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Does Cultural Anthropology Support Judicial Bias?
(A Comparative Study of Fiduciary Appeal Cases)

Abstract

Fiduciary duties are requirements observed by those assigned confidence and trust by parties willing to become vulnerable to their subsequent actions and decision making, while this faith underpins a complex and often fraught relationship that always remains inches away from abuse. By first comparing the rules and principles laid down by four pre-agreed common law countries, the aim of this research was to establish what (if any) differences might become visible and what (if any) effects those differences might have upon the courts when deciding fiduciary breaches.

The purpose of using appeal cases is to encompass multiple judgments in order to benefit from the maximum judicial representation available. Each case and final judgment is outlined and simplified (as much as is editorially possible) in order to avoid labour intensive reading, before an overall analysis is provided to permit a final comparison of the domestic approaches used. As with all preliminary research, there will be expected degrees of limitation, particularly with an ambitious exercise such as this; and yet, with the proper discipline and discretionary application of facts, the results found will hopefully offer insight enough to both justify the analysis and relevance of the question raised.

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1. Introduction

The purpose of this comparative research is not to explore the idea that fiduciary breaches ought be mitigated or condemned, but rather to examine through comparison, the current rules and principles guiding those occupying positions of trust. Surprisingly, there are no pre-determined rules or frameworks within the discipline of comparative law, rather a cache of ideas and relied upon models of engagement; a liberty that makes the subject both challenging and yet potentially rewarding to those researchers willing to tackle it. More notably, there are schools of thought which seek only to observe for the purpose of data compilation, whereas some academics prefer to use the comparatist vehicle to further question or at least investigate, specific legal areas ripe for reform.

Regardless of which model is preferred, the values of such pursuits risk being overlooked in favour of localisation of jurisprudence; yet in the last decade comparative law has enjoyed something of a renaissance period, with broader emerging methods of analysis, some of which embracing questions and theories, (inter) disciplinarity, functionalism and dynamic comparison[1] to name but a few. Fundamentally speaking, there are of course many reasons why one might choose to compare fiduciary duty cases within equity and the law of trusts, but such motives need honest clarification to sustain enduring argument; however, there is also the grounded rationale that we would be wise to expect (comparative researchers) to deliver what they can realistically expect to obtain and achieve: to instruct or even educate an audience that without comparatist intervention would remain ignorant of foreign law.[2] If such a notion were further embraced within a commercial context, then comparative research is surely the primary breeding ground for epistemology, because knowledge and understanding of different approaches to law can be crucial to providing appropriate legal advice.[3]

1.2 Research Question and Methodology

'Does cultural anthropology support judicial bias? A comparative study of fiduciary appeal cases' discusses whether cultural influences that in turn, determine the select strictness of fiduciary duties, are traceable through judicial approach. As in all appeal cases, there are a number of judges bringing their subjective opinion in order to translate the principles of equity, therefore by analysing a small number of fiduciary cases across four common law countries, the aim here is to test the theory that cultural influence is visible and consistent enough to be considered as real. It is important to note that the cases selected for analysis were sourced arbitrarily, while filtered for pure fiduciary breaches, rather than those overlapping with tortious or contract themes, in order to prevent data pollution and remove any bias from the final account. It is also the hope of the researcher that whatever transpires, the work undertaken will not have been in vain and that the data collected might perhaps warrant further enquiry to provide greater empirical clarification.

1.3 Cultural Anthropology and Fiduciary Duties

'No person can loyally serve two masters'[4]

In order to better understand why fiduciary duties (or obligations) exist, one would need to briefly remove law from the discussion and turn instead to the nature of human relationships. Since the emergence of social civilisation there has been a need for one individual to place their trust into another; or in a greater context, to act for or on behalf of another when called upon. Such circumstances only proved feasible when the relationship between those parties was sufficient enough to foster trust. Just as sure as dependencies like these have become necessary, there has also been the impetus to ensure that under certain conditions those assigned trust cannot breach that agreement to the detriment of the bestower or 'beneficiary'. This disparity gave rise to laws designed to prevent or at least discourage, a 'trustee' from acting less than honourably;[5] however, to best encapsulate the purpose of fiduciaries, one would rely upon the words of Leonard Rotman, who enthused:

> "Fiduciary" is one of the means by which law transmits its *ethical resolve to the spectrum of human interaction*. Few legal purposes are simultaneously as vital and as broad. As a vehicle through which law imposes its standard of ethics on a potentially infinite variety of actors involved in an indefinite number of circumstances, the fiduciary concept cannot be defined with the explicitness generally desired by legal actors.[6]

Cultural anthropology on the other hand, is less codified than endemic, but nonetheless integral to the foundation of comparative study because all legal principles are formed directly from the human interactions of each country, religion, race and even state; therefore, it would be remiss to overlook how influential such practices and traditions are upon private (and to a lesser extent) public laws.

Thus, when we discuss fiduciary strictness, we do so in the knowledge that greater emphasis is placed not just upon the black letter itself, but through a deep if not altogether unconscious appreciation of domestic cultural values; a concept that makes the study of anthropological impact upon judicial reasoning a complex undertaking, because we cannot reasonably contemplate influence without first analogising the chicken and the egg.

