Hodgkinson v. Simms, [1994] 3 S.C.R. 377

Supreme Court Reports

Supreme Court of Canada

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.

1993: December 6; 1994: September 30.

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[1994] 3 S.C.R. 377 | [1994] 3 R.C.S. 377 | [1994] S.C.J. No. 84 | [1994] A.C.S. no 84 | 1994 CarswellBC 438

Robert L. Hodgkinson, appellant; v. David L. Simms and Jerry S. Waldman, carrying on business as Simms & Waldman, and the said Simms & Waldman, a partnership, respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Fiduciary duty — Non-disclosure — Damages — Financial adviser — Client insisting that adviser not be involved in promoting — Adviser not disclosing involvement in projects — Client investing in projects suggested by adviser — Ultimate decision as to whether or not to invest that of client — Substantial losses incurred during period of economic downturn — Whether or not fiduciary duty on part of adviser — If so, calculation of damages.

Contracts — Contract for independent services — Breach by failure to disclose — Calculation of damages.

Appellant, a stock broker who was inexperienced in tax planning, wanted an independent professional to advise him respecting his tax planning and tax sheltering needs. He hired respondent Simms, an accountant, who specialized in providing general tax shelter advice, and specifically, real estate tax shelter investments. Appellant relied heavily on the respondent's advice, a reliance assiduously fostered by the respondent. The relationship was such that the appellant did not really question him about the reasons underlying the advice given. Respondent advised appellant to invest in MURBs, real estate investment projects which, by the conventional wisdom, were safe and conservative. Appellant bought 4 MURBs (income tax sheltered properties) on the accountant's advice and lost heavily when the value of the four MURBs fell during a decline in the real estate market.

The gravamen of appellant's action lay in the fact that respondent was acting for the developers during the relevant period in the "structuring" of each of these MURB projects and did not disclose this. Fraud and deceit were not at issue. Appellant got the investments he paid for from the developers, but the same could not be said of his relationship with his accountant. He looked to the respondent as an independent professional advisor, not a promoter, and would not have invested in the impugned projects had he known the true nature and extent of respondent's relationship with the developers.

Appellant brought an action in the Supreme Court of British Columbia for breach of fiduciary duty, breach of contract and negligence to recover all his losses on the four investments recommended by the respondent accountant. The claim in negligence was dismissed at trial and was not pursued before the Court of Appeal. The trial judge, however, allowed his action for breach of fiduciary duty and breach of contract and awarded him damages. The British Columbia Court of Appeal upheld the trial judge on the breach of contract issue, but reversed on the issue of fiduciary duties. It also varied the damages award, setting damages at an amount equal to the fees received by respondent accountant from the developers on account of the four projects, prorated as

between the various investors in those projects. This, therefore, was a case of material non-disclosure in which the appellant alleged breach of fiduciary duty and breach of contract against the respondent in the performance of a contract for investment advice and other tax-related financial services.

Held (Sopinka, McLachlin and Major JJ. dissenting): The appeal should be allowed.

Per La Forest, L'Heureux-Dubé and Gonthier JJ.: Liability here flows from the principles underlying the notion of fiduciary duty, one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. This generalized duty unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation. A fiduciary obligation carries with it not only a duty of skill and competence; the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.

A fiduciary duty is distinct from other equitable and common law doctrines. Undue influence focuses on the sufficiency of consent and unconscionability on the reasonableness of a given transaction. The fiduciary principle monitors the abuse of a loyalty reposed. The existence of a contract does not necessarily preclude the existence of fiduciary obligations between parties. Indeed, the legal incidents of many contracts give rise to a fiduciary duty.

A party becomes a fiduciary where it, acting pursuant to statute, agreement or unilateral undertaking, has an obligation to act for the benefit of another and that obligation carries with it a discretionary power. Several indicia are of assistance in recognizing the existence of fiduciary relationships: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power.

The term fiduciary is properly used in two ways. The first describes certain relationships having as their essence discretion, influence over interests, and an inherent vulnerability. A rebuttable presumption arises out of the inherent purpose of the relationship that one party has a duty to act in the best interests of the other party. The second, slightly different use of fiduciary exists where fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship. In such a case the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust are non-exhaustive examples of evidentiary factors to be considered in making this determination. Outside the established categories of fiduciary relationships, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary.

Relationships characterized by a unilateral discretion, such as the trustee-beneficiary relationship, are a species of a broader family of relationships termed "power-dependency" relationships. The concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party.

In seeking to identify the various civil duties that flow from a particular power-dependency relationship, it is wrong to focus only on the degree to which a power or discretion to harm another is somehow "unilateral". This concept has neither descriptive nor analytical relevance to many fact-based fiduciary relationships. Ipso facto, persons in a "power-dependency relationship" are vulnerable to harm. Further, the relative "degree of vulnerability" does not depend on some hypothetical ability to protect one's self from harm, but rather on the nature of the parties' reasonable expectations. A party which expects the other party to a relationship to act in the former's best interests is more vulnerable to an abuse of power than a party which should be expected to know that it should take measures to protect itself.

The precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship.

Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest. Parties, in all other respects independent, will rarely be justified in

surrendering their self-interest so as to invoke the fiduciary principle. The law does not object to one party's taking advantage of another per se, so long as the particular form of advantage taking is not otherwise objectionable.

In the professional advisor context, however, a person receiving advice should not need to protect him- or herself from the abuse of power by his or her independent professional advisor when the very basis of the advisory contract is that the advisor will use his or her special skills on behalf of the advisee. In sharp contrast to arm's length commercial relationships, which are characterized by self-interest, the essence of professional advisory relationships is precisely trust, confidence, and independence. Concern about the dangers of extending the fiduciary principle in the context of an arm's length commercial relationship is simply not transferable to professional advisory relationships.

Finding of a fiduciary relationship in the independent professional advisory context does not represent any addition to the law. Courts exercising equitable jurisdiction have repeatedly affirmed that clients in a professional advisory relationship have a right to expect that their professional advisors will act in their best interests, to the exclusion of all other interests, unless the contrary is disclosed.

The courts have consistently shown a willingness to enforce a fiduciary duty in the investment advice aspect of many kinds of financial service relationships. This can arise even where the ultimate power remains in the beneficiary, and without regard to the level of sophistication of the client.

The relationship of broker and client is not per se a fiduciary relationship. Where the elements of trust and confidence and reliance on skill and knowledge and advice are present, the relationship is fiduciary and the obligations that attach are fiduciary. On the other hand, if those elements are not present, the fiduciary relationship does not exist. The circumstances can cover the whole spectrum from total reliance to total independence. Where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor.

Policy considerations support fiduciary relationships in the case of financial advisors. These are occupations where advisors to whom a person gives trust has power over vast sums of money, yet the nature of their position is such that specific regulation might frustrate the very function they have to perform. By enforcing a duty of honesty and good faith, the courts are able to regulate an activity that is of great value to commerce and society generally.

In many advisory relationships norms of loyalty and good faith are often indicated by the various codes of professional responsibility and behaviour set out by the relevant self-regulatory body. Here, the standards set by the accounting profession at the relevant time compelled full disclosure by the respondent of his interest with the developers. While there was no prohibition against the respondent's representing both a developer and an investor in relation to a real estate tax-shelter investment, the respondent had a duty to disclose the true state of affairs to both sides.

The principle of non-intervention by an appellate court in the findings of fact and credibility of the trial court is a rule of law. The Court of Appeal committed a reversible error when it reversed the findings of the trial judge on the question of reliance. The trial judge applied the proper legal test and that test applied was not eclipsed by Lac Minerals. The analysis of the facts was consistent with the relevant authorities and did not disclose an error of law.

Concepts like "trust", independence from outside interests, disregard for self-interest, are all hallmarks of the fiduciary principle. The courts have frequently enforced fiduciary duties in professional advisory relationships. The type of disclosure that routinely occurs in these kinds of relationships results in the advisor's acquiring influence which is equivalent to a discretion or power to affect the client's legal or practical interests. Power and discretion in this context mean only the ability to cause harm. Vulnerability is nothing more than the corollary of the ability to cause harm, viz., the susceptibility to harm. In the advisory context, the advisor's ability to cause harm and the client's susceptibility to be harmed arise from the simple but unassailable fact that the advice given by an independent advisor is not likely to be viewed with suspicion; rather, it is likely to be followed.

Reliance is an important element in a fiduciary duty. In this context it does not mean a wholesale substitution of

decision-making power from the investor to the advisor. This approach is too restrictive; it ignores the peculiar potential for overriding influence in the professional advisor. Strong policy reasons favour the law's intervention by means of its jurisdiction over fiduciary duties to foster the fair and proper functioning of the investment market which cannot really be regulated in other ways. The facts must be closely examined to determine whether the decision is effectively that of the advisor. Here the reliance placed in the respondent (and assiduously fostered by the latter) was such that the respondent's advice was in substance an exercise of a power and discretion placed in the respondent by the appellant when the appellant invested in the MURB projects.

The proper approach to damages for breach of a fiduciary duty is restitutionary. Appellant is entitled to be put in as good a position as he would have been in had the breach not occurred. Appellant was found at trial to have changed his position because of material non-disclosure and the respondent did not meet the burden of proving the victim would have suffered the same loss regardless of the breach. Mere speculation is not enough. Notwithstanding the general economic recession, the particular fiduciary breach initiated the chain of events leading to the investor's loss and the breaching party accordingly must account for this loss in full.

This result is not affected by the fact that a court exercising equitable jurisdiction may consider the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. A breach of a fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate. Equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law. This approach is in accordance with the fusion of law and equity. Courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded. The courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy. Here, however, the duty breached by the respondent was directly related to the risk that materialized and in fact caused the appellant's loss. The respondent was specifically retained to give independent advice about suitable investments, which gave the respondent a kind of influence or discretion over the appellant such that the respondent effectively chose the risks to which the appellant would be exposed.

Courts have treated common law claims of the same nature as the wrong complained of in the present case in much the same way as claims in equity. Where a party can show that but for the relevant breach it would not have entered into a given contract, that party is freed from the burden or benefit of the rest of the bargain. The wronged party is entitled to be restored to the pre-transaction status quo.

From a policy perspective, placing the risk of market fluctuations on a plaintiff who would not have entered into a given transaction but for the defendant's wrongful conduct is unjust. The proper approach to damages in this case was the monetary equivalent of a rescissionary remedy. The appellant should not suffer from the fact that he did not discover the breach until such time as the market had already taken its toll on his investments. This principle is reflected in the common law of mitigation, itself rooted in causation.

The trial judge's award of damages should also be upheld in order to put special pressure on those in positions of trust and power over others in situations of vulnerability. Here, the wrong complained of goes to the heart of the duty of loyalty that lies at the core of the fiduciary principle. A measure of damages that places the exigencies of the market-place on the respondent can be used because it is in accordance with the principle that a defaulting fiduciary has an obligation to effect restitution in specie or its monetary equivalent.

The respondent's behaviour calls for strict legal censure. The remedy of disgorgement is not sufficient to guard against the type of abusive behaviour engaged in by the respondent. The law of fiduciary duties has always contained within it an element of deterrence. The law can accordingly monitor a given relationship that society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility.

Given the fiduciary duty between the parties, damages for breach of contract need not in strictness be considered. Damages in contract follow the principles stated in connection with the equitable breach. Respondent breached his contractual duty to make full disclosure of any material conflict of interest -- a contract providing for the performance of obligations characterized in equity as fiduciary. But for the non-disclosure, the contract with the developers for the MURBs would not have been entered into. It was foreseeable that if the contract were breached the appellant would be exposed to market risks to which he would not otherwise have

been exposed. Since damages must be foreseeable as to kind, but not extent, any distinction based on the unforeseeability of the extent of the market fluctuations must be dismissed.

Per Iacobucci J.: Agreement with the reasons of La Forest J. on the following points: the existence of fiduciary duty between the parties, the existence of a breach of duty by respondent through non-disclosure of the pecuniary interest with the developers and the question of damages. Lac Minerals Ltd. v. International Corona Resources Ltd., however, should simply be distinguished.

Per Sopinka, McLachlin and Major JJ. (dissenting): The hallmark of a fiduciary relationship is that one party is dependent upon or in the power of the other. In determining if this is the case, the court looks to the three characteristics of a fiduciary relationship: (1) The fiduciary has scope for the exercise of some discretion or power and (2) can unilaterally exercise that discretion or power so as to affect the beneficiary's legal or practical interests, and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. This descriptive list does not form an absolute legal test. A fiduciary relationship can be found even though all of these characteristics are not present. The presence of these ingredients will not invariably identify the existence of a fiduciary relationship. Vulnerability is the one feature considered indispensable to the existence of the relationship.

Two considerations may act as false indicators of a fiduciary relationship. First, conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty. Secondly, the "category" into which the relationship falls, such as doctor-patient or lawyer-client, is not determinative for not every act in a so-called fiduciary relationship is encumbered with a fiduciary obligation and, conversely, fiduciary obligations may arise in relationships not traditionally considered fiduciary. The relationship here was not a traditional "fiduciary relationship".

An objective criterion is necessary to identify the measure of confidence and trust sufficient to give rise to a fiduciary obligation in order to establish some degree of certainty. The cases suggest that the distinguishing characteristic between advice simpliciter and advice giving rise to a fiduciary duty is the ceding by one party of effective power to the other. The mutual conferring and acceptance of power to the knowledge of both parties creates the special and onerous trust obligation. Vulnerability, in this broad sense, may be seen as encompassing all three descriptive characteristics of the fiduciary relationship. It comports the notion, not only of weakness in the dependent party, but of a relationship in which one party is in the power of the other -- a relationship of dependency or implied dependency.

A total reliance and dependence on the fiduciary by the beneficiary is necessary to establish a fiduciary relationship. This accords with the concepts of trust and loyalty at the heart of the fiduciary obligation. The word "trust" connotes a state of complete reliance and the correlative duty of loyalty arises from this level of trust and the complete reliance which it evidences. Where a party retains the power and ability to make his or her own decisions, the other person may be under a duty of care not to misrepresent the true state of affairs or face liability in tort or negligence but is not under a duty of loyalty. That higher duty arises only when the person has unilateral power over the other person's affairs.

Policy considerations may support a fiduciary duty's being imposed on services requiring skills that are very costly to master. In the case of such special skills, the client is effectively obliged to give exclusive power to the person with these skills and a fiduciary obligation may accordingly be appropriate. The law aims at deterring fiduciaries from misappropriating the powers vested in them solely for the purpose of enabling them to perform their functions. Further, the imposition of fiduciary obligations in some cases may be justified on the ground of maintenance of the public's acceptance of, and the credibility of, important institutions in society which render fiduciary services. Neither of these rationales justifies imposing a fiduciary obligation on the purveyor of investment advice where the client retains the power and ability to make the decisions of which he or she later complains. And neither undermines the view that, once imposed, the fiduciary rule should be strictly pursued. Ultimately, the stringent measure of compensation for breach of fiduciary duty, which may take a different view of loss causation than tort and contract law, can be justified only in cases where true trust in the sense of complete reliance is demonstrated.

A court of appeal must not interfere with the findings of fact of the trial judge unless they are clearly unsupported on the evidence. Here, the trial judge's error lay in the failure to ask whether appellant had given and the

investment counsellor had assumed total power over the affairs in question. The evidence did not establish the necessary total grant of power and the trial judge accordingly could not have reasonably concluded the assumption of a fiduciary obligation.

Losses recoverable in an action arising out of the non-performance of a contractual obligation are limited to those which will put the injured party in the same position as he would have been in had the wrongdoer performed what he promised. In order to avoid either under-compensation or over-compensation, the measure of damages in law is limited by the concept of the foreseeability of the resulting loss. Moreover, the principles must be sufficiently flexible in their application to insure that the measure of damages is reasonable in the circumstances of the individual case. Two considerations have emerged in the legal analysis associated with the measure of damages; causation and the reasonable contemplation of the parties.

The results of supervening events beyond the control of the defendant are not justly visited upon him/her in assessing damages, even in the context of the breach of an equitable duty.

The principle that the plaintiff must prove both transaction causation (that the violations in question caused the plaintiff to engage in the transaction) and loss causation (that the misrepresentations or omissions caused the harm) can be applied where the application of the principle in situations where the representation itself is not causally connected to the devaluation. In such situations, where the losses incurred by a plaintiff are related to the contractual breach of the defendant merely on a "but for" basis, it would be unduly harsh to impose liability for all of the losses upon the defendant, especially where the direct cause of the loss is outside of the defendant's control.

In assessing the damages for respondent's breach of contract it is necessary to ask whether the loss sustained by the appellant arose naturally from a breach thereof or whether at the time of contracting the parties could reasonably have contemplated the loss flowing from the breach of the duty to disclose. In the event that either criterion is satisfied, the respondent should be held liable for that loss. Finally, the damage assessment as a whole must represent a fair resolution on the facts of this case.

The devaluation of the appellant's investments did not arise naturally from the respondent's breach of contract. It was caused by an economic downturn which did not reflect any inadequacy in the advice provided by the respondent. The "but for" approach to causation is rejected where the loss resulted from forces beyond the control of the respondent who, the trial judge determined, had provided otherwise sound investment advice.

The parties would not reasonably have contemplated the losses associated with an economic downturn as liable to result from the respondent's breach of his duty to make full disclosure. The two events were in no way causally related. The continuing nature of the breach of the duty to disclose does not affect this conclusion.

In situations involving breach of a duty to disclose, courts have consistently recognized the right of plaintiffs to compensation for losses equivalent to the difference between the price which they paid for a particular investment and the actual value of the investment purchased. Here, since the appellant had paid nothing more than the fair market value for the investments, no damages should have been assessed. The damages award made by the Court of Appeal could not be reduced here because no cross-appeal was made from the judgment of that Court.

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APPEAL from a judgment of the British Columbia Court of Appeal (1992), 65 B.C.L.R. (2d) 264, [1992] 4 W.W.R. 330, 6 C.P.C. (3d) 141, 45 E.T.R. 270, 5 B.L.R. (2d) 236, 11 B.C.A.C. 248, 22 W.A.C. 248, allowing an appeal from a judgment of Prowse J. (1989), 43 B.L.R. 122. Appeal allowed, Sopinka, McLachlin and Major JJ. dissenting.

