peters*, *supra*, footnote 14; *International Corona Ltd. v. Lac Minerals Ltd.* (1987), 44 D.L.R. (4th) 592, 62 O.R. (2d) 1 (Ont. C.A.), especially at pp. 636, 637, 644 (D.L.R.), 44, 46, 53 (O.R.).

tionships, the importance of such elements as confidence, confidentiality, undue influence, duress and unequal bargaining power and finally the uniformity of the fiduciary obligation.

The existence of fiduciary obligations does not depend on the existence of identifiable classes of relationships. It is the nature of the relationship rather than the category of actor involved that gives rise to the duty. Because of this, the categories of fiduciary obligations, like those of negligence, are never closed. This has been made clear by the Supreme Court of Canada in *Guerin v. The Queen*.²³ In similar vein, it must be stated that just because some classes of relationship normally involve fiduciary obligations, does not mean that they invariably do. The parties may have changed the rules that would normally apply. They may have reduced, varied or negated the fiduciary duty. For instance, there may be a duty to protect the principal's interest but the fiduciary has permission also to protect and advance his own interests and make a profit for himself. In *International Corona Ltd. v. Lac Minerals Ltd.*,²⁴ the court asserted that there are no identifiable classes of relationships that consistently exhibit a fiduciary component. "Whether or not fiduciary obligations arise depends on the course of dealings between the parties and the proof of facts which give rise to such obligations."²⁵

This is no doubt correct, but with respect, there are some classes of relationship, which by intrinsic nature or definition, make it difficult to imagine how fiduciary obligations are not involved. It would seem that where guardians, solicitors and executors are concerned, fiduciary obligations are consistently involved—although it may occur, in some exceptional cases, that the parties agree to do away with the normal obligations and restrictions that attend them.

The converse must also be true. A particular class of legal relationship will not automatically deny the existence of a fiduciary obligation. Just because some classes of relationship do not normally exhibit a fiduciary component does not mean that they may not do so. Again, everything depends on the circumstances. Despite this, the belief is frequently encountered that certain relationships never involve fiduciary duties. For instance, it is often said that no fiduciary duty is owed by majority shareholders to minority shareholders. A recent example of this is *Re Brant Investments and KeepRite Inc.*²⁶ With respect, the question of whether a majority shareholder owes such a duty to a minority shareholder is not subject to a blanket answer but the answer depends on the particular

²³ *Supra*, footnote 11.

²⁴ *Supra*, footnote 22.

²⁵ *Ibid.*, at pp. 637 (D.L.R.), 46 (O.R.).

²⁶ (1987), 42 D.L.R. (4th) 15, 60 O.R. (2d) 737 (Ont. H.C.). One also encounters the view that mere employees without managerial duties cannot owe fiduciary duties. See *R.W. Hamilton Ltd. v. Aeroquip Corp.* (1988), 65 O.R. (2d) 345 (Ont. H.C.).

facts of each case. This is illustrated by *Lavigne v. Robern*²⁷ where a majority shareholder was held to owe a fiduciary duty to a minority shareholder in the sale of a company and was obliged to disgorge what he received under a secret consulting contract.

It has also been said that businessmen who are involved in negotiations with each other have competing interests which are repugnant to the existence of fiduciary obligations, but this is not necessarily so. *International Corona Ltd. v. Lac Minerals Ltd.*²⁸ is an illustration of fiduciary relations being found to exist between two negotiating business concerns in relation to a mining venture. The fiduciary duty was based on evidence of a practice in the mining industry that negotiating parties would not act to the detriment of the other by utilizing the information of the other.

Although fiduciary relationships involve reliance and vulnerability, they do not necessarily involve a quality of confidence in a subjective sense because sometimes fiduciaries are not subjectively trusted by the principal or beneficiary. For example, an insolvent may have no faith whatever in his receiver. On the other hand, confidence itself will not give rise to the relationship. We place confidence in others on a daily basis in a variety of situations but this does not lead to fiduciary relations unless there is also present the undertaking and the power.

Sir Eric Sachs referred to the necessary element of "confidentiality" which he said is so impossible to define but which connotes "confidential relationship".²⁹ It is assumed that he was referring to the type of confidentiality that exists between a solicitor and his client or between a banker and his customer who is seeking advice and guidance, but it is submitted that confidentiality has no validity in the equation if it is intended to mean anything more than the presence of reliance or vulnerability.³⁰

Elements such as undue influence, duress or inequality of bargaining power may be present in a fiduciary relationship—again the exam-

²⁷ (1984), 18 D.L.R. (4th) 759, 51 O.R. (2d) 60 (Ont. C.A.).

²⁸ *Supra*, footnote 22. In *Standard Investments v. Canadian Imperial Bank of Commerce* (1985), 22 D.L.R. (4th) 410, 52 O.R. (2d) 473, the Ontario Court of Appeal held that a commercial bank owed a fiduciary duty to customers who were commercially sophisticated and experienced.

²⁹ *Lloyds Bank v. Bundy*, *supra*, footnote 6.

³⁰ In *National Westminster Bank Plc v. Morgan*, *supra*, footnote 22, at pp. 708-709 (A.C.), 830-831 (All E.R.), the House of Lords approved what Sir Eric Sachs said, but expressed the view that the term "confidentiality" should be avoided as a description of the relationship. This was cited with approval by the Ontario Court of Appeal in *Hayward v. Bank of Nova Scotia* (1985), 19 D.L.R. (4th) 758, at p. 760, 51 O.R. (2d) 193, at pp. 194-195 (Ont. C.A.). However, it is unclear whether the House of Lords was referring to a fiduciary relationship or the relationship necessary to give rise to a presumption of undue influence. They seemed to combine these two concepts. See the text *supra*, footnote 20.

ples of a solicitor and client or a ward and guardian—but they are not necessary. Fiduciary duties can flow between equals, as in the case of a partnership, or indeed from the weaker to the stronger as in the case of an employee toward his employer. One will not generally find undue influence or inequality of bargaining power in these relationships. Conversely, undue influence, duress and unequal bargaining power do not in themselves produce fiduciary duties. These matters, without more, sound in unconscionability or unjust enrichment. In *Adamson v. Watts & Henderson*,³¹ a settlement agreement between an employee and employer on termination of an employment contract was set aside on the grounds of duress, inequality of bargaining power and reliance, but there was no suggestion of any fiduciary relationship and indeed such a suggestion would be untenable. Fiduciary relations are determined by the concepts of power, undertaking and reliance and not whether the defendant overstepped the bounds of acceptable commercial morality or took advantage of another's weakness. However, if undue influence, duress or unequal bargaining power are present, they can be probative factors in establishing the reliance and thus the relationship.