With a consideration of the almost intangible nature of fiduciary relationships and their marriage to anthropological culture, we are next presented with an inevitably complex framework of fiduciary responsibility; and so, in order to better identify any similarities or differences one might expect to find when carrying out this kind of research, a comparison and analysis of fiduciary duties across the four common law countries of Australia, Canada, the United Kingdom (UK) and the USA will provide both evidential clarity and the proper footing for judicial discussion.

2. Fiduciary Duties by Common Law Country

2.1 Australia

In Australia, the core principles applied to fiduciary duty fall under the term 'obligations' and are divisible over two main arms[7]. The emphasis here is largely based upon negative proscription and confers that fiduciary obligation is to not act in any situation where there is a conflict between the duty owed to the beneficiary and that of personal interest. The reason for such a rule is to avoid conflict with both contract and tort laws accordingly; however, greater note ought to be placed upon the acknowledgement that fiduciary duties may coexist with contractual terms where the relationship allows, although some contractual terms can prove so exact as to preclude the opportunity to impose fiduciary obligations altogether. This principle would likewise apply where duty-duty[8] disputes involving multiple beneficiaries occur.

There is an overarching duty of care bestowed upon trustees to preserve trust property while reducing into possession, any trust property that is so entitled, sometimes referred to as the 'duty of care and skill' principle.[9] There are also strict rules governing both vertical and horizontal duties, such as that of guardian and ward, where only one party benefits from the other, unlike the latter relationship between partners, whereby both parties can derive benefit from their respective obligations.

A fiduciary must never profit from their position and must furthermore provide protection of all economic and proprietorial interests held by the beneficiary (however recent Australian cases have shown a willingness to consider protection of non-economic losses resulting from aggravated damage and mental distress).[10] A fiduciary is similarly unable to appropriate trust property for personal benefit, nor exploit any business opportunity owed to the beneficiary. The only other positive obligation besides protection of economic and proprietorial interests is the obligation to 'disclose', which differs from the UK requirement inasmuch as such a duty exists only to allow the fiduciary to obtain consent from the beneficiary (pending legislative, contractual or constitutional impositions) and is more commonly recognised as a defence to a breach of duty.[11]

2.2 Canada

In Canada, the wording follows a similar line, but prefers the term 'duty of loyalty'[12] when describing fiduciary duties. 'Conflict of interest or duty' is a principle where the fiduciary is strictly prohibited from acting in self-interest within the scope of any related task; however, if such behaviour occurs beyond the parameters of the trust then any profits derived directly from those actions are not required for surrender to the beneficiary. That said, any evidence leading to similar behaviours within the trust invoke an immediate breach that cannot be mitigated through rational explanation nor reasoned argument. The purpose of such strictness is to diminish beneficiary concerns that an appointed fiduciary remains worthy of trust, despite disloyalty; hence, causality is irrelevant upon principle. The rule 'A trustee must act gratuitously' exists where the nature of a fiduciary relationship prevents that any trustee must not serve in the anticipation of remuneration, unless under a pre-agreed clause permitting such reward. This exception presides regardless of any conflict of interest that may become manifest on the part of the trustee.[13]

The 'purchase of the trust property' rule governs that a trustee may not purchase any of the trust property unless conferred such rights through the trust instrument or will.[14] Nor may a trustee convey owned property to the trust by way of sale[15], loan at interest or exchange, although such a fiduciary is free to speculate the advantages of such opportunities. Similarly, loans by the trust to the trustee, or trustee purchase from the beneficiary are also prohibited. In both instances, where such a transaction has occurred, the onus of proof falls to the fiduciary and becomes subject to scrutiny by the courts.[16]

The principle 'a trustee must show ordinary care, skill and prudence' demonstrates that vigilance, providence and sagacity[17] are key to the standard of care expected of fiduciaries and trustees alike. Figuratively speaking, a person may speculate with funds and prove negligent in their administration of their own estate, but when serving within a fiduciary relationship, the same powers and discretion favour the interest of another. It is therefore reasonable that a beneficiary can expect an objective test of what is deemed careful, skilful and prudent. Furthermore, this principle applies to all fiduciary functions and enjoys regulation through Canadian statute.[18]

The prohibitive fiduciary duty relating to delegation operates under the latin maxim *delegatus non potest delegare,* which is to say that no trustee or fiduciary has the right to shift their duties on to any other persons including agents or co-trustees, subject to exceptions.[19] 'Duty to account' and 'duty to provide information' collectively require that all fiduciaries and trustees must keep an orderly house with regard to financial dealings and related documentation. This is because at any point during the relationship, the beneficiary may request to view such material[20], albeit subject to reasonable time frames within the parameters of the arrangement; however, where a trustee is bestowed discretionary power, there is no prerequisite to provide reasons for the exercise of such discretion, nor permit beneficiary inspections.

2.3 United Kingdom (UK)

Fiduciary duty within English equitable law can be best interpreted through several overlapping rules, each open to ambiguous translation, yet following the same rigid principles. The first of these is the 'no conflict rule', or the primary obligation to avoid any clash of interests when acting within a fiduciary capacity.[21] By this it is held that the needs of the beneficiary reign, while allowing the fiduciary to explore possible opportunities to enlarge or expand upon the nature of the trust itself.