Earl A. Cherniak, Q.C., Gregory Walsh and Kirk Stevens, for the appellant. Glenn A. Urquhart and Arthur M. Grant, for the respondents.

Solicitors for the appellant: Walsh & Company, Vancouver. Solicitors for the respondent: Singleton, Urquhart, Macdonald, Vancouver.

The judgment of La Forest, L' Heureux-Dubé and Gonthier JJ. was delivered by

La FOREST J.

I. Introduction

1 This is a case of material non-disclosure in which the appellant alleges breach of fiduciary duty and breach of contract against the respondent in the performance of a contract for investment advice and other tax-related financial services. The respondent, Mr. Simms, was a Chartered Accountant and partner in the respondent firm Simms & Waldman. Though the firm and Mr. Waldman are parties to these proceedings, I shall, because of Mr. Simms' central role, generally be referring to him when I speak of "the respondent". Mr. Simms had developed a special expertise in relation to multi-unit residential buildings (MURBs). In 1980 the appellant Mr. Hodgkinson retained Mr. Simms' services in the areas of tax planning and preparation, and in finding stable, tax-sheltering investments. Mr. Hodgkinson was a "neophyte" in the field of tax planning and tax-related investments. He approached Mr. Simms as an independent professional who would give him the impartial service and advice he was looking for. Mr. Hodgkinson decided to put himself in Mr. Simms' hands with respect to his tax planning and tax sheltering needs. In the course of their relationship, Mr. Simms recommended four MURB projects to Mr. Hodgkinson as meeting his investment criteria. Mr. Hodgkinson duly invested in these projects. What Mr. Hodgkinson did not know, however, was that at the time Mr. Simms was making these recommendations, he was in a financial relationship with the developers of the projects. The more MURBs Mr. Simms sold to Simms & Waldman clients, the larger the fees he reaped from the developers. While Mr. Simms attempted to deny the non-disclosure by arguing at discovery that his relationship with the developers was in fact disclosed to Mr. Hodgkinson, and then stating at trial that his business relationship with the developers did not commence until after Mr. Hodgkinson had invested in the projects, this line of defence was rejected by the trial judge and was not pursued on appeal. Rather, this appeal concerns the proper characterization of the relationship between the parties and determining the nature and extent of the civil liability, if any, flowing from the non-disclosure.

2 The trial judge, Prowse J., found there was an implied retainer between the parties, one of the terms of which was a contractual duty of material disclosure. She went on to find the respondent in breach of this term. In addition, the trial judge, after a careful and detailed review of the facts, held that the relationship between the parties was such that the respondent owed the appellant a fiduciary duty. This duty carried with it a duty of disclosure, which, again, the respondent was found to have breached. While the finding of contractual liability was upheld by the Court of Appeal, and was not made the subject of a cross-appeal before this Court, the Court of Appeal reversed the trial judge's finding of fiduciary liability. The Court of Appeal took the view that the trial judge misstated the law of fiduciary duties, since she had not had the benefit of this Court's judgment in Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574. The Court of Appeal also varied the trial judge's damages award.

3 I should say at the outset that I would restore the trial judge's decision in its entirety. In my view, her statement of fiduciary law was correct, and I cannot find fault with her assiduous findings of fact or her application of the facts to the law. I am also in substantial agreement with her on the issue of damages. In assessing damages, the trial judge rightly focused on the nature of the breach rather than the nature of the loss and, as a result, her calculation of the losses flowing from the breach vindicated the core duties immanent in the relationship between the appellant and the respondent.

II. Facts

4 The appellant, Mr. Hodgkinson, was in January 1980 a 30-year-old stockbroker working for Canarim Investments Ltd. He had joined Canarim in 1979, after a 7 year stint with A. E. Ames & Co., which he described as a conservative, blue-chip securities firm. By contrast, Mr. Hodgkinson described Canarim as an aggressive firm which dealt in speculative underwritings in the oil and gas and mining trades. At Canarim Mr. Hodgkinson's gross income increased from between $50,000 to $70,000 per year which he had been earning at A. E. Ames & Co. to $650,000 in 1980 and $1.2 million in 1981. Prior to retaining the services of Simms & Waldman, Mr. Hodgkinson had always prepared his own tax returns. His investment experience was quite limited. He had an interest in a ski chalet at Mt. Baker, two units in a MURB townhouse development in White Rock, and some flow-through shares in a mineral exploration tax shelter. In addition, he had bought and sold a small house in West Vancouver. However, with the 10 to 20-fold increase in his gross income, Mr. Hodgkinson decided to seek professional assistance in both accounting for his money and sheltering it from taxation.

5 The respondent Simms was in 1980 a Chartered Accountant and a partner in the firm of Simms & Waldman. He is a member of the Canadian and British Columbia Institutes of Chartered Accountants. While Mr. Simms specialized in providing general tax and business advice to small businessmen and professionals, beginning in 1979 he developed a practice of evaluating real estate "tax shelter" investments, or MURBs, on behalf of clients. According to his evidence at trial, he and Mr. Russ Long, another accountant associated with Simms & Waldman, had analyzed approximately 70 tax shelters in 1979.

6 The remaining two parties to this action are Mr. Jerry Waldman, a partner of Mr. Simms at the relevant time, and the partnership of Simms & Waldman. As the trial judge noted, Mr. Waldman was not involved with the investments in question, and his and the firm's liability, if any, flow from the principles of partnership law.

7 Mr. Hodgkinson first consulted Mr. Simms in early January 1980. He was planning to marry in a few months and wanted to protect a portion of his earnings from the risks associated with the securities markets. In entrusting Mr. Simms with his financial matters, Mr. Hodgkinson placed a premium on the fact that Mr. Simms was not part of the high risk world of "promoters" in which he normally operated in his job at Canarim. He looked to Mr. Simms as someone who could be relied on for independent analysis in the complex area of tax shelter investments. While Mr. Hodgkinson desired assistance in preparing tax returns, his most important objective was to minimize his exposure to income tax while at the same time acquiring some stable long-term investments. Mr. Simms suggested MURBs as an ideal instrument for Mr. Hodgkinson in realizing his investment goals. He and Mr. Hodgkinson shared the view, common at the time, that real estate provided a stable long-term investment. In addition, investment in MURBs generated the potential for significant tax savings. MURBs were a product of a 1974 change in taxation policy made by the Minister of Finance to stimulate investment in rental real estate. Pursuant to regulation 1100(1) and Schedule B to the Income Tax Act, S.C. 1970-71-72, c. 63, individual taxpayers could shelter their income by claiming capital cost allowances from qualifying investments in real estate. As such, real estate developers, rather than selling apartment units on a "turn-key" basis, sold an undivided interest in the vacant land to each investor. The investors then entered into a construction contract with the developer, who would in turn construct the building on behalf of the investors. In this way investors became "mini-developers", and as such could deduct certain related costs (typically financing costs) incurred during the construction period. These deductions were known as "soft costs".

8 The relationship between the parties, and in particular Mr. Hodgkinson's confidence in Mr. Simms, was such that Mr. Hodgkinson did not ask many questions regarding the investments. He trusted Mr. Simms to do the necessary analysis, and believed if he recommended a project it was a good investment. By turns, Mr. Hodgkinson made substantial investments in four MURBs recommended by Mr. Simms. These investments were, in chronological order: (1) "Duncana", a mixed residential-commercial project in Penticton, B.C., (2) "Bella Vista", a 41-unit MURB apartment block also in Penticton, (3) "Oliver Place", a shopping centre in Oliver, B.C., and (4) "Enterprise Way", a warehouse project in Surrey, B.C. The developers of the first three investments were Jerry and Bob Olma; the developer of "Enterprise Way" was Rod Dale-Johnson.

9 As these proceedings attest, Mr. Hodgkinson's investments lost virtually all their value. When the real estate market crashed in 1981, Mr. Hodgkinson lost substantially on all of them. Each of the MURB units he purchased on the advice of Mr. Simms was either sold at a loss to avoid cash calls, or was the subject of foreclosures when they could not be sold or rented.

10 This is not a case of fraud or deceit. Mr. Hodgkinson did not pay any more than fair market value for any of the MURB units he purchased. He does not complain about this. Rather, the gravamen of Mr. Hodgkinson's complaint lies in the fact that, unknown to him, Mr. Simms was during the relevant period acting for the developers in the "structuring" of each of these MURB projects. Specifically, Mr. Simms advised and assisted the developers in the analysis and maximization of tax deductible expenses that could be incorporated into the real estate investments offered for sale. In fact, during 1980 and 1981, Mr. Simms billed the Olma Brothers a total of $172,000, which represented fully one sixth of Simms & Waldman's billables that year. In figuring the developers' bills, the respondent measured not only his time spent on a given project, but also the extent to which the MURB units were in fact purchased by Simms & Waldman clients. Mr. Simms described this billing practice as "bonus billing".

11 Thus, while Mr. Hodgkinson got what he paid for from the developers, the same cannot be said of his relationship with Mr. Simms. Mr. Hodgkinson looked to Mr. Simms as an independent professional advisor, not a promoter. In short, Mr. Hodgkinson would not have invested in the impugned projects had he known the true nature and extent of Mr. Simms' relationship with the developers.

12 Mr. Hodgkinson brought an action in the Supreme Court of British Columbia for breach of fiduciary duty, breach of contract and negligence to recover all his losses on the four investments recommended by the respondent Simms. The claim in negligence was dismissed at trial and was not pursued before the Court of Appeal. The trial judge, Prowse J., however, allowed Mr. Hodgkinson's action for breach of fiduciary duty and breach of contract and awarded him damages in the amount of $350,507.62. The British Columbia Court of Appeal upheld the trial judge on the breach of contract issue, but reversed on the issue of fiduciary duties. As well, the Court of Appeal varied the damages award, setting damages at an amount equal to the fees received by Mr. Simms from the developers on account of the four projects, prorated as between the various investors in those projects.

III. Judgments Below

British Columbia Supreme Court *(1989), 43 B.L.R. 122* (Prowse J.)

13 Prowse J. first examined the claim for breach of fiduciary duty. She noted that in construing a relationship as fiduciary, everything turns on the particular facts of the relationship. She cited, inter alia, the Australian decision, Hospital Products Ltd. v. United States Surgical Corp. (1984), 55 A.L.R. 417 (Aust. H.C.), for the proposition that a fiduciary relationship exists where one party agrees to act on behalf of, or in the best interests of another person and, as such, is in a position to affect the interests of that other person in a legal or practical sense. As such, fiduciary relationships are marked by vulnerability in that the fiduciary can abuse the power or discretion given to him or her to the detriment of the beneficiary.

14 On the facts before her, Prowse J. concluded that the parties were indeed in a fiduciary relationship. She found

that Mr. Hodgkinson trusted and relied on Mr. Simms to exercise his special skills on Mr. Hodgkinson's behalf, and that Mr. Simms was aware of this fact. She also found as a fact that the particular relationship between the parties was such that if Mr. Simms recommended an investment, Mr. Hodgkinson invested. She stated, at p. 168:

> This was not simply the case of an accountant preparing a client's income tax return, or advising what the tax consequences of tax shelter "A" versus tax shelter "B" would be. . . . Here, Mr. Simms went far beyond that, to the extent of "analyzing tax shelters", which analysis was directed toward the relative merits of location, construction costs, potential revenues and expenses, management of the project, options for financing, obtaining legal advice on the forms of agreement and so on. He never once referred Mr. Hodgkinson out for any other kind of professional advice or suggested that there was any need for it. On the contrary, he led Mr. Hodgkinson to believe that everything was in hand and that he was doing his homework and was in control of the situation. He knew very well that Mr. Hodgkinson was not relying on any other professional advice except his own with respect to all of these projects. . . . In effect, Mr. Simms assumed the responsibility for Mr. Hodgkinson's choice. He analyzed the investments, he recommended the investments, and he effectively chose the investments for Mr. Hodgkinson.

With respect to the issue of vulnerability, the learned trial judge stated, at p. 165:

> He [Mr. Simms] recognized in Mr. Hodgkinson a "neophyte" taxpayer, with no experience in dealing with large real estate tax shelters. Mr. Simms not only recognized Mr. Hodgkinson's vulnerability in that regard, but he cultivated that vulnerability and trust by impressing upon Mr. Hodgkinson that he knew the developers of these projects, that he had done his homework in his analyses of these projects and, generally, that he was experienced in the field of tax-shelter analysis.

15 Prowse J. acknowledged that during the relevant period Mr. Hodgkinson made several risky investments without consulting Mr. Simms, and in one case proceeded with an investment in a movie financing deal which Mr. Simms in fact opposed. However, she was of the view, at p. 151, that "Mr. Hodgkinson's relationship with his co-investors in other investments . . . cannot excuse Mr. Simms for any breach of his own duty to Mr. Hodgkinson." In particular, she found that Mr. Hodgkinson and Mr. Simms had an understanding that Mr. Simms was being relied upon to apply a certain portion of Mr. Hodgkinson's income towards stable, tax sheltering investments which were distinct from the speculative world with which Mr. Hodgkinson was more familiar.

16 Having found that the parties were in a fiduciary relationship, Prowse J. turned to the scope of the fiduciary duties owed by Mr. Simms to Mr. Hodgkinson. She once again cited the Hospital Products case, at pp. 169-70, here for the proposition that a fiduciary "is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict . . . between his personal interests and those of the persons whom he is bound to protect". She found that Mr. Simms violated this duty by failing to disclose to Mr. Hodgkinson that at the time he was advising Mr. Hodgkinson to invest in certain projects, he was also advising and being paid by the developers of these projects. She stated, at p. 170:

> . . . Mr. Simms was serving two masters and was attempting to make both of them happy. One of those masters, the developer, and in particular the Olma brothers, were in a position to provide Mr. Simms with even more lucrative work if he served them well. Part of serving them well was to provide them with purchasers for their projects. Mr. Simms had a vested personal interest in so doing. Thus, he was in a conflict of interest, not only in the sense of potentially preferring one set of clients over another, but also in preferring his own monetary gain over his clients generally.

Prowse J.'s jaundiced view of Mr. Simms' behaviour was supported by the professional standards required of accountants by the accounting profession. These standards required Mr. Simms to disclose any real or potential conflict of interest.

17 Prowse J. then turned to the question of damages for breach of fiduciary duty. In dealing with this issue, Prowse J. was guided by the principles set forth in the "non-disclosure" cases. Based on the principles set forth, inter alia, in

Burns v. Kelly Peters & Associates Ltd. *(1987), 16 B.C.L.R. (2d) 1* (C.A.), and Jacks v. Davis, *[1983] 1 W.W.R. 327* (B.C.C.A.), she concluded that Mr. Hodgkinson was entitled to be put in the position he would have been in had he never been induced to make the four investments. These damages should account for the capital invested in the four projects, minus the tax benefits received as a result of the investments, plus an additional amount paid by way of arrears on the income tax reassessments on Bella Vista and Oliver Place relating to over-stated "soft cost" write-offs. In addition, Mr. Hodgkinson was entitled to consequential damages, namely the legal and accounting fees required by Mr. Hodgkinson to extricate himself from each of the MURBs and in settling his accounts with Revenue Canada.

18 With respect to the claim for breach of contract, Prowse J. found that the damages for the breach of contract were the same as those for the breach of the fiduciary duty. Based on the principle that damages for breach of contract should as much as possible be calculated in such a way as to put the injured party in the same position as he or she would have been had the contract been performed, subject to the principle that damages are limited to those losses which would have been in the reasonable contemplation of the contracting parties at the time of contracting. In this case, if the contract had been performed, that is if Mr. Simms had disclosed his affiliation with the developers, Mr. Hodgkinson would not have made the impugned investments. In addition, Prowse J. held that at the time of contracting it was reasonably foreseeable that a change in the economy could adversely affect real estate investments.

19 Prowse J. dismissed the claim for damages based on negligence. She found no evidence that any damage flowed from the manner in which Mr. Simms conducted his investigations into any of the projects.

British Columbia Court of Appeal *(1992), 65 B.C.L.R. (2d) 264* (McEachern C.J., Wood and Gibbs JJ.A. concurring)

20 McEachern C.J. purported to accept the trial judge's findings of fact, though as will become apparent later, I am of the view that he failed to respect those findings on several important points. He did, however, uphold the trial judge's ruling that the respondent owed the appellant a duty of disclosure flowing from the implied retainer between the parties.

21 Turning to the fiduciary duty issue, McEachern C.J. reversed the trial judge's finding of liability. He noted that the trial judgment was rendered before the judgment of this Court in Lac Minerals, supra, and observed that while the trial judge felt bound by the majority judgment in Kelly Peters, the dissenting view of Lambert J.A. more closely accorded with Lac Minerals.

22 Turning to the facts before him, McEachern C.J. stated that the critical matter was to examine the degree of vulnerability or dependency between the parties. The Chief Justice found that the requisite degree of vulnerability had not been made out. He found that the appellant did not give the respondent any unilateral authority or discretion to prefer his own position or that of the developers to the appellant's disadvantage. In his view, the evidence tended to show that "the choice to invest or not to invest was entirely that of the [appellant]" (p. 275). With respect to the Duncana investment, McEachern C.J. cited the fact that the appellant was given a chance to meet the developers and was given a written description of the development with accurate projections. Similarly, the appellant discussed the Bella Vista project with the respondent, received a written description of the project 10 days prior to his final decision to invest, and had an opportunity to discuss the project with the developers on the day he signed the cheque. With respect to Oliver Place and Enterprise Way, McEachern C.J. pointed to the disclaimers in the letter sent to all potential investors describing the project, and the "ample time" the appellant had to consider whether to invest or not. In short, McEachern C.J. found, at p. 277, that the appellant was "fully acquainted with questions of risk and he was in many respects a free agent".

23 McEachern C.J. then turned to consider the trial judge's assessment of damages for breach of contract. He held that damages in contract are limited to the damages actually resulting from the breach which would be within the reasonable contemplation of the parties at the time of contracting. Most importantly, he ruled that the losses suffered by the appellant were caused by the unforeseeable collapse of the real estate market, which was a risk the appellant must be taken to have assumed, rather than any failure of the respondent to disclose. The consequential

losses relating to accounting and legal fees, as well as the reassessments by Revenue Canada, were similarly attributed to the recession rather than to the respondent's non-disclosure.