The term fiduciary does not connote a single class of relationship to which a fixed set of rules and principles apply. Rather, when a person assumes a fiduciary role the undertaking is that he will act in the interest or interests of the principal, as defined, and will not allow his own interests to conflict with the duty that he has undertaken. The scope of the undertaking will be as varied as are human engagements, both with respect to the interests to be served, the nature and content of the duty and the extent of the concomitant restrictions. The obligations will vary from case to case, both in content and degree.³² This is dealt with more fully under the section of this article entitled *The Scope of Duty*.³³

III. Commercial Contracts

Some contractual relationships often demand, as a core element, fiduciary obligations on the part of one of the parties. Examples of this are solicitor-client and vendor-agent engagements. But, if custom, or the inherent nature of the contract does not demand the observance of fiduciary duties, and if the contract is silent on the point, may they nevertheless co-exist with the stated contractual duties? There is some conflict.

³¹ (1987), 16 C.C.E.L. 73 (Ont. H.C.).

³² The duty and restrictions are as defined by the parties and circumstances. See *Hospital Products Limited v. United States Surgical Corp.*, *supra*, footnote 14, per Mason J., at p. 458. See also *Phipps v. Boardman*, [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (H.L.); *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, (1973), 40 D.L.R. (3d) 371.

³³ *Infra*, p. 18.

There has been a basic reluctance to perceive or exact fiduciary duties in ordinary contracts. This is understandable. The inherent nature of most contracts involves opposing interests, at least during contract formation, and this is at odds with loyalty to the interests of the other person which are at the core of fiduciary duty. The two concepts are mutually exclusive to a point, but this does not mean that the parties, having come together for contract purposes, may not introduce a fiduciary duty of loyalty and good faith between them for some purposes and to some extent. This is to be seen in *International Corona Ltd. v. Lac Minerals Ltd.*³⁴ where, as mentioned, such duties were found to exist between businessmen negotiating a joint venture agreement.

Nevertheless, there is still a common belief that general commercial transactions between experienced businessmen will deny the existence of fiduciary obligations, unless the parties clearly provide for it. It is said that if the parties have worked out the details of their relationship and have reduced it to a written contract, there is not much room for a court to interfere by implying a fiduciary duty that the parties have declined to express.³⁵

If this is correct, why can a court permit and impose a duty of care in tort in the face of a similar commercial contract? The result of *Rafuse, Maryon and Consumers Glass*³⁶ is that while a contract produces contractual duties, it will not exclude the generation of duties in the field of negligence unless the contract either expressly or impliedly excludes such duties. A duty of care may arise not only as a contractual obligation but also from the proximate relationship that comes into being as a result of the contract.

It is submitted that there is no difference in principle between the two situations and that the approach shown by the courts when dealing with the tort-contract relationship should also be used when dealing with the contract-fiduciary relationship. To do so gives a mature flexibility to the law rather than the rigidity that is involved in cases like *Jirna*.³⁷

If the arrangement between the parties is of a purely commercial kind and they have dealt at arms' length and on an equal footing, then these factors are important in indicating that no broad fiduciary relation-

³⁴ *Supra*, footnote 22.

³⁵ *Jirna Ltd. v. Mister Donut of Canada* (1971), 22 D.L.R. (3d) 639, [1972] 1 O.R. 251 (Ont. C.A.), aff'd, [1975] 1 S.C.R. 2, (1973), 40 D.L.R. (3d) 303; *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726, at p. 745, (1982), 135 D.L.R. (3d) 1, at p. 15.

³⁶ *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, (1986), 31 D.L.R. (4th) 481; *John Maryon International Ltd. v. New Brunswick Telephone Co.* (1982), 141 D.L.R. (3d) 193, 24 C.C.L.T. 146 (N.B.C.A.); *Consumers Glass v. Foundation Co. of Canada* (1985), 20 D.L.R. (4th) 126, 33 C.C.L.T. 104 (Ont. C.A.).

³⁷ *Jirna Ltd. v. Mister Donut of Canada*, *supra*, footnote 35.

ship exists but they are not conclusive factors. Each case depends on the circumstances.

But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arms' length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its own merits with the view of ascertaining whether it manifests the characteristics of a fiduciary relationship.³⁸

In *International Corona Ltd. v. Lac Minerals Ltd.*³⁹ the Ontario Court of Appeal said the same thing:

We agree that the law of fiduciary relationships does not *ordinarily* apply to parties who are involved in arm's length commercial transaction. Nevertheless, it appears to be clear that the law of fiduciary relationships does apply in certain circumstances to persons dealing at arm's length in commercial transactions.

It becomes a question of fact in each case whether the relationship of the parties, the one to the other, is such as to create a fiduciary relationship. The circumstances which give rise to such a relationship have not been fully defined nor are they forever closed.

How is the problem to be approached? There are two possibilities. One is to use classic contract law and see if a fiduciary duty may be implied based on the rules for the implication of terms. This is a comparatively narrow approach because the rules governing implied terms in contract are highly restrictive in order that certainty in contract not be threatened. A term can be implied only if it is necessary to give business efficacy to the contract or if it is something so obvious that it goes without saying.⁴⁰ Lambert J.A. dealt with this in the fiduciary context as follows:⁴¹

If the parties are in a contractual relationship, and the question is whether their relationship gives rise to a fiduciary duty, it is relevant to consider whether a term should be implied, by operation of law or by the deemed consent of the parties, to encompass the fiduciary duty. The custom of the trade may require the implication of such a term as it does in the relationship of solicitor and client. But if there is no recognized custom of the trade, as there is none with respect to life insurance

³⁸ *Hospital Products Limited v. United States Surgical Corp.*, *supra*, footnote 14, per Mason J., at pp. 456-457; see also Gibbs C.J., at p. 433, for a similar statement.

³⁹ *Supra*, footnote 22, at pp. 635-636 (D.L.R.), 44 (O.R.); see also *United Dominion Corporations Ltd. v. Brian Pty. Ltd.* (1985), 59 A.L.J.R. 676 (H.C. Aust.).

⁴⁰ See S. Waddams, *The Law of Contracts* (2d ed., 1984), p. 366.