This prohibition lends itself well to the next rule of 'accountability for any unauthorised profit', which is to say that when carrying out any task that may produce expected or unexpected profits and losses, the fiduciary is again liable for a full and reasoned explanation as to why such an undertaking occurred.[22] Where permission is granted by the beneficiary or trust instrument[23] to generate profitability, or in more recent examples where professional trustees (not lay trustees) are granted such powers under s.29 of the Trustee Act 2000, then no such explanation is required. That said, it is the right of all fiduciaries to recoup costs incurred through duty under s.31 of the same act.[24]

Following accountability is the 'self-dealing and fair dealing' rule, which prevents the fiduciary (more typically in beneficiary-trustee relationships) from either the purchase of[25], selling to and in the latter rule, acquiring some or all of the beneficiary's interest in the trust estate.[26] The purpose of this restriction is to remove any uncertainty of fiduciary motive and prevent betrayal of beneficiary interest, yet in the matter of fair-dealing, the rules are less strict and can allow for leniency upon grounds that both trustee and beneficiary entered into an arrangement through honest advice and mutual agreement; however, this is further subject to exemption under specific trust conditions, i.e. the self-dealing rule will not apply if the trust instrument authorises the trustee to purchase trust property, as per *Sargeant v National Westminster Bank plc.*[27]

Another rule of equity concerning fiduciary duty is that of 'proprietary and personal nature of liability'. This rule examines the handling of trust property (and those extenuating from the trust itself) by the fiduciary and the nature in which such affairs are dealt with. This complex and often subjective ruling calls forth the need for full accountability rising from any incongruity[28] or apparent abuse of fiduciary duty. Dealing with both personal profits[29] and proprietary rights, the court will attempt to determine where the fiduciary relationship ends and when equity must challenge the integrity of fiduciaries, while aiming to preserve the entitlements of the beneficiary.

Finally is 'equitable compensation for breach of fiduciary duty' a rule which rather than dealing with unauthorised fiduciary profits or activities, exists to restore that which has been denied the beneficiary through breach of fiduciary duty[30] whether through pecuniary or performance related measures. Twinned with this is 'secondary liability for breach of fiduciary obligation' whereby a fiduciary misappropriates trust property involving a third-party or via the creation of a third-party recipient i.e. business or shareholder.

2.4 United States of America (USA)

'Loyalty','trustworthiness' and 'faithfulness' are the key terms used to underline the fiduciary's duty to their 'entrustors',[31]while contained within this duty is the expectation that a fiduciary will not attempt to benefit from, nor act in a manner that conflicts with the rules of the trust relationship. Furthermore, the earmarking of trust property serves to prevent any temptation to abuse the trust through the distorted belief that such property belongs to the fiduciary. This principle also applies to the commingling of trust assets, with the exception that banks acting as trustees are permitted to commingle trust assets belonging to multiple entrustors, as per *Delta Pride Catfish Inc v Midland Business Loans.*[32]

The duty to 'follow trust directives regards fiduciary powers and trust property' confers that a trustee may not exceed assigned authority to purchase an item, nor exceed the amount dictated by the settlor. Nor may the fiduciary invest trust property beyond the scope of the trust instrument, unless specific circumstances permit such action; for example, managers of mutual funds typically describe investment policies under which the trust funds comply, unless ambiguity warrants legislative intervention. The duty to act in good faith also provides sound footing for the duty to account, primarily because accounting requires disclosure from the fiduciary. This action further demands systematic and comprehensive qualities; however, the duration and frequency of such disclosure remains representative of the fiduciary relationship itself.

'Non-delegation' duties demonstrate that once assigned the position of trustee, it is not equitable to delegate trust duties; therefore, those who take it upon themselves to execute partial delegation risk forced resignation[33] or liability for any wrongdoing arising from third-party abuses. That said, trustees are permitted to rely upon secretarial and research services as part of their role and in some instances, federal laws validate assistance from corporate assignees, albeit within a narrow framework.[34]

The final and most fundamental duty is the 'duty of care' and although considered secondary to the duty of loyalty, fiduciaries must perform their services with providence, attention and proficiency at all times, while a failure to do so can result in a breach of duty.[35] Ultimately, the emphasis is on quality over obligation, but without laborious scrutiny, this does prove itself a difficult duty to measure or control, thereby bringing its own pitfalls. Some examples of the components used to enforce a duty of care include fiduciaries possessing the same skills purported to own at the time of their appointment,[36] the evaluation of fiduciary performance by process[37] and the legal risks imposed on fiduciaries.[38]

2.5 Analysis

As presented within their individual jurisdictions, the overriding principles of fiduciary conduct remains largely consistent across the four countries; however, it is noted that although these principles still follow their respective common laws, they are ultimately subject to the condition of the trust instrument, along with consideration of any specific performance contained therein.

What emerges through comparison, is that Australian fiduciary principles seem to place greater focus on the strictness of vertical and horizontal arrangements, which could suggest that relationship power dynamics are of particular importance when assessing the punitive nature of a case; yet, while this observation risks appearing superficial, it is certainly robust enough to imagine where disparities might appear when dealt with at court level.

Through the examination of Canadian fiduciary principles, greater strictness and emphasis is evidently placed upon the discipline of appointed fiduciaries, broadly translatable as a 'zero tolerance' approach to a breach of fiduciary duty; however, what will be of natural importance, is whether that underlined prerequisite is then reflected in the cases researched.

