Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and Wilson*, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

1990: October 29 / 1991: November 21.

File No.: 21672.

[1991] 3 S.C.R. 534 | *[1991] 3 R.C.S. 534* | *[1991] S.C.J. No. 91* | *[1991] A.C.S. no 91*

Canson Enterprises Ltd. and Fealty Enterprises Ltd., appellants; v. Boughton & Company, Ralph R. Wollen, George O. Treit, Treit Land Consultants Inc., Pacific Mortgage Corporation Limited, Gordon Bert Wilkins, Sun-Mark Development Corporation and Peregrine Ventures Inc., respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (96 paras.)

* Wilson J. took no part in the judgment.

Case Summary

Damages — Breach of fiduciary duty — Solicitor preparing conveyance not advising purchasers of secret profit made on a flip — On agreed facts, purchasers fully apprised of situation would not have entered the transaction — Action arising because inability of other professionals found liable in tort for faulty construction of building on subject lands to pay damages — Whether or not damages recoverable.

In May, 1977, the appellants and respondent Peregrine Ventures Inc. agreed (on the proposal of respondent Treit) to purchase a piece of property and to enter a joint venture to develop it. The purchasers agreed to pay Treit a commission of 15 percent of any profit on resale. Unknown to the appellants, but known to Peregrine, Treit had arranged for an intermediate company, Sun-Mark Development Corporation, to share in the profit from the sale, a profit from which Treit would share equally. This profit came about because Sun-Mark had entered an interim agreement to buy the [page535] land from the vendors (the Hendersons) for $410,000. The purchasers paid $525,000 and the secret profit to Peregrine and Treit from the "flip" was therefore $115,000. Appellants would not have purchased the property or entered into the joint venture had they known of the interim agreement with Sun-Mark.

The alleged breach of fiduciary duty arose out of the following circumstances. The solicitor, Wollen, of the defendant law firm, Boughton & Co., acted for the purchasers in the preparation of the conveyance and joint venture agreement. He also acted for Sun-Mark in its purchase and resale of the property, but did not disclose to the appellant purchasers that the property was not being purchased directly from the Hendersons. The statement of adjustments for the Hendersons prepared by Wollen showed the sale price to be $410,000 while that prepared for the purchasers (the appellants and Peregrine) showed it to be $525,000 paid to the Hendersons. Therefore, this statement of adjustments did not disclose Sun-Mark's interest. Wollen paid over the $115,000 secret profit to Sun-Mark and did not disclose this payment to the appellants. Although the conveyance he prepared transferred the property directly from the Hendersons to the appellants and Peregrine, Wollen did not apportion the land title fees or the conveyancing fees between Sun-Mark and the appellants but rather rendered a bill to the appellants and Peregrine for the entire amount of his services.

Following the purchase, the appellants proceeded with a warehouse development on the property, but

suffered substantial losses when piles supporting a warehouse constructed on the property began to sink, causing extensive damage to the building. The appellants then brought action against the soils engineers and a pile-driving company retained by the purchasers for the damage to the warehouse. At trial, the soils engineers were found negligent and damages of $4,920,200.33 were awarded against them. On appeal, the pile-driving company was also found liable in damages for breach of contract. As a result of the inability of the pile-driving company to pay, the matter was settled for a sum less than that awarded at trial. The engineering firm was unable to pay any part of the damage award, and the mortgage company, from which the appellants and Peregrine had borrowed funds, ultimately foreclosed on the property. The appellants and Peregrine received the proceeds of the settlement of the lawsuit, but were left with [page536] a shortfall of $801,290 for Canson and $280,000 for Fealty.

The appellants commenced the present action against the respondent solicitor and his law firm for the amount of the shortfall, alleging that the failure to disclose the secret profits was actionable as deceit or breach of fiduciary duty. The action was brought as a special case on the basis of an agreed statement of facts. The sole issue before the court was whether and what damages were recoverable from the defendants (respondents), assuming the facts in the agreed statement were true.

The trial judge found the solicitor Wollen was not liable in deceit but liable for breach of fiduciary duty and awarded damages on the same basis as for an action for deceit. The Court of Appeal dismissed an appeal from that judgment. The appellants appealed to this Court on the ground that compensation for breach of the fiduciary duty should be calculated on the same footing as for a breach of trust.

Held: The appeal should be dismissed.

Per La Forest, Sopinka, Gonthier and Cory JJ.: The situation here involved a breach of a fiduciary duty sufficient to call upon equity's jurisdiction to compensate the appellants for breach of the duty. A fiduciary duty may be breached when the solicitor fails to inform a client of a fact of which he should have informed him, or that he should seek independent advice. A solicitor may be liable for a fiduciary duty for non-disclosure of a factor of some importance, even when his or her personal interest is not at stake. The law does not limit fiduciary obligations to situations where the solicitor may benefit from a misstatement.

The manner of calculating compensation adopted by the courts in trust cases or situations akin to a trust do not apply, however. There is a sharp divide between a situation where a person has control of property which in the view of the court belongs to another, and one [page537] where a person is under a fiduciary duty to perform an obligation where equity's concern is simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on. The principles applicable to trusts should not be transposed to a breach of a fiduciary duty of the type in question here. The harshness of the result is reason alone, but apart from this, the claim for the harm resulting from the actions of third parties can fairly be looked upon as falling within what is encompassed in restoration for the harm suffered from the breach.

The equitable remedy of compensation is not likely to be resorted to frequently, except as adjunct to some other equitable remedy. The tort of deceit has long provided a convenient common law remedy that makes resort to the equitable remedy infrequent in cases of fraud, and with the development of the principle in Hedley Byrne & Co. v. Heller & Partners Ltd., it is unlikely to be used often in cases of negligent misstatement. An award of compensation, however, is no less that because the amount recovered in a particular case is the same as would have been awarded in an action at common law.

Policies underlying concepts like remoteness and mitigation might have developed from an equitable perspective. However, given the paucity of authority in the field, it is scarcely surprising that courts will deal with a case falling properly within the ambit of equity as if it were a common law matter or as justifying the use of its mode of analysis.

The maxims of equity are malleable principles that can be flexibly adapted to serve the ends of justice as now perceived. 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 it was reasonable and proper that the courts have tended to merge the principles of law and equity. Only when there are different policy objectives [page538] should equity engage in its well-known flexibility to achieve a different and fairer result.

The fusion of law and equity provides a general, but flexible, approach that allows for direct application of the experience and best features of both law and equity, whether the mode of redress (the cause of action or remedy) originates in one system or the other. The whole of the two systems should not be indiscriminately melded together; some equitable concepts like trusts, equitable estates and consequent equitable remedies must continue to exist apart, if not in isolation, from common law rules.

With fiduciary relationships and the law regarding misstatements, both the courts of common law and of equity provided remedies where a person failed to meet the trust or confidence reposed in that person. There was throughout considerable overlap. In time, however, the common law outstripped equity and the remedy of compensation became somewhat atrophied. Under these circumstances, there is no reason why equity should not borrow from the experience of the common law. Whether the courts refine the equitable tools such as the remedy of compensation, or follow the common law on its own terms, is not particularly important where the same policy objective is sought.

Where a situation requires different policy objectives, the remedy may be found in the system that appears more appropriate. This will often be equity. Its flexible remedies such as constructive trusts, account, tracing and compensation must continue to be moulded to meet the requirements of fairness and justice in specific situations. This process should not be confined to pre-existing situations.

Per Lamer C.J. and L'Heureux-Dubé and McLachlin JJ.: Apart from cases where the trustee controls the property of the cestui que trust, damages for breach of fiduciary duty should not be measured by analogy to tort and contract. Proceeding by analogy with tort overlooks not only the unique foundation and goals of equity but also the differences between the tort of negligence and contract on the one hand and the basis of the fiduciary obligation and the rationale for equitable compensation on the other. Such an approach would also require that [page539] "true trust" situations be artificially separated from other fiduciary obligations.

Compensation is an equitable monetary remedy 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. 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.

The plaintiffs would not have bought an interest in the property and the joint venture had they known of the breach of fiduciary duty. The loss arising from this was caused by the breach and is recoverable. The further losses sustained in the course of construction did not result or flow from the breach of fiduciary duty. The solicitor's liability therefore did not extend to loss suffered by the plaintiff due to the negligence of architects and engineers in subsequent construction on the land. Damages should be assessed as by the trial judge and the Court of Appeal.

Per Stevenson J.: Compensation should not be determined in the same way as a court of equity would determine compensation as against a trustee and yet it should not be defined as merely putting the plaintiff in as good a position as before the breach. The measure of damages in a compensation claim may not always be the same as in an action of deceit or negligence and differs from [page540] damages particularly where equity is looking at restitution. A court of equity, applying principles of fairness, would and should draw the line at calling upon the fiduciary to compensate for losses arising as a result of the unanticipated neglect of the engineers and pile driving contractor. The fiduciary had nothing to do with their selection, their control, their contractual or bonding obligations. These losses are too remote, not in the sense of failing the "but for" test, but in being so unrelated and independent that they should not, in fairness, be attributed to the defendant's

breach of duty.

The fusion of law and equity had nothing to do with deciding this case. If it did, the rules of equity would prevail. The principles of contributory negligence were not introduced by fusion.

Cases Cited

By La Forest J.