⁴¹ *Burns v. Kelly Peters & Associates Ltd.*, *supra*, footnote 14, at pp. 601 (D.L.R.), 330 (C.C.L.T.). *B.P. Refinery Pty. Ltd. v. Shire of Hastings* (1977), 16 A.L.R. 363 (P.C.), held that a term may be implied if the following conditions are met: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it goes without saying; (4) it must be capable of clear expression; and (5) it must not contradict any express term of the contract.

salesmen who give financial advice, then it is reasonable to ask whether the principles employed in the law of contract for the implication of terms are met. Those principles permit the implication of a term where the nature of the contract or the strictures of the law require it, or where the business efficacy test or the officious bystander test is satisfied.

The second approach is broader and is the same approach that is used when considering whether tort duties may co-exist with contractual duties. In a tort and contract situation, the circumstances and relationship between the parties may be such that it gives rise to a general duty of care between them, based on the principle enunciated in *Donoghue v. Stevenson*,⁴² notwithstanding the existence of a contract. If there is a relationship of sufficient proximity between the parties, a general duty of care may exist no matter that the circumstances giving rise to such proximity were brought about as a result of the contract, and no matter that contractual duties exist between the parties, unless the contract, either expressly or impliedly, excludes such other duties.⁴³ The same reasoning must logically extend to the question of whether fiduciary duties may co-exist in the presence of commercial contractual duties.

The question then, is whether the parties by their actions toward each other have added fiduciary duties to their relationship in the one case, or duties of care in the other. In each case, the contractual foundation is important because it delineates the basic rights and liabilities of the parties and if extra-contractual duties are to exist they must be consistent with the terms of the contract, and not contradictory to them.

It is submitted that one should start by asking whether a fiduciary term should be implied because of the nature of the contract, or the custom of the trade, whether the strictures of the law demand it or whether the business efficacy test demands it. If not, then one asks whether the parties by their interactions have introduced a fiduciary component. Was there a relationship between the parties such that gave rise to a justified reliance, and thus vulnerability, based on the representation or undertaking of the defendant that he would be acting in the interests of the plaintiff? If so, there should be liability, just as there is in a *Hedley Byrne*⁴⁴ situation.

This broad approach conflicts with the attitude expressed in *Jirna*⁴⁵ and *Dunlop*⁴⁶ which, in essence, holds that the written contract is the governing consideration and if fiduciary obligations are not provided for in the contract they are not included.

⁴² [1932] A.C. 562 (H.L. Sc.).

⁴³ See cases cited, *supra*, footnote 36.

⁴⁴ *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

⁴⁵ *Jirna Ltd. v. Mister Donut of Canada*, *supra*, footnote 35.

⁴⁶ *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, *ibid.*

Which approach our courts will take remains to be seen but it is submitted that the certainty of the written contract is not the only consideration⁴⁷ and it should not be used to hide the realities that exist in the parties' relationship. There is no reason to view the co-existence of fiduciary duties in a contractual setting any differently than one views the co-existence of tort duties in a contractual setting. In both cases, there are simply additional duties, or duties that differ in quality, over and above the contractual duties. It helps, when one is considering whether a fiduciary component has been introduced into the relationship, to recall that the philosophy that underlies the fiduciary principle is that fundamental decency and honour in personal and commercial affairs is something to be valued, and enforced according to the circumstances.

In case one is gripped with alarm that on this basis the commercial world will become topsy-turvy with uncertainty and that all commercial contracting parties will become fiduciaries, comfort will be had with the realization that generally contracts will exclude fiduciary obligations, either expressly or by implication, or the fiduciary aspect will add nothing to the duties that are already there under the contract. But in any event, the presence of such duties, involving good faith and ethical and honourable behaviour, is not to be totally discounted in value.

IV. *Fiduciary Duties, Contractual Duties and Duties of Care*

What distinguishes a fiduciary duty from a contractual duty or a duty of care based on the *Hedley Byrne*⁴⁸ principle? In each case the elements giving rise to the duty are the same, that is, a power to affect another's interest, an undertaking, a reliance and a knowledge of the reliance. Reasonable reliance on another's undertaking and, through it, vulnerability, is at the root of liability for breach of fiduciary duty just as it is the root of liability for breach of contract or under the *Hedley Byrne* principle.

In *Burns v. Kelly Peters & Associates Ltd.*,⁴⁹ Lambert J.A. said:

Just as reasonable reliance, and through it, vulnerability, is at the root of liability under the *Hedley Byrne* principle; so vulnerability, arising through justifiable reliance or in some other way, is at the root of liability for breach of fiduciary obligation.

He could have added that these matters are also at the root of liability in contract. He went on to deal with the parallels between an action for breach of fiduciary duty and an action in negligence for breach of duty of care.⁵⁰

⁴⁷ *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R.347, at pp. 362-363, (1982). 132 D.L.R. 193, at p. 205.

⁴⁸ *Supra*, footnote 44.

⁴⁹ *Supra*, footnote 14, at pp. 600 (D.L.R.), 330 (C.C.L.T.).

⁵⁰ *Ibid.*, at pp. 598 (D.L.R.), 327 (C.C.L.T.).

The parallels between an action for breach of fiduciary duty and an action for negligence for breach of a duty of care are manifest. In both cases the duty arises whenever the relationship between the parties brings it into being; in both cases the categories of relationship which will bring the duty into being are not closed and fixed, but are variable and flexible and are influenced by what the parties made of their own relationship; in both cases the duty may arise in respect of one aspect of the relationship but not in respect of another aspect; in both cases the establishment of the duty does not end the search for the nature of the obligation, because even when the duty is established, the standard which must be attained may vary; and, in both cases, where the relationship that gives rise to the duty grows out of a contractual linkage between the parties, the duty is likely to be influenced in its existence, in its scope, and in its standard, by the provisions of the contract.

A good illustration of the similarity and the overlap in duties is to be seen in the approach of the trial judge in *Tracy v. Atkins*⁵¹ where the defendant, a lawyer, acting for the purchaser of real estate, was the only solicitor involved in the transaction. The vendors, who were elderly, were not represented but did not retain the defendant. Despite this, the trial judge held that the defendant owed a duty of care *and* a fiduciary duty to the plaintiffs. It is to be seen in the facts that there was a relationship of proximity because the defendant, though he may not have expressly undertaken to represent the interests of the plaintiffs, did undertake to carry out all the conveyancing and he knew or ought to have known that the plaintiffs might well be relying on him to protect their interests. The British Columbia Court of Appeal affirmed the trial judge's decision, but on the basis of a duty of care in negligence and a "*Hedley Byrne*" duty, and did not refer to a fiduciary duty. Nevertheless, this case gives a strong example of the functional merging of fiduciary duty and duty of care; and, in this situation, they are indistinguishable. Indeed, if there had been a retainer, the plaintiff would have been owed a contractual duty as well.⁵²

Two matters are to be noted. One is that the theoretical basis of liability is the same for breach of contract, breach of a *Hedley Byrne* duty or a fiduciary duty; and that is the protection of reliance arising from an undertaking. The second matter to be noted is that a fiduciary duty is not a unique phenomenon but is just one part of the world of private law duties between individuals; such duties do not arise in a vacuum but they arise as part of the duties flowing from contractual or duty of care relationships.