Looking next to the principles laid down in English law, the self-dealing rule seems subject to greater strictness, which might indicate an inherent fear of fiduciary acquisition, despite allowances for the trustee to profit financially. This separation or rather classification of proscriptive rights, shows an immediate contradiction to the informed reader, yet cannot completely surprise those who can appreciate such cultural paradoxes.

Although in many respects similar to the other three countries included here, the United States of America has chosen to enforce the 'tagging' of trust property through earmarking, a rule that seems to carry greater weight than perhaps the others befalling trustees, including the permissive delegation of fiduciary duties that extend as far as corporate influence (not something that might perhaps be expected among such often personal and intimate arrangements). What this suggests is that possession of property outweighs other beneficiary concerns and while reminiscent of the prevention of acquisition, it represents a demarcation rather than denial of rights on the part of the beneficiary.

With consideration of the patterns shown from fiduciary principles, correlations, power dynamics, discipline, acquisition and possession now form the nucleus of a comparative study which will either confirm or deny that there is substance enough to argue why these cultural derivatives are influencing presiding judges when other areas of fiduciary breach warrant equal consideration; and so, for no particular reason other than following the above list, we shall begin our examination with Australia.

5. Australian Fiduciary Appeal Case Studies

5.1 United Dominions Corp Ltd v Brian Pty Ltd[39]

5.1.1 Case Overview

In this supreme court appeal case, the appellants were part of a profitable joint investment project, along with the respondents and a third party. The appellants were the primary funders of the venture through the provision of a conditional mortgage to the third party during the life cycle of the project, a fact which had been withheld or undisclosed to the respondents when their participation was established. Upon post-project liquidation of the third party, the appellants relied upon its contractual clause in order to recover all monies loaned and profits arising from both the appellants and the respondents investment under the terms of the mortgage. The issue discussed, was whether when agreeing to provide the mortgage, the appellants did so under the principles of a fiduciary relationship, thereby owing a duty to disclose such risks when knowing the respondents were to become involved.

5.1.2 Judgments

When forming a reasoned judgment, Gibbs CJ ruled there could be no doubt that when the appellants created a mortgage that by virtue of its construction, affected the rights and interests of the respondents, it did so in a way that served only to benefit itself at the expense of the other, particularly when non-disclosure prevented the respondents from making an informed decision regards becoming contractually complicit. Under the principles of a fiduciary relationship, such actions demonstrated an abuse of position, thus it was only fair that any profits made through such deceit were held upon trust for the respondents.

Mason, Brennan and Deane JJ turned to the elements found within the presence of a partnership (commercial or otherwise) in order to establish whether a fiduciary duty was owed. They found that the appellants occupied a dual role, inasmuch as they were both lenders and partners in the venture; and that the characteristics shown by their actions and knowledge of the extent that the respondents were to be involved displayed that such a duty existed. It was further agreed that even before the footing of a partnership can be fully established, the intention to enter into that relationship dynamic indicates acquiescence to commit to those principles found within equity when acting in the trust of another. It was for that reason that the three judges found a breach of fiduciary duty was evident.

Dawson J instead relied upon simple terminology in order to reach his judgment. Through the comparison of ‘joint ventures’ and ‘partnerships’, it was agreed that despite the former phrase being primarily referred to in US courts (and also found within Scottish law[40]), there could be no discernible reason to distinguish between what are both working relationships based upon trust and confidence regardless of duration; hence, it was on those grounds that a fiduciary breach had occurred and equity was to be provided.

5.1.3 Analysis

Dishonesty between business partners, particularly when taken upon commencement of any joint venture, immediately compromises one party in favour of another. At no point did the respondent have knowledge that a decision to invest into land would incur liability for the financial affairs of its respective partner, the appellant. The only reason that the appellant was able to execute such a scheme was because there existed a relationship based upon trust and confidence with the respondent. After all, it is only reasonable to assume that in order for the respondent to continue as a successful business, it would have possessed sound understanding of contracts, which in this instance, was never discussed, thereby showing that the respondent placed great faith in his co-investor. On this occasion, an absolute example of a fiduciary relationship is witnessed through the vulnerability of the respondent and the willingness to take advice from the appellant regards where to invest.

When viewing the case from the position of a power dynamic, what appears to be a horizontal fiduciary relationship, in fact resembles a far more vertical one. This is because when the appellants decided to enter into the venture, they were by virtue of being the primary lender, the more powerful of the two parties. What is of note is that Gibbs CJ approached the case with that view, citing abuse as the motivation for non-disclosure; whereas the other judges viewed the damage as that inflicted through disloyalty and deceit. What this tells us is that on this occasion the minority rule embraced power dynamics, therefore supporting the theory of cultural influence to a lesser degree.

5.2 Consul Development Pty Ltd v DPC Estates Pty Ltd[41]

5.2.1 Case Overview

In this high court of appeal case, the respondent (a solicitor) owned and operated a number of property renovation and sale firms that required the services of a manager. Also working for the respondent within his capacity as a solicitor, was the appellant (an articled clerk), who himself co-owned and operated a family company of a similar nature, albeit working in a different field. After announcing to the manager that he intended to enter the same field as the respondent, a selection of properties were put forward for consideration by the manager upon disclosure that the respondent had wanted to secure them himself but was unable to afford them.