Considered: Guerin v. The Queen, *[1984] 2 S.C.R. 335*; Jacks v. Davis *(1980), 12 C.C.L.T. 298*, aff'd *[1983] 1 W.W.R. 327*; Brickenden v. London Loan & Savings Co., *[1934] 3 D.L.R. 465* (P.C.), aff'g *[1933] S.C.R. 257*; Nocton v. Lord Ashburton, [1914] A.C. 932; McKenzie v. McDonald, [1927] V.L.R. 134; Day v. Mead, [1987] 2 N.Z.L.R. 443; United Scientific Holdings Ltd. v. Burnley Borough Council, [1978] A.C. 904; referred to: Lac Minerals Ltd. v. International Corona Resources Ltd., *[1989] 2 S.C.R. 574*; Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158; Rainbow Industrial Caterers Ltd. v. C.N.R., *[1990] 3 W.W.R. 413*, aff'd *[1991] 3 S.C.R. 3*; Central Trust Co. v. Rafuse, *[1986] 2 S.C.R. 147*; Bartlett v. Barclays Bank Trust Co. (No. 2), [1980] 2 All E.R. 92; Canadian Aero Service Ltd. v. O'Malley, *[1974] S.C.R. 592*; Burrowes v. Lock (1805), 10 Ves. Jun. 470, 32 E.R. 927; Slim v. Croucher (1860), 1 De G. F. & J. 518, 45 E.R. 462; Culling v. Sansai Securities Ltd. *(1974), 45 D.L.R. (3d) 456*; Burke v. Cory *(1959), 19 D.L.R. (2d) 252*; Howard v. Cunliffe *(1973), 36 D.L.R. (3d) 212*; Laskin v. Bache and Co., *[1972] 1 O.R. 465*; Maghun v. Richardson Securities of Canada Ltd. *(1986), 58 O.R. (2d) 1*; Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465; Derry v. Peek (1889), 14 A.C. 337; Low v. Bouverie, [1891] 3 Ch. 82; [page541] Balkis Consolidated Co. v. Tomkinson (1893), 42 W.R. 204 and [1893] A.C. 396; Todd v. Gee (1810), 17 Ves. Jun. 273, 34 E.R. 106; Ex parte Adamson (1878), 8 Ch. D. 807; LeMesurier v. Andrus *(1986), 54 O.R. (2d) 1*; Asamera Oil Corp. v. Sea Oil & General Corp., *[1979] 1 S.C.R. 633*.

By McLachlin J.

Considered: Nocton v. Lord Ashburton, [1914] A.C. 932; Guerin v. The Queen, *[1984] 2 S.C.R. 335*; Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158; referred to: Canadian Aero Service Ltd. v. O'Malley, *[1974] S.C.R. 592*; Frame v. Smith, *[1987] 2 S.C.R. 99*; Lac Minerals Ltd. v. International Corona Resources Ltd., *[1989] 2 S.C.R. 574*; Ex parte Adamson (1878), 8 Ch. D. 807; Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co. (1966), 84 W.N. (Pt.1) (N.S.W.) 399; Caffrey v. Darby (1801), 6 Ves. Jun. 488, 31 E.R. 1159; Esso Petroleum Co. v. Mardon, [1976] Q.B. 801.

By Stevenson J.

Referred to: McKenzie v. McDonald, [1927] V.L.R. 134; Nocton v. Lord Ashburton, [1914] A.C. 932; Carl B. Potter Ltd. v. Mercantile Bank of Canada, *[1980] 2 S.C.R. 343*.

Statutes and Regulations Cited

British Columbia Supreme Court Rules, 1976, Rule 33.
Chancery Amendment Act, 1858 (Eng.), 21 & 22 Vict., c. 27.
Law and Equity Act, R.S.B.C. 1979, c. 224, s. 41.
Supreme Court of Judicature Act, 1873 (Eng.), 36 & 37 Vict., c. 66.

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Cooter, Robert and Bradley J. Freedman. "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991), 66 N.Y.U.L.Rev. 1045.
Davidson, Ian E. "The Equitable Remedy of Compensation" (1982), 13 Melbourne U.L.Rev. 349.
Gummow, W.M.C. "Compensation for Breach of Fiduciary Duty". In T.G. Youdan, ed., Equity, Fiduciaries and Trusts. Toronto: Carswell, 1989.
Hanbury, Harold Greville and Ronald Harling Maudsley. Modern Equity. 12th ed. by Jill E. Martin. London: Stevens, 1985.
Meagher, Roderick Pitt, W.M.C. Gummow and J.R.F. Lehane. Equity, Doctrines and Remedies. Sydney: Butterworths, 1984.

[page542]

Sealy, L.S. "Fiduciary Relationships", [1962] Cambridge L.J. 69.
Sealy, L.S. "Some Principles of Fiduciary Obligation", [1963] Cambridge L.J. 119.

APPEAL from a judgment of the British Columbia Court of Appeal *(1989), 39 B.C.L.R. (2d) 177*, *61 D.L.R. (4th) 732*, *45 B.L.R. 301*, *[1990] 1 W.W.R. 375*, dismissing an appeal from a judgment of Macdonell J. *(1988), 31 B.C.L.R. (2d) 46*, *52 D.L.R. (4th) 323*, *45 C.C.L.T. 209*, *[1989] 2 W.W.R. 30*, finding the defendant solicitor was not liable in deceit but liable for breach of fiduciary duty. Appeal dismissed.

David Roberts, Q.C., Dr. Donovan Waters, Q.C., and Murray Clemens, for the appellants. K.C. Mackenzie, Q.C., and Carla Forth, for the respondents.

Solicitors for the appellants: Campney & Murphy, Vancouver. Solicitors for the respondents: Guild, Yule & Co., Vancouver.

The reasons of Lamer C.J. and L'Heureux-Dubé and McLachlin JJ. were delivered by

McLACHLIN J.

1 This case concerns the extent of a solicitor's obligation for breach of fiduciary duty in failing to disclose that a third party was making a secret profit in the plaintiff's purchase of land. More particularly, it raises the question of whether the plaintiff can hold the solicitor liable for loss suffered by the plaintiff due to the negligence of architects and engineers in subsequent construction on the land.

2 I agree with Justice La Forest that the solicitor's liability does not extend this far and that damages should be assessed as by the trial judge and the Court of Appeal. I base this result, however, in equity. I cannot concur in the suggestion in my colleague's reasons that apart from cases where the trustee controls the property of the cestui que trust, damages [page543] for breach of fiduciary duty should be measured by analogy to tort and contract.

3 My first concern with proceeding by analogy with tort is that it overlooks the unique foundation and goals of

equity. The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken - an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest": Canadian Aero Service Ltd. v. O'Malley, *[1974] S.C.R. 592*, at p. 606. In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.

4 The trust-like nature of the fiduciary obligation manifests itself in characteristics which distinguish it from the tort of negligence and from breach of contract. Thus Justice Wilson in Frame v. Smith, *[1987] 2 S.C.R. 99*, at pp. 136-138, (approved by Justices Sopinka and La Forest in Lac Minerals Ltd. v. International Corona Resources Ltd., *[1989] 2 S.C.R. 574*, at pp. 559 and 646) attributed the following characteristics to a fiduciary obligation: (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 [page544] legal or practical interests; (3) the beneficiary is peculiarly vulnerable or at the mercy of the fiduciary holding the discretion or power.

5 Cooter and Freedman, in "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991), 66 N.Y.U.L.Rev. 1045, offer a similar formulation of the characteristics of a fiduciary obligation: (i) separation of ownership from control or management, (i.e., one party has some power or discretion which can be exercised unilaterally so as to affect the other party's legal or practical interest); (ii) open-ended obligations, in that specific conduct or definite results are not stipulated; (iii) asymmetry of information concerning acts and results. The first characteristic in this formulation parallels Wilson J.'s first and second characteristics, and the remaining two can be seen as treating the notion of vulnerability in Wilson J.'s test.

6 Cooter and Freedman go on to point out that because the fiduciary has superior information concerning his or her acts, it will be difficult to detect and prove breach of these wide obligations; and because the fiduciary has control based on the notion of implicit trust, there is a substantial potential for gain through such wrongdoing. This may justify more stringent remedies than for negligence or breach of contract. As Lord Dunedin put it in Nocton v. Lord Ashburton, [1914] A.C. 932, at p. 963: "there was a jurisdiction in equity to keep persons in a fiduciary capacity up to their duty."

7 These differences suggest that we cannot simply assume that an analogy with tort law is appropriate. And even if we could, the analogy would not be of great assistance. For tort offers different measures of compensation, depending on the nature of the wrong. The measure for deceit, for example, is more stringent than for negligence. So adoption of a tort measure does not solve the problem. The further [page545] question arises: which tort measure? One might argue that the appropriate analogy is with the tort of deceit, since both deceit and breach of fiduciary obligation involve wrongful acts with moral overtones. But the better approach, in my view, is to look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy. In so far as the same goals are shared by tort and breach of fiduciary duty, remedies may coincide. But they may also differ.

8 The danger of proceeding by analogy with tort law is that it may lead us to adopt answers which, however easy, may not be appropriate in the context of a breach of fiduciary duty. La Forest J. has avoided one such pitfall in indicating that compensation for a breach of fiduciary duty will not be limited by foreseeability, but what of other issues? For instance, the analogy with tort might suggest that presumptions which operate in favour of the injured party in a claim for a breach of fiduciary duty will no longer operate, for example, the presumption that trust funds will be put to the most profitable use. And it is clear that tort law is incompatible with the well developed doctrine that a fiduciary must disgorge profits gained through a breach of duty, even though such profits are not made at the expense of the person to whom the duty is owed. La Forest J. allows that benefits may be disgorged, but addresses only the case where no such benefit was obtained (at p. 578). From this it appears that he would treat benefit to the

fiduciary on the basis of equitable principles, and losses to the plaintiff on the basis of common law. In my view it is preferable to deal with both remedies under the same system -- equity. Rather than begin from tort and proceed by changing the tort model to meet the constraints of trust, I prefer to start from trust, using the tort analogy to the extent shared concerns may make it helpful. This said, I readily concede that we may take wisdom where we find it, and accept such [page546] insights offered by the law of tort, in particular deceit, as may prove useful.

9 My second concern with proceeding by analogy with tort is that it requires us to separate so called "true trust" situations, where the trustee holds property as agent for the beneficiary, from other fiduciary obligations. This distinction is necessary if one proceeds by analogy with tort because the tort analogy cannot apply in the former category (see La Forest J., at p. 578). In my view, however, this distinction is artificial and undercuts the common wrong embraced by both categories -- the breach of the obligation of trust and utmost good faith which lies on one who undertakes to control or manage something -- be it property or some other interest -- on behalf of another. Nor do the cases support the distinction, as illustrated by the analysis which follows of Guerin v. The Queen, *[1984] 2 S.C.R. 335*.

10 Differences between different types of fiduciary relationships may, depending on the circumstances, dictate different approaches to damages. This may be significant as the law of fiduciary obligations develops. However, such differences must be related in some way to the underlying concept of trust -- the notion of special powers reposed in the trustee to be exercised exclusively for the benefit of the person who trusts. The distinction between the rights of a claimant in equity for maladministration of property as opposed to wrongful advice or information, [page547] resides in the fact that in the former case equity can and does require property wrongfully appropriated to be restored to the cestui que trust together with an account of profits. Where there is no property which can be restored, restitution in this sense is not available. In those cases, the court may award compensation in lieu of restitution. This is a pragmatic distinction in the form of the remedy which must not obscure the fact that the measure of compensation remains restitutionary or "trust-like" in both cases. Any further distinction is difficult to support. Why in principle, should a trustee's abuse of power in relation to tangible property attract different compensation from a trustee's abuse of power in relation to a lease or a mortgage or the purchase of a business or a home? The goals of equity in the latter category of case, as asserted in Nocton v. Lord Ashburton, supra, are not only to compensate the plaintiff but to deter fiduciaries from abusing their powers. Whence then the difference in compensation?