If the foregoing is correct, then every relationship which involves an undertaking, reliance and power (contractual or otherwise), can be classified as fiduciary. For instance, in the every day world of contract where a person is entrusted to do something like repair a car or cultivate

⁵¹ (1977), 83 D.L.R. (3d) 47 (B.C.S.C.), aff'd (1979), 105 D.L.R. (3d) 632 (B.C.C.A.).

⁵² See *Central Trust Co. v. Rafuse*, *supra*, footnote 36.

a rose garden and undertakes to do so, a power and indeed a discretion is entrusted which can affect the owner's interest and the owner will ordinarily be in an extremely vulnerable position. These are fiduciary relationships even though we normally do not think of them as such. The elements present are the same as in the situation where a vendor entrusts an agent to sell his home—the agent is a fiduciary. The point is that fiduciary relations are infinitely varied and prevalent but we do not think of them as such and it is not necessary to do so. Fletcher Moulton L.J. pointed out that fiduciaires can range from the trustee to the errand boy.⁵³

It is said that the son was the manager of the stores and therefore was in a fiduciary relationship to his mother. This illustrates in most striking form the danger of trusting to verbal formulae. Fiduciary relationships 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 parties 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.

We do not think of the mechanic, the gardener or the errand boy as fiduciaries because the interest being served is very narrow, the scope of the power and extent of the vulnerability is very limited with the result that the "common law" remedy of compensatory damages will suffice and the need to resort to fiduciary considerations and remedies is not present. However, the fiduciary principle will be resorted to in some instances in order to get a broader remedy. For instance, if the errand boy turns the object of the errand to personal use or profit or utilizes the information contained in the message that he is delivering, it can be expected that for purposes of remedy it will be alleged that he was fulfilling a fiduciary role. It is to be remembered that remedies in our system of law are discretionary and are to be applied according to the justice of the case: "The equity of the transaction must shape the measure of relief."⁵⁴

⁵³ *Re Coomber*, [1911] 1 Ch. 723, at pp. 728-729 (C.A.); quoted with approval in *Glover v. Glover*, [1951] 1 D.L.R. 657, at pp. 663-664 (P.C.).

⁵⁴ Cardozo J. in *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, at p. 389 (N.Y.C.A., 1919).

It is the basic submission of this article that the concept of fiduciary duty is relevant only in terms of remedy and there is no difference in substance between fiduciary duties and the other duties. In each case, the elements that are involved are the same. The only difference is that the degree of power, reliance and vulnerability in relationships that we designate as fiduciary is generally greater than in the usual contract or duty of care situations with the result that a higher degree of duty and good faith is exacted from the fiduciary and more restrictive rules of behaviour are imposed on him, in keeping with the higher duties, and because of all this, wider remedies are available, which of course include equitable remedies.

In classic fiduciary situations, such as those involving executors, solicitors and agents, it is readily seen that the measure of power, reliance and vulnerability is normally substantial and much more so than in ordinary contract or duty of care situations. The "trust" element is much more significant. As a result, the law does two things. It recognizes that the fiduciary's undertaking must involve an intrinsic duty of loyalty and good faith, and if this level of performance is to be met, the duty will have to involve correlative restrictions on the freedom of the fiduciary. Not to do so would threaten the fidelity of performance undertaken. Secondly, because of the degree of trust and vulnerability, the law makes available a wide range of remedies. This is done to ensure that the remedies are adequate to rectify the wide damage and injustice that can be caused in any particular case and also to safeguard the institution of fiduciary relationships.

The remedies go far beyond compensatory principles: the defendant may be obliged to account and disgorge to the plaintiff all profits that he has received even though the plaintiff has not suffered a corresponding loss or any loss at all; and third parties as well may be liable if they partake or assist in a breach of trust. The range of remedies which are available will be seen more fully under the section entitled *Remedies*.⁵⁵

It may be argued that, in addition to remedies, fiduciary relationships are distinguished (1) by the high degree of loyalty and good faith expected from the fiduciary; and (2) by the restrictive rules that surround fiduciary structures, such as those which say that a fiduciary may not profit from his position even if it is not at the expense of his principal. This is true, but these matters only trigger the remedies; they are not matters of substance or principle, instead, they are matters of scale relating to the level of duty undertaken. As previously said, because of the trust and vulnerability involved, the fiduciary's undertaking will include an obligation to act in the best of good faith; and the restrictions that follow are nothing more than the reverse side of such duties, and they

⁵⁵ *Infra*, p. 20.

are imposed to protect against any interference with performance of the high duty undertaken.

Although there are many relationships that could be called fiduciary and are not, in the converse sense there are cases where the need for a "fiduciary" remedy has induced the court to label the relationship a fiduciary one when it really was not. This can be seen in such cases as *Reading v. Attorney General*⁵⁶ and *Goodbody v. Bank of Montreal*,⁵⁷ where an army sergeant and thief were respectively referred to as fiduciaries. As was noted earlier,⁵⁸ such a device would not be necessary in Canada today because we recognize a general principle of unjust enrichment and accept that constructive trusts and tracing orders do not require a fiduciary base. In this vein, it might be questioned whether it was necessary to find the existence of a fiduciary relationship between the intending joint venturers in *International Corona Ltd. v. Lac Minerals Ltd.*⁵⁹ The plaintiff complained that the defendant made use of mining information that was disclosed to it during negotiations. It is submitted that the general doctrine of unjust enrichment or the more specific doctrine of breach of confidence would cover the matter and provide the same remedy as flows from breach of fiduciary duty and in fact the courts did so find with respect to the breach of confidence.

V. *The Scope of the Duty*

The existence of the relationship is the first step. The next step is to determine what is involved in the relationship. The fiduciary concept, as previously stated, does not connote a single class of relationship to which a fixed set of rules and principles apply; instead, fiduciary relationships are of different types carrying different obligations and vary from case to case.⁶⁰

In order to find out what is involved in the fiduciary obligation in any particular case, the simple approach is to ask: what has the fiduciary undertaken to do? How has he undertaken to do it? Does the law expect anything else from him?