Graced with that knowledge, the appellant proceeded to purchase them through his own company on the agreement that the manager would take an equal share of the profits or losses accrued through the joint initiative. The grounds of the appeal were whether the appellant, by working in partnership with the manager employed by the respondent, had assisted in a breach of fiduciary duty on the part of the manager and that the subsequent properties were held upon constructive trust for the respondent.

5.2.2 Judgments

Barwick CJ allowed the appeal on the footing that acting while under direct employment by the respondent, the manager had shown a clear breach of his fiduciary position through the sharing of information, as per *Phipps v Boardman;*[42] whereupon the appellant had merely enabled such a breach by dishonestly and fraudulently acquiring trust property with the knowledge gained.

McTiernan J considered instead, the clandestine nature of the relationship shared by the manager and the appellant, focussing on the time afforded the manager to reflect upon his motivations in order make the right choices, as per his obligation to an employer. Due to the fact that costly respondent resources were both used and shared with the appellant prior to the purchases, it was also evident that a calculated decision to breach his position both as an employee and fiduciary, gave no doubt as to how the properties secured became trust assets to the respondent. It was subsequently this mens rea that reinforced his dismissal of the appeal.

Gibbs J exuded that due to the appellant holding a position with the respondent that was peripheral to the property business, any choice to purchase freely available properties failed to bind him to any sense of obligation, fiduciary or otherwise. He further expressed that due to the respondents overt inability to secure the properties and that the manager was free to buy them himself after the fact, his participation with the appellant did not constitute a breach, rather a right to buy beyond the scope of his duties; thereby declaring that for these reasons the appeal should be upheld.

Stephen J examined the idea that a constructive trust existed on the grounds that collusion had bought about the purchase in spite of the respondents express interest and willingness to buy. When taking into account the methodology used by the manager, it stood that both age and experience allowed the manager to mislead the appellant into co-investing, an arrangement that began only after considerable research had been taken by the appellant to quantify the extent of the respondent's financial grasp. Based upon the doctrine of *trustee de son tort,* there could be no qualifying evidence to suppose a trust existed, only that a breach of fiduciary duty had occurred on the part of the manager; thus the appeal was upheld.

5.2.3 Analysis

From the outset of the case, it was apparent that although the respondent had expressed an interest in purchasing the properties (as was his right), there is no explanation that he was made fully aware of the financial status of his firm. Before an assumption of fiduciary duty can exist there needs to be agreement that the manager had taken the necessary steps to disclose to the respondent the why's and wherefore's of both the properties for sale and the mechanics of how a purchase was impossible at that point. Only then can he show that his decision to enter into a joint purchase with the appellant was based upon transparency and good faith toward his employer. Had this been established, any anger or frustration felt by the respondent after the fact would have remained free of fiduciary ties and exempt from trust application.

Unfortunately, on this occasion it was made clear by the respondent that he wanted his manager to ensure that a purchase went through, despite any financial concerns he might have; but after submitting an inadequate offer to the seller only to wind up rejected, the manager failed to increase the offer, instead lying to the respondent, while offering them to the appellant. Furthermore, the manager lied to the appellant regards the respondent's lack of interest, thus prompting the appellant to place a higher than expected offer, thereby securing them for himself (to the advantage and benefit of the manager); it was shortly after this that the manager was dismissed through a conflict of interest and proceedings began. What is evident from the analysis are multiple abuses of power on the part of the manager, beginning with non-disclosure, deceit, manipulation of the respondent and a conflict of interest that benefits the trustee when a fiduciary relationship is agreed. What is less clear, is whether the appellant did in fact collude through subtle persuasion of the manager and non-disclosure within his capacity as a clerk, although it would appear that much of this doubt stemmed from the appealing character of the appellant and a pretence to feign ignorance of questionable behaviour shown by the manager at the time.

When approaching the case from a power dynamic stance, what is clear is the vertical relationship between the appellant and the respondent; however, what is of greater note is the unusual nature of the abuse; here we have an articled clerk (appellant) understudying his employer (respondent), nonetheless using his leverage as a business owner to undermine the respondent. Furthermore, the subordinate in the vertical relationship has manipulated those of relative power (the manager) in order to weaken the dominance of the respondent as a developer; translating as subterfuge on the part of the appellant with intention to cause harm.

Given the cultural nature of fiduciary strictness, one would expect the weight of equity to fall heavily upon the appellant, primarily as his intentions were both pre-constructed and dishonest throughout. At no point did the appellant take steps to prevent his abuse of power; in fact, he encouraged it, ultimately instigating the abuse and breach of fiduciary duty through disclosure to the manager.

Barwick CJ failed to acknowledge the vertical relationship between the appellant and respondent, instead dividing liability between the appellant and the manager; thereby using a horizontal relationship as the footing of the breach. McTiernan J showed a greater perception of the vertical power afforded the appellant when choosing to breach his position, thereby showing a willingness to reflect upon the manager's actions, but placing primary weight upon the abuse of duty owed to the respondent by the appellant. Gibbs J discarded any notion of foul-play altogether, focussing instead upon the oversight of the respondent (almost suggesting he deserved what happened to him). This judgment is concerning, as it could be construed as condoning the misuse of information privy to those employed to serve and protect the interests of their employers; while further suggesting punishment for honesty and transparency between parties within a relationship based upon trust and confidence.