24 McEachern C.J. substituted the trial judge's award of damages with an amount equal to a prorated share of the amounts paid by the developers to the respondent. He stated, at p. 280:

> . . . the law so dislikes a failure of disclosure of material facts that it assumes the value of the investment was less than the amount paid, at least to the extent of the amounts paid by the developer to the defendant [respondent]. This is because it is reasonable to assume that the cost price to the investor would be reduced by the amount of these payments.

As to costs, McEachern C.J. ordered that there be no costs to either party either in the Court of Appeal or the trial court.

IV. Analysis

Recovery for Breach of Fiduciary Obligation

The Legal Concept

25 Before turning to the particular facts of this case, it is useful to review the principles underlying the notion of fiduciary duties, for, in my view, liability in this case inexorably flows from these principles. In the famous case of Lloyds Bank Ltd. v. Bundy, [1975] Q.B. 326, Sir Eric Sachs of the English Court of Appeal stated the fiduciary principle as follows, at p. 341:

> Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element which in this judgment will for convenience be referred to as confidentiality. It is this element which is so impossible to define and which is a matter for the judgment of the court on the facts of any particular case.

From a conceptual standpoint, the fiduciary duty may properly be understood as but one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasize from the outset, then, that the concept of vulnerability is not the hallmark of fiduciary relationship though it is an important indicium of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the "golden thread" that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.

26 At the same time, however, it is only by having regard to the often subtle differences between these causes of action that civil liability will be commensurate with civil responsibility. For instance, the fiduciary duty is different in important respects from the ordinary duty of care. In Canson Enterprises Ltd. v. Boughton & Co., *[1991] 3 S.C.R. 534*, at pp. 571-73, I traced the history of the common law claim of negligent misrepresentation from its origin in the equitable doctrine of fiduciary responsibility; see also Nocton v. Lord Ashburton, [1914] A.C. 932, at pp. 968-71, per Lord Shaw of Dunfermline. However, while both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.

27 The concepts of unequal bargaining power and undue influence are also often linked to discussions of the fiduciary principle. Claims based on these causes of action, it is true, will often arise in the context of a professional

relationship side by side with claims related to duty of care and fiduciary duty; see Horace Krever and Marion Randall Lewis, "Fiduciary Obligations and the Professions" in Special Lectures of the Law Society of Upper Canada, 1990, Fiduciary Duties, at pp. 291-93. Indeed, all three equitable doctrines are designed to protect vulnerable parties in transactions with others. However, whereas undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction, the fiduciary principle monitors the abuse of a loyalty reposed; see G. H. L. Fridman, The Law of Contract in Canada (2nd ed. 1986), at pp. 301-11. Thus, while the existence of a fiduciary relationship will often give rise to an opportunity for the fiduciary to gain an advantage through undue influence, it is possible for a fiduciary to gain an advantage for him- or herself without having to resort to coercion; see Hospital Products, supra; and Canadian Aero Service Ltd. v. O'Malley, *[1974] S.C.R. 592*. Similarly, while the doctrine of unconscionability is triggered by abuse of a pre-existing inequality in bargaining power between the parties, such an inequality is no more a necessary element in a fiduciary relationship than factors such as trust and loyalty are necessary conditions for a claim of unconscionability; see Waters v. Donnelly *(1884), 9 O.R. 391*, at p. 401; and Norberg v. Wynrib, *[1992] 2 S.C.R. 226*, at p. 249. Professor Weinrib, for instance, criticizes the use of unequal bargaining power as a proxy for finding a fiduciary duty (Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 6.):

> It cannot be the sine qua non of a fiduciary obligation that the parties have disparate bargaining strength. . . . In contrast to notions of conscionability, the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement.

See also P. D. Finn, "The Fiduciary Principle" in T. G. Youdan, ed., Equity, Fiduciaries and Trusts (1989), at p. 45; Peter D. Maddaugh, "Definition of Fiduciary Duty" in Special Lectures of the Law Society of Upper Canada, 1990, Fiduciary Duties, supra, at p. 20.

28 Finally, I note that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations; see Johnson v. Birkett *(1910), 21 O.L.R. 319* (H.C.); McLeod v. Sweezey, *[1944] S.C.R. 111*; P. D. Finn, "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76. In other contractual relationships, however, the facts surrounding the relationship will give rise to a fiduciary inference where the legal incidents surrounding the relationship might not lead to such a conclusion; see Standard Investments Ltd. v. Canadian Imperial Bank of Commerce *(1985), 52 O.R. (2d) 473* (Ont. C.A.), leave to appeal refused, *[1986] 1 S.C.R. vi*. However, as Professor Finn puts it, the "end point" in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests"; see supra, at p. 88.

29 Having distinguished the fiduciary principle from other related equitable and common law doctrines, it is now possible to examine the nature of the fiduciary duty itself with a surer hand. While the legal concept of a fiduciary duty reaches back to the famous English case of Keech v. Sandford (1726), Sel. Cas. T. King 61, 25 E.R. 223, until recently the fiduciary duty could be described as a legal obligation in search of a principle. Indeed, commentators busied themselves in an effort to sort out this area of the law; see Ernest J. Weinrib, "The Fiduciary Obligation", supra; P. D. Finn, Fiduciary Obligations (1977); J. C. Shepherd, The Law of Fiduciaries (1981); Tamar Frankel, "Fiduciary Law" (1983), 71 Calif. L. Rev. 795; and P. D. Finn, "The Fiduciary Principle", supra. As I stated in M. (K.) v. M. (H.), *[1992] 3 S.C.R. 6*, at p. 62, over the past ten years or so this Court has had occasion to consider and enforce fiduciary obligations in a wide variety of contexts, and this has led to the development of a "fiduciary principle" which can be defined and applied with some measure of precision. One may begin with the following words of Dickson J. (as he then was) in Guerin v. The Queen, *[1984] 2 S.C.R. 335*, at p. 384:

> . . . where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. . . .

> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed. [Emphasis added.]

30 This conceptual approach to fiduciary duties was given analytical structure in the dissenting reasons of Wilson J. in Frame v. Smith, [1987] 2 S.C.R. 99, at p. 136, who there proposed a three-step analysis to guide the courts in identifying new fiduciary relationships. She stated that relationships in which a fiduciary obligation has been imposed are marked by the following three characteristics: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power. Although the majority held on the facts that there was no fiduciary obligation, Wilson J.'s mode of analysis has been followed as a "rough and ready guide" in identifying new categories of fiduciary relationships; see Lac Minerals, supra, per Sopinka J., at p. 599, and per La Forest J., at p. 646; Canson, supra, at p. 543; and M. (K.) v. M. (H.), supra, at pp. 63-64. Wilson J.'s guidelines constitute indicia that help recognize a fiduciary relationship rather than ingredients that define it.

31 In Lac Minerals I elaborated further on the approach proposed by Wilson J. in Frame v. Smith. I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an inherent vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis is a useful guide.

32 As I noted in Lac Minerals, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see at p. 648. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

33 Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. This idea was well-stated in the American case of Dolton v. Capitol Federal Sav. & Loan Ass'n, 642 P.2d 21 (Colo. App. 1982), at pp. 23-24, in the banker-customer context, to be a state of affairs

> . . . which impels or induces one party "to relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger." . . . [and] . . . has been found to exist where there is a repose of trust by the customer along with an acceptance or invitation of such trust on the part of the lending institution.

In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary. For example, most everyday transactions between a bank customer and banker are conducted on a creditor-debtor basis; see Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan, [1980] 1 S.C.R. 433; Thermo King Corp. v. Provincial Bank of Canada (1981), 34 O.R. (2d) 369, leave to appeal refused, [1982] 1 S.C.R. xi. Similarly, the relationship of an investor to his or her discount broker will not likely give rise to a fiduciary duty, where the broker is simply a conduit of information and an order taker. There are, however, other advisory relationships where, because of the presence of elements such as trust, confidentiality, and the complexity and importance of the subject matter, it may be reasonable for the advisee to expect that the advisor is in fact exercising his or her special skills in that other party's best interests, unless the contrary is disclosed. Professor Finn describes these kinds of relationships in the following terms in "The Fiduciary Principle", supra, at pp. 50-51:

> . . . fiduciary responsibilities will be exacted where the function the advisor represents himself as performing, and for which he is consulted, is that of counselling an advised party as to how his interests will or might best be served in a matter considered to be of importance to his personal or financial well-being, and in which the adviser would be expected both to be disinterested, save for his remuneration, and to be free of adverse responsibilities unless the contrary is disclosed at the outset. It does seem to be the case, here, that our ready acceptance of a fiduciary expectation is coloured both by our assumption that credence is likely to be given to any advice given and by our perception of the social importance of the advisory function itself. [Emphasis added.]

J. C. Shepherd has endorsed a similar theory of fiduciary law, which he terms the "transfer of encumbered power" theory; see Shepherd, supra, at pp. 96-110; see also D. Waters, Law of Trusts in Canada (2nd ed. 1984), at pp. 712-14.

34 More generally, relationships characterized by a unilateral discretion, such as the trustee-beneficiary relationship, are properly understood as simply a species of a broader family of relationships that may be termed "power-dependency" relationships. I employed this notion, developed in an article by Professor Coleman, to capture the dynamic of abuse in Norberg v. Wynrib, supra, at p. 255. Norberg concerned an aging physician who extorted sexual favours from a young female patient in exchange for feeding an addiction she had previously developed to the pain-killer Fiorinal. The difficulty in Norberg was that the sexual contact between the doctor and patient had the appearance of consent. However, when the pernicious effects of the situational power imbalance were considered, it was clear that true consent was absent. While the concept of a "power-dependency" relationship was there applied to an instance of sexual assault, in my view the concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party. Because of the particular context in which the relationship between the plaintiff and the doctor arose in that case, I found it preferable to deal with the case without regard to whether or not a fiduciary relationship arose. However, my colleague Justice McLachlin did dispose of the claim on the basis of the fiduciary duty, and whatever may be said of the peculiar situation in Norberg, I have no doubt that had the situation there arisen in the ordinary doctor-patient relationship, it would have given rise to fiduciary obligations; see, for example, McInerney v. MacDonald, *[1992] 2 S.C.R. 138*.

35 As is evident from the different approaches taken in Norberg, the law's response to the plight of vulnerable people in power-dependency relationships gives rise to a variety of often overlapping duties. Concepts such as the fiduciary duty, undue influence, unconscionability, unjust enrichment, and even the duty of care are all responsive to abuses of vulnerable people in transactions with others. The existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards. For instance in Norberg, supra, the Hippocratic Oath was evidence that the sexual relationship diverged significantly from the standards reasonably expected from physicians by the community. This inference was confirmed by expert evidence to the effect that any reasonable practitioner in the defendant's position would have taken steps to help the addicted patient, in stark contrast to the deplorable exploitation which in fact took place; see also Harry v. Kreutziger *(1978), 95 D.L.R. (3d) 231* (B.C.C.A.), at p. 241 per Lambert J.A.

36 In seeking to identify the various civil duties that flow from a particular power-dependency relationship, it is simply wrong to focus only on the degree to which a power or discretion to harm another is somehow "unilateral". In my view, this concept has neither descriptive nor analytical relevance to many fact-based fiduciary relationships. Ipso facto, persons in a "power-dependency relationship" are vulnerable to harm. Further, the relative "degree of vulnerability", if it can be put that way, does not depend on some hypothetical ability to protect one's self from harm, but rather on the nature of the parties' reasonable expectations. Obviously, a party who expects the other party to a relationship to act in the former's best interests is more vulnerable to an abuse of power than a party who should be expected to know that he or she should take protective measures. J. C. Shepherd, supra, puts the matter in the following way, at p. 102:

> Where a weaker or reliant party trusts the stronger party not to use his power and influence against the weaker party, and the stronger party, if acting reasonably, would have known or ought to have known of this reliance, we can say that the stronger party had notice of the encumbrance, and therefore in using the power has accepted the duty. [Emphasis in original.]

Thus in Lac Minerals, supra, I felt it perverse to fault Corona for failing to negotiate a confidentiality agreement with Lac in a situation where the well-established practice in the mining industry was such that Corona would have had no reasonable expectation that Lac would use the information to its detriment. To imply that one is not vulnerable to an abuse of power because one could have protected, but did not protect one's self is to focus on one narrow class of "power-dependency relationship" at the expense of the general principle that transcends it. I recognize, of course, that the majority holding in that case was that "the evidence does not establish in this case the existence of a fiduciary relationship" (per Lamer J. (as he then was), at p. 630). But as I will indicate presently, there is a basic difference between the type of situation that arises here and that which arose in Lac Minerals.

37 In summary, the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, "[t]here is no substitute in this branch of the law for a meticulous examination of the facts"; see National Westminster Bank plc v. Morgan, [1985] 1 All E.R. 821 (H.L.), at p. 831.

The Authorities

38 The Court of Appeal relied heavily on this Court's reasons in Lac Minerals, and, more particularly, on the reasons of Justice Sopinka. In my view the Court of Appeal erred in importing the analysis in the Lac Minerals case to professional advisory relationships. Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest; see Jirna Ltd. v. Mister Donut of Canada Ltd. *(1971), 22 D.L.R. (3d) 639* (Ont. C.A.), aff'd, *[1975] 1 S.C.R. 2*; and Midcon Oil & Gas Ltd. v. New British Dominion Oil Co., *[1958] S.C.R. 314*. The requirement of vulnerability was addressed in Lac Minerals in a context where the parties were engaged in negotiations with a view to entering into a joint mining venture. While I viewed the facts differently, I quite understand the reluctance on the part of some of my colleagues to extend the fiduciary principle to what they perceived to be an arm's length commercial relationship. Similarly, the Hospital Products case, supra, which was central to Sopinka J.'s analysis of vulnerability in Lac Minerals, was a case about two commercial actors dealing at arm's length, there in the context of an exclusive distributorship agreement. No doubt it will be a rare occasion where parties, in all other respects independent, are justified in surrendering their self-interest such as to invoke the fiduciary principle. Put another way, the law does not object to one party taking advantage of another per se, so long as the particular form of advantage taking is not otherwise objectionable. In Lac Minerals, for instance, the majority viewed the particular form of advantage-taking as not unfair. This was primarily owing to their view that International Corona could have protected, but did not protect itself from harm by contract. On the other hand, it was my view that the particular form of advantage-taking was in fact objectionable, given the expectations of the parties generated, inter alia, by industry practice concerning the treatment of confidential information between parties negotiating towards a joint venture; see R. E. Hawkins, "LAC and the Emerging Obligation to Bargain in Good Faith" (1990), 15 Queen's L.J. 65.

39 The situation here is quite different from that which arose in Lac Minerals. In the professional advisor context, the situation here, it would be surprising indeed to expect an advisee to protect him- or herself from the abuse of power by his or her independent professional advisor when the very basis of the advisory contract is that the advisor will use his or her special skills on behalf of the advisee. The difficulty with this proposition was forcefully expressed by MacFarlane J.A. in Burns v. Kelly Peters, supra, at p. 44:

> . . . I do not think that an investor must inquire whether his trusted and paid adviser is joined with the developer in making secret profits at his expense, and in concealing facts material to his financial well-being.

Similarly, in Nocton v. Lord Ashburton, supra, another case of non-disclosure, the House of Lords summarily dismissed the defendant's submission that the client had the means to correct the false impression made on him by his solicitor's misleading statement.

40 In sharp contrast to arm's length commercial relationships, which are characterized by self-interest, the essence of professional advisory relationships is precisely trust, confidence, and independence. Thus, the concern expressed by Wilson J. in Frame, supra, and echoed by Sopinka J. in Lac Minerals, supra, about the dangers of extending the fiduciary principle in the context of an arm's length commercial relationship is simply not transferable to professional advisory relationships.

41 I note in passing that the dissenting reasons of Lambert J.A. in Kelly Peters, supra, upon which the Court of Appeal relied in the present case, turned, at least in part, on the absence of fees between the parties. The plaintiffs in Kelly Peters were clients of Kelly Peters & Associates Ltd. (K.P.A.) (the defendant), a financial planning and counselling concern. K.P.A. had been retained by the various plaintiffs to set up a "base plan" on their behalf. This included such services as drawing up a will, making arrangements for life insurance, RRSPs, and so on. K.P.A. also offered an "investment plan" whereby clients received counselling regarding the purchase of real estate for investment and tax purposes. As it turned out, the defendants advised the plaintiffs on the purchase of certain Hawaiian MURBs without disclosing that they (the defendants) were receiving a substantial commission on each sale. At the time the plaintiffs were being advised to purchase the Hawaiian MURBs the adviser was not asking for any fee for the advice or making any arrangements to secure payment of a fee. This fact led Lambert J.A. to infer that the plaintiffs must have known that the advice was not independent, but rather that it was tainted by self-interest. He stated, at p. 29:

> The plaintiffs must have known that commissions were being paid to someone, and they must have known that K.P.A. Ltd., William Kelly, John Peters, Maureen Kelly, and the associates obtained commission income from transactions. There is no evidence that if the plaintiffs had asked about commissions they would not have been told the precise situation.

I would add, however, that while Lambert J.A. was willing to infer from the absence of fees an understanding on the part of the plaintiffs that the advice of K.P.A. was tainted, the majority was unwilling to draw such an inference. Having said this, I note that the facts in the present case are much stronger than those in Kelly Peters with respect to this crucial point. The appellant adduced uncontradicted evidence to the effect that the respondent went out of his way to represent himself as independent, and this factor was of critical importance to the appellant. In fact, the respondent made a conscious decision not to disclose his fee arrangement with the developers to his investor clients for fear it would interfere with his lucrative practice. At a meeting of July 21, 1980 attended by the respondent, the Olma brothers, and the Olmas' attorney, it was explained that any fees and monies paid to the respondent must be disclosed to the investors, otherwise such fees could be construed as a secret commission or bribe under the Criminal Code. The discussion then turned to other ways in which the respondent could earn income from the Olmas without having to make disclosure to the investors. By that point the respondent had already billed the Olma brothers in the amount of $24,500.