This boils down to a simple statement: the scope of the undertaking defines the duty to be obeyed. The duty to be obeyed can vary in a number of ways: (1) the interests to be served; (2) the duties to be

⁵⁶ *Supra*, footnote 17.

⁵⁷ *Supra*, footnote 18.

⁵⁸ *Supra*, p. 6.

⁵⁹ *Supra*, footnote 22. But see *McLeod & More v. Sweeze*, [1944] S.C.R. 111, where fiduciary duties were imposed on an independent contractor in a joint venture mining claim operation.

⁶⁰ *Supra*, footnote 32.

performed; (3) the standards to be attained; and (4) the restrictions to be obeyed. The principal's interests that must be served and protected, as we have already said, are as defined and understood by the parties. A fiduciary relationship does not necessarily connote a total all-embracing duty and loyalty to the principal for all purposes. The question is to ask what did the fiduciary undertake. The undertaking may be of a general character extending to all of the others' interests, as occurs in the case of a general agency or where a general power of attorney is held, or it may be specific and limited as in the case of an agent appointed to sell a specific property.

Lord Wilberforce said that a person "may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction or group of transactions must be looked at".⁶¹ He then quoted Dixon J.:⁶²

The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties. . . but also from the course of dealing actually pursued by the firm.

*Two Brothers Kingston Limited v. Zakos*⁶³ is a recent illustration of the principle that a fiduciary duty may exist in relation to some activities but not in relation to others. The defendant was an insurance agent who, at the plaintiff's request, insured property that the plaintiff was interested in buying, but shortly thereafter obtained the property for himself. It was held that the agent was a fiduciary for insurance purposes but the duty stopped there and he was entitled to be involved in matters, which, while of interest to his principal, were irrelevant to and did not conflict with his engaged duty. It does not appear from this case that the defendant made use of any opportunity that arose or information that was gained from his position as an agent.

The nature and content of the duty as it relates to the principal's interests will vary from case to case in various respects. What are the duties that must be performed? What standards apply? And what restrictions are to be observed? In other words, what must the fiduciary do and what must the fiduciary refrain from doing?

In some cases, the obligations of performance are comparatively minor while in others they are quite onerous. If we compare the duty that is on an errand boy to serve the interests of his employer with the

⁶¹ *New Zealand Netherlands Society "Oranje" Incorporated v. Kuys*, [1973] 1 W.L.R. 1126, at p. 1130, [1973] 2 All E.R. 1222, at pp. 1225-1226 (P.C.).

⁶² *Ibid.*, at pp. 1130 (W.L.R.), 1226 (All E.R.). The quotation is from *Birtchnell v. Equity Trustees, Executors & Agency Co. Ltd.* (1929), 42 C.L.R. 384, at p. 408 (H.C. Aust.).

⁶³ (1985), 28 D.L.R. (4th) 541, 55 O.R. (2d) 371 (Ont. H.C.). Aff'd by Ont. C.A., Jan. 26, 1988 (unreported).

duty that is on a solicitor to serve the interests of a client the proof is obvious. In the former case, the duty may involve nothing more than reasonable performance in making a purchase and returning the change, while in the latter case the duties on the solicitor may involve not only competent performance in completing a purchase and the avoidance of secret profit but many other duties such as information, guidance and advice.

The correlative restrictions that are imposed on a fiduciary's freedom of action will, of course, also vary from case to case. In some they are very strict—the trustee is the paradigm in this sense. He must serve the beneficiary's interests with the utmost loyalty and to the utter exclusion of his own interests. But the rigorous standards that are appropriate to a trustee do not necessarily apply to other fiduciaries. In some cases the fiduciary may be permitted, under the contract, to pursue his own interests, or profit from his position, but if the profit comes from within the ambit of his duty it will be necessary to have the informed consent of the principal, unless it is clearly understood, as in the case of a partnership or joint venture arrangement where the self-interest of the parties is self-evident. In every case, the answer is to be found in the facts. In conclusion, it is not correct to say that a fiduciary must serve his principal's interests to the exclusion of his own or all other interests or that a fiduciary may never profit from his position. The correct statement is that a fiduciary may not profit from an act which occurs within the scope of the duty that he undertakes, unless it is with the informed consent of his principal.

VI. Remedies

In negligence and contract law the injured party is normally restricted to damages, but under fiduciary law the remedies that are available are both wider and considerably more advantageous. Restitutionary remedies in general are covered in the standard texts and will only be referred to briefly here, but this article will deal more extensively with the deterrent and prophylactic aspect of the remedies which frequently result in windfalls to the plaintiff.

Both personal and proprietary remedies are available. Therefore, the plaintiff may claim damages or an accounting for profit, or he may exert a claim for a specific asset by way of a constructive trust or equitable lien. The proprietary remedies are of particular value if the asset is unique or has appreciated in value because the plaintiff will get the benefit of the appreciation (but this will not occur in the case of an equitable lien which is for a specific amount), and if the defendant is insolvent the plaintiff's position becomes that of a secured creditor because the claim is exerted against the asset. Tracing is an equitable remedy which allows the plaintiff to follow property into the hands of a third party.

Restitution, rather than damages, is the normal remedy in fiduciary situations. This goes much beyond compensation, for the principal may have lost nothing. It requires the defendant to restore what he took or acquired from his position. Because of this, the plaintiff's loss is irrelevant. Because the appropriate relief is to require the defendant to restore what he took, and in lieu thereof to account to the plaintiff, it follows that if monetary compensation is to be paid instead of restoring the assets, then the "damages" are at large and are not restricted by principles of foreseeability and remoteness, and any increase in market value between the time of breach and the date of restitution will be for the account of the fiduciary.⁶⁴ It should be noted that the defendant can be called to account as well as to restore the assets.

If a fiduciary obtains a profit, benefit or advantage from within the ambit of his duty the law is tough and he must disgorge it. It is irrelevant that the beneficiary would never have obtained the benefit or that it could not have been made without the fiduciary's special skill or that the plaintiff lost nothing thereby; also, the fairness of the transaction and the good faith of the fiduciary are irrelevant.⁶⁵

The stringency of the rules is designed to keep the relationships pure and to safeguard the absolute loyalty that the principal can expect by removing even the possibility of personal benefit. If the fiduciary cannot profit, he will not be tempted to put self-interest before duty. But it is not only the fiduciary who breaches his duty who is liable to the principal. The courts also zealously protect the fiduciary relation from any external attack.