Stephen J felt that a horizontal relationship permitted the manager to coerce and manipulate the appellant into a joint purchase, which while acknowledging the power dynamic, fails to provide restorative justice to the respondent, as no appellant accountability was found, thereby negating the existence of a trust; although quite how this summation occurred is fairly alarming, particularly given the facts presented throughout the case.

Regarding power dynamic as a theoretically influential factor, there is evidence that on this occasion the strictness rule was applied by a three to one majority, therefore suggesting that cultural anthropology has influenced strictness and judicial reasoning; however, from an equitable perspective it must be noted that while half of the four judges acknowledged abuse as cause for damages, the other half either chose to ignore wrongful action or remove the appellant's liability completely.

6. Canadian Fiduciary Appeal Case Studies

6.1 Canson Enterprises Ltd v Boughton & Co.[43]

6.1.1 Case Overview

In this supreme court appeal case, the respondent (a solicitor) was involved in a joint land development project where while acting under instruction from the appellants (the purchasers), he withheld information that may have influenced their decision to purchase, in order to make a profit for another client. This was achieved through the resale of the proposed land to a third party prior to the preparation of the agreed conveyance, whereupon the sale price was increased by a significant margin (a process known as ‘flipping’), while the original vendors names remained on the relevant documentation. It was after this that the appellants proceeded to use sub-contractors to prepare the foundations for a commercial property, only to discover that after a partial collapse of the substructure, the soil below was deemed unsuitable for its intended purpose.

The aim of the appeal was to establish if the respondent had by virtue of his failure to disclose, been in breach of his duty both as a solicitor and a fiduciary, whether the breach had denied the appellants their right to reach an informed decision regards completing the purchase and whether respondent liability for pecuniary losses occurring beyond the breach was valid.

6.1.2 Judgments

La Forest J, Sopinka, Gonthier and Cory JJ ruled that by distinguishing the two leading British Columbia cases surrounding solicitors, namely *Jacks v Davis*[44] and *Guerin v R*[45], it was only reasonable that while a breach of fiduciary duty had occurred, the extent of the remedy was restricted to the value attached to the secret profit (as per *Jacks*), which was around a tenth of the shortfall left after the development failed; a sentiment echoed through emphasis that:

> The rubric “breach of fiduciary duty” has come to encompass so many different types of liability that it is not now possible to determine the appropriate remedy by defining the wrong simply as a “breach of fiduciary duty”. It is necessary instead, to look through the categorisation of the wrong as a “breach of fiduciary duty” to the nature of the wrong, and to move from there to the determination of the remedy. The nature of the loss, not the nature of the cause of action, will dictate the scope of the remedy.[46]

This meant that remoteness and foreseeability precluded the respondent from an obligation to honour the claim for any damages exceeding those stemming from his direct involvement.

Mclachlin J, Lamer CJC and L’Heureux-Dubé J showed a clear reluctance to indulge tort principles to underpin their final judgment; using instead, the premise of trust to form opinion. By examining the extent to which a trustee is liable for losses linked to their breach of fiduciary duty, it was held that once purchase of the land was complete, any incidents that caused financial loss to the buyers was theirs to shoulder alone and that restoration of the shortfall borne from the dishonest inflation of the vendor's price was sufficient to provide equity, therefore any merit for appeal was dismissed.

Stevenson J showed concurrence with the collective judgments given, but took strong opposition to the notion that equity and common law principles were mergeable, on grounds that such alchemy breeds confusion where only clarity is required; and that given the nature of the breach and the relationship between appellant and respondent, a remedy based upon equity was sufficient enough and needed no expansion. For reasons unexplained, Wilson J refrained from passing judgment.

6.1.3 Analysis

By non-disclosure, the respondent becomes by association, a willing participant in the deceit of the appellants when the footing of the venture rested upon knowledge that the vendors were the same as those at the time of the sale. Furthermore, the respondent was acting on behalf of the appellants, therefore also professionally bound to avoid and declare any visible conflict of interest when carrying out his services.

Due to the complex nature of the overall venture, it is also possible to consider the potential fiduciary relationship between the appellants and the project proposer, who themselves profited from the property 'flip'. Basing the argument that a relationship of trust and confidence must have existed between the appellant and the proposer in order for the appellants to heed the advice given as part of the proposal, it may have been prudent to pursue restorative justice against them, had the case against the solicitor failed; albeit an exploration of the history behind such a relationship would help remove any contractual limitations, before fully considering fiduciary obligations.

When consideration for fiduciary discipline is given, the appeal case proves an excellent demonstration of how damaging a fiduciary breach can be. Not only did the respondent owe a duty of care to his client, he held a position of significant power as a solicitor; a role that requires rigorous self-discipline. By choosing to act for two parties with obvious conflicting interests, the respondent compromised everything professionally and had no liability for a fiduciary breach been found, there was surely no doubt that a breach of duty as a solicitor had occurred.