11 Having concluded that equitable compensation should not be determined by the simple expedient of resorting to tort, I come to the central question in this case. What is the ambit of compensation as an equitable remedy? Proceeding in trust, we start from the traditional obligation of a defaulting trustee, which is to effect restitution to the estate. But restitution in specie may not always be possible. So equity awards compensation in place of restitution in specie, by analogy for breach of fiduciary duty with the ideal of restoring to the estate that which was lost through the breach.

12 The restitutionary basis of compensation for breach of trust was described in Ex parte Adamson (1878), 8 Ch. D. 807, at p. 819:

> The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability [page548] in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated.

It has been widely accepted ever since. As Davidson states in his very useful article "The Equitable Remedy of Compensation" (1982), 13 Melbourne U.L.Rev. 349, at p. 351, "the method of computation [of compensation] will be that which makes restitution for the value of the loss suffered from the breach."

13 Nocton v. Lord Ashburton, supra, one of the first cases to deal with a solicitor's breach of fiduciary obligation by way of misstatement, reflects the restitutionary approach to monetary compensation for breach of fiduciary duty. The action in negligence being statute barred and the mens rea required for deceit unproven, the House of Lords

had recourse to "the old bill in Chancery to enforce compensation for breach of a fiduciary obligation" (per Viscount Haldane, at p. 946). Under this action the Court of Chancery "could order the defendant not ... to pay damages as such, but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury" (at p. 952). Viscount Haldane held that the proper measure of compensation would have been restitution of the mortgage security and an account for the interest, observing "[t]he measure of damages may not always be the same as in an action of deceit or for negligence" (at p. 958). But since the plaintiff had not asked for the restitutionary remedy and since it was "a matter of form only", compensation was calculated as for damages in tort.

14 In those cases where the trust consists of property or funds in a stable investment the "actual money or thing" which is to be restored to the injured party will [page549] be relatively well defined. The matter becomes more difficult when the remedy is extended from traditional trusts to breaches of fiduciary duty, where not only the value, but even the nature of the thing lost may be difficult to determine. The application of the principle of compensation in lieu of restitution in such a situation is well illustrated in the only recent decision of this Court on the subject: Guerin v. The Queen, supra. In Guerin this Court rejected the submission that tort principles should govern the assessment of compensation and proceeded on the basis that the plaintiffs were entitled to compensation based on any trust principles.

15 The plaintiff in Guerin was a member of an Indian Band whose lands had been administered by the Crown. The Crown was authorized to enter into a lease on terms which were authorized by the Band. Those terms could not be obtained in negotiation, and the Crown, without consulting the Band, entered into a long-term lease on the Band's behalf on terms less advantageous than those which had been authorized. The Band sued for compensation for breach of a fiduciary duty. At common law in tort or contract, damages would have been limited to the loss reasonably foreseeable or contemplated at the time the lease was made. The trial judge, however, was persuaded to take an "equitable" approach based on the unforeseen escalation of the value of the land in subsequent years, and awarded $10,000,000. In short, instead of viewing the issue of compensation from the date of the breach as required at common law, he based the damages on the trial date having regard to what had actually happened, as would be the case in an equitable award for restitution (see Wilson J. at p. 359.)

16 Guerin was not concerned with abuse of trust property in the classic trust sense. There were no assets or property which had been misappropriated. The wrong was the failure to adhere to the conditions of surrender and to consult with the band in accordance [page550] with the Crown's fiduciary duty. Both the judgment of Dickson J. (as he then was) (Beetz, Chouinard and Lamer JJ. concurring), and the judgment of Wilson J. (Richie and McIntyre JJ. concurring), held that, notwithstanding that the legal relationship was not a true trust but a fiduciary duty, the appropriate measure of damages was trust damages. Dickson J. put it this way at p. 376:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect. [Emphasis added.]

17 Dickson J. was content to say that damages should be determined "by analogy with the principles of trust law" (at p. 390). The judgment of Wilson J. dealt more extensively with the principles on which compensation was to be calculated. Relying on the personal nature of the breach of a fiduciary obligation and the historical refusal to limit compensation in equity by considerations relevant to tort and contract, she concluded that the underlying goal of compensation for breach of fiduciary duty was to compensate the person who suffered from the breach by analogy to restoration in specie, taking into account unforeseen market fluctuations to the date of trial. She quoted with approval (at p. 361) the following passage from Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co. (1966), 84 W.N. (Pt.1) (N.S.W.) 399, per Street J.:

> The reasoning which the House of Lords adopted in Tomkinson's case proceeds upon the basis that damages at common law are ordinarily not affected by subsequent fluctuations in currency exchange rates

> any more than ordinarily they are affected by subsequent fluctuations in market values. This reasoning is not available in a claim against a defaulting trustee as his obligation has [page551] always been regarded as tantamount to an obligation to effect restitution in specie; such an obligation must necessarily be measured in the light of market fluctuations since the breach of trust; and in my view it must also necessarily be affected, where relevant, by currency fluctuations since the breach. [Emphasis added.]

Applying the reasoning of restitution, Wilson J. concluded that the Crown in failing to consult the band and obtain further instructions on the lease had committed a breach of trust. The Crown was required to compensate the Band for the value of what was lost because of the breach, namely, the opportunity to enter into a more favourable arrangement. The value of this lost opportunity was based not on the common law tort or contract measure of what might have reasonably been foreseen at the time, but on the equitable approach of looking at what actually happened to values in later years.

18 While foreseeability of loss does not enter into the calculation of compensation for breach of fiduciary duty, liability is not unlimited. Just as restitution in specie is limited to the property under the trustee's control, so equitable compensation must be limited to loss flowing from the trustee's acts in relation to the interest he undertook to protect. Thus Davidson states "it is imperative to ascertain the loss resulting from breach of the relevant equitable duty" (at p. 354, emphasis added).

19 The need for a link between the equitable breach and the loss for which compensation is awarded is fair and sound in policy and is supported by in Guerin. The trial judge in Guerin did not measure damages as the difference between the lease which was entered into and that which the Band was prepared to authorize, because the golf club would not have entered into a lease at all on the terms sought by the Band, and it could not therefore be said that the breach had caused the Band to lose the opportunity to enter a lease on the authorized terms. Nor did the trial judge simply assess damages as the difference between the value of [page552] the lease actually entered into and the amount that the land was worth at the time of trial, which would be the result if causation were irrelevant. Rather he concluded that had there been no breach the Band would have eventually leased the land for residential development. He allowed for the time which would have been required for planning, tenders and negotiation, and he also discounted for the fact that some of the then current value of the surrounding developments was due to the existence of the golf course. In other words, he assessed, as best he could, the value of the actual opportunity lost as a result of the breach.

20 The requirement that the loss must result from the breach of the relevant equitable duty does not negate the fact that "causality" in the legal sense as limited by foreseeability at the time of breach does not apply in equity. It is in this sense that I read the statement of Street J. in Re Dawson, supra, that "causation, foreseeability and remoteness do not readily enter into the matter" (quoted in Guerin at p. 360), and the broad language of Caffrey v. Darby (1801), 6 Ves. Jun. 488, 31 E.R. 1159 (relied on by Street J.), where in fact a causal link between the breach and the loss was found, the Court stating that had the trustees adhered to their duty "the property would not have been in a situation to sustain that loss" (at p. 404) (appropriation by a third party).

21 Thus while the loss must flow from the breach of fiduciary duty, it need not be reasonably foreseeable at the time of the breach, as Guerin affirms. The considerations applicable in this respect to breach of fiduciary duty are more analogous to deceit than negligence in breach of contract. Just as "it does not lie in the mouth of the fraudulent person to say that they [the losses] could not reasonably [page553] have been foreseen", (Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158 (C.A.), at p. 167, so it does not lie in the mouth of a fiduciary who has assumed the special responsibility of trust to say the loss could not reasonably have been foreseen. This is sound policy. In negligence we wish to protect reasonable freedom of action of the defendant, and the reasonableness of his or her action may be judged by what consequences can be foreseen. In the case of a breach of fiduciary duty, as in deceit, we do not have to look to the consequences to judge the reasonableness of the actions. A breach of fiduciary duty is a wrong in itself, regardless of whether a loss can be foreseen. Moreover the high duty assumed and the difficulty of detecting such breaches makes it fair and practical to adopt a measure of compensation calculated to ensure that fiduciaries are kept "up to their duty".

22 Doyle v. Olby (Ironmongers) Ltd. is likewise helpful in considering mitigation. Sachs L.J. stated, "the court must obviously take care not to include sums for consequences which may be due to the plaintiff's own unreasonable actions" (at p. 171). In a similar vein Winn L.J. remarked that:

> ... no element in the consequential position can be regarded as attributable loss and damage ... in any case where the person deceived has not himself behaved with reasonable prudence, reasonable common sense or can in any true sense be said to have been the author of his own misfortune. The damage that he seeks to recover must have flowed directly from the fraud perpetrated upon him. (at p. 168)

(It should be noted that while in Doyle v. Olby (Ironmongers) Ltd. Lord Denning said that "[t]here is nothing to be taken off in mitigation" this is because "there is nothing more that he could have done to reduce his loss" (at p. 167). In that case the plaintiff was indeed behaving as a reasonable and prudent [page554] person in the circumstances.)

23 The thrust of these dicta is that while the plaintiff will not be required to act in as reasonable and prudent a manner as might be required in negligence or contract, losses stemming from the plaintiff's unreasonable actions will be barred. This is also sound policy in the law of fiduciary duty. In negligence and contract the law limits the actions of the parties who are expected to pursue their own best interest. Each is expected to continue to look after their own interests after a breach or tort, and so a duty of mitigation is imposed. In contrast, the hallmark of fiduciary relationship is that the fiduciary, at least within a certain scope, is expected to pursue the best interest of the client. It may not be fair to allow the fiduciary to complain when the client fails forthwith to shoulder the fiduciary's burden. This approach to mitigation accords with the basic rule of equitable compensation that the injured party will be reimbursed for all losses flowing directly from the breach. When the plaintiff, after due notice and opportunity, fails to take the most obvious steps to alleviate his or her losses, then we may rightly say that the plaintiff has been "the author of his own misfortune." At this point the plaintiff's failure to mitigate may become so egregious that it is no longer sensible to say that the losses which followed were caused by the fiduciary's breach. But until that point mitigation will not be required. This said, it must also be emphasized that behaviour by the defendant which is a not unreasonable attempt to make the best of a difficult situation, as in Doyle v. Olby (Ironmongers) Ltd. or Esso Petroleum Co. v. Mardon [1976] Q.B. 801 (C.A.), will not be penalized.