42 The finding of a fiduciary relationship in the independent professional advisory context simply does not represent any addition to the law. Courts exercising equitable jurisdiction have repeatedly affirmed that clients in a professional advisory relationship have a right to expect that their professional advisors will act in their best interests, to the exclusion of all other interests, unless the contrary is disclosed. J. C. Shepherd states the following in his treatise, The Law of Fiduciaries, supra, at p. 28:

> It appears to be settled that any person can, by offering to give advice in a particular manner to another, create in himself fiduciary obligations stemming from the confidential nature of the relationship created, which obligations limit the adviser's dealings with the advisee.

Indeed, nobody would argue against the enforcement of fiduciary duties in policing the advisory aspect of solicitor-

client relationships; see Nocton v. Lord Ashburton, supra; Jacks v. Davis, supra. Similar rules apply in the fields of real estate and insurance counselling; see Henderson v. Thompson, [1909] S.C.R. 445 (real estate agents); Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada *(1977), 17 O.R. (2d) 529* (C.A.); Fletcher v. Manitoba Public Insurance Co., *[1990] 3 S.C.R. 191* (insurance agents); and J. G. Edmond, "Fiduciary Duties Owed by Insurance, Real Estate and Other Agents" in The 1993 Isaac Pitblado Lectures, Fiduciary Duties/Conflicts of Interest, at pp. 75-86.

43 More importantly for present purposes, courts have consistently shown a willingness to enforce a fiduciary duty in the investment advice aspect of many kinds of financial service relationships; see Baskerville v. Thurgood *(1992), 100 Sask. R. 214* (C.A.); Kelly Peters, supra; Elderkin v. Merrill Lynch, Royal Securities Ltd. *(1977), 80 D.L.R. (3d) 313* (N.S.C.A.) (investment counsellor-client); Glennie v. McD. & C. Holdings Ltd., *[1935] S.C.R. 257*; Burke v. Cory *(1959), 19 D.L.R. (2d) 252* (Ont. C.A.); Maghun v. Richardson Securities of Canada Ltd. *(1986), 34 D.L.R. (4th) 524* (Ont. C.A.) (stockbroker-client); Lloyds Bank, supra; Standard Investments Ltd. v. Canadian Imperial Bank of Commerce, supra, (banker-client); Wakeford v. Yada Tompkins Huntingford & Humphries (unreported, B.C.S.C. August 1, 1985), (Van. Reg. No. C826216), aff'd *(1986), 4 B.C.L.R. (2d) 306* (C.A.) (accountant-client); see, generally, Mark Ellis, "Financial Advisors" (Chapters 7 and 8) in Fiduciary Duties in Canada (1988). In all of these cases, as here, the ultimate discretion or power in the disposition of funds remained with the beneficiary. In addition, where reliance on the investment advice is found, a fiduciary duty has been affirmed without regard to the level of sophistication of the client, or the client's ultimate discretion to accept or reject the professional's advice; see Elderkin, supra; Laskin v. Bache & Co., *[1972] 1 O.R. 465* (C.A.); Wakeford, supra, at p. 8. Rather, the common thread that unites this body of law is the measure of the confidential and trust-like nature of the particular advisory relationship, and the ability of the plaintiff to establish reliance in fact.

44 Much of this caselaw was recently canvassed by Keenan J. in Varcoe v. Sterling *(1992), 7 O.R. (3d) 204* (Gen. Div.), in an effort to demarcate the boundaries of the fiduciary principle in the broker-client relationship. Keenan J. stated, at pp. 234-36:

> The relationship of broker and client is not per se a fiduciary relationship. . . . Where the elements of trust and confidence and reliance on skill and knowledge and advice are present, the relationship is fiduciary and the obligations that attach are fiduciary. On the other hand, if those elements are not present, the fiduciary relationship does not exist. . . . The circumstances can cover the whole spectrum from total reliance to total independence. An example of total reliance is found in the case of Ryder v. Osler, Wills, Bickle Ltd. *(1985), 49 O.R. (2d) 609*, *16 D.L.R. (4th) 80* (H.C.J.). A $400,000 trust for the benefit of an elderly widow was deposited with the broker. An investment plan was prepared and approved and authority given to operate a discretionary account. . . . At the other end of the spectrum is the unreported case of Merit Investment Corp. v. Mogil, Ont. H.C.J., Anderson J., March 23, 1989 (summarized at *14 A.C.W.S. (3d) 378*), in which the client used the brokerage firm for processing orders. He referred to the account executive as an "order-taker", whose advice was not sought and whose warnings were ignored.
>
> . . .
>
> The relationship of the broker and client is elevated to a fiduciary level when the client reposes trust and confidence in the broker and relies on the broker's advice in making business decisions. When the broker seeks or accepts the client's trust and confidence and undertakes to advise, the broker must do so fully, honestly and in good faith. . . . It is the trust and reliance placed by the client which gives to the broker the power and in some cases, discretion, to make a business decision for the client. Because the client has reposed that trust and confidence and has given over that power to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly.

In my view, this passage represents an accurate statement of fiduciary law in the context of independent professional advisory relationships, whether the advisers be accountants, stockbrokers, bankers, or investment counsellors. Moreover, it states a principled and workable doctrinal approach. Thus, where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the

parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor.

Policy Considerations

45 Apart from the idea that a person has breached a trust, there is a wider reason to support fiduciary relationships in the case of financial advisors. These are occupations where advisors to whom a person gives trust has power over a vast sum of money, yet the nature of their position is such that specific regulation might frustrate the very function they have to perform. By enforcing a duty of honesty and good faith, the courts are able to regulate an activity that is of great value to commerce and society generally.

46 This feature of fiduciary law has been remarked upon by several prominent academics in the area; see Ernest J. Weinrib, "The Fiduciary Obligation", supra, at p. 15; Shepherd, supra, at pp. 78-83; Tamar Frankel, "Fiduciary Law", supra, at pp. 802-4; Tamar Frankel, "Fiduciary Law: The Judicial Process and the Duty of Care" in The 1993 Isaac Pitblado Lectures, supra, pp. 143-62, at p. 145; P. D. Finn, "The Fiduciary Principle", supra, at pp. 27, 50-51; P. D. Finn, "Contract and the Fiduciary Principle", supra, at p. 82; P. D. Finn, "Conflicts of Interest and Professionals", paper presented at Professional responsibility Seminar, University of Auckland, May 29, 1987, pp. 4-48, at pp. 14-15. For example, Professor Frankel states, at pp. 144-45:

> Fiduciary law regulates the providers of very special services. These services can be divided into two groups. The first group consists of services that require entrustment of property or power to the fiduciary. Without such entrustment the services cannot be rendered at all, or they can be rendered with less than maximum efficiency. The second group consists of services requiring skills that are very costly to master; for example, lawyering, and some kinds of investment management.
>
> Because the relationship poses for one party ("the entrustor") substantial risks of misappropriation and monitoring costs and because public policy strongly supports both groups of services, fiduciary law interferes to reduce these risks and costs. The law aims at deterring fiduciaries from misappropriating the powers vested in them solely for the purpose of enabling them to perform their functions. . . .

Professor Finn puts the matter this way in "Conflicts of Interest and Professionals", supra, at p. 15:

> In some spheres conduct regulation would appear to be becoming an end in itself and this because there can be a public interest in reassuring the community -- not merely beneficiaries -- that even the appearance of improper behaviour will not be tolerated. The emphasis here seems, in part at least, to be the maintenance of the public's acceptance of, and of the credibility of, important institutions in society which render "fiduciary services" to the public.

Finally, Professor Weinrib speaks in terms of "maintaining the integrity of the marketplace", supra, at p. 15.

47 The social importance of the fiduciary principle is embedded in the very genesis of the legal concept, as it was developed in Keech v. Sandford, supra. In Keech the defendant trustee held a lease of a market in trust for an infant beneficiary. Prior to the expiration of the lease the lessor stated he would not renew the lease to the infant, upon which the trustee took the lease for himself. The court, however, ordered the renewed lease to be held on a constructive trust for the infant beneficiary, and held the defendant to account for the profits. The Lord Chancellor stated the following at p. 223 (E.R.) and at p. 62 (Sel. Cas. T. King):

> . . . I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to cestui que use. . . . This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to cestui que use. [Emphasis added.]

48 The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout

fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules. By instilling this kind of flexibility into our regulation of social institutions and enterprises, the law therefore helps to strengthen them.

49 I earlier referred to the coincidence of business and accepted morality in Lac Minerals, supra, at p. 668. The concern there was with reinforcing the established norms by which the development of the natural resources of this country could be most efficiently accomplished. Of greater relevance to the case at bar, I note my colleague Justice Cory's description of the investment advisor-client relationship in R. v. Kelly, *[1992] 2 S.C.R. 170*, the criminal counterpart to Kelly Peters, supra. There, the accused was convicted of corruptly accepting a reward or benefit contrary to s. 426(1)(a) of the Criminal Code, R.S.C., 1985, c. C-46. Cory J., writing for the majority of this Court, stated, at p. 183:

> With increasing frequency financial advisors are acting as agents for their clients. Very often business and professional people earning a good income are too busy earning that income to properly arrange their financial affairs. They turn to financial advisors for assistance. The principal/agent relationship is almost invariably based upon the disclosure by the principal to the agent of confidential information. The relationship is founded upon the trust and confidence that the principal can repose in the advice given and the services performed by the agent.

Cory J. had little difficulty concluding that the relationship between the parties was one of principal-agent which was of course fiduciary in nature. He stated, at p. 186: "There can be no doubt in this case that an agency relationship existed between Kelly and his clients and that Kelly was aware of the existence of that relationship."

50 Further, in many advisory relationships norms of loyalty and good faith are often indicated by the various codes of professional responsibility and behaviour set out by the relevant self-regulatory body. The raison d'être of such codes is the protection of parties in situations where they cannot, despite their best efforts, protect themselves, because of the nature of the relationship. These codes exist to impose regulation on an activity that cannot be left entirely open to free market forces. I have already referred to the function of the professional standards expected of doctors in Norberg, supra. The professional rules of conduct governing lawyers was considered in Granville Savings and Mortgage Corp. v. Slevin *(1990), 68 Man. R. (2d) 241* (Q.B.), rev'd *[1992] 5 W.W.R. 1* (Man. C.A.), trial judgment restored *[1993] 4 S.C.R. 279*. There, the defendant law firm undertook to prepare certain mortgage documents in connection with a mortgage transaction between their client (the mortgagor) and the plaintiff mortgagee. As it turned out, the lawyers negligently represented to the plaintiffs that their mortgage constituted a first charge on the property. The plaintiffs sued in tort, contract, and fiduciary duty. The trial judge allowed the claim on all three heads of liability. This was reversed by the Court of Appeal, but on a further appeal to this Court, the trial judge's judgment was restored. The finding of a fiduciary duty was consistent with Commentary 8, Chapter 19 of the Canadian Bar Association's Code of Professional Conduct, which instructs lawyers to urge unrepresented parties to seek representation, and, failing that, to ensure that the party "is not proceeding under the impression that the lawyer is protecting such person's interests". The code goes on to warn lawyers that they may have an obligation to a person whom the lawyer does not represent.

51 In the present case, the trial judge found as a fact that the standards set by the accounting profession at the relevant time compelled full disclosure by the respondent of his interest with the developers. Reference was made during the course of the trial to the Rules of Professional Conduct of the Institute of Chartered Accountants of British Columbia. Rules 204 and 208.1, both in effect in 1980, stated:

> 204 A member who is engaged to express an opinion on financial statements shall hold himself free of any influence, interest or relationship, in respect of his client's affairs, which impairs his professional judgment or objectivity or which, in the view of a reasonable observer, has that effect.

> 208.1 A member or student shall not, in connection with any transaction involving a client, hold, receive, bargain for, become entitled to or acquire any fee, remuneration or benefit without the client's knowledge and consent.

Reference was also made to a document entitled the "Duncan Manson Memorandum", a memorandum prepared by the Public Practice Committee and the Council of the Institute of Chartered Accountants of British Columbia to address concerns raised by accountants engaged in giving investment advice regarding real estate and other tax shelters. These concerns, according to the witness Chambers, stemmed from a view that "the Chartered Accountant's traditional role of providing independent objective advice with integrity and due care was in some cases being eroded". Finally, both experts agreed that while there was no prohibition against the respondent's representing both a developer and an investor in relation to a real estate tax-shelter investment, the respondent should have disclosed the true state of affairs to both sides.

52 In sum, the rules set by the relevant professional body are of guiding importance in determining the nature of the duties flowing from a particular professional relationship; see MacDonald Estate v. Martin, *[1990] 3 S.C.R. 1235*. With respect to the accounting profession, the relevant rules and standards evinced a clear instruction that all real and apparent conflicts of interest be fully disclosed to clients, particularly in the area of tax-related investment advice. The basis of this requirement is the maintenance of the independence and honesty which is the linchpin of the profession's credibility with the public. It would be surprising indeed if the courts held the professional advisor to a lower standard of responsibility than that deemed necessary by the self-regulating body of the profession itself.

Application to the Case at Bar

53 Turning to the case at bar, it is important to note at the outset that the trial judge made detailed findings of fact which were, to a large extent, based on her assessment of credibility. It is axiomatic that a reviewing court must exercise considerable deference with respect to a trial judge's findings of fact, all the more so when those findings are based on credibility; see Fletcher v. Manitoba Public Insurance Co., supra, at pp. 204-5; Laurentide Motels Ltd. v. Beauport (City), *[1989] 1 S.C.R. 705*, at pp. 794, 799; Lensen v. Lensen, *[1987] 2 S.C.R. 672*, at p. 683; White v. The King, *[1947] S.C.R. 268*, at p. 272. In my view, the reasons supporting this principle apply with particular force to situations where a trial judge is asked to characterize a relationship for the purposes of determining the nature and extent of civil liability. This point was recently made in Huff v. Price *(1990), 51 B.C.L.R. (2d) 282* (C.A.), where the court stated, at pp. 318-19:

> We have set out a passage from the reasons in Burns v. Kelly Peters & Assoc. Ltd. which points out the similarities between the circumstances which give rise to a duty of care in negligence and the circumstances which give rise to a fiduciary duty. Each duty grows out of the factual circumstances of the particular relationship. In many cases, of which Jaegli Ent. Ltd. v. Taylor, *[1981] 2 S.C.R. 2*, *124 D.L.R. (3d) 415*, *40 N.R. 4* (sub nom. Taylor v. Ankenman) (B.C.), is only one example, the Supreme Court of Canada has said that when a trial judge has reached the conclusion, on all the evidence, either that there was, or there was not a duty of care, and that there was or there was not a breach of that duty of care, a Court of Appeal should not substitute its own view for the view of the trial judge unless it is satisfied that the trial judge made a material and identifiable error of law or a clear and identifiable error of fact in his appreciation of the evidence. In our opinion, the same principles apply in the case of a trial judge's finding that there was or there was not a fiduciary duty, and that there was or there not [sic] a breach of that fiduciary duty. [Emphasis added.]

I agree. Moreover, I stress that the principle of non-intervention stated in this line of cases is not merely cautionary; it is a rule of law. Failing a manifest error, an appellate court simply has no jurisdiction to interfere with the findings and conclusions of fact of a trial judge; see Lapointe v. Hôpital Le Gardeur, *[1992] 1 S.C.R. 351*, at pp. 358-59. While the Court of Appeal stated that it accepted the trial judge's findings, in my view it in fact reversed these on the question of reliance. As such, it committed a reversible error.

54 The Court of Appeal was of the opinion that the parties' relationship lacked the level of vulnerability required by

this Court in Lac Minerals. The court stated, at p. 270, that Lac Minerals represented a "substantial development in the law on the scope of fiduciary duty and it is unfortunate that the learned trial judge did not have the benefit of that judgment". Later, the court continued, at p. 274, "[u]ntil LAC Minerals the line between reliance and vulnerability to the extent required for the creation of a fiduciary duty seems to have been blurred and any degree of dependency was often sufficient to establish a fiduciary obligation".

55 Two points must be made about this statement. First, as discussed earlier, the Court of Appeal failed to recognize a basic difference between the factual context of Lac Minerals and that of this case. I see nothing in Lac Minerals that purports to create a new, higher legal standard for the finding of a fiduciary duty. Rather, in Lac Minerals this Court grappled with a difficult fact situation and the result was, perhaps not surprisingly, differing views among the various Justices. Second, the trial judge examined the dynamic underlying the parties' relationship, and in doing so, examined the indicia of vulnerability in the way it was set out in Hospital Products, supra, which is the very test used by Sopinka J. in Lac Minerals, at p. 599. Moreover, she quoted, at p. 271, the definition of vulnerability set out by Lambert J.A. (dissenting) in Kelly Peters, supra, which definition the Court of Appeal itself stated, "more closely accord[s] with the judgment [of Sopinka J.] in LAC Minerals".

56 In short, I simply cannot agree that the trial judge applied the wrong legal test, or that the test she applied was eclipsed by Lac Minerals. On the contrary, her analysis of the facts was on the whole consistent with the relevant authorities, and does not disclose an error of law. The trial judge carefully considered the parties' relationship and found it to have all the characteristics of those relationships the law labels as fiduciary. In the end, she had little difficulty concluding that the appellant relied on the respondent's recommendations in deciding to make the four impugned investments, and that the respondent was aware of this reliance.

57 While the foregoing is sufficient to dispose of the fiduciary issue in favour of the appellant, it is useful to review the trial judge's findings of fact. In so doing, I propose to separate the analysis into two steps. First, I will examine the trial judge's findings with respect to the nature of the parties' relationship, and then I will turn to the question of reliance. In so doing, I recognize that the two are in reality intertwined. Moreover, I caution against the use of this approach in all cases where the issue of a fiduciary duty arises. While the approach is perhaps a useful guide in the professional advisor context, a different fact situation may call for a different approach.

The Nature of the Relationship

58 The trial judge's findings on this point are virtually uncontestable. The respondent under cross-examination admitted that his relationship with the appellant was such that he was under a duty to serve the best interests of the appellant at the expense of his own self-interest. The relevant testimony is as follows:

Q. But you know that he came to trust you? He trusted you an awful lot, didn't he?

A. Yes he did.

. . .

Q. Now, Mr. Hodgkinson trusted you as his professional advisor, correct?

A. Correct.

Q. He was trusting you to give him independent advice, correct?

A. Correct.

Q. Advice which was not directed towards protecting your personal interests but was directed exclusively to protecting his interests as your client, correct?