A party who pays a secret commission to a fiduciary or otherwise knowingly assists in the breach of a fiduciary's duty is also liable. The knowledge may be constructive as well as actual and liability will exist even where the third party did not share in the illegal profit or where the principal suffered no loss.⁶⁶

In *MacMillan Bloedel Limited v. Binstead*,⁶⁷ the defendant Binstead was an employee of the plaintiff and had the duty of disposing of surplus logs. He had a secret one-third interest in a log company that was also a defendant, as were its other two shareholders. Over the years, the log company, or a related company, acquired and disposed of many of

⁶⁴ *Guerin v. The Queen*, *supra*, footnote 11; *Maghun v. Richardson Securities* (1986), 34 D.L.R. (4th) 524, 58 O.R. (2d) 1 (Ont. C.A.).

⁶⁵ *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 (H.L.); *Phipps v. Boardman*, *supra*, footnote 32.

⁶⁶ *Coy v. Pommerenke* (1911), 44 S.C.R. 543; *Ontario Wheat Producers Marketing Board v. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729, 46 O.R. (2d) 362 (Ont. C.A.); *MacMillan Bloedel Limited v. Binstead* (1982), 22 B.L.R. 255 (B.C.S.C.).

⁶⁷ *Ibid.*

the plaintiff's surplus logs at a handsome profit. The plaintiff sued for these profits, even though it had been paid the full price that it wanted for the logs and would not have sold them for a higher price (this was because of industry/policy reasons). The defendant Binstead was liable, even though the plaintiff lost nothing and the other defendants who knowingly participated in Binstead's breach of fiduciary duty and who received profits derived as a result were also liable. Another defendant, an accountant, who did not receive any of the illegal profits but who knowingly participated in the breach, was also liable. The trial judge, Dohm J., stated the law as follows:⁶⁸

A stranger to a trust who has not received any trust property can be fixed with liability as a constructive trustee only if it is shown that he assisted the trustee as his agent in a breach of trust and had knowledge of a dishonest or fraudulent design on the part of the trustees. The knowledge need not be actual, it need only be constructive. And to succeed in an action for an accounting in these circumstances, it need not be shown that the stranger was the recipient of any of the trust property (Morgan received his professional fee only and no trust funds passed through his hands.) Nor must it be shown that the stranger profited from the trust or that he was an active participant in the dishonest scheme.

The judgment further stated that all such defendants were liable "not to balance the equities but to ensure that trustees and fiduciaries remain faithful and that those who assist them in the breaches of their duty are called to account".⁶⁹

May the plaintiff enjoy cumulative remedies which result in a double recovery? A fiduciary must account to his principal if he receives a secret commission, and the payor of the commission is also liable.⁷⁰ In such a case, are the remedies that are open to the plaintiff cumulative or alternative ones? The better view is that the remedies are distinct and cumulative so that payment by one does not exclude or exonerate payment by the other, but the cases are in conflict. The English Court of Appeal in *Salford Corporation v. Lever*⁷¹ held that where the agent accepts a bribe and the principal demonstrates that he suffered real damages in that he paid a price that exceeded the market value or received a price that was less than the market value, he can recover both the bribe and the damages. The concise headnote from the *Salford* case reads as follows:⁷²

⁶⁸ *Ibid.*, at p. 291.

⁶⁹ *Ibid.*, at pp. 287-288. See also the *Ontario Wheat Board* case, *supra*, footnote 66, where the bank was liable for receiving money deposited by the plaintiff's agent in breach of his fiduciary duty to the Board of which the bank had knowledge.

⁷⁰ *Coy v. Pommerenke*, *supra*, footnote 60.

⁷¹ *Salford Corporation v. Lever*, [1891] 1 Q.B. 168 (C.A.). *Salford Corporation* was referred to by the Ontario Court of Appeal in *Peacock v. Crane* (1913), 29 O.L.R. 282, and quoted with approval by Idington J. in *Coy v. Pommerenke*, *supra*, footnote 66.

⁷² *Ibid.*, at p. 168.

Where an agent, who has been bribed to do so, induces his principal to enter into a contract with the person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies; he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, either jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract, without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third person first.

Two cases go the opposite way. The Privy Council dealt with this problem in a case from Malaysia⁷³ and held that the principal's remedies were in the alternative and an election had to be made between suing for money had and received, that is, the bribe, on the implied contract, and suing for damages in tort, that is, for fraud. The plaintiff sued only the briber (the agent had fled with his funds), and the question was whether the plaintiff could recover from the briber the amount of the bribe paid plus the amount of the payment that exceeded the market value. It was held that the plaintiff could not recover twice. The Privy Council rejected *Salford* and approached the whole matter as a question of damages.

Prior to this, the Nova Scotia Appellate Division came to a similar conclusion in *Attorney General of Nova Scotia v. Christian*,⁷⁴ where a senior government official was paid a secret commission for the sale of lands to the government. The purchase price was higher than necessary. The bribing company, its agent, and the government official were all found liable jointly and severally for the bribe *and* the damages, that is, the excess price. The bribing company appealed the award of the bribe plus the damages. The Court of Appeal also approached the matter on general damage principles involving the tort of fraud and deceit and held that the briber did not have to pay both the damages and the bribe. The government had established its loss, and its recovery was limited to that.

In each case, the basic reasoning in refusing cumulative remedies was that a person should not recover twice from the same wrong; otherwise he is over-compensated. This makes eminent sense as a general principle of damage theory, but there is nothing wrong with a double recovery if we view the second recovery as the disgorgement of an unjust enrichment or as a punitive measure rather than a compensatory measure.

In considering whether the agent must pay for the damages and hand over the bribe, we must bear in mind broader interests than merely compensating the plaintiff for his loss. If the agent does not have to hand over the bribe as well as pay for the loss caused to the principal,

⁷³ *Mahesan v. Malaysia Government Officers Co-op*, [1979] A.C. 374, [1978] 2 All E.R. 405 (P.C.).

⁷⁴ (1974), 49 D.L.R. (3d) 742 (N.S. App. Div.).

there is little deterrent to him. He has little to lose and it pays him to be fraudulent. If he succeeds in hiding the fraud, he keeps the bribe to the detriment of his principal, but if he is found out, he only has to hand it over or keep the bribe and pay the damages.