24 A related question which must be addressed is the time of assessment of the loss. In this area tort and contract law are of little help. There the general rule is that damages are assessed based on the value of the shares as at the time of the wrongful act, in view of what was then foreseeable, either by a reasonable [page555] person, or in the particular expectation of the parties. Various exceptions or apparent exceptions are made for items difficult to value, such as shares traded in a limited market. The basis of compensation at equity, by contrast, is the restoration of the actual value of the thing lost through the breach. The foreseeable value of the items is not in issue. As a result, the losses are to be assessed as at the time of trial, using the full benefit of hindsight: Guerin, supra.

25 It may sometimes be necessary to qualify this general principle to recognize the plaintiff's responsibility not to act unreasonably. It may not be fair, for example, to allow a plaintiff who has discovered the breach to speculate at the expense of the fiduciary. If a fiduciary holds out an investment as secure when in reality it is highly speculative, the injured party should not be able to retain the investment in unreasonable hope of a fortuitous rise in value, secure in the knowledge that any loss will be borne by the fiduciary. In such a case, the court might conclude that the loss should be assessed as at the time at which the behaviour of the plaintiff becomes clearly unreasonable. Mitigation, where losses are assessed as at the time of trial but adjusted to account for what might have been saved, will be appropriate where the losses which might have been prevented are separable from the underlying value of the thing lost; for instance, consequential losses. Adjusting the time of assessment will be more appropriate where the actions or omissions of the plaintiff directly affect the value of the thing lost. No doubt the final award will sometimes be the same under either approach.

26 The requirement that the loss flow from the breach also assists in determining responsibility for the acts of strangers or third parties. If the breach permits a third party to take an unlawful advantage causing loss to the

plaintiff, the fiduciary will be liable because there is a causal link between the breach and the loss. This was the case in Caffrey v. Darby, supra, where a [page556] trustee whose neglect permitted another to abscond with trust property was held liable for that loss. Where, on the other hand, the plaintiff suffers loss as a result of the act of a third party after the fiduciary's obligation has terminated and the plaintiff has taken control of the property, the result will be otherwise.

27 In summary, 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.

28 I come finally to the application of these principles to this case. The breach of fiduciary duty is conceded, as is the fact that the plaintiffs would not have bought an interest in the property and the joint venture had there been no breach. This establishes that the breach of fiduciary resulted in the acquisition of this interest. The question is whether, applying a common sense view of causation, the further losses sustained in the course of construction can be said to have resulted or flowed from the breach of fiduciary duty.

[page557]

29 In my view, the answer to this question is no. The construction loss was caused by third parties. There is no link between the breach of fiduciary duty and this loss. The solicitor's duty had come to an end and the plaintiffs had assumed control of the property. This loss was the result, not of the solicitor's breach of duty, but of decisions made by the plaintiffs and those they chose to hire. To put in the terms of Wilson J. in Guerin, what the plaintiffs lost as a result of the breach of fiduciary duty was the opportunity to say no to acquisition of the property represented by the joint venture. The difference in the price represented by the secret profit, together with expenditures incidental to the acquisition, restores that lost opportunity. Thereafter, recourse does not lie in equity against the solicitor, whose duty and control had ended, but against others. (The trial judge awarded what he termed consequential damages. It is not clear what these consist of and whether they could be said to flow from the breach itself. As the point was not argued, I would not disturb this award.)

30 This result accords with common sense and policy. If fiduciaries on land transactions who breach their fiduciary duty were responsible not only for losses flowing from the fiduciary breach but for all wrongful acts associated with the property thereafter which cause loss to the plaintiff, they would not only be deterred from breach of duty, but rendered impotent. Insurance rates for solicitors would rise (if insurance could be obtained) and the costs of providing the services would increase accordingly. If such a result were necessary to protect innocent purchasers or deter misconduct, perhaps a case could be made for it. But it is not necessary as a policy of the law. The law gives a plaintiff other remedies. It is fairer that losses arising from construction on the property after the purchase be borne by those who assume responsibility for the construction rather than by the solicitor who acted in the purchase transaction. Where construction is concerned, it is their negligent conduct [page558] -- not the solicitor's -- which the law should seek to deter.

31 For these reasons I would dismiss the appeal.

The judgment of La Forest, Sopinka, Gonthier and Cory JJ. was delivered by

LA FOREST J.

32 This case concerns the extent to which a person who has suffered loss from a breach of a fiduciary obligation may recover for that loss from the person who has committed the breach. Specifically, what is the extent of liability of a solicitor who, in handling a real estate transaction, failed to disclose to the purchasers a secret profit made by a third party? Is the solicitor responsible only for losses directly flowing from the breach of duty itself, or is he also liable for loss caused by an intervening act unrelated to that breach, in this case loss caused by subsidence of a building resulting from the fault of engineers and pile-drivers in carrying out the project known by the parties to be the purpose for the acquisition of the property? The purchasers were unable to execute fully upon judgments in an action in negligence against the engineers and pile-drivers for the damage caused by the subsidence. The question here is whether they can recover the shortfall by the present action for breach of fiduciary duty.

Facts

33 At the outset, it should be noted that the action was commenced as a special case before the British Columbia Supreme Court in which a question of law was put on the basis of an agreed statement of facts. It should also be observed that while there are several respondents, the principal question examined by the courts below was the liability of the solicitor, the respondent Wollen.

[page559]

34 The facts are as follows. In May, 1977, on the proposal of the respondent Treit, the appellants, Canson Enterprises Ltd. and Fealty Enterprises Ltd., and the respondent, Peregrine Ventures Inc., agreed to purchase a piece of property and to enter a joint venture to develop it. The purchasers agreed to pay Treit a commission of 15 percent of any profit on resale. Unknown to Canson and Fealty, but known to Peregrine, Treit had arranged for an intermediate company, Sun-Mark Development Corporation, to share in the profit from the sale, a profit from which Treit would share equally. This profit came about because Sun-Mark had entered an interim agreement to buy the land from the vendors, Mr. and Mrs. Henderson, for $410,000. The price paid by the purchasers was $525,000, so the secret profit to Peregrine and Treit from the "flip" was $115,000. According to the agreed facts, the appellant purchasers, Canson and Fealty, would not have purchased the property or entered into the joint venture had they known of the interim agreement with Sun-Mark.

35 The alleged breach of fiduciary duty arose out of the following circumstances. The solicitor, Wollen, of the defendant law firm, Boughton & Co., acted for the purchasers in the preparation of the conveyance and joint venture agreement. He also acted for Sun-Mark in its purchase and resale of the property, but did not disclose to the appellant purchasers that the property was not being purchased directly from the Hendersons. Furthermore, Wollen prepared the statement of adjustments for the vendors (the Hendersons) showing the sale price to be $410,000, and also prepared the statement of adjustments for the purchasers (the appellants and Peregrine) showing the price to be $525,000 and the vendors to be the Hendersons. Therefore, this statement of adjustments did not disclose Sun-Mark's interest. Wollen paid over the $115,000 secret profit to Sun-Mark and did not disclose this payment to the appellants. Although the conveyance he prepared transferred the property directly from the Hendersons to the appellants and Peregrine, Wollen did not apportion the land title fees or the conveyancing fees between Sun-Mark and the [page560] appellants but rather rendered a bill to the appellants and Peregrine for the entire amount of his services.

36 Following the purchase, the appellants proceeded with a warehouse development on the property, but suffered substantial losses when piles supporting a warehouse constructed on the property began to sink, causing extensive damage to the building. The appellants then brought action in the British Columbia County Court against the soils engineers and a pile-driving company retained by the purchasers for the damage to the warehouse. At trial, the soils engineers were found negligent in failing to detect a layer of peat in the soil, and damages of $4,920,200.33 were awarded against them. On appeal, the pile-driving company was also found liable in damages for breach of

contract. As a result of the inability of the pile-driving company to pay, the matter was settled for a sum less than that awarded at trial. The engineering firm was unable to pay any part of the damage award, and the mortgage company, from which the appellants and Peregrine had borrowed funds, ultimately foreclosed on the property. The appellants and Peregrine received the proceeds of the settlement of the lawsuit, but were left with a shortfall of $801,290 for Canson and $280,000 for Fealty.

37 The appellants then commenced the present action against the respondent solicitor and his law firm for the amount of the shortfall, alleging that the failure to disclose the secret profits was actionable as deceit or breach of fiduciary duty. As indicated above, the action was brought as a special case pursuant to Rule 33 of the British Columbia Supreme Court Rules, 1976 on the basis of an agreed statement of facts. The sole issue before the court was whether and what damages were recoverable from the defendants (respondents), assuming the facts in the agreed statement were true.

[page561]

Judicial History

Supreme Court of British Columbia *(1988), 31 B.C.L.R. (2d) 46*

38 The case came before Macdonell J. of the Supreme Court of British Columbia in chambers. He found the solicitor Wollen was not liable in deceit but liable for breach of fiduciary duty. The judge then went on to consider the issue of damages. Up to the decision of this Court in Guerin v. The Queen, *[1984] 2 S.C.R. 335*, he noted, the leading case in British Columbia on the fiduciary duty of solicitors was Jacks v. Davis *(1980), 12 C.C.L.T. 298* (B.C.S.C.), aff'd *[1983] 1 W.W.R. 327* (B.C.C.A.). In Jacks, a solicitor was found liable in damages for breach of fiduciary duty for failing to reveal secret profits made by an intermediate party in the sale and purchase of an apartment block which he handled. In assessing damages at trial, Anderson J. had held that the measure of damages for breach of fiduciary duty is the same as in a claim for damages in fraud. Thus, a defendant would be liable for all losses suffered by the plaintiff, subject to the limitations of mitigation, remoteness and intervening factors. On the appeal from that case, Hinkson J.A., speaking for the British Columbia Court of Appeal, had upheld the quantum of damages ascertained at trial, but on the basis that these damages corresponded to the difference between the purchase price and the actual value of the property at the date of the purchase. Hinkson J.A. specifically stated that mitigation and remoteness need not enter into the assessment of damages.