A. Correct.

Q. And he was trusting you not to protect the interests of someone on the other side of a transaction on which you were advising but to protect exclusively his interests, correct?

A. Correct.

Q. And you assumed that responsibility to provide him with independent advice?

A. Yes, I did. [Emphasis added.]

In my view this testimony, taken by itself, vindicates the appellant's fiduciary expectation. Concepts like "trust", independence from outside interests, disregard for self-interest, are all hallmarks of the fiduciary principle. It lies ill in the mouth of the respondent to argue that the appellant was not vulnerable to a breach of loyalty when he himself concedes that loyalty was the central feature of the parties' business relationship. As it turned out, of course, the respondent used the position of ascendency granted him by the appellant to line his own pockets and the pockets of his developer clients.

59 The frequency with which courts have enforced fiduciary duties in professional advisory relationships is not surprising. The very existence of many professional advisory relationships, particularly in specialized areas such as law, taxation and investments, is premised upon full disclosure by the client of vital personal and financial information that inevitably results in a "power-dependency" dynamic. The case at bar is typical. The respondent testified in cross-examination as follows:

Q. Now, you told the court in chief that the premise on which you were developing your practice was that you wanted to develop a team relationship with your businessmen and professional clients, a hands on approach, and you wanted to demonstrate to them that you were knowledgeable in all of their personal financial matters, am I correct?

A. I think there is [sic] two questions there. Yes, we wanted to create a team approach, a hands on approach,. And we wanted to, as best we could, have a fair level of knowledge as to what our clients wanted to do and what their game plan was in the future.

Q. And you had to become familiar with their financial affairs?

A. We would become as familiar with their financial affairs as time would allow and as their privacy would allow.

Q. That was your object, though?

A. Yes, it was, but not always achievable.

Q. And that was the kind of object that you told Hodgkinson you were trying to achieve in your client/accountant relationship with him, correct?

A. Yes.

I would have thought it self-evident that the type of disclosure that routinely occurs in these kinds of relationships results in the advisor's acquiring influence which is equivalent to a discretion or power to affect the client's legal or practical interests. As I stated in Lac Minerals, at p. 664, power and discretion in this context mean only the ability to cause harm. Vulnerability is nothing more than the corollary of the ability to cause harm, viz., the susceptibility to harm. For this reason, it is undesirable to overemphasize vulnerability in assessing the existence of a fiduciary relationship. In this I am in substantial agreement with the following description of the concept of vulnerability by Lambert J.A. in Kelly Peters, supra, at p. 25:

> . . . the concept of vulnerability as expressed in the Hosp. Prod. case is nothing other than a description of the victim's situation when he is in a position where the fiduciary can exert influence over him by abusing his confidence in order to obtain an advantage. . . .

In the advisory context, the advisor's ability to cause harm and the client's susceptibility to be harmed arise from the

simple but unassailable fact that the advice given by an independent advisor is not likely to be viewed with suspicion; rather, it is likely to be followed. Shepherd observes that transfers of power can inform our analysis of the underlying power dependence dynamic. He describes the power dynamic in these types of situations as follows, at p. 100:

> Powers are not only transferred formally. There are many ways of transferring powers either consciously but informally, or totally unconsciously. When an individual relies on another, for example a professional adviser, there is a quite conscious transfer of power, but rarely is there a document in which the beneficiary writes "I hereby grant you the power to influence my decision-making".

A retainer, when combined with the disclosure of confidential information or the vesting of discretion or power, is strong evidence of the existence of an underlying dynamic of power dependency in relation to certain duties. The appellant's testimony confirms the overt, if not explicit, power transfer which in fact occurred. He stated, "I was paying him for his advice. If I didn't want to take it, why would I pay him? I did not disagree with any of his advice." This remark cannot help but strike one as intuitively reasonable, particularly given the appellant's relative inexperience in MURB investing. As I noted earlier, the refusal to protect this reliance on the grounds that the appellant somehow had the means to protect his own interests is to take an impoverished view of the law in this area.

Reliance

60 I have already noted the importance of reliance in relation to fiduciary duties; see Varga v. F. H. Deacon & Co., *[1975] 1 S.C.R. 39*; Hospital Products Ltd. v. United States Surgical Corp., supra, at p. 488 (per Dawson J.). It is important, however, to add further precision about the nature of reliance, particularly as it applies in the advisory context. Reliance in this context does not require a wholesale substitution of decision-making power from the investor to the advisor. This is simply too restrictive. It completely ignores the peculiar potential for overriding influence in the professional advisor and the strong policy reasons, to which I have previously referred, favouring the law's intervention by means of its jurisdiction over fiduciary duties to foster the fair and proper functioning of the investment market, an important social and economic activity that cannot really be regulated in other ways. As I see it, the reality of the situation must be looked at to see if the decision is effectively that of the advisor, an exercise that involves a close examination of facts. Here, as I see it, the trust and reliance the appellant placed in the respondent (a trust and reliance assiduously fostered by the respondent) was such that the respondent's advice was in substance an exercise of a power or discretion reposed in him by the appellant. This was the view taken by the trial judge respecting the appellant's investment in the four MURB projects, and her decision is amply supported by the evidence.

61 In this respect, the appellant stated the following during the course of his testimony:

> I was relying on him [the respondent]. It was his recommendation. He was the guy with all the expertise about, number one, analysing real estate ventures, particularly tax shelters, and he was certainly the one that had expertise about the economics of investing -- and the economics. He was the one that knew these people that were going to be involved in it, and based on our discussions I took his opinion.

This testimony is corroborated by the appellant's actions concerning another Olma brothers' MURB project which the respondent told the appellant about but which he did not recommend. The appellant did meet with Jerry Olma but, without the respondent's stamp of approval, he decided not to invest. The appellant described this episode in the following terms:

> Q. Given your assessment of Jerry Olma, at any point in 1980 did you ever sit down and have a heart to heart with Dave Simms about really how trustworthy Jerry Olma was?
>
> A. No. I think maybe the only example there in 1980 of my real feelings for Jerry Olma were the fact when I met with him more or less at David's request, or at David's introduction regarding a proposed Ladner

> shopping centre that he had, I felt uncomfortable enough with the way he approached the deal that without Simms I didn't want any part of it and in fact I chose not to pursue it.

62 Moreover, in finding that the appellant relied on the respondent's recommendations, the trial judge did not simply prefer the appellant's evidence over that of the respondent. On the contrary, she thoroughly examined all the circumstances of the relationship. Consider the following. The appellant approached the respondent as a "neophyte" taxpayer, with no experience in dealing with large real estate tax shelters. The parties developed a relationship that involved frequent telephone and personal contact. The respondent identified the appellant as one of his "special" clients. While the respondent did not hold himself out as an investment counsellor per se, he did not qualify his experience as a tax shelter or investment advisor in any way. He did not refer the appellant to any other professionals for investment advice. In sum, the parties' relationship was such that the trial judge was able to conclude, at p. 168, "[i]n effect, Mr. Simms assumed the responsibility for Mr. Hodgkinson's choice. He analyzed the investments, he recommended the investments, and he effectively chose the investments for Mr. Hodgkinson" (emphasis added).

63 The respondent, for his part, actively cultivated this high degree of reliance. He was fully aware of the appellant's lack of experience with MURBs, and he held himself out as an expert in the assessment of MURB-type investments. The respondent's influence over the appellant was built upon the latter's confidence that the respondent was independent from the developers. During the course of the appellant's examination-in-chief, the following exchange took place:

> Q. Mr. Hodgkinson, would you have followed Mr. Simms' advice had you known that he was acting for and getting paid by the vendors of these projects when he was advising you on the question of whether you should invest or not?
>
> A. No, I would not have. . . . Had I known and particularly the size of the funds that transferred between Simms and the developers, I wouldn't have gone close to these investments. It would have been an obvious conflict and I wouldn't have been getting the independent professional advice I was looking for.

The trial judge was satisfied, at p. 127, that it was the appellant's intention to, "drop his tax and financial-planning problems into Mr. Simms' lap and to go about his business as a stockbroker". All the while, the respondent was fully aware that the appellant's lack of expertise meant that he wielded considerable influence over the appellant's investment decisions.

64 The case put against the trial judge's findings of fact seems to turn on four points. First, the respondent's letters to his investor clients included various disclaimers to the effect that each individual investor should study the enclosed data to his or her own satisfaction before following the recommendation of Simms & Waldman. Second, with respect to the final two investments a considerable amount of time elapsed between the appellant's being made aware of the opportunity and recommendations and his decision to invest. Third, the appellant had a chance to meet personally with the developers. Fourth, during the relevant period the appellant made several investments outside of his relationship with the respondent, some of which might be considered "risky". Based on these facts, the Court of Appeal concluded, at p. 277, "[t]he plaintiff [the appellant] was not relying solely upon the defendant for financial advice. He was fully acquainted with questions of risk and he was in many respects a free agent".

65 At the outset, it should be noted that the trial judge did not overlook any of these points in her assessment of the facts; on the contrary, each point was examined and eventually rationalized within the overall factual mix of the case. Turning, then, to the disclaimers. The letter sent out by Mr. Simms to his investor clients regarding Bella Vista stated, in part, "it is your money and you must place your expectations on what you anticipate will happen in the future . . . ". The disclaimers attaching to the Oliver Place and Enterprise Way projects were even stronger:

> These analyses are based on revenues and expenses estimated by the promoters and not by us. It would be necessary, before investing in these projects, to satisfy yourself that these figures are realistic and reflect current conditions in the rental market place.

. . .

> We are in no way recommending that you buy one of these investments. We are saying that if you are investing and will be considering a tax shelter this year, that these two projects appear to merit your serious consideration.

The trial judge considered this evidence, but concluded that the appellant did not believe that the disclaimers applied to him based on his "special" relationship with the respondent. She found the letters were reasonably interpreted by Mr. Hodgkinson as endorsements, particularly given the surrounding circumstances of the parties' relationship. It must be kept in mind that throughout the period these investments were made the parties were in frequent contact, by letter, telephone, and in person. The appellant testified:

> At all times he [the respondent] had recommended these investments highly to me and so I didn't think that much of his sentence when he says, "I in no way recommend this investment to you." I felt it was a natural disclaimer that would be there for those that weren't used to dealing with him on the intimate level that I felt I was.

The appellant described the respondent as very enthusiastic about the projects. He even went so far as to fabricate a false sense of scarcity in relation to the Oliver Place project, stating in a September 26, 1980 letter that the high demand for the units required they be allocated on a first-come, first-serve basis. The respondent's enthusiasm was apparently infectious. All but four of the purchasers involved in Oliver Place were Simms & Waldman clients, while the Enterprise Way project, save for two units taken by the developer, was completely sold out to Simms & Waldman investors. In short, I see no reason to disturb the trial judge's dismissal of the effect of the disclaimers. Indeed, in both Maghun, supra and Elderkin, supra, the plaintiff investors were well-informed of the potential risks of the market. In Maghun, at p. 526, the plaintiffs signed a "risk disclosure statement", and in Elderkin, at p. 325, it was company policy that clients be made aware of "any negative factors involved in a transaction as well as positive ones". In both cases, however, the courts found that the special circumstances of the relationship overrode these disclaimers, and a fiduciary obligation was enforced.

66 With respect to the second point, I do not view the fact that some time elapsed between the recommendations and the investments as particularly relevant. First, this evidence has little or no probative value in relation to Duncana or Bella Vista. The Simms & Waldman letter containing the financial data for these projects was dated April 10. The appellant made downpayments on Duncana and Bella Vista on April 11 and April 20, respectively. Further, the appellant had made a tentative decision to invest in both projects even before he received the letter of April 10, simply on the strength of the respondent's recommendations.

67 The first letter to the investors describing Oliver Place was dated June 16. In it, the respondent stated that Oliver Place offered a significant tax shelter opportunity. A second letter concerning Oliver Place, dated September 26, advised investors that negotiations with the developers had been concluded, and requested investors to order their units by mail consistent with the "first-come, first-serve" system described above. This letter also included a description of Enterprise Way. Oliver Place in fact only closed in November 1980. A few days later the appellant bought five units in Oliver Place. The final pro formas for Enterprise Way were set out in a letter dated November 9, 1980. While it is not clear when the appellant invested in Enterprise Way, the trial judge put the date as sometime in November. These facts, in my view, militate against any inference of independence based on a time lag. Further, the evidence tends to indicate that the appellant relied on the respondent in timing his investments. He testified:

> We had general discussions on the Oliver Place project. By that time, if I can give you some background, by that time I had developed a great deal of confidence in David [the respondent]. He knew how to put projects, [sic] he knew how to present these, he had done a lot of work with these projects. I felt he had worked hard in being able to find good investments. . . . And so any discussions I had with him up to this point in time were more, rather than being critiques, were more give me [sic] the gist of what's going on and give me the sense of timing.

The trial judge accepted this evidence. She found that by the time of the Oliver Place and Enterprise Way investments, the appellant had reached the point that he no longer asked many questions concerning the investments. In short, I cannot find fault with the trial judge's findings on the basis that the appellant had, as the Court of Appeal put it, at p. 276, "ample time to consider whether he wished to invest".

68 Turning to the third point, it is true that the appellant's meetings with the various developers could conceivably give rise to an inference of independence. When considered in light of all the evidence, however, it is clear that it was the respondent's stamp of approval that was decisive for the appellant. In this context the appellant's decision not to invest in the Ladner Downs project, discussed above, is of particular significance. More generally, the appellant stated: "If I had been approached directly by Jerry Olma, I would have considered him too much the promoter type of individual and I wouldn't have invested in his projects." With respect to the April 11 meeting with the developers concerning Duncana, the appellant testified: "He [the respondent] felt it was important that I know the developers on a firsthand basis." In fact, the appellant had already made up his mind to invest in Duncana based on the respondent's recommendation. As he put it, he approached the meeting with "chequebook in hand". This was in fact the only formal meeting the appellant attended with any of the developers to discuss the MURB projects. While the appellant did happen to meet Mr. Dale-Johnson once as they crossed paths at the Simms & Waldman offices, and he also made one informal stop at Mr. Olma's residence in relation to the Ladner Downs project, these meetings have almost no probative value and I will not comment on them except to acknowledge that they occurred.

69 Finally, with respect to the other outside investments made by Mr. Hodgkinson, some of which were high risk ventures, the trial judge stated, at p. 151, "the fact that Mr. Hodgkinson invested and lost money with other investors does not mean that he did not rely upon Mr. Simms with respect to these particular investments". I agree. A similar point arose in Elderkin, supra, in that instances were cited by the defendants where the plaintiffs did not follow the defendants advice to buy and sell certain shares other than "Multico", the shares which in that case gave rise to the action. The court dismissed the point, stating, at p. 324: "Be that as it may, what we are here concerned with are shares of Multico." In addition, it is not without significance that in each case where the appellant invested independently of the respondent, he was in large part persuaded to invest by the personalities and track records of his co-investors. For instance, his enthusiasm for the "Akroyd II" MURB project was explained by the fact that it was his first opportunity to invest with senior management at Canarim, his new employer. While the appellant may have been a "free agent" to the extent that he wrote the cheques, the circumstances of the outside investments could easily be interpreted to support an inference of the appellant's lack of independence generally in the area of tax-related investments.

Conclusion on Fiduciary Duty Issue

70 To conclude, I am of the view that the trial judge did not err in finding that a fiduciary obligation existed between the parties, and that this duty was breached by the respondent's decision not to disclose pecuniary interest with the developers.

Damages

71 The trial judge assessed damages flowing from both breach of fiduciary duty and breach of contract. She found the quantum of damages to be the same under either claim, namely the return of capital (adjusted to take into consideration the tax benefits received as a result of the investments), plus all consequential losses, including legal and accounting fees. As I stated at the outset, I cannot find fault with the trial judge's disposition of the damages question.

72 It is useful to review some key findings of fact that bear on the issue of damages. The trial judge found the appellant paid fair market price for each of the four investments. However, she found that throughout the period during which the appellant was induced by the respondent's recommendations into making the investments, the respondent was in a financial relationship with the developers of the projects. In short, the trial judge found the

respondent stood to gain financially if the appellant invested according to his recommendations. She further found that if the appellant had known of the true relationship between the respondent and the developers, he would not have invested. She also found that had the parties turned their minds to the potential consequences of the respondent's relationship with the developers it would have been reasonably foreseeable that the appellant would not have invested.

73 I turn now to the principles that bear on the calculation of damages in this case. It is well established that the proper approach to damages for breach of a fiduciary duty is restitutionary. On this approach, the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred. On the facts here, this means that the appellant is entitled to be restored to the position he was in before the transaction. The trial judge adopted this restitutionary approach and fixed damages at an amount equal to the return of capital, as well as all consequential losses, minus the amount the appellant saved on income tax due to the investments.

74 The respondent advanced two arguments against the trial judge's assessment of damages for breach of fiduciary duty. Both raise the issue of causation, and I will address these submissions as they were argued.

75 The respondent first submitted that given the appellant's stated desire to shelter as much of his income as possible from taxation, and his practice of buying a wide variety of tax shelters, the appellant would still have invested in real-estate tax shelters had he known the true facts. The main difficulty with this submission is that it flies in the face of the facts found by the trial judge. The materiality of the non-disclosure in inducing the appellant to change his position was a live issue at trial which the judge resolved in the appellant's favour, a finding accepted by the Court of Appeal. For reasons given earlier, I agree with this finding.

76 What is more, the submission runs up against the long-standing equitable principle that where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach; see London Loan & Savings Co. v. Brickenden, *[1934] 2 W.W.R. 545* (P.C.), at pp. 550-51; see also Huff v. Price, supra, at pp. 319-20; Commerce Capital Trust Co. v. Berk *(1989), 57 D.L.R. (4th) 759* (Ont. C.A.), at pp. 763-64. This Court recently affirmed the same principle with respect to damages at common law in the context of negligent misrepresentation; see Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co., *[1991] 3 S.C.R. 3*, at pp. 14-17. I will return to the common law cases in greater detail later; it suffices now to say that courts exercising both common law and equitable jurisdiction have approached this issue in the same manner. In Rainbow, Sopinka J., on behalf of a 6-1 majority of this Court, had this to say, at pp. 15-16:

> The plaintiff is the innocent victim of a misrepresentation which has induced a change of position. It is just that the plaintiff should be entitled to say "but for the tortious conduct of the defendant, I would not have changed my position". A tortfeasor who says, "Yes, but you would have assumed a position other than the status quo ante", and thereby asks a court to find a transaction whose terms are hypothetical and speculative, should bear the burden of displacing the plaintiff's assertion of the status quo ante.