To extend the Nova Scotia and Malaysian decisions to the issue of whether the principal can recover from both the briber and the agent would involve the same mistake of equating the theory of damages with principles of fiduciary obligation and unjust enrichment. Ordinary damage principles alone do not govern the issues. Damages, unjust enrichments and sanctions are all involved and the issue is whether there can be an accounting of the unjust enrichment from the agent, which frequently is also the presumed loss, plus a sanction exacted from the briber at the same time. Because the claims are different in nature and purpose, they should be able to coexist. If they are not cumulative we lose a significant deterrent value. It is submitted that the windfall or double recovery to the plaintiff is preferable to encouraging fraud, weakening our structures or trust, and prejudicing those whom we wish to protect. The windfall is irrelevant to the problem. It may be that because jail terms were imposed in both of these cases this avoided the need for an added deterrent based on restitutionary principles.

The wider approach to the problem set forth in *Salford* and arguably adopted in Ontario⁷⁵ is much to be preferred.

We have seen that those who assist in a breach of fiduciary duty can also be liable. The next question is to ask what the situation will be where no bribe is involved but a fiduciary obtains a secret profit with the help of a third party who has knowledge of the fiduciary obligation, as in *MacMillan Bloedel Limited v. Binstead*.⁷⁶ Will there be cumulative liability and recovery? What if the plaintiff did not suffer any real loss? How many times can the plaintiff recover? Will honesty or *bona fides* affect the cumulative aspect?

There are no ready answers, but it is submitted that the problem is to be approached by considering all factors, including whether the principal suffered a loss, whether the fiduciary was unjustly enriched, whether there was dishonesty or *male fides*, and whether there is a danger that by not imposing a sanction our system of fiduciary relations and principles will be weakened. In the absence of bad faith, dishonesty, or conduct that should be censured, it is doubtful that the plaintiff will recover twice. And where there are several who are caught up in the deterrent net, their liability will probably be joint and several, not cumulative, unless there is conduct to be censured.

⁷⁵ *Supra*, footnote 71.

⁷⁶ *Supra*, footnote 66.

VII. Rigidity of Rules

The standards of conduct that are imposed on the classic fiduciary like a trustee can be very demanding. He must act in the interests of his principal. His duty is that of utmost loyalty and he must bring care, skill and devotion to his task. He is utterly selfless. A.P. Herbert might well have said of the fiduciary, as he said of the reasonable man, that he is an "excellent but odious character".⁷⁷

He must avoid and disclose any conflict of interest and may not obtain a profit, benefit or advantages out of his position unless it is with the full knowledge and consent of the principal. The fairness of the transaction and the good faith of the fiduciary are immaterial and it is irrelevant that the beneficiary could never have obtained the benefit or that it could not have been made without the fiduciary's special skill. The principal is entitled to payment even though he has lost nothing and the payment constitutes a windfall. The motives of the fiduciary are irrelevant.⁷⁸

It has been previously mentioned that the rules preventing a fiduciary from profiting from his position are designed to prevent injury to the principal resulting from a betrayal of confidence or abuse of a position of trust. But the rules have a much wider purpose than compensating the principal for a benefit obtained at his expense. They also have a prophylactic function, and for this reason the rules apply even where the plaintiff has lost nothing. It is well recognized that a fiduciary generally has many opportunities to profit from his position, and one of the main purposes of the strict rules is to remove all possibility of profit in order to avoid all possibility of conflict between duty and self-interest, thus to ensure totally devoted service. If all temptation is removed, the more likely that total loyalty will be assured.

It has been said that the rule against secret profits is an inflexible rule and that it must be applied inexorably; and the court is not entitled to receive evidence or argument as to whether the secret profits influenced the fiduciary in the performance of his duty or whether the principal did or did not suffer any injury as a result: "for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry".⁷⁹ If there is a secret profit the court will presume influence and injury and that presumption is irrebuttable.

⁷⁷ A.P. Herbert, *Uncommon Law* (1974), p. 4.

⁷⁸ *Regal (Hastings) Ltd. v. Gulliver*, *supra*, footnote 65, at p. 386.

⁷⁹ James L.J. in *Parker v. McKenna* (1874), L.R. 10 Ch. App. 96, at p. 125, quoted in *Charles Baker Ltd. v. Baker*, [1954] O.R. 418 (Ont. C.A.); see also *Barry v. Stoney Point Canning Co.* (1917), 55 S.C.R. 51.

It has also been said that if one tampers in any way with the rigidity of the law with respect to fiduciaries arising from an agency relationship, "one will destroy the whole fabric of the trust reposed in the relationship of principal and agent".⁸⁰

There are two basic submissions to be made with respect to the above rules. First, the rules which state that evidence of motive and lack of injury are irrelevant and inadmissible and that the presumption of influence and injury are irrebuttable are not substantive law which go to jurisdiction, but rather, they are at most rules of practice. They are matters for the discretion of the judge.⁸¹ The rules can and should be varied depending on the circumstances and needs of justice in any given case. Secondly, the general rules that govern fiduciaries are salutary and sound, but they should be applied "sensitively, not as a sledge-hammer".⁸²

Each case should be examined on its own merits keeping in mind the basic principles of fairness on the one hand and the importance of untainted fiduciary relations on the other. There is no argument if the fiduciary profits at his principal's expense. Such profits must be disgorged. But, is it fair or necessary to treat a fiduciary who acts openly and in good faith, and without any prejudice to his principal, in the same manner as a fiduciary who acts surreptitiously, dishonestly and to the prejudice of his principal? "To treat the innocent with the same severity as the guilty is rigorous equity."⁸³ It is submitted that if the fiduciary proves his honesty and shows affirmatively that he acted in his principal's best interest and shows that the fiduciary's gain was not at the expense of the principal, then he should not be obliged to go further.

The reason for the rules, as has been said, is to remove all temptation from the fiduciary because the plaintiff is entitled to expect the best of good faith and loyalty in performance. But, secondly, the courts have stated that in cases of this kind the plaintiff who is at a disadvantage because of the reliance and trust should not be put to the burden of having to show that the fiduciary's gain was at the plaintiff's expense. As well, the courts themselves, it is said, are not up to the task of examining and ascertaining the true situation of whether the benefit influenced the fiduciary in the performance of his duty and, in consequence, caused prejudice to the principal. This is because the answer is dependant on facts which, to a large extent, come under the control of the fiduciary. The power, control and knowledge possessed by the fiduciary

⁸⁰ *S.E. Lyons Ltd. v. Lennox Contractors Ltd.*, [1956] O.W.N. 624, at p. 626 (Ont. H.C.), per McRuer C.J.

⁸¹ See Gareth Jones, *Unjust Enrichment and the Fiduciary's Duty of Loyalty* (1968), 84 Law Q. Rev. 472, at p. 490; *Holder v. Holder*, [1968] Ch. 353 (C.A.), per Sachs L.J., at pp. 402-403 and *Dankwerts L.J.*, at p. 398.