39 Macdonell J. concluded that Jacks remained the leading case in British Columbia and was not affected by Guerin. The latter case, he held, was not applicable because the Crown in its fiduciary capacity was there holding property for the benefit of the [page562] Indian band, and thus was more like a trustee than the solicitor in the case at bar. Moreover, the facts of Guerin were such that the issue of intervening acts and their impact on damages was not raised.

40 Macdonell J. concluded that the damages were not limited to the amount of the secret profit, and that the appellants were entitled to consequential damages limited by intervening factors. It is apparent that the chambers judge followed the trial level decision in Jacks. He held that the appellants were entitled to direct damages represented by the difference between the purchase price and the value of the property, which is equivalent to the amount of the secret profit, as well as unspecified consequential damages represented by expenses incurred on the warehouse project prior to the wrongful acts of the engineers and pile-drivers.

41 Finally, Macdonell J. held that all of the respondents were parties to concealing the secret profit and thus had breached their fiduciary duties and were accordingly liable in damages along with the solicitor and his firm. Additionally, Treit had committed the tort of deceit.

Court of Appeal *(1989), 39 B.C.L.R. (2d) 177*

42 The Court of Appeal dismissed the appeal. Hutcheon J.A., with whom Carrothers and Lambert JJ.A. agreed, stated that the Guerin decision was clear authority for the proposition that a fiduciary who mishandles trust property and causes a loss is liable in damages to be calculated by analogy to trust law. In trust law, the measure of damages is not affected by considerations of foreseeability or remoteness. Therefore, if Guerin was applicable, the Jacks decision would no longer be good law in British Columbia. However, Hutcheon J.A. agreed with the chambers judge that Guerin was distinguishable in that it is limited to trust-like situations, i.e., situations where the fiduciary is holding the property beneficially for [page563] another. Since the solicitor in the present case was not holding the property for the appellants, Guerin did not apply. Instead, Hutcheon J.A. purported to apply Jacks and held, at p. 186, that the shortfall was not recoverable, because such damages did not flow from the breach of the fiduciary obligation, but "were the result of unrelated and entirely independent problems in the construction of the warehouse, caused by the fault of the soils engineer and pile-driving contractor". In his view, "the consideration of remoteness applies to the breach of fiduciary duty alleged in this case".

43 Lambert J.A. agreed with Hutcheon J.A.'s reasons but went on to give reasons of his own. He was of the view that Guerin did not establish a single new remedy applicable to every case that is categorized as a breach of fiduciary duty. In Guerin, the remedy was linked to the proprietary aspect of the case, and the nature of the fiduciary relationship was sui generis because of the unique nature of the relationship between the parties. Since the case at bar did not involve trust property or a trust obligation, Guerin, he held, was not applicable.

44 Lambert J.A. emphasized that the remedy for breach of fiduciary duty cannot be established on the basis of a body of rigid rules, at p. 182:

> The rubric "breach of fiduciary duty" has come to encompass so many different types of liability that it is not now possible to determine the appropriate remedy by defining the wrong simply as a "breach of fiduciary duty". It is necessary, instead, to look through the categorization of the wrong as a "breach of fiduciary duty" to the true nature of the wrong, and to move from there to the determination of the remedy. The nature of the wrong and the nature of the loss, not the nature of the cause of action, will dictate the scope of the remedy.

[page564]

In support of this approach, he referred to the decision of this Court in Lac Minerals Ltd. v. International Corona Resources Ltd., *[1989] 2 S.C.R. 574*.

45 After stating that the court was bound by Jacks, Lambert J.A. went on to find that he would have reached the same result in any event. He disposed of the case as follows, at pp. 182-83:

> My understanding of the effect of the fusion of law and equity is not simply that both systems are administered together by a single structure of courts, but that common law remedies may be awarded for what were purely equitable wrongs, and vice versa, and, in addition, that remedies which have aspects of both systems may be awarded for wrongs that have aspects of both systems ... .
>
> The leading case on a solicitor's breach of fiduciary duty is Nocton v. Lord Ashburton, [1914] A.C. 932. In that case the House of Lords was content to let the damages that had been awarded for common law actual fraud stand as the relief that should be awarded for breach of fiduciary duty constituting equitable fraud. That result was carried forward by this court in its judgement in Jacks v. Davis. In consequence, the award of damages by Mr. Justice Macdonell in this case rests not on common law principles and not on equitable principles but on the fused amalgam of those principles. That fusion has produced what this court, in Jacks v. Davis, decided was the appropriate remedy for a solicitor's failure to disclose material facts about a secret profit that was not retained by the solicitor. The remedy is damages equal to the amount by which the price paid exceeded the actual value, plus damages equal to consequential losses that are not too remote, with remoteness determined by a common sense view of the strength of causation and not by

considerations of foreseeability or what the parties contemplated. In this case the intervening negligent acts put an end to the consequential losses.

46 The appellants now appeal to this Court.

[page565]

The Arguments

The Appellants' Arguments

47 The task before this Court, the appellants noted, is to determine the proper measure of restitution for breach of fiduciary duty in the present case. If the action was one founded on breach of contract, it would be necessary to consider whether the damages suffered were within the reasonable contemplation of the parties. If the action was founded in negligence, it would be proper to apply principles of remoteness, foreseeability and intervening cause. And if the action was one for deceit or fraud, not only foreseeable but unforeseeable damages flowing from the deceit would be awarded, stopping, however, where the chain of causation was broken; see Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158 (C.A.); Rainbow Industrial Caterers Ltd. v. C.N.R., *[1990] 3 W.W.R. 413*, at p. 426 (B.C.C.A.), aff'd by this Court, *[1991] 3 S.C.R. 3*. If the action were brought on any of these bases, then, the appellants could not recover for the very substantial damages that arose from the actions of the engineering firm and the pile-driving company.

48 The appellants do not, however, seek damages at common law. Rather, they seek compensation in equity for breach of fiduciary duty. Where concurrent liability lies in tort and contract and in equity, the appellants may sue in whatever manner they find most advantageous; see Central Trust Co. v. Rafuse, *[1986] 2 S.C.R. 147*, at p. 206; Bartlett v. Barclays Bank Trust Co. (No. 2), [1980] 2 All E.R. 92, at pp. 95-96 (Ch.).

49 And here, the appellants say, there is a distinct advantage to their relying on fiduciary duty. Where such equitable compensation for breach of a fiduciary duty, as distinct from common law damages, is sought, they argue, concepts of remoteness, intervening cause and foreseeability have no relevance. A court of equity in exercising its jurisdiction to compensate for loss suffered by a plaintiff as a result of breach of a fiduciary relation is engaged in a process [page566] of restitution. It seeks to put the plaintiff in as good a position as he or she would have been had the breach not occurred, citing Brickenden v. London Loan & Savings Co., *[1934] 3 D.L.R. 465* (P.C.), aff'g *[1933] S.C.R. 257*. Equity could order fiduciaries to replace property improperly acquired or to make compensation for property lost. The appellants advance the position that there is no difference between the approach that should be taken to trust situations and a breach of a fiduciary duty of the kind that occurred in the present case.

50 The appellants draw comfort from this Court's decision in Guerin. In Guerin, the Crown had accepted a surrender from the plaintiff Indians of their aboriginal title to land on the understanding that the land would be leased to a golf club on certain specified conditions. In fact, the Crown leased it on another basis and so acted contrary to its obligation by statute and common law to deal fairly with the Indians. Three of the judges agreed (per Wilson J.) that on surrender the relationship of the Crown became that of a full fledged trustee, but four (per Dickson J.) were of the view that the relationship of the Crown to the Indians was not that of a full fledged trustee in equity but was a sui generis relationship; it was a fiduciary relation akin to a trust. The remaining judge, Estey J., arrived at his conclusion independently on the basis of an agency relationship, a view not directly relevant here. Despite their divergencies regarding the nature of the relationship between the Crown and the Indians, all the judges were agreed that the compensation to the Indians should be calculated on the same basis as a breach of trust. What the Court sought to do was to place the Indians, so far as money could do it, in the same position as they would have been but for the breach of the Crown's obligation to the Indians. The appellants argue that the same approach should be adopted here. In the present case, the fiduciary, by failing to disclose facts which he had a duty to disclose, caused the appellants to embark on a financially disastrous [page567] venture which they would not have undertaken but for the failure of the fiduciary to reveal the truth.

51 The courts below, the appellants contend, fell "into error because of a misplaced concern with concepts of common sense and reasonableness", thus ignoring the long established principle of equity that a fiduciary in breach must make good any loss incurred by the beneficiary. They maintain that the Court of Appeal erred in making a distinction between fiduciaries who hold property and fiduciaries who simply owe a duty of good faith and disclosure. According to the appellants, no such distinction was maintained by this Court in Guerin, and the same remedy applies against a faithless fiduciary as would apply against a trustee. Thus, equity will require restitution of the whole of the loss which occurred as a result of the breach of fiduciary duty, regardless of considerations of remoteness. The underlying reason for equity's approach was the need to compel fiduciaries to comply with strict standards of good faith and avoidance of conflicts of interests in the performance of their duties; see Canadian Aero Service Ltd. v. O'Malley, *[1974] S.C.R. 592*, at p. 610. It would follow from what has been said that the decision of the British Columbia Court of Appeal in Jacks v. Davis, supra, which held that the measure of damages for breach of fiduciary duty is the same as the measure of damages for fraud, was wrongly decided.

52 The appellants also take issue with the view of Lambert J.A. that "remedies which have aspects of both systems may be awarded for wrongs that have aspects of both systems" (at p. 182). Law and equity, they maintain, have not become fused but are separate systems with their own informing principles. Thus the Court of Chancery could not entertain a suit [page568] in or award damages in the common law sense, not even, until the Chancery Amendment Act of 1858 (Lord Cairn's Act), (Eng.), 21 & 22 Vict., c. 27, an award of damages in addition to or in lieu of specific performance. The appellants also stress that equity has exclusive jurisdiction over claims based on breach of fiduciary duty, and assert that common law principles and remedies are no more applicable to such an action than are criminal law principles. The appellants also argue that s. 41 of the Law and Equity Act, R.S.B.C. 1979, c. 224, which provides that in the case of a conflict between a rule of common law and a rule of equity the latter prevails, would be violated if the approach of Lambert J.A. were adopted.