Further, mere "speculation" on the part of the defendant will not suffice; see ibid., at p. 15; Commerce Capital, supra, at p. 764. In the present case the respondent has adduced no concrete evidence to "displac[e] the plaintiff's assertion of the status quo ante", and this submission must, therefore, be dismissed.

77 The respondent also argued that even assuming the appellant would not have invested had proper disclosure been made, the non-disclosure was not the proximate cause of the appellant's loss. Rather, he continued, the appellant's loss was caused by the general economic recession that hit the British Columbia real estate market in the early 1980s. The respondent submits that it is grossly unjust to hold him accountable for losses that, he maintains, have no causal relation to the breach of fiduciary duty he perpetrated on the appellant.

78 I observe that a similar argument was put forward and rejected in the Kelly Peters case, supra. There the plaintiffs, like the appellant in the present case, had approached the defendant investment advisors for, inter alia, investment advice particular to the real estate tax shelter market; see at p. 38. The defendants, like the respondent

here, used their position of influence to put the plaintiffs in those specific real estate projects in which they had a pecuniary interest, namely "Kona condominiums" located in Hawaii. The plaintiffs suffered heavy losses when the real estate market for Hawaiian MURBs crashed. As I noted earlier, the defendants were eventually found liable for breach of fiduciary duties. The defendants argued that damages should be assessed with reference to the date of sale on the grounds that neither the buyer nor the seller should be affected by later market fluctuations. This argument was rejected at trial and in the Court of Appeal. In a passage cited with approval by MacFarlane J.A., the trial judge, at p. 49, stated that a purchaser has a right to recovery of losses "up to the time he learns of the fraud and whether or not the losses result from a falling market".

79 The similarity between Kelly Peters and the present case is striking. Both the defendant in Kelly Peters and the respondent here induced parties into investments they would not otherwise have made by deliberately concealing their own financial interest. These respective investors were thereby exposed to all the risks, i.e., including the general market risks, of these investments. On the finding of facts, these investors would not have been exposed to any of the risks associated with these investments had it not been for their respective fiduciary's desire to secure an improper personal gain. In short, in each case it was the particular fiduciary breach that initiated the chain of events leading to the investor's loss. As such it is right and just that the breaching party account for this loss in full.

80 Contrary to the respondent's submission, this result is not affected by the ratio of this Court's decision in Canson Enterprises, supra. Canson held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. Canson does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of a fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate; see also McInerney v. MacDonald, supra, at p. 149. Writing extra-judicially, Huband J.A. of the Manitoba Court of Appeal recently remarked upon this idea, in "Remedies and Restitution for Breach of Fiduciary Duties" in The 1993 Isaac Pitblado Lectures, supra, pp. 21-32, at p. 31:

> A breach of a fiduciary duty can take many forms. It might be tantamount to deceit and theft, while on the other hand it may be no more than an innocent and honest bit of bad advice, or a failure to give a timely warning.

Canson is an example of the latter type of fiduciary breach, mentioned by Huband J.A. There, the defendant solicitor failed to warn the plaintiff, his client, that the vendors and other third parties were pocketing a secret profit from a "flip" of the subject real estate such that the property was overpriced. See also Jacks, supra. In this situation, the principle of full restitution should not entitle a plaintiff to greater compensation than he or she would otherwise be entitled to at common law, wherein the limiting principles of intervening act would come into play.

81 Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law. As I noted in Canson, at pp. 587-88, this approach is in accordance with the fusion of law and equity that occurred near the turn of the century under the auspices of the old Judicature Acts; see also M. (K.) v. M. (H.), supra, at p. 61. Thus, properly understood Canson stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded. As I stated in Canson, at p. 581:

> . . . 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.

In other words, the courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy.

82 Returning to the facts of the present case, one immediately notices significant differences from the wrong

committed by the defendant in Canson as compared to the character of the fiduciary breach perpetrated by the respondent. In Canson there was no particular nexus between the wrong complained of and the fiduciary relationship; this was underlined, at p. 577, by my colleague, McLachlin J., who followed a purely equitable route. Rather, the fiduciary relationship there arose by operation of law, and was in many ways incidental to the particular wrong. Further, the loss was caused by the wrongful act of a third party that was unrelated to the fiduciary breach. In the present case the duty the respondent breached was directly related to the risk that materialized and in fact caused the appellant's loss. The respondent had been retained specifically to seek out and make independent recommendations of suitable investments for the appellant. This agreement gave the respondent a kind of influence or discretion over the appellant in that, as the trial judge found, he effectively chose the risks to which the appellant would be exposed based on investments which in his expert opinion coincided with the appellant's overall investment objectives. In Canson the defendant solicitor did not advise on, choose, or exercise any control over the plaintiff's decision to invest in the impugned real estate; in short, he did not exercise any control over the risks that eventually materialized into a loss for the plaintiff.

83 Indeed, courts have treated common law claims of the same nature as the wrong complained of in the present case in much the same way as claims in equity. I earlier referred to Rainbow Industrial Caterers. The plaintiff there had contracted to cater lunches to CN employees at a certain price per meal. The price was based on the estimated number of lunches the defendant would require over the period covered by the contract. This estimate was negligently misstated, and the plaintiff suffered a significant loss. The Court was satisfied that but for the misrepresentation, the plaintiff would not have entered into the contract. The defendant, however, alleged that much of the loss was not caused by the misrepresentation but rather by certain conduct of CN employees, e.g., taking too much food. This argument was rejected by the Court in the following terms, at p. 17:

> . . . CN bore the burden of proving that Rainbow would have bid even if the estimate had been accurate. That was not proved, and so it is taken as a fact that Rainbow would not have contracted had the estimate been accurate. The conduct referred to in para. 49 [i.e. the conduct of the CN employees] would not have occurred if there had been no contract, and therefore the loss caused thereby, like all other losses in the proper execution of the contract by Rainbow, is directly related to the negligent misrepresentation. [Emphasis in original.]

Thus, where a party can show that but for the relevant breach it would not have entered into a given contract, that party is freed from the burden or benefit of the rest of the bargain; see also BG Checo International Ltd. v. British Columbia Hydro and Power Authority, *[1993] 1 S.C.R. 12*, at pp. 40-41 (per La Forest and McLachlin JJ.). In short, the wronged party is entitled to be restored to the pre-transaction status quo.

84 An identical principle was applied by the British Columbia Court of Appeal in K.R.M. Construction Ltd. v. British Columbia Railway Co. *(1982), 40 B.C.L.R. 1*, a case relied upon by Macfarlane J.A. in Kelly Peters. In K.R.M. the defendant railway company, which was renegotiating a major contract with the plaintiff due to an earlier misrepresentation, induced the plaintiff into a settlement when it was agreed that the defendant would grant permission to the plaintiff to work out of one camp rather than two, thereby effecting a savings to the plaintiff of $1.6 million. During the course of this negotiation, the plaintiff had been informed that the coming winter's line revisions would be minor. In fact, the defendant was planning a major revision. As it turned out, the plaintiff experienced considerable delays and failed to meet the completion date for the project. The contract was eventually terminated by mutual agreement and the plaintiff brought an action for damages. It was found as a fact that the plaintiff was induced into signing the amending agreement and the release of its past claims by the non-disclosure concerning the line revision. The railway company argued, however, that the proximate cause of the delay was not related to the non-disclosure but to the unusually warm winter weather. Indeed the court, at p. 32, stated, "[i]t would appear that a very significant factor in the respondents' difficulties and delays was the unusually mild winter weather. It was a factor adversely affecting work, major line revision or not." Nonetheless, the court found in favour of the plaintiffs. It stated, at p. 32:

> . . . in our view considering and weighing these matters is not the proper approach. . . . As the result of the second deceit they [the respondents] resumed work on revised terms. . . . The resumption of work

> subjected them to all contingencies including adverse weather. Without the second deceit the respondents would not have been exposed to those contingencies, and the heavy losses suffered in the subsequent work would not have been incurred. [Emphasis added.]

85 The respondent points to a number of cases in which courts have refused to compensate plaintiffs for losses suffered owing to general market fluctuations despite the existence of "but for" causation; Waddell v. Blockey (1879), 4 Q.B.D. 678 (C.A.); Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), aff'd in part 459 U.S. 375 (1983); McGonigle v. Combs, 968 F.2d 810 (9th Cir. 1992).

86 The respondent placed considerable reliance on the Waddell case. There the defendant sold rupee paper of his own to the defendant on the fraudulent basis that the paper belonged to persons other than the defendant. After the purchase the rupee paper rapidly fell in value owing to an unrelated decline in the market for such paper. The plaintiff eventually sold the paper five months later at a loss of Pound43,000. The English Court of Appeal, reversing, held that despite the proven fraudulent misrepresentation, the plaintiff was not entitled to any damages on the grounds that there was "no natural or proximate connection between the wrong done and the damage suffered"; per Thesiger L.J., at p. 682.

87 The first thing one notices about this case is its age. Waddell was decided in 1879, well before the English courts began to expand the fiduciary concept beyond the strict trust context to reach professional relationships such as the one in the present case. The modern approach to professional advisory relationships was launched in Nocton v. Lord Ashburton, where the fiduciary principle was used as a means of putting pressure on solicitors (and others in a "special relationship" with the public) in the performance of their special skills; see Viscount Haldane, at p. 955; see also Gummow J., "Compensation for Breach of Fiduciary Duty" in Youdan (1989), supra, at pp. 57-62; Lloyds Bank, supra. I observe that while there is some mention of a fiduciary relationship in Waddell, there is no mention of any equitable remedial principles such as would have been dictated by a strict trust approach. Put another way, the court treated the case on the same footing as a case of common law fraud in which the evil complained of relates exclusively to the price or value of the underlying security.

88 It is worthy of note as well that the trial judge in Waddell awarded the plaintiff the full extent of his loss. Thus it appears that, even as early as 1879, there was at least a measure of disagreement on the issue. I observe that in Allan v. McLennan (1916), 31 D.L.R. 617, the British Columbia Court of Appeal came to the result opposite to that in Waddell on virtually identical facts. In Allan the plaintiff bought shares from the defendant based on the representation that they belonged to the Bank of Vancouver, whereas they in fact belonged to the defendant, who would receive the proceeds of the sale. This misstatement caused the plaintiff to inquire less carefully into the matter than he otherwise would have. The trial judge, at p. 618, concluded that "these representations were relied upon by the respective plaintiffs and induced them to purchase the shares". The measure of damages was held to be the difference in value of the shares at the time of discovery of the misstatement and what was paid for them. In short, to the extent that Waddell and the cases that follow it support the respondent's position, I do not agree with them. This authority is displaced by the more recent jurisprudence in this area which I have set forth earlier, and which, in my view, adopts the correct principle.

89 The respondent also referred us to a line of American authority in the securities fraud context. These cases distinguish between "transaction causation" and "loss causation", the former corresponding to the "but for" test and the latter to ordinary tort notions of proximate causation. In Huddleston, for instance, the court stated, at p. 549:

> The plaintiff must prove not only that, had he known the truth, he would not have acted, but in addition that the untruth was in some reasonably direct, or proximate, way responsible for his loss. The causation requirement is satisfied in a Rule 10b-5 case only if the misrepresentation touches upon the reasons for the investment's decline in value.

The policy supporting these cases is that absent the requirement of causation an action for fraud would become an "insurance plan for the cost of every security purchased in reliance upon a material misstatement"; see idem. The policy direction taken by the American courts is no doubt prompted by a concern about the detrimental effects of the

explosion in securities fraud litigation on the efficiency of the capital markets. One obvious means of limiting potential liability is by developing a strict causation requirement, and this is precisely what the United States courts have done. I would have thought it obvious that the application of this policy imperative to the present situation is tenuous to say the least.

90 Moreover, there exists a second line of United States authority that has a greater affinity to the case at bar. These cases deal with the self-interested behaviour of stockbrokers and other professionals in the investment industry. Here, the American courts have apparently decided that the policy against giving the investor an "insurance plan" against market fluctuations is outweighed by the need to ensure that persons with power over individual investors act in good faith in carrying out their professional services, and have awarded damages on the principle of full restitution. In Chasins v. Smith Barney & Co., 438 F.2d 1167 (1970), the Second Circuit Court of Appeals held that where a stockbroker induces a client to invest in a stock without disclosing that he is making a market in that particular stock (i.e., holding himself out as being willing to buy and sell particular securities for his own account on a continuous basis otherwise than on a national securities exchange), the stockbroker is required to compensate the client for the whole of his loss, notwithstanding the fact that the investor paid no more than fair market value. The court stated, at p. 1173:

> The issue is not whether Smith, Barney was actually manipulating the price on Chasins or whether he paid a fair price, but rather the possible effect of disclosure of Smith, Barney's market-making role on Chasins' decision to purchase at all on Smith, Barney's recommendation. It is the latter inducement to purchase by Smith, Barney without disclosure of its interest that is the basis of this violation; the evil in such a case is that recommendations to clients will be based upon the best interests of the dealer rather than the client. [Emphasis added.]

Chasins was relied on by the Ninth Circuit Court of Appeals in the context of "churning" in Hatrock v. Edward D. Jones & Co., 750 F.2d 767 (1984). Churning occurs when a broker who exercises control over a customer's account engages in trading for the purpose of realizing increased commissions or for some other purpose that is not in the best interests of the client. Like securities fraud, "churning" is a violation of s. 10(b) of the Securities and Exchange Act, 1934 and Rule 10b-5 promulgated pursuant to that statute. The Hatrock court stated, at pp. 773-74:

> The plaintiff . . . should not have to prove loss causation where the evil is not the price the investor paid for a security, but the broker's fraudulent inducement of the investor to purchase the security. . . .
>
> The investor may recover excessive commissions charged by the broker, and the decline in value of the investor's portfolio resulting from the broker's fraudulent transactions.

91 The policy underlying the doctrine of loss causation has been the subject of rather spirited academic and judicial debate in the United States; see, for instance, Marbury Management, Inc. v. Kohn, 629 F.2d 705 (2nd Cir. 1980), per Meskill J. (dissenting); Bastian v. Petren Resources Corp., 681 F.Supp. 530 (N.D. Ill. 1988); Robert B. Thompson, "The Measure of Recovery Under Rule 10B-5: A Restitution Alternative to Tort Damages" (1984), 37 Vand. L. Rev. 349; Michael J. Kaufman, "Loss Causation: Exposing a Fraud on Securities Law Jurisprudence" (1991), 24 Ind. L. Rev. 357; Andrew L. Merritt, "A Consistent Model of Loss Causation in Securities Fraud Litigation: Suiting the Remedy to the Wrong" (1988), 66 Tex. L. Rev. 469. Despite this controversy, however, the courts continue to hold defendants liable for the plaintiff's gross loss in cases of churning and other such misbehaviour by those in a position of power and ascendency over investors; see Casella v. Webb, 883 F.2d 805 (9th Cir. 1989).

92 From a policy perspective it is simply unjust to place the risk of market fluctuations on a plaintiff who would not have entered into a given transaction but for the defendant's wrongful conduct. I observe that in Waddell, supra, Bramwell L.J. conceded, at p. 680, that if restitutio in integrum had been possible, the plaintiff could probably have recovered in full. Indeed counsel for the appellant argued that the proper approach to damages in this case was the monetary equivalent of a rescisionary remedy. I agree. In my view the appellant should not suffer from the fact that he did not discover the breach until such time as the market had already taken its toll on his investments. This principle, which I take to be a basic principle of fairness, is in fact reflected in the common law of mitigation, itself

rooted in causation; see S. M. Waddams, The Law of Contracts (3rd ed. 1993), at p. 515. In Asamera Oil Corp. v. Sea Oil & General Corp., *[1979] 1 S.C.R. 633*, this Court held that in an action for breach of the duty to return shares under a contract of bailment, the obligation imposed on the plaintiff to mitigate by purchasing like shares on the open market did not commence until such time as the plaintiff learned of the breach or within a reasonable time thereafter.

93 There is a broader justification for upholding the trial judge's award of damages in cases such as the present, namely the need to put special pressure on those in positions of trust and power over others in situations of vulnerability. This justification is evident in American caselaw, which makes a distinction between simple fraud related to the price of a security and fraudulent inducements by brokers and others in the investment business in positions of influence. In the case at bar, as in Kelly Peters and the American cases cited by the appellant, the wrong complained of goes to the heart of the duty of loyalty that lies at the core of the fiduciary principle. In redressing a wrong of this nature, I have no difficulty in resorting to a measure of damages that places the exigencies of the market-place on the respondent. Such a result is in accordance with the principle that a defaulting fiduciary has an obligation to effect restitution in specie or its monetary equivalent; see Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co., [1966] 2 N.S.W.R. 211; Island Realty Investments Ltd. v. Douglas *(1985), 19 E.T.R. 56* (B.C.S.C.), at pp. 64-65; Rothko v. Reis, 372 N.E.2d 291 (C.A.N.Y. 1977). I see no reason to derogate from this principle; on the contrary, the behaviour of the respondent seems to be precisely the type of behaviour that calls for strict legal censure. Mark Ellis puts the matter in the following way in Fiduciary Duties in Canada, supra, at p. 20-2:

> . . . the relief seeks primarily to protect a party owed a duty of utmost good faith from deleterious actions by the party owing the fiduciary duty. The vehicles by which the Court may enforce that duty are diverse and powerful, but are premised upon the same desire: to strictly and jealously guard against breach and to redress that breach by maintenance of the pre-default status quo, where possible.

The remedy of disgorgement, adopted in effect if not in name by the Court of Appeal, is simply insufficient to guard against the type of abusive behaviour engaged in by the respondent in this case. The law of fiduciary duties has always contained within it an element of deterrence. This can be seen as early as Keech in the passage cited supra; see also Canadian Aero, supra, at pp. 607 and 610; Canson, supra, at p. 547, per McLachlin J. In this way the law is able to monitor a given relationship society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility. Like-minded fiduciaries in the position of the respondent would not be deterred from abusing their power by a remedy that simply requires them, if discovered, to disgorge their secret profit, with the beneficiary bearing all the market risk. If anything, this would encourage people in his position to in effect gamble with other people's money, knowing that if they are discovered they will be no worse off than when they started. As a result, the social benefits of fiduciary relationships, particularly in the field of independent professional advisors, would be greatly diminished.