⁸² Jones, *ibid.*, at p. 487.

⁸³ *Ibid.*, at p. 478.

are such that he can paint a picture or develop a transaction in a manner that appears perfectly proper and favourable to the principal whereas in reality it is prejudicial, and because of the comparatively weak position of the principal it will not be possible for him or his advisers to penetrate, examine and decide the matter, and therefore, the courts adopt a blanket prohibition on principle.

This is too modest an assessment of the talent and abilities of beneficiaries, advisers and courts. It should not be necessary to place an absolute bar on the possibility, as well as the actuality, of an unjust enrichment. If the fiduciary proves that he was open and honest, was acting at all times in his principal's best interests and that the gain was not at the expense of the principal, and the court is satisfied as to the propriety of the fiduciary's motives and actions, the whole basis of the objection disappears because the precondition that the court be satisfied, beyond doubt, as to what the true situation is, has been met.

There are other arguments to support a relaxation of the rules. One is that while we have an interest in protecting the integrity of fiduciary relations we also have an interest in encouraging commercial and economic enterprise. If we impose excessively tough and rigid rules in commercial relationships there is a danger that we will smother or inhibit entrepreneurial initiative. If the interest of protecting such relationships is over-zealously applied, it may conflict with society's interest in providing economic incentive. This was recognized in *Lavigne v. Robern*,⁸⁴ where the court quoted the following language of Professor Weinrib:⁸⁵ "... the courts must navigate a delicate course between the encouragement of co-operative mechanisms of business interests and the encouragement of profit-making by individual entrepreneurs." In addition, it must be asked, who will take on positions of trust if the rules are excessively rigid and restrictive? Many will be persuaded not to do so if they are going to be shackled unduly from otherwise legitimate matters.

Another argument to support a more relaxed approach, rather than the blanket approach, is that the fiduciary element is a variable. It is more intense in some relations than in others. In some cases the opportunity for tricky dealings is great—in other cases, not quite so. There is a huge difference in the quality of fiduciary trust when we contrast a corporation and one of its directors with a ward and his guardian. Different rules and shadings should apply when considering the obligations and restrictions that should be imposed and this depends on the varying degrees of dependence, vulnerability, discretion, and opportunity that are involved. The nature of the trust must define the stringency of the duty.

⁸⁴ *Supra*, footnote 27, at pp. 762 (D.L.R.), 63-64 (O.R.).

⁸⁵ *Loc. cit.*, footnote 9, at p. 18.

In addition, regard must be had to the fiduciaries themselves. The actions, intentions and motivations will vary from one fiduciary to another. Some fiduciaries can be guilty of fraud and deceit in securing a benefit, while in other situations, the benefit arises in circumstances of good faith where the fiduciary is acting in the interest of the principal and produces a most desirable result for the principal, but coincidentally, in doing so, he realizes a benefit for himself.

This point, and the harshness of the rules, are illustrated by *Phipps v. Boardman*,⁸⁶ where the defendants, in purchasing the shares involved, acted openly, in the best of good faith, and in the pure interest of the plaintiff, who could not purchase them. Nevertheless they had to account. It is said that cases like this carry the sense of justice to an unjust result. The Law Lords obviously recognized that the strictness of the fiduciary rules could amount to unjust enrichment, in reverse, because the defendants were allowed liberal compensation for their efforts and success.

Legal support for the position advanced, in addition to the *Lavigne v. Robern*⁸⁷ case above, is to be found in *Canadian Aero Service Ltd. v. O'Malley*⁸⁸ where Laskin J. suggested that in *Regal (Hastings) Ltd. v. Gulliver*⁸⁹ the fiduciary principles may have been over-zealously applied. In the British Columbia Court of Appeal, in *Peso Silver Mines Limited v. Cropper*,⁹⁰ Bull J.A., speaking for the majority, stated that although the principles and rules are salutary, care should be taken to interpret them in the light of modern practice and way of life. Support is also given to this position by academics.⁹¹

Practical demonstrations of the less rigid approach are to be seen from *Crocker and Croquip Ltd. v. Tornroos*⁹² and *Peso Silver Mines*.⁹³ In the first case an executor was permitted to buy shares in a company that the estate held shares in, and, as a result, the executor obtained control of the company. The estate could not buy in because the shares did not constitute trustee investments. In *Peso Silver Mines* directors of a company who picked up mining claims that the board had decided against, and which were contiguous to ground already staked by the company, were allowed to keep them. In *Holder v. Holder*,⁹⁴ the English

⁸⁶ *Supra*, footnote 32.

⁸⁷ *Supra*, footnote 27.

⁸⁸ *Supra*, footnote 32.

⁸⁹ *Supra*, footnote 65.

⁹⁰ (1965), 56 D.L.R. (2d) 117 (B.C.C.A.). The majority decision was affirmed on appeal, [1966] S.C.R. 673 (1966), 58 D.L.R. (2d) 1.

⁹¹ See Jones, *loc. cit.*, footnote 81.

⁹² [1957] S.C.R. 151, (1957), 7 D.L.R. (2d) 104.

⁹³ *Supra*, footnote 90.

⁹⁴ [1968] Ch. 353, [1968] 1 All E.R. 665 (C.A.).

Court of Appeal has challenged the inexorable rule that a trustee may never purchase property and permitted an executor to buy property from the estate.

Conclusion

The fiduciary principle is not a monolithic phenomenon. It is a simple pragmatic concept that is associated with undertakings that arise from contract or duty of care relationships. The scope of a fiduciary duty is not uniform and it is not pre-defined. It varies from case to case according to the nature and scope of the undertaking in the same way as contractual duties and duties of care vary from case to case.

There is no difference in principle between contractual duties, duties of care based on the *Hedley Byrne* principle and fiduciary duties. They all involve the same elements. The difference is only in degree. The reliance and vulnerability in a fiduciary situation is normally greater than in other duty situations. Because of this, the duty on the fiduciary is more profound and the law makes available a range of remedies that go beyond mere damage awards. But in the end, fiduciary duties are nothing more than elevated contractual duties or duties of care.

The remedies are the real distinction and, in light of this, it might be asked whether the fiduciary concept is legally necessary and whether it should be treated as a separate body of law. This is questionable in light of the fact that remedies are discretionary and servient to the needs of justice in any particular case. Nevertheless, the fiduciary designation will not disappear, and it should not; it is too convenient, meaningful and descriptive of those special classes of human relationships where trust and honour are of special value and importance.