53 According to the agreed statement of facts, the appellants would not have purchased the property or entered into the joint venture agreement had they known about the secret profit. Thus, the appellants seek an order that they are entitled to compensation from the respondents for their entire loss, to be proved at trial, which was incurred as a result of embarking upon the joint venture. Damages would include the amount of the secret profit, and consequential damages unlimited by principles of remoteness, causation or intervening acts.

The Respondents' Arguments

54 The essence of the respondents' argument is that the Court of Appeal was correct in holding that law and equity are now fused, so that the common law remedy of damages, as limited by the principles of remoteness and causation, is available for the equitable claim of breach of fiduciary duty.

55 The respondents assert that the appellants are attempting to recover losses which are not recoverable [page569] in contract or tort (because of remoteness) "under the cloak of a claim for restitution". They argue that the law of restitution has no application to the issues in this appeal. According to the respondents, restitution in equity or at common law is concerned with circumstances where one party has been unjustly enriched at the expense of another. The equitable form of restitution is concerned with assets and profits, and not with losses.

56 The respondents submit that this Court should be wary of attempting to clothe all fiduciaries with the mantle of a trustee. In their view, the Court of Appeal correctly distinguished Guerin as a case involving a fiduciary's exercise of control over the beneficiary's property. Where no property has passed between the fiduciary and the beneficiary, the principles of liability for breach of trust will be of little assistance. The respondents further submit that the extension of the rule of strict accountability from trustees to all fiduciaries would be merely punitive and would have no sound basis in policy. This is particularly true in the case at hand, where the actual cause of the loss was the unrelated wrongdoing of another party.

57 According to the respondents, the Law and Equity Act is not applicable in this case, as that statute presupposes a conflict between rules of common law and equity. No such conflict exists in the present case. Where duties

imposed by equity have been breached, the limitation of damage awards by operation of the principles of causation and remoteness is in accordance with established equitable rules and the principles of fairness and justice that underlie these rules.

[page570]

Analysis

58 The appellants, we saw, firmly base their claim in equity for breach of a fiduciary duty. Although they could pursue various claims at common law, they maintain that they can seek equitable remedies concurrently and may choose the remedy most advantageous to them. The respondents do not contest this and, in my view, quite properly concede this point. The appellants' position is fully supported so far as torts and contracts are concerned by this Court's decision in Central Trust Co. v. Rafuse, supra, and so far as claims in law and equity are concerned by the House of Lord's decision in Nocton v. Lord Ashburton, [1914] A.C. 932.

59 Nocton v. Lord Ashburton is the leading case in this area. Its facts bear a considerable affinity to the present case, and it forms a convenient starting point for a discussion of the applicable principles. There a mortgagee brought action against his solicitor for indemnity for loss he had suffered from the advice given by his solicitor to release a part of a mortgage security. The security became insufficient and the mortgagor defaulted. The release gave the solicitor further security for his own mortgage. The trial judge dealt with the case as one of deceit and, having found no fraud, dismissed the action. While an action for negligence may have lain, such action was statute-barred. On appeal, the Court of Appeal reversed the trial judge on the issue of fraud and granted damages for deceit. The House of Lords, however, restored the findings of the trial judge on the issue of fraud, but affirmed the Court of Appeal's award of damages on other grounds. A majority of their Lordships granted equitable relief for breach of fiduciary duty.

60 This equitable jurisdiction the Lord Chancellor, Viscount Haldane, noted was grounded in the old Bill of Chancery to enforce compensation for breach of a [page571] fiduciary obligation (at p. 946). Operating as a court of conscience, equity not only exercised concurrent jurisdiction with the common law in respect of misrepresentations where there was actual fraud; it also acted in respect of a wide range of cases where there was misrepresentation or failure to give information, not amounting to actual fraud, where a person was under a fiduciary duty or by reason of other special circumstances under a duty to inform another. As a court of conscience, it would act in personam to prevent persons from acting against the dictates of conscience as defined by the court, i.e., where there was "equitable fraud". Equity's remedies, the Lord Chancellor stated, were more elastic than those available at common law. "Operating in personam", he continued, equity "could order the defendant, not, indeed, in those days [i.e., before Lord Cairn's Act] to pay damages ... but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily" as he would have been before the breach (at p. 952). Thus the measure of compensation may not always be the same as damages in an action for deceit or negligence. However, in the case before him that question was one of form only and it was not clear whether it would have made any difference whether compensation or damages was awarded. The issue was, in any event, not raised and the Court of Appeal's award was allowed to stand.

61 There was one difference in the nature of the breach by the solicitor in Nocton from that complained of in the present case. In Nocton, it will be remembered, the breach could give rise to a possible benefit to the solicitor, a situation that does not arise here. However, I have no doubt, and it was not contested, that the situation here also involves a breach of a fiduciary duty sufficient to call upon equity's jurisdiction to compensate the appellants for breach of the duty. It is true that Viscount Haldane specifically referred to the benefit enuring to the solicitor in [page572] holding that there was a breach of fiduciary duty. He notes, at pp. 956-57:

> When, as in the case before us, a solicitor has had financial transactions with his client, and has handled his money to the extent of using it to pay off a mortgage made to himself, or of getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a

> mortgage of his own, a Court of Equity has always assumed jurisdiction to scrutinize his action. It did not matter that the client would have had a remedy in damages for breach of contract. Courts of Equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him.

62 This does not mean that a fiduciary duty has not been breached when, as in the present case, the solicitor fails to inform a client of a fact of which he should have informed him, or that he should seek independent advice. It is clear from earlier cases he discussed (Burrowes v. Lock (1805), 10 Ves. Jun. 470, 32 E.R. 927) and Slim v. Croucher (1860), 1 De G. F. & J. 518, 45 E.R. 462) that he considered that other situations might call for the superintending jurisdiction of equity. As well, it should be observed that Lord Dunedin and Lord Shaw of Dunfermline do not appear to rely on this factor. Indeed, the latter does not in his statement of the facts even mention the possible advantage enuring to the solicitor; he speaks more broadly of misrepresentations and misstatements made by a person entrusted with a duty and of the failure to comply with that duty (at p. 968), or again the liability of an adviser in respect of statements upon which the other is guided or upon which [page573] he justly relies, and this whether the statement is fraudulent or innocent (at pp. 969-71).

63 What has just been said is consistent with the subsequent case of Brickenden v. London Loan & Savings Co., supra, involving a similar fact situation. It is apparent from the language of Lord Thankerton, giving the judgment of the Privy Council, that a solicitor may be liable for a fiduciary duty for non-disclosure even when his or her personal interest is not at stake though that is a factor of some importance. Lord Thankerton had this to say, at pp. 468-69:

> Their Lordships are clearly of opinion that the appellant's non-disclosure of these two mortgages was a breach of his duty as solicitor to the Loan Company, particularly in view of his personal interest in them, and that it would equally have been a breach of duty if, contrary to their Lordships' opinion, the appellant had only been employed for the certificate of title. It follows that the Loan Company were entitled at least to nominal damages against the appellant.

64 Some academic writings, it is true, argue for limiting fiduciary obligations to situations where the solicitor may benefit from a misstatement; see Gummow, "Compensation for Breach of Fiduciary Duty", in Youdan, ed., Equity, Fiduciaries and Trusts (1989). However, the Canadian cases on the subject make it clear that the law is not so limited; see Culling v. Sansai Securities Ltd. *(1974), 45 D.L.R. (3d) 456* (B.C.S.C.); Burke v. Cory *(1959), 19 D.L.R. (2d) 252* (Ont. C.A.); Howard v. Cunliffe *(1973), 36 D.L.R. (3d) 212* (B.C.C.A.); Laskin v. Bache and Co., *[1972] 1 O.R. 465* (C.A.); Maghun v. Richardson Securities of Canada Ltd. *(1986), 58 O.R. (2d) 1* (C.A.). The attempt to narrow the application of fiduciary relations may to some extent rest on, in my view, a misguided sense of orderliness. As in the present case, there are often other remedies in contract or in tort available for the person suffering loss from a breach of duty. The argument, I think, fails to appreciate how equity operates. There have always been considerable areas of overlap, as Nocton v. Lord Ashburton exemplifies. As Lord Dunedin there tells us, at p. 964, there are of course classes of cases [page574] where "equity has been peculiarly dominant, not, I take it, from any scientific distinction between the classes of duty existing and the breaches thereof, but simply because in certain cases where common justice demanded a remedy, the common law had none forthcoming, and the common law (though there is no harder lesson for the stranger jurist to learn) began with the remedy and ended with the right". The reticence to give full sway to equity may also be owing to the fact that equitable remedies may, in certain cases, not appear appropriate to the task. This seems to fly in the face of Viscount Haldane's description of their "elastic" features, and I shall have more to say about this later.

65 This does not mean, however, that the question whether a fiduciary benefits from a breach of his duties is not important. This may, in an appropriate case, give rise to a constructive trust or other equitable remedy as Viscount Haldane observes in the passage, at pp. 956-57, above cited. The present case would clearly not call for restitution in that sense. What we are left with is a claim for compensation for simple failure to perform a fiduciary duty as occurred in Nocton v. Lord Ashburton.

66 The nature of the remedy of compensation for breach of an equitable obligation, except as it applies to property

held in a fiduciary capacity, is rather obscure; for an excellent discussion, see Davidson, in "The Equitable Remedy of Compensation" (1982), 13 Melbourne U.L.Rev. 349. There are not many cases on the issue. Nonetheless, the inherent jurisdiction of equity to compensate for a breach of a fiduciary duty cannot be denied. It is at times used where the exercise of another equitable jurisdiction, for example rescission of contract, has become impossible; see McKenzie v. McDonald, [1927] V.L.R. 134. But, as already mentioned, it has also been used independently [page575] of other remedies where there was a misstatement by a fiduciary or other persons in special circumstances. Certain developments before the Supreme Court of Judicature Act, 1873 (Eng.), 36 & 37 Vict., c. 66, held the promise of providing a means of dealing with situations now dealt with at common law as negligent misstatement under the principles expounded in Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465 (H.L.). For an account of this development, see Davidson, supra, esp. at pp. 357 et seq. The cases of Burrowes v. Lock, supra, and Slim v. Croucher, supra, discussed in Nocton v. Lord Ashburton are instructive on this point. However, Derry v. Peek (1889), 14 App. Cas. 337 (H.L.), where it was held that actual fraud was necessary to ground an action for deceit, was for a time thought to have more extensively limited remedies for loss for misrepresentation both at common law and in equity. In that climate, Burrowes v. Lock was explained on the basis of estoppel and Slim v. Croucher was held to be wrongly decided; see Low v. Bouverie, [1891] 3 Ch. 82. Nonetheless, the judges in Nocton v. Lord Ashburton subsequently appear to have at least approved of the principle underlying both these cases; see also Davidson, supra, who (at p. 368) cites a comment of Lord McNaghten in argument in Balkis Consolidated Co. v. Tomkinson (1893), 42 W.R. 204 (H.L.), at p. 205, (a comment not found in the "official" report, [1893] A.C. 396), which would suggest that he thought Slim v. Croucher was good law.