94 In view of my finding that there existed a fiduciary duty between the parties, it is not in strictness necessary to consider damages for breach of contract. However, in my view, on the facts of this case, damages in contract follow the principles stated in connection with the equitable breach. The contract between the parties was for independent professional advice. While it is true that the appellant got what he paid for from the developers, he did not get the services he paid for from the respondent. The relevant contractual duty breached by the respondent is of precisely the same nature as the equitable duty considered in the fiduciary analysis, namely the duty to make full disclosure of any material conflict of interest. This was, in short, a contract which provided for the performance of obligations characterized in equity as fiduciary.

95 Further, it remains the case under the contractual analysis that but for the non-disclosure, the contract with the developers for the MURBs would not have been entered into. The trial judge found as a fact that it was reasonably foreseeable that if the appellant had known of the respondent's affiliation with the developers, he would not have invested. This finding is fully reflected in the evidence I have earlier set forth. Put another way, it was foreseeable that if the contract was breached the appellant would be exposed to market risks (i.e., in connection with the four MURBs) to which he would not otherwise have been exposed. Further, it is well established that damages must be

foreseeable as to kind, but not extent; as such any distinction based on the unforeseeability of the extent of the market fluctuations must be dismissed; see H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co., [1978] Q.B. 791, at p. 813; Asamera, supra, at p. 655. See also S. M. Waddams, The Law of Damages (2nd ed. 1991), at paras. 14.280 and 14.290.

96 The Court of Appeal's approach to contractual damages is puzzling in that it seemed to accept the finding that if the contractual duty had not been breached the investments would not have been made, yet it proceeded to award damages in proportion to the amounts paid by the developer to the defendant. It is clear, however, that there would have been no such fees had the investments not been made. In short, I am unable to follow the Court of Appeal's reasoning on the issue of damages for breach of contract, and I would restore the award of damages made by the trial judge.

Disposition

97 I would allow the appeal, set aside the order of the British Columbia Court of Appeal and restore the order of the trial judge, with costs throughout, including letter of credit costs to avoid a stay and allow recovery on the trial judgment pending appeal to the Court of Appeal.

The reasons of Sopinka, McLachlin and Major JJ. were delivered by

SOPINKA AND McLACHLIN JJ. (dissenting)

98 This appeal raises two issues: first, whether a fiduciary duty arises and second, the amount of damages recoverable.

I. The Facts

99 In January, 1980, the appellant Mr. Hodgkinson was a 30-year-old stock broker working for a Vancouver investment firm. He had recently moved from a more conservative firm dealing primarily with blue-chip securities to one dealing with the speculative underwriting of junior resource stock and his income had increased dramatically. Prior to the move, he had grossed between $50,000 and $70,000 per year. In the year following his move, his gross income was $650,000. A year later, it was in excess of $1 million.

100 Mr. Hodgkinson had never employed an accountant. He had always prepared his own income tax returns and arranged his own investments. These included an interest in a ski chalet at Mt. Baker, two units in a Multiple Unit Residential Building ("MURB") in White Rock and some "flow-through" shares in a mineral exploration tax shelter. He had also bought and sold a small house in West Vancouver. His financial picture, however, was growing increasingly complex and he was planning to marry in a few months. He wanted to "shelter" his money from immediate taxation while securing sound long-term investments. He decided he needed a "financial manager" and sought advice from Mr. Simms.

101 Mr. Simms was a chartered accountant and a partner in the firm of Simms & Waldman. Until 1979, he had specialized in providing general tax and business advice to small businessmen and professionals. During 1979 he began to offer investment advice to his clients with respect to real estate tax shelters. He also developed the concept of "cross-pollenization" of clients. He would put clients in one area of business together with clients in another area of business with an eye to their mutual profit. He would suggest to clients wishing to invest in tax shelters that he could put them together with a developer and they could then deal with one accountant, one lawyer and one developer. In this way, he functioned as the linchpin in what he viewed as a "win-win" situation for everyone concerned.

102 At their first meeting in 1980, Mr. Hodgkinson and Mr. Simms quickly settled on MURBs as the most promising

investment vehicle for the appellant. On Mr. Simms' advice, Mr. Hodgkinson invested substantial sums in two MURBs which a real estate developer named Olma Bros. was developing in the Okanagan region of the province. Later in the year, the appellant invested in a third Okanagan development of Olma Bros. Mr. Simms billed Olma Bros. for the financial services he was performing in connection with these MURBs. He did not disclose this to Mr. Hodgkinson.

103 In late 1980, Mr. Hodgkinson, on Mr. Simms' advice, invested in a development called Enterprise Way promoted by Mr. Dale-Johnson, a friend and client of Mr. Simms. Mr. Dale-Johnson paid fees to Mr. Simms for "structuring" this project which Mr. Simms did not disclose to Mr. Hodgkinson.

104 During the time Mr. Hodgkinson was investing in MURBs on Mr. Simms' recommendations, he was also making other investments on his own. These included a MURB in Richmond to which he committed over $900,000; a $250,000 investment in a joint venture development, also in Richmond; a $95,000 investment in the Montreal Alouette Football Club; a $122,435 investment in "flow-through" shares of Platte River Resources; and a $24,000 investment in a movie.

105 In 1981, the price of real estate crashed. Mr. Hodgkinson sustained large losses. He sold some of his investments at a loss to avoid cash calls. Others were foreclosed upon when they could not be sold or rented.

106 In 1985, Mr. Hodgkinson learned that the respondent may have received fees and payments from Olma Bros. with respect to the three Okanagan projects. In 1986, he sued Mr. Simms in negligence. In early 1987, further documents came to light indicating that Simms & Waldman had been collecting fees on the projects but the extent of their involvement remained unclear. As evidence accumulated, the pleadings were amended to include a claim for breach of fiduciary duty.

II. Judgments Below

British Columbia Supreme Court *(1989), 43 B.L.R. 122* (Prowse J.)

107 Mr. Hodgkinson sought to recover all losses on the four investments recommended by Mr. Simms based upon breach of fiduciary duty, breach of contract and negligence. He essentially founded his claim upon Mr. Simms' failure to disclose the payments he had taken for "structuring" the projects he recommended.

108 Prowse J. found, at p. 168, a fiduciary relationship between Mr. Hodgkinson and Mr. Simms based on the fact that Mr. Simms, "took it upon himself to investigate and make recommendations on the relative merits of tax shelter investments for a client he knew was dependent upon him for that advice and who accepted that advice and acted upon it" and thus "assumed the responsibility for Mr. Hodgkinson's choice". This fiduciary duty required Mr. Simms to disclose to Mr. Hodgkinson "all facts material to Mr. Hodgkinson's decision whether to invest in these projects" (p. 170). Prowse J. concluded that Mr. Simms had breached his fiduciary duty by failing to disclose the nature and extent of his relationship with both Olma Bros. and Mr. Dale-Johnson, and by writing billing and reporting letters in such a way as to suggest that the investors were the sole source of payment for the work which he was doing on the tax shelters.

109 Prowse J. assessed damages for breach of fiduciary duty at $350,507.62. The calculation of these damages included the return of the capital Mr. Hodgkinson had invested in the four projects, adjusted to take into consideration the tax benefits which the appellant received, as well as the consequential losses flowing from his investment in the projects.

110 Prowse J. also found Mr. Simms liable for breach of contract. She held that Mr. Simms' professional contract with Mr. Hodgkinson obliged Mr. Simms to disclose all material facts concerning prospective tax shelters and investments. The contract further required the respondent to disclose if he was acting for a developer or vendor of a project in which he was advising the appellant as an investor, and to disclose the nature and extent of any affiliation

with the vendor of tax shelters upon which he was advising. For substantially the same reasons that the respondent was found in breach of his fiduciary obligations, Prowse J. held that he was also in breach of the terms of the contract.

111 Prowse J. accepted that damages for breach of contract are limited to those in the reasonable contemplation of the parties at the time they entered into the contract: Asamera Oil Corp. v. Sea Oil & General Corp., *[1979] 1 S.C.R. 633*. See also Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd., [1949] 2 K. B. 528 (C.A.), and Koufos v. C. Czarnikow Ltd., [1969] 1 A.C. 350. She concluded that at the time of making the contract it was reasonably foreseeable that: (1) had Mr. Simms made proper disclosure, Mr. Hodgkinson would not have invested; and (2) that a change in the economy could adversely affect any investments. Concluding that Mr. Hodgkinson's losses had been caused by a combination of the consequences of non-disclosure and the downturn in the economy, Prowse J. held Mr. Simms liable in contract for the full amount of the loss sustained by the appellant as a result of entering into the investments, the same amount she had awarded with respect to the breach of fiduciary duty.

112 The claim in negligence was dismissed by the judge at trial and abandoned by the appellant on appeal.

British Columbia Court of Appeal *(1992), 65 B.C.L.R. (2d) 264* (McEachern C.J.B.C., Wood and Gibbs JJ.A.)

113 The Court of Appeal, per McEachern C.J., allowed the appeal on the grounds that the respondent owed no fiduciary duty to the appellant and that the trial judge's assessment of damages for breach of contract was too high.

114 The court concluded against a fiduciary duty on the basis of the decision of this Court in Lac Minerals Ltd. v. International Corona Resources Ltd., *[1989] 2 S.C.R. 574*, which was released after the decision at trial. McEachern C.J. held that the necessary characteristics of a fiduciary relationship were absent. Mr. Hodgkinson had not given Mr. Simms the necessary authority or discretion. The choice of whether to invest or not invest lay at all times with Mr. Hodgkinson. Finally, Mr. Hodgkinson was not "peculiarly vulnerable to" or at the mercy of the respondent.

115 The Court of Appeal agreed that Mr. Simms was liable for breach of contract. However, it found error in the assessment of damages. While the trial judge had cited the correct principles, she had erred, in the court's view, in her application of those principles to the facts before her. McEachern C.J. rejected the submission that the losses suffered by Mr. Hodgkinson through the sale or foreclosure of the properties or other consequential losses such as legal and accounting fees were within the contemplation of the parties as flowing from the breach of contract by Mr. Simms. He held that all such losses were the result of the unforeseeable collapse of the real estate market and that Mr. Hodgkinson has assumed that risk. In his view, the proper measure of damages was the difference between what the appellant had paid for his investments and their real value at that time, plus any further damages flowing from the breach which were in the reasonable contemplation of the parties at the time of entering into the contract.

III. The Issues

116 The issues on appeal are:

1. Did a fiduciary duty arise?
2. If not, did the trial judge err in her assessment of damages for breach of contract?

1. Did a Fiduciary Duty Arise?

A. The Law of Fiduciaries

117 At the heart of the fiduciary relationship lie the dual concepts of trust and loyalty. This is first and best illustrated by the fact that the fiduciary duties find their origin in the classic trust where one person, the fiduciary, holds property on behalf of another, the beneficiary. In order to protect the interests of the beneficiary, the express trustee is held to a stringent standard; the trustee is under a duty to act in a completely selfless manner for the sole

benefit of the trust and its beneficiaries (Keech v. Sandford (1726), 25 E.R. 223) to whom he owes "the utmost duty of loyalty". (Waters, Law of Trusts in Canada (2nd ed. 1984), at p. 31). And while the fiduciary relationship is no longer confined to the classic trustee-beneficiary relationship, the underlying requirements of complete trust and utmost loyalty have never varied.

118 Certain relationships and actors have always been subject to the duties and obligations imposed by courts of equity upon fiduciaries. These traditional categories include, among others, solicitor-client, principal-agent, directors and partners. These per se fiduciary relationships, however, are not exhaustive of the principle. Fiduciary relationships may also be found in other trust-like relationships. To determine whether a fiduciary obligation lies, one must look carefully at the particular relationship between the parties. As Dickson J. (as he then was) stated in Guerin v. The Queen, *[1984] 2 S.C.R. 335*, at p. 384:

> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. [Emphasis added.]

119 In Frame v. Smith, *[1987] 2 S.C.R. 99*, at p. 136, Wilson J. defined the characteristics of a fiduciary relationship as follows:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

And although Wilson J. wrote in dissent, this list of the characteristics of a fiduciary relationship was adopted by the majority of this Court, per Sopinka J., in Lac Minerals, supra. Sopinka J. cautioned that the list was a description, not an absolute legal test and stated at p. 599: "It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship." Sopinka J., however, identified vulnerability as "[t]he one feature . . . which is considered to be indispensable to the existence of the relationship" and at pp. 599-600 quoted Dawson J. in Hospital Products Ltd. v. United States Surgical Corp. (1984), 55 A.L.R. 417, at p. 488, who stated:

> There is . . . the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other . . .

120 Prior to addressing the nature of the relationship between Mr. Hodgkinson and Mr. Simms in greater detail, we mention two considerations which may act as false indicators of a fiduciary relationship.

121 The first is the presence of conduct which attracts judicial sanction. As Sopinka J. stated in Lac Minerals, at p. 600:

> ... the presence of conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty. In Tito v. Waddell (No. 2), [1977] 3 All E.R. 129, at p. 232, Megarry V.-C. said:
>
>> If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty: it is a

> disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

122 La Forest J., in the same case, discussed three uses of the term "fiduciary". He found the third use reflected this precise error. In his view, at p. 652, "this third use of the term fiduciary, used as a conclusion to justify a result, reads equity backwards. It is a misuse of the term".

123 The second consideration which may act as a false indicator of a fiduciary obligation is the "category" into which the relationship falls. Professional relationships like doctor-patient and lawyer-client often possess fiduciary aspects. But equally, many of the tasks undertaken pursuant to these relationships may not be trust-like or attract a fiduciary obligation. As Southin J. (as she then was) stated in Girardet v. Crease & Co. *(1987), 11 B.C.L.R. (2d) 361*, at p. 362:

> The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty -- if not of deceit, then of constructive fraud. See Nocton v. Lord Ashburton, [1914] A.C. 932 (H.L.). Those who draft pleadings should be careful of words that carry such a connotation.

124 Just as not every act in a so-called fiduciary relationship is encumbered with a fiduciary obligation, so conversely fiduciary obligations may arise in relationships which have not been traditionally considered as fiduciary. As J. C. Shepherd states in The Law of Fiduciaries (1981), at p. 28:

> It appears to be settled that any person can, by offering to give advice in a particular manner to another, create in himself fiduciary obligations stemming from the confidential nature of the relationship created, which obligations limit the adviser's dealings with the advisee.

125 This brings us to the crux of the issue in this case. The relationship between these parties was not a traditional "fiduciary relationship" like trustee and beneficiary or lawyer and client. The question, however, is whether aspects of it assumed a fiduciary character.

126 Our colleague La Forest J., as we understand his reasons, holds that the giving of independent professional advice may give rise to a fiduciary duty toward the person seeking the advice (pp. 415 ff.). The essence of such relationships, he suggests at p. 415, is "trust, confidence, and independence." He states, at p. 420, that "where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor". The facts are looked at in order to determine whether they disclose that the advice was given in the context of a relationship of trust and confidence. As La Forest J. puts it at pp. 418-19, "the common thread that unites this body of law is the measure of the confidential and trust-like nature of the particular advisory relationship, and the ability of the plaintiff to establish reliance in fact".

127 The difficulty lies in determining what measure of confidence and trust are sufficient to give rise to a fiduciary obligation. An objective criterion must be found to identify this measure if the law is to permit people to conduct their affairs with some degree of certainty. The contexts in which investment advice is given are multitudinous. They range from newspaper advertisements through personal "tips" to cases akin to the classic trust. Clearly they do not

all attract fiduciary duties, but where is the line to be drawn? Accepting that a bright line may be elusive, is there some hallmark that provides a reliable indicator of the acceptance of a fiduciary obligation? The vast disparity between the remedies for negligence and breach of contract -- the usual remedies for ill-given advice -- and those for breach of fiduciary obligation, impose a duty on the court to offer clear assistance to those concerned to stay in the former camp and not stray into the latter.

128 As we have seen, the cases suggest that the distinguishing characteristic between advice simpliciter and advice giving rise to a fiduciary duty is the ceding by one party of effective power to the other. It is this mutual conferring and acceptance of power to the knowledge of both parties that creates the special and onerous trust obligation. Wilson J. referred in Frame v. Smith, at p. 136, to the "scope for the exercise of ... discretion or power" in the fiduciary and to the power of the fiduciary to "unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests" (emphasis added). She also referred to the beneficiary's being "at the mercy" of the fiduciary. Sopinka J. approved this language in Lac Minerals, at pp. 599-600, and underscored the indispensable nature of the feature of vulnerability requiring "the protection of equity acting upon the conscience of that other" (per Dawson J. in Hospital Products, supra).

129 Vulnerability, in this broad sense, may be seen as encompassing all three characteristics of the fiduciary relationship mentioned in Frame v. Smith. It comports the notion, not only of weakness in the dependent party, but of a relationship in which one party is in the power of the other. To use the phrase of Professor Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 7, quoted in Guerin at p. 384 and in Lac Minerals at p. 600, ". . . the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion".

130 Vulnerability does not mean merely "weak" or "weaker". It connotes a relationship of dependency, an "implicit dependency" by the beneficiary on the fiduciary (D. S. K. Ong, "Fiduciaries: Identification and Remedies" (1984), 8 U. of Tasm. L. Rev. 311, at p. 315); a relationship where one party has ceded power to the other and is, hence, literally "at the mercy" of the other.

131 This then is the hallmark to which a court looks in determining whether a fiduciary relationship exists; is one party dependent upon or in the power of the other. In determining if this is the case, the court looks to the characteristics referred to by Wilson J. in Frame v. Smith. Does one party possess power or discretion over the property or person of the other? Can that power or discretion be exercised unilaterally, that is, without the consent of the other? In the final analysis, can the powerless party be said to be "peculiarly vulnerable" or "at the mercy of" the party who holds the power? To quote Keenan J. in Varcoe v. Sterling *(1992), 7 O.R. (3d) 204* (Gen. Div.), at p. 236, relied upon by our colleague La Forest J., at p. 419: "Because the client has reposed that trust and confidence and has given over that power to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly." (emphasis added).