Unfortunately, because the appeal case discusses damages unreasonably applicable to the appellant, the original trial[47] is required to provide sufficient material upon which to base adequate analysis. On that occasion, Macdonnell J found that a breach of fiduciary duty over the tort of deceit had occurred, despite the caveat that only solid evidence of inducement prevented a tortious remedy (was this overlooked in preference to a stricter judgment)?

Furthermore, when deciding the award for damages, Macdonell J drew reference from *Jacks,*[48] in order to throw the full weight of liability upon the then defendants; demonstrating that although recovery of the secret profits was inherently sufficient to provide equity, a broader encumbrance for harm seemed best; subsequently awarding damages up to losses incurred through sub-contractor negligence. This increased award might suggest that the nature of the breach was irrelevant and rather that an act of poor self-discipline would always be taken with a dim view and little forgiveness.

6.2 Hodgkinson v Simms[49]

6.2.1 Case Overview

The facts surrounding this supreme court appeal case concern the relationship between the respondent (a chartered accountant) and the appellant (a stock-broker). After earning a dramatically higher annual salary in his new position, the appellant looked to invest as much money as possible, in order to avoid excessive taxation. After considering some ideas of his own, he was advised by the newly employed respondent that the best form of tax sheltering was through the collaboration with other businesses working in different fields. An example of this was investment in popular MURB (multiple unit residential buildings) projects, whereby developer costs could be offset against taxation and profits taken from any future sales of leases pursued.

Placing trust in the advice given, the appellant proceeded to invest heavily, unaware that the respondent was receiving substantial commission from the developers in exchange for the appellant's ongoing contributions. Less than two years into the incentive, the housing market crashed, resulting in the appellant losing all but a small amount of his capital; and so, the aim of this appeal was to establish if by non-disclosure of his relationship with the developers and the nature of his relationship with the appellant, the respondent had in fact breached his fiduciary duty and was therefore liable for the profits retained through those agreements and that those profits were now owed to the appellant.

6.2.2 Judgments

La Forest J, Gonthier and L'Heureux-Dubé JJ initially referred to a three-step qualification process for the existence of fiduciary duties, as per Wilson J in *Frame v Smith,*[50] which provided (i) scope for the existence of some discretion or power (ii) that the same power or discretion can be exercised unilaterally so as to affect the beneficiary's legal or practical interests and (iii) there exists a peculiar vulnerability to the exercise of that discretion or power, while further defining the inherent susceptibility found in professional advisory relationships.

By drawing upon elements such as discretion, influence, vulnerability and trust, analogies were used to demonstrate that in many respects, financial advisers party to a professional relationship involving large sums of money are akin to those of a trustee-beneficiary nature; and so, there could be no uncertainty that a vulnerability on the part of the appellant exists where guided investment relies upon expert advice.

It was in the early stages of the relationship that the appellant's financial disclosure permitted influence on the part of the respondent, while relying upon the belief that the respondent was acting independently of any other parties (including the developers themselves). While acknowledging the intimate nature of their arrangement, it was clear that little attention was given to surrounding investment correspondence, as experience had shown that any important issues were typically discussed in person (although the wording of those documents were not to be discounted). Ultimately, it was the fact that the respondent had every opportunity to reveal his relationship with the developers, but chose instead to withhold such pivotal information in the pursuit of self-interest, that led the three judges to uphold the appeal upon grounds of a fundamental breach of fiduciary obligation.

Sopinka and McLachlan JJ dissented through the argument that self-dealing in the absence of an agreed fiduciary relationship does not in itself create one. By distinguishing the advisor-advisee relationship from that of a trustee-beneficiary, the two judges felt that despite any implied dependence and trust placed upon the respondent, the appellant was always free to choose when, if and how much to invest. This in itself, prevented financial dominion on the part of the respondent, thus negating any evidence that a fiduciary relationship had been constructed.

6.2.3 Analysis

When the appellant committed to pay the respondent for his expert advice, he did so with a sense of trust and appreciation of the skills the respondent claimed to possess. Likewise, when the respondent chose to withhold vital information, he did so in the knowledge that it was detrimental to the value of their arrangement and compromised the security of the appellant. This represented a relationship that while fiduciary in nature, was bound to end up in civil proceedings.

There is clear evidence that the appellant possessed little or no knowledge regards tax shelters, so was prudent enough to seek the advice of someone with obvious experience in that field, although what altered a seemingly straightforward venture, was the intimate nature of their working relationship, one based upon great trust and a tendency to take such advice as an endorsement to invest.

From a judicial perspective, it was interesting to see that while one party supported the framework of the relationship from a fiduciary footing, it was the decision to adhere rigidly to the origins of the term *fiducia* to the detriment of the appellant, that created the division of judgment; however, with regard to choice, a beneficiary is free to remove a trustee where foul play is found, so by definition, a right to ask for compensation for the mis-actions of a trusted professional should not be overlooked.

Similarly, the origins of the term fiduciary needs to be seen more as guidance than strict definement. A trust is more a practical representation of the nature of a relationship itself than a mere moniker; a fact that must be both understood and appreciated, so those seeking to separate intention from description, serve only to confuse and insult the naturally organic process of equity itself.