67 However that may be, the remedy of compensation in cases like the present is not likely to be resorted to frequently. The tort of deceit has long provided a convenient common law remedy that makes resort to the equitable remedy infrequent in cases of fraud, and with the development of the principle in Hedley Byrne & Co. v. Heller & Partners Ltd., supra, it is [page576] unlikely to be used often in cases of negligent misstatement. Nonetheless, it may at times be of utility; for an example, see McKenzie v. McDonald, supra, where on the facts a remedy in negligence was held to be unavailable. There may, as well, be other situations where equity may make use of the remedy in its traditional role of filling gaps in the law or improving the remedies available for a breach of duty; see Davidson, supra.

68 The simple fact is, however, that there is a paucity of cases where compensation has been awarded for breach of fiduciary duty in a context such as the present. More particularly, apart from the present case and Jacks v. Davis, supra, upon which it is based, only a few cases have anything to say regarding the effect of the intervening fault of a third party on compensation and not much more about the related issue of mitigation. The most elaborate judicial discussion appears in the New Zealand case of Day v. Mead, [1987] 2 N.Z.L.R. 443 (C.A.), where the court addressed the issue of contributory negligence in connection with a solicitor's breach of duty. I shall return to Day v. Mead later.

69 I shall begin by attempting to describe the nature of compensation and, more particularly, what it means in the present context. The appellants strongly emphasized that the courts of equity had, before the Judicature Act, no power to award damages, this being the exclusive domain of the common law, and the only statutory change to this regime was made by Lord Cairn's Act and its successors. Equity, they assert, was concerned with restoring a plaintiff to the position he or she was in before the breach of duty calling upon equity's intervention. The situation, they argued, was not changed by the Judicature Act, which was aimed largely at providing for the enforcement of law and equity in the same courts, not [page577] in altering the jurisdiction exercisable under each system.

70 There can be little doubt that damages come within the province of the common law (see, for example, Todd v. Gee (1810), 17 Ves. Jun. 273; 34 E.R. 106), although some early transgressions appear to have taken place where equity awarded damages (see Meagher, Gummow and Lehane, Equity, Doctrines and Remedies (2nd ed. 1984) s. 2304). Damages are a monetary payment awarded for the invasion of a right at common law. Equity aimed at restoring a person to whom a duty was owed to the position in which he or she would have been had the duty not been breached. This it did through a variety of remedies, including compensation.

71 The difference between damages and restitution was abundantly clear in cases of breaches of trust, and in that context the following statement of James and Baggallay L.JJ. in Ex parte Adamson (1878), 8 Ch. D. 807, at p. 819, appears unexceptionable:

> The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated.

But while the same approach of restitution or restoration applied in the case of simple compensation not involving the restoration of property, the difference in practical result between compensation and damages is by no means as clear. All that Viscount Haldane tells us about this (at p. 958) is that "[t]he measure of damages [he was there speaking in a generic and not in a technical sense] may not always be the same as in an action of deceit or for negligence", and in the case before him he was content to say that it was a mere matter of form. On this matter, I fully agree with Cooke P. in Day v. Mead, supra, at p. 451, that in many cases it is "a difference without a [page578] distinction". The question is whether, like the case before him, this is one of them.

72 The appellants urged us to accept the manner of calculating compensation adopted by the courts in trust cases or situations akin to a trust, and they relied in particular on the Guerin case, supra. I think the courts below were perfectly right to reject that proposition. There is a sharp divide between a situation where a person has control of property which in the view of the court belongs to another, and one where a person is under a fiduciary duty to perform an obligation where equity's concern is simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on; see Sealy, "Some Principles of Fiduciary Obligation", [1963] Cambridge L.J. 119; Sealy, "Fiduciary Relationships", [1962] Cambridge L.J. 69. In the case of a trust relationship, the trustee's obligation is to hold the res or object of the trust for his cestui que trust, and on breach the concern of equity is that it be restored to the cestui que trust or if that cannot be done to afford compensation for what the object would be worth. In the case of a mere breach of duty, the concern of equity is to ascertain the loss resulting from the breach of the particular duty. Where the wrongdoer has received some benefit, that benefit can be disgorged, but the measure of compensation where no such benefit has been obtained by the wrongdoer raises different issues. I turn then specifically to that situation.

73 McKenzie v. McDonald, supra, usefully sets the stage for discussion. There the plaintiff, a widow, had approached the defendant real estate agent advising him she wished to sell her farm for GBP 4 10s. per acre. The defendant inspected the property and was advised by an experienced land valuer that it was worth the price asked. He, however, persuaded the [page579] plaintiff that it was not worth that price and later proposed an arrangement, which she accepted, whereby she would convey it to him in exchange for property he owned plus an amount to make up the difference between the value of her land and his. He, however, undervalued her farm (at GBP 4 per acre) and overvalued his land. The court found the defendant liable for breach of a fiduciary duty. Since third parties had acquired the farm, the court could not order rescission, so it ordered the defendant to pay the plaintiff compensation for the undervaluation of the farm and the overvaluation of his land. It is important to observe that, although the defendant had subsequently sold the farm for GBP 4 10s. an acre on extended terms, the court assessed the value of the farm in terms of the initial sale price, GBP 4 5s., not its value at the time of judgment. That was the loss the defendant suffered because she would have sold the land for the initial sale price.

74 The case thus demonstrates that, while compensation is designed to put the plaintiff "in as good a position pecuniarily as ... before the injury", as Viscount Haldane put it in Nocton v. Lord Ashburton, supra, at p. 952, "it is imperative" as Davidson, supra, at p. 354 reminds us, "to ascertain the loss resulting from breach of the relevant equitable duty". The case also illustrates that compensation is not the same for every equitable remedy. Had this been an action for an account, the value would have been determined at the time of judgment.

75 An award of compensation is no less that because the amount recovered in a particular case is the same as would have been awarded in an action at common law. It was not felt necessary in McKenzie v. McDonald to bring

in common law concepts to arrive at the same result as would have been obtained in a common law action. There were no issues of remoteness, or intervening cause, as arose here, however, and the appellants, we saw, strongly maintained that doctrines [page580] like remoteness and mitigation have no place in equity.

76 I should first of all say that the fact that such limitations may not have been developed before the Judicature Act is no ground for saying there is no room for further development of equitable principles to deal with the situation. We have it on high authority that equitable principles were not frozen in time; see United Scientific Holdings Ltd. v. Burnley Borough Council, [1978] A.C. 904. As Lord Diplock put it, at p. 926:

> Nor did the coming into force of that Act bring to a sudden halt the whole process of development of the substantive law of England that had been so notable an achievement of the preceding decades.

We have been given no case where the principles applicable to trusts have been applied to a breach of a fiduciary duty of the type in question here, and for reasons already given, I see no reason why they should be transposed here. The harshness of the result is reason alone, but apart from this, I do not think that the claim for the harm resulting from the actions of third parties can fairly be looked upon as falling within what is encompassed in restoration for the harm suffered from the breach. That is the view taken by all the Canadian courts that have dealt with the issue. In addition to Jacks v. Davis and the present case, reference may also be made to Laskin v. Bache and Co., supra, and Burke v. Cory, supra, both in the Ontario Court of Appeal.

77 I have no doubt that policies underlying concepts like remoteness and mitigation might have developed from an equitable perspective. However, given the paucity of authority in the field, it is scarcely surprising that courts will deal with a case falling properly within the ambit of equity as if it were a common law matter or as justifying the use of its mode of analysis. This can be seen from Burke v. Cory, and Laskin v. Bache and Co. In Cory, a broker induced a client to purchase certain stocks after gaining his confidence by emphasizing the broker's qualifications and his possession of private information regarding the [page581] stocks and then making false representations about the company. The court held that apart from the action of deceit, which requires an allegation of fraud, liability for the misrepresentation could be rested on the existence of a fiduciary relationship. The amount of compensation (which the court there referred to as the measure of damages) was calculated in terms of the loss at the time of the allotment.

78 In Cory, and for that matter in Laskin, the court was also willing to apply the concept of mitigation of damages. Mitigation in equity was also found to be appropriate in LeMesurier v. Andrus *(1986), 54 O.R. (2d) 1* (C.A.), and it seems to be implicit in this Court's decision in Asamera Oil Corp. v. Sea Oil & General Corp., *[1979] 1 S.C.R. 633*, at pp. 667-68. This is consistent with the fact that equity acted on the basis of fairness and justice. The truth is that barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.

79 United Scientific Holdings Ltd. v. Burnley Borough Council, supra, gives strong support to this manner of approaching the issue. That case concerned the different routes taken by common law and equity in determining whether time was of the essence in a lease. As in the present case, there was some tendency for these different routes to converge even before the Judicature Act, for it must not be forgotten that well before that Act "the evolution of the one system was influenced by the other" (per Lord Simon, at p. 944). In United Scientific, s. 25 of the Act seems to me to have given appropriate guidance as to how modern courts should approach the situation and I need not closely examine the holding of that case except to bring attention to what the House of Lords thought the interplay of law and equity should be. In a passage with which all the other Law [page582] Lords agreed, Lord Diplock had this to say, at pp. 924-25:

> My Lords, if by "rules of equity" is meant that body of substantive and adjectival law that, prior to 1875, was administered by the Court of Chancery but not by courts of common law, to speak of the rules of equity as being part of the law of England in 1977 is about as meaningful as to speak similarly of the Statutes of Uses or of Quia Emptores. Historically all three have in their time played an important part in the development of

> the corpus juris into what it is today; but to perpetuate a dichotomy between rules of equity and rules of common law which it was a major purpose of the Supreme Court of Judicature Act 1873 to do away with, is, in my view, conducive to erroneous conclusions as to the ways in which the law of England has developed in the last hundred years.
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> Your Lordships have been referred to the vivid phrase traceable to the first edition of Ashburner, Principles of Equity where, in speaking in 1902 of the effect of the Supreme Court of Judicature Act he says (p. 23) "the two streams of jurisdiction" (sc. law and equity) - "though they run in the same channel, run side by side and do not mingle their waters." My Lords, by 1977 this metaphor has in my view become both mischievous and deceptive. The innate conservatism of English lawyers may have made them slow to recognise that by the Supreme Court of Judicature Act 1873 the two systems of substantive and adjectival law formerly administered by courts of law and Courts of Chancery (as well as those administered by courts of admiralty, probate and matrimonial causes), were fused. As at the confluence of the Rhône and Saône, it may be possible for a short distance to discern the source from which each part of the combined stream came, but there comes a point at which this ceases to be possible. If Professor Ashburner's fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now.