132 Phrases like "unilateral exercise of power", "at the mercy of the other's discretion" and "has given over that power" suggest a total reliance and dependence on the fiduciary by the beneficiary. In our view, these phrases are not empty verbiage. The courts and writers have used them advisedly, concerned for the need for clarity and aware of the draconian consequences of the imposition of a fiduciary obligation. Reliance is not a simple thing. As Keenan J. notes in Varcoe v. Sterling at p. 235, "[t]he circumstances can cover the whole spectrum from total reliance to total independence". To date, the law has imposed a fiduciary obligation only at the extreme of total reliance.

133 This is in accordance with the concepts of trust and loyalty which lie at the heart of the fiduciary obligation. The word "trust" connotes a state of complete reliance, of putting oneself or one's affairs in the power of the other. The correlative duty of loyalty arises from this level of trust and the complete reliance which it evidences. Where a party retains the power and ability to make his or her own decisions, the other person may be under a duty of care not to misrepresent the true state of affairs or face liability in tort or negligence. But he or she is not under a duty of loyalty. That higher duty arises only when the person has unilateral power over the other person's affairs placing the latter at the mercy of the former's discretion.

134 This is a question that was decided by the majority in Lac Minerals. We are unable to agree with our colleague, at p. 414, that the Court of Appeal "erred in importing the analysis in the Lac Minerals case to professional advisory relationships". He would distinguish the latter from business entities on the following basis at p. 414:

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest....

The reasons of both the majority and minority in Lac Minerals canvassed the entire spectrum of fiduciary and potential fiduciary relationships. Professional relationships as such were not identified as a separate category which attracted special consideration. Rather, the preoccupation was with respect to the different treatment to be accorded certain relationships which traditionally have been recognized as giving rise to fiduciary obligations and others which may be found to be so by reason of the presence of characteristics commonly associated with traditional fiduciary relationships. As previously noted, these characteristics or criteria are those enumerated by Wilson J. in Frame, supra, and adopted by Sopinka J. in Lac Minerals.

135 It is not suggested in this case that the relationship in question is one of those traditional relationships that are presumed to be fiduciary. Indeed, our colleague adopts the statement of Keenan J. in Varcoe v. Sterling, at p. 234, that the "relationship of broker and client is not per se a fiduciary relationship" as a correct statement of the law applicable to, inter alia, "accountants". The analysis in Lac Minerals is, therefore, directly applicable to determine whether, applying the relevant criteria, fiduciary obligations should be extended to apply to this case. We see no reason to depart from the principles so recently stated in Lac Minerals by reason of a supposed distinction between professional advisers and other "commercial interactions". It cannot be assumed that the latter are always based on self-interest and the former are not. Moreover, as far as social utility is concerned, it could be debated whether advice as to how to add to one's personal wealth while paying the least amount of tax is to be preferred over business dealings which may lead to the development of a mine providing employment to many Canadians.

136 Nor are we persuaded that we should depart from Lac Minerals on other grounds of principle or policy. We agree with Professor Frankel, "Fiduciary Law: The Judicial Process and the Duty of Care" in The 1993 Isaac Pitblado Lectures, Fiduciary Duties/Conflicts of Interest (1993), at p. 144, cited by our colleague La Forest J. at p. 421, that policy considerations may support a fiduciary duty's being imposed on services "requiring skills that are very costly to master" such as "some kinds of investment management" (emphasis added). In the case of such special skills, the client is effectively obliged to give exclusive power to the investment manager; the client lacks the special skills to effectively monitor and make the decisions involved. For this reason, a fiduciary obligation may be appropriate. As Professor Frankel puts it at p. 145, "[t]he law aims at deterring fiduciaries from misappropriating the powers vested in them solely for the purpose of enabling them to perform their functions". We agree as well with Professor Finn, "Conflicts of Interest and Professionals" (1987), at p. 15, cited by our colleague, at p. 421, that imposition of fiduciary obligations in some cases may be justified on the ground of "maintenance of the public's acceptance of, and of the credibility of, important institutions in society which render 'fiduciary services' to the public". But neither of these rationales would appear to justify imposing a fiduciary obligation on the purveyor of investment advice where the client retains the power and ability to make the decisions of which he later complains. And neither undermines our colleague's view, which we share, that once imposed, the fiduciary "rule should be strictly pursued": Keech v. Sandford, supra, at p. 223. Ultimately, the stringent measure of compensation for breach of fiduciary duty, which may take a different view of loss causation than tort and contract law, can be justified only in cases where true trust in the sense of complete reliance is demonstrated.

137 The question then, as we see it, is whether the facts in this case are capable of demonstrating the unilateral exercise of power by the alleged fiduciary and the correlative total reliance on that person by the beneficiary required to establish a fiduciary obligation.

B. Application of the Principle to the Relationship at Bar

138 We acknowledge at the outset that we accept the principle that a court of appeal must not interfere with the findings of fact of the trial judge unless they are clearly unsupported on the evidence. In our view the trial judge's error in this case lay elsewhere. It lay in her failure to ask herself whether Mr. Hodgkinson had given and Mr. Simms had assumed total power over the affairs in question. In fact, the evidence, however it may be construed, falls short of establishing the contention that this total concession of power occurred. In other words, it is not a question of interfering with the trial judge's findings of fact, but rather of concluding that there was no evidence upon which the trial judge could reasonably have concluded that Mr. Simms had assumed a fiduciary obligation to Mr. Hodgkinson. In saying this, we do not wish to be taken as offering any criticism of the trial judge. She did not have the advantage of this Court's reasons in Lac Minerals when she made her decision.

139 The Court of Appeal focused directly on the requirement of a concession of unilateral power by the beneficiary to the trustee as explained by Wilson J. in Frame as adopted in Lac Minerals. McEachern C.J. stated, at p. 275:

> As the authorities suggest, the power or discretion of the alleged fiduciary to deal with the property of the victim is a highly significant feature of a fiduciary relationship. There is in this case no suggestion that the plaintiff gave the defendant any unilateral authority or discretion to prefer his own position or that of the developers to the disadvantage of the plaintiff.
>
> This is because, with respect to each investment, the choice to invest or not to invest was entirely that of the plaintiff.

140 McEachern C.J. reviewed individually the investment decisions made by Mr. Hodgkinson. He found that in every case Mr. Hodgkinson was given complete and accurate information with respect to the financial projections and the anticipated tax savings. There was, in fact, no allegation of fraud or dishonesty made against Mr. Simms. Neither does it appear that Mr. Hodgkinson was placed under time pressures with respect to the investments or that he was subjected to any 'hard-sell' techniques to obtain his investment dollars. Most importantly, there was nothing in the evidence to support the theory that Mr. Hodgkinson had conferred any discretion or power on Mr. Simms, or that Mr. Simms used his position to exercise unilateral power over the legal or practical interests of Mr. Hodgkinson.

141 The evidence shows that Mr. Hodgkinson looked to Mr. Simms for advice with respect to investments and tax shelters. As the trial judge found, he accepted that advice. But it flies in the face of the evidence to suggest that he did so unreflectively. Mr. Hodgkinson discussed each investment with Mr. Simms. He was given an accurate and fair written description of each development and was aware of the financial projections and the estimated tax savings. Mr. Hodgkinson met with the developers on more than one occasion. He took time for consideration. Finally, he chose to invest. As McEachern C.J. put it at p. 278, "the plaintiff was not peculiarly vulnerable, let alone at the mercy of or under the domination of the defendant".

142 We add that this does not mean that advisors, financial or otherwise, can never be subject to fiduciary obligations. Each relationship must be examined on its own facts. A relationship where one party unreflectively and automatically accepts the advice of the other might raise different considerations. The critical question, as noted earlier, is whether there is total assumption of power by the fiduciary, coupled with total reliance by the beneficiary. In short, that the beneficiary was vulnerable in the sense of being at the mercy of the fiduciary's discretion. That is not, on the evidence, the sort of relationship which is before us on this appeal.

143 On the facts of this case, no fiduciary obligation arises. Mr. Simms' only liability is for breach of contract. We turn then to the measure of damages for breach of contract in these circumstances.

2. Damages

   A. The Compensation Principle

144 In Asamera Oil Corp. v. Sea Oil & General Corp., supra, Estey J., for the Court, set out the general principle of

compensation underlying damages for breach of contract, at p. 645, stating:

> The calculation of damages relating to a breach of contract is, of course, governed by well-established principles of common law. Losses recoverable in an action arising out of the non-performance of a contractual obligation are limited to those which will put the injured party in the same position as he would have been in had the wrongdoer performed what he promised.

However, the harshness which the compensation principle would visit on defendants, if rigidly applied, has been recognized and its rigours mitigated in law. As Asquith L.J. noted in Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd., supra, at p. 539:

> It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. . . . This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. [Emphasis added.]

145 In order to avoid either under-compensation or over-compensation, the measure of damages in law is limited by the concept of the foreseeability of the resulting loss. Moreover, the principles must be sufficiently flexible in their application to insure that the measure of damages is reasonable in the circumstances of the individual case.

B. The Foreseeability Limitation on the Compensation Principle

146 In Hadley v. Baxendale (1854), 9 Ex. 341, 156 E.R. 145, the House of Lords held that the contract breaker was responsible for losses which fairly and reasonably could be considered to have arisen from the breach of contract itself or may reasonably have been within the contemplation of the parties at the time of contracting as the probable result of the breach. Therefore, two considerations have emerged in the legal analysis associated with the measure of damages, causation and the reasonable contemplation of the parties.

(a) Causation

147 The appellant in this case does not allege that the losses which he incurred were caused directly by the respondent's breach of contract. Instead, he claims that "but for" the respondent's breach of the first contract, the appellant would not have entered into subsequent investment contracts which, due to an economic downturn, were significantly devalued. A literal application of the "but for" approach to causation has been rejected in British, Canadian and American case law, in the context of both equitable and common law claims.

148 In Waddell v. Blockey (1879), 4 Q.B.D. 678, a case involving an action for fraudulent misrepresentation, the Queen's Bench Division ordered damages in the amount of the difference between the price paid by the individual represented by the plaintiff and the fair market value of the item sold. Although the rupee paper would not have been purchased had the defendant made full disclosure of the fact that he owned the paper which he sold to the purchaser, the defendant was not held liable for the resulting losses sustained by the purchaser due to devaluation of the item. Thesiger L.J. reasoned as follows in this regard at pp. 682 and 684:

> There is [in this case] no natural or proximate connection between the wrong done and the damage suffered.
>
> . . .
>
> But the present case is complicated by the circumstance of the defendant's fiduciary position in the matter of the purchase, and by the fact that the fraud did not touch the value of the article sold. . . . It would seem, however, strange if under such circumstances a plaintiff who has got the article he bargained for, upon

> whom no fraud as regards its value has been practised, could, after the article has been depreciated and resold at a loss owing to a cause totally unconnected with the fraud, claim to recover all the loss which he has thereby sustained. I cannot see upon what principle such a claim could be based. [Emphasis added.]

Similarly, in Canson Enterprises Ltd. v. Boughton & Co., *[1991] 3 S.C.R. 534*, at p. 580, this Court recognized that the results of supervening events beyond the control of the defendant are not justly visited upon him/her in assessing damages, even in the context of the breach of an equitable duty.

149 A similar line of authority has developed in several U.S. cases involving common law claims of fraudulent and negligent misrepresentation and the application of the Securities and Exchange Act of 1934, June 6, 1934, c. 404, Title I, [section] 10, 48 Stat. 891 (15 U.S.C. para78j(b)) and S.E.C. Rule 10b-5. In McGonigle v. Combs, 968 F.2d 810 (1992), the Ninth Circuit of the United States Court of Appeals stated the following with respect to the causal requirement in cases involving allegations of misrepresentation leading to investments with third parties, at p. 821:

> Plaintiffs would have us interpret the "causal connection" requirement of. . . [Accord Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461 (9th Cir. 1990)] very broadly. They argue that their loss was "caused" by the misrepresentations simply because the misrepresentations of the "quality" of their investment induced them to buy the shares which then declined in value. The misrepresentations, they argue, caused the loss because the loss would not have occurred if the misrepresentations had not been made. We reject this interpretation, because it renders the concept of loss causation meaningless by collapsing it into transaction causation. The dual and independent requirements of transaction causation and loss causation, as we noted in Vigman, are analogous to the basic tort principle that a plaintiff must demonstrate both "but for" and proximate causation. . . . As the Fifth Circuit stated in Huddleston, 640 F.2d at 549, "[t]he plaintiff must prove not only that, had he known the truth, he would not have acted, but in addition that the untruth was in some reasonably direct, or proximate, way responsible for his loss. The causation requirement is satisfied in a Rule 10b-5 case only if the misrepresentation touches upon the reasons for the investment's decline in value." [Emphasis added.]

150 This decision reflected prior jurisprudence of that Court which determined that in an action under Rule 10b-5 for material omissions or misstatements, "the plaintiff must prove both transaction causation, that the violations in question caused the plaintiff to engage in the transaction, and loss causation, that the misrepresentations or omissions caused the harm": Hatrock v. Edward D. Jones & Co., 750 F.2d 767 (9th Cir. 1984), at p. 773.

151 Although these U.S. cases involve interpretation of a protective provision in securities exchange legislation, the basic premise underlying those decisions is consistent with the concern for avoiding undue harshness in damage awards expressed in English and Canadian cases previously mentioned. While we would not wish to be taken as agreeing with this particular approach to damages in a situation where a material misrepresentation resulted in a loss to an investor, we do agree with the application of the principle in situations where the representation itself is not causally connected to the devaluation. In such situations, where the losses incurred by a plaintiff are related to the contractual breach of the defendant merely on a "but for" basis, it would be unduly harsh to impose liability for all of the losses upon the defendant, especially where the direct cause of the loss is outside of the defendant's control.

(b) Reasonable Contemplation

152 The law in relation to the reasonable contemplation of the parties in assessing damages was elaborated upon by Asquith L.J. in Victoria Laundry, supra, at pp. 539-40:

> (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

. . .

(5) In order to make a contract-breaker liable. . . it is not necessary that he should actually have asked himself what loss is liable to result from a breach. . . . It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result. . . .

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. [Emphasis added.]

C. Application to the Case at Bar

153 In assessing the damages for respondent's breach of contract it is necessary to ask whether the loss sustained by the appellant arose naturally from a breach thereof or whether at the time of contracting the parties could reasonably have contemplated the loss flowing from the breach of the duty to disclose. In the event that either criterion is satisfied, the respondent should be held liable for that loss. Finally, the damage assessment as a whole must represent a fair resolution on the facts of this case.

(a) Causation

154 In our view, it cannot be concluded that the devaluation of the appellant's investments arose naturally from the respondent's breach of contract. The loss in value was caused by an economic downturn which did not reflect any inadequacy in the advice provided by the respondent. We would reject application of the "but for" approach to causation in circumstances where the loss resulted from forces beyond the control of the respondent who, the trial judge determined, had provided otherwise sound investment advice. Therefore, the respondent cannot be held liable for the appellant's losses under the first arm of the test set out in Hadley, supra.

(b) Reasonable Contemplation

155 Turning to the second arm of the Hadley test, the trial judge made certain findings of fact as to what the reasonable contemplation of the parties had been at the time of contracting. With respect to the first contract, between the appellant and the respondent, the trial judge concluded that the respondent fulfilled his requirement to give sound investment advice to the appellant and found that there had been no negligent misrepresentation with respect to the quality of the investments in question. The trial judge also concluded that if the parties had turned their minds to the potential consequences of the respondent's failure to make full disclosure to the appellant under the first contract, they would have contemplated that the appellant would not have entered the subsequent investment contracts and that a change in the economy could adversely affect any investment.

156 However, the material question to be considered is whether the parties would reasonably have contemplated the losses associated with an economic downturn as liable to result from the respondent's breach of his duty to make full disclosure: Victoria Laundry, supra. This question can only be answered in the negative. It would simply not be reasonable for the parties to have contemplated that the respondent's failure to make full disclosure was likely to result in devaluation of the investment due to an economic downturn. As indicated previously, the two events were in no way causally related. The answer might have been different had the respondent's services been defective with respect to assessing the likelihood of economic downturn or the likely effect of an economic downturn on the future value of the investments. However, no such defects were revealed in this case.

157 Moreover, the fact that the breach of the duty to disclose was a continuing one does not affect our conclusion in this regard. The factual finding was that the investments were sound ones, but for the economic downturn, and there is no evidence to indicate that, had the respondent disclosed his conflicting interests prior in time to the economic downturn, the appellant would have sold his interest in the investments. In fact, it would be unreasonable to infer that he would have done so, given that the investments were sound ones.

158 In situations involving breach of a duty to disclose, courts have consistently recognized the right of plaintiffs to compensation for losses equivalent to the difference between the price which they paid for a particular investment and the actual value of the investment purchased: Waddell, supra, and Canson, supra. In the case at bar, the trial judge concluded that there was no evidence to indicate that the appellant had paid anything more than the fair market value for the investments which he made. Therefore, it would appear that no damages should have been assessed. However, McEachern C.J. in the Court of Appeal concluded, at p. 280, that "the law so dislikes a failure of disclosure of material facts that it assumes the value of the investment was less than the amount paid, at least to the extent of the amounts paid by the developer to the defendant." There was no cross-appeal from the judgment of the Court of Appeal. In these circumstances we are not entitled to reduce the award of damages made by the Court of Appeal.

IV. Conclusion

159 For the foregoing reasons, we would dismiss this appeal and maintain the damage award ordered by the British Columbia Court of Appeal. Pursuant to that order, the appellant is entitled to his prorated share of the fees paid by the developers to the respondent on the four projects. If the parties are unable to agree upon the exact amount, the matter should be referred back to the trial court.

The following are the reasons delivered by

IACOBUCCI J.

160 I agree with La Forest J. that the trial judge did not err in finding that a fiduciary duty existed between the parties, and that the respondent breached this duty by not disclosing the pecuniary interest with the developers. I also agree with my colleague's views on the question of damages. Although I agree with much of my colleague's excellent reasons, I prefer to treat Lac Minerals Ltd. v. International Corona Resources Ltd., *[1989] 2 S.C.R. 574* by simply distinguishing that case from the present one.

161 I would dispose of the appeal in the manner proposed by La Forest J.

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