80 This approach was followed in the Ontario Court of Appeal in LeMesurier v. Andrus, supra, where that court, in the face of its own recent contrary dicta, held that where specific performance with an abatement [page583] is available to a vendor, he must equally be entitled, where he has sold to another to mitigate his damages, to the common law remedy of damages with an "abatement" or reduction in those damages for the deficiency of title. What made this possible, the court reasoned (at p. 9), was that "[w]hatever the original intention of the Legislature, the fusion of law and equity is now real and total", citing Lord Diplock's statement. Lambert J.A., in the present case, adopted a similar approach.

81 The most dramatic example of this approach is the New Zealand case of Day v. Mead to which I have previously referred. Mead, Day's solicitor, acted for him for many years in connection with land subdivision projects and other ventures. None of the investments could fairly be described as speculative until those that gave rise to the litigation. These concerned a newly formed company, Pacific Mills Ltd., of which Mead was a director and shareholder. The investment and the decision of the trial judge are conveniently set forth in the headnote to the case, at p. 443, as follows:

> In July 1977, acting on Mead's advice, Day purchased 20,000 shares, at $1 per share, in Pacific Mills, knowing that Mead was a shareholder and that his firm's nominee company had lent money to Pacific Mills. After this initial investment of $20,000, Day took an interest in the company's business, regularly visiting its paper-mill factory and attending a couple of directors' meetings as an onlooker. Then, in December 1977, once again acting on Mead's advice, Day subscribed for a further 80,000 shares in the company at a cost of $80,000. In March 1978 the company went into receivership, and Day lost both investments. He sued Mead for his loss plus interest, claiming breach of fiduciary duty. The High Court Judge held that Mead was in breach of his fiduciary duty to Day in failing to refer Day to an independent solicitor and in failing to inform him of the management and financial difficulties facing the company. The Judge further held that Day was entitled to full compensation for his first investment, but, as Day was equally to blame for the loss of his second investment due to his business experience and his involvement with the company between July and December [page584] 1977, he was entitled to compensation for only half that investment. The Judge awarded Day damages of $60,000, but refused interest on the grounds of Day's delay in bringing the case to trial.

The Court of Appeal affirmed the decision of the trial judge except as to the matter of interest, an issue I need not discuss here. It agreed that Mead, though he acted quite innocently, was, having regard to the circumstances, in breach of fiduciary duties. In the absence of complete disclosure of the various conflicts of interest, he should have referred Day to an independent adviser and should have informed him of the problems faced by the company.

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 [page585] be apparent from Hayward v Giordani [1983] NZLR 140, 148.
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> 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.
>
> 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. [page586] 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.

84 Lord Diplock's remark to the effect that the two streams of common law and equity have now mingled and

interact are abundantly evident in this area. That is as it should be because in this particular area law and equity have for long been on the same course and whether one follows the way of equity through a flexible use of the relatively undeveloped remedy of compensation, or the common law's more developed approach to damages is of no great moment. Where "the measure of duty is the same", the same rule should apply; see Somers J. in Day v. Mead, supra, at p. 457. Only when there are different policy objectives should equity engage in its well-known flexibility [page587] to achieve a different and fairer result. The foundation of the obligation sought to be enforced, Somers J. notes at p. 458, is "the trust or confidence reposed by one and accepted by the other or the assumption to act for the one by that other". That being so, it would be odd if a different result followed depending solely on the manner in which one framed an identical claim. What is required is a measure of rationalization. I fully concur with the following statement of Somers J., at p. 458:

> I am disposed to think that the equitable and common law obligations as to disclosure, use of confidential information, and want of care discernible in the cases are now but particular instances of duties imposed by reason of the circumstances in which each party stands to the other and that while the particular remedy for breach of duty may depend upon the way the case has developed, equity and the law are set upon the same course.

85 I am aware that reservations have been expressed in some quarters about this fusion or, perhaps more accurately, mingling of law and equity; see Hanbury and Maudsley, Modern Equity (12th ed. 1985), at pp. 22-26. But no case was brought to our attention where it has led to confusion, and there are many cases, some of which I have discussed, where it has made possible a just and reasonable result. It simply provides a general, but flexible, approach that allows for direct application of the experience and best features of both law and equity, whether the mode of redress (the cause of action or remedy) originates in one system or the other. There might be room for concern if one were indiscriminately attempting to meld the whole of the two systems. Equitable concepts like trusts, equitable estates and consequent equitable remedies must continue to exist apart, if not in isolation, from common law rules. But when one moves to fiduciary relationships and the law regarding misstatements, we have a situation where now the courts of common law, now the courts of equity [page588] moved forward to provide remedies where a person failed to meet the trust or confidence reposed in that person. There was throughout considerable overlap. In time the common law outstripped equity and the remedy of compensation became somewhat atrophied. Under these circumstances, why should it not borrow from the experience of the common law? Whether the courts refine the equitable tools such as the remedy of compensation, or follow the common law on its own terms, seems not particularly important where the same policy objective is sought.

86 Where a situation requires different policy objectives, then the remedy may be found in the system that appears more appropriate. This will often be equity. Its flexible remedies such as constructive trusts, account, tracing and compensation must continue to be moulded to meet the requirements of fairness and justice in specific situations. Nor should this process be confined to pre-existing situations. Lord Diplock has reminded us that the regime of conjoint application of law and equity introduced by the Judicature Act must not be seen as bringing to a halt the process of development of substantive law in both great systems of judicially created law. And this Court in cases such as Canadian Aero Service Ltd. v. O'Malley, supra, and Lac Minerals, supra, to name but two, has not been slow to accept this counsel.

87 But, as these cases underline, equity cannot be rigidly applied. Its doctrines must be attuned to different circumstances. Quite obviously not all fiduciary obligations are the same. It would be wholly inappropriate to interpret equitable doctrines so technically as to displace common law rules that achieve substantial justice in areas of common concern, thereby leading to harsh and inequitable results. I wholeheartedly reject the notion advanced by the appellants that the Court of Appeal fell "into error because of a misplaced [page589] concern with concepts of common sense and reasonableness". I would have thought these concerns were central to both common law and equity.

88 It was said, however, that the approach is necessary to sustain fiduciary relationships. I do not accept that there is need to strengthen the fiduciary position to the point of unnecessary harshness. Both the common law and equity sufficiently support the fiduciary position by compensating the victim of the breach of confidence. Damages

equivalent to those for deceit would seem sufficient to meet both these ends. That was the level of compensation awarded by the courts below and neither party contested its appropriateness.

Disposition

89 I would dismiss the appeal with costs.

The following are the reasons delivered by

STEVENSON J.

90 I have read the draft judgment of my colleague, La Forest J. and agree with his conclusion and am in substantial agreement with his reasoning.

91 I part company with his reasoning on two points.

1. Compensation as a Remedy

92 Firstly, while I am in agreement that compensation here should not be determined in the same way as a court of equity would determine compensation in the case of a claim against a trustee, I would not define compensation in equity as merely putting the plaintiff in as good a position as the plaintiff was before the breach. In McKenzie v. McDonald, [1927] V.L.R. 134, the Defendant actually took title to the principal's property and I would have been inclined to [page590] make him disgorge the profit. This case is not one of profit making and restitutionary concepts do not fit.

93 On the other hand, I think Viscount Haldane was correct in Nocton v. Lord Ashburton, [1914] A.C. 932, at p. 958, when he says that the measure of damages in a compensation claim may not always be the same as in an action of deceit or negligence. The thrust of the article by Davidson, "The Equitable Remedy of Compensation" (1982), 13 Melbourne U.L.Rev. 349, is that compensation in equity differs from damages, particularly, of course, where equity is looking at restitution. The difference is also helpfully discussed by Gummow J., writing extra-judicially, in "Compensation for Breach of Fiduciary Duty", in Youdan, ed., Equity, Fiduciaries and Trusts (1989).

94 In my view a court of equity, applying principles of fairness, would and should draw the line at calling upon the fiduciary to compensate for losses arising as a result of the unanticipated neglect of the engineers and pile driving contractor. The fiduciary had nothing to do with their selection, their control, their contractual or bonding obligations. It follows that I agree with the trial judge and the British Columbia Court of Appeal that these losses are too remote, not in the sense of failing the "but for" test, but in being so unrelated and independent that they should not, in fairness, be attributed to the defendant's breach of duty.

2. The Fusion of Law and Equity

95 I do not think that the so-called fusion of law and equity has anything to do with deciding this case. If it did, the rules of equity would prevail. I greatly fear that talk of fusing law and equity only results in confusing and confounding the law. I do agree that equity is not frozen at the time of the Judicature Acts. [page591] But the Judicature Acts were not a new Statute of Uses.

96 Nor do I agree that principles of contributory negligence were introduced by fusion. This subject is addressed in the article of Gummow J, to which I referred. Common law contributory negligence was a complete bar to the action which it would be if equity adopted the common law. Moreover, this Court has held that contributory negligence legislation does not apply in a claim for breach of trust: Carl B. Potter Ltd. v. Mercantile Bank of Canada, *[1980] 2 S.C.R. 343*, at p. 352 (cited by Gummow). The beneficiary is under no duty to the trustee any more than the

plaintiffs here were under any duty to the defendant solicitor. I do not say that a court of equity might not find some losses to be caused by a plaintiff rather than a defendant, and to be too remote in that sense, but it would not do so because of the fusion of law and equity.

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