Furthermore, the reapplication of a three-step test showed a marked attempt to offer clarification of the unbridled nature of fiduciary principles; however, it was the reluctance to embrace the phrase ‘trust’ in all of its facets that granted permission of continued abuses when in fact, a progressive approach was required. In much the same way that the appellant and respondent were pulling in different directions from the outset, any judicial efforts to broaden the nature and embodiment of fiduciary scope were met with equal resistance, a fact that does not go unnoticed during analysis.

When factoring discipline into the discussion, anybody practising as a chartered accountant knows the level of academic study, self-control and precise accountability required to achieve it. This exactness must surely be a prerequisite for any occupation involving numbers and more importantly money; and yet, the respondent not only misled the appellant into loaded investments, he profited from such an arrangement through the withholding of vital information.

There was a clear vulnerability on the part of the appellant and therefore equal discipline was required to preserve it. It is this personal quality that goes right to the heart of fiduciary principles, so to commit such a breach warrants only the fullest judgment, which if the theory proposed is correct, then Canada is quite literally the worst place for that to happen.

La Forest J, Gonthier and L’ Heureux-Dubé J, all drew inference from the appellant’s vulnerability that respondent discipline was needed. This failure to act was exacerbated in the knowledge that most, if not all contractual matters were orally agreed, which the appellant mistook for a sign of confidence. It was largely due to this lack of moral fibre that the breach was found and the appeal upheld; which suggests that the strictest approach was taken and supports the theory as far as the three judges go.

In contrast, Sopinka and McLachlan JJ chose again to ignore the notion that a duty of care was owed to the appellant; in fact, arguing that freedom to speculate at the expense of another is acceptable practice for any accountant. This unwillingness to consider the fiduciary relationship in preference to arms length dealings perhaps represents a division of jurisprudential beliefs and merits due consideration for academic research where possible.

7. UK Fiduciary Appeal Case Studies

7.1 John Taylors (A Firm) v Masons[51]

7.1.1 Case Overview

The nature of this civil appeal case concerns the breakdown of an existing partnership, prior to a reformation of a new partnership within the same field of practice. After operating as successful livestock auctioneers, the appellants (two of the five original partners) chose to dissolve their interests after witnessing a dramatic loss of profits over the previous year's trading. The original partnership had previously been able to trade under a ten-year local authority licence, which then expired the same day the appellants left the business.

It was then that the appellants started a new partnership while applying for and receiving a provisional licence, despite open protest from the respondents (the remaining three partners). Evidence taken from a meeting two months prior to the withdrawal of the appellants, showed that the local authority had agreed to renew the old licence under the same terms; however, the respondents had insufficient resources to continue alone, which hampered their ability to compete.

The subsequent public conflict that emerged between the two parties led the local authority to put the new full licence up for tender; at which point, the respondents, the appellants and a third party applied. Based upon a long standing popularity with customers, knowledge of operational practices, business connections and the overall strength of their tender application, the appellants were granted a new licence and continued to trade in a similar fashion as before. This led the respondents to claim that as former partners of the original business, the appellants owed a fiduciary duty to account for any advantage, goodwill and profits made up to the time the former partnership assets were wound up; and that they had exploited such a position and assets in order to obtain the new licence. The aim of the appeal was then to determine if no such duty existed; and that the former partners had acted in good faith and without obligation when applying for the new licence.

7.1.2 Judgments

Arden LJ viewed the circumstances as an attempt to take advantage of a fiduciary position to acquire both benefit and property belonging to the original partnership. By examination of the fiduciary obligation to account for all assets, benefits and property stemming from partnership activities prior to dissolution, it was held that most, if not all of the events following dissolution were traceable to those preceding it.

This, by virtue of its own calculation, permitted the appellants to take possession of the new provisional licence through historic benefits equally divisible between the five partners as a whole, thereby failing to consider the needs and interests of the remaining partners up the point of the partnership being fully terminated. It was on this footing that the judge dismissed the appeal.

Morland LJ concurred, inasmuch as despite acting in good faith and reasonable transparency, it was found that the appellants were in a much stronger position than the respondents when the old licence expired and the tender process began. It was also held that this allowed the appellants to exploit their advantage to secure the new licence(s) while under a fiduciary obligation to account for such as yet undeterminable partnership assets. In conclusion, the judge dismissed the appeal, encompassing his reasoning with the words of Morritt LJ in *Don King Productions Inc v Warren*:[52]

'…raises the question whether the renewal obtained by the partner for his own benefit was obtained or received by use or by reason of his fiduciary position, or of any opportunity or knowledge resulting from it.

In my view it is plain prima facie that this question must be answered in the affirmative too. The successful management or promotion of a boxer is likely to generate goodwill in both the legal as well as the literal sense.

Such goodwill is likely to lead to a renewal with the same manager or promoter rather than another. But the goodwill and opportunity and advantage to which it gives rise is the property of the partnership'

Peter Gibson LJ while viewing the case from a trust and trustee perspective, agreed with his learned colleagues and the original trial judge, citing that regardless of faith or clandestine activity, until the partnership could be seen as fully wound up, any profits accrued by the appellants remained property of the former partnership and therefore held upon trust for the respondents, summarily dismissing the appeal.

7.1.3 Analysis

As can sometimes be the case in fiduciary relationships, those who feel they are acting in good faith and reasonable conduct don't always see the bigger picture. In this instance, the actions of the appellants carried a tone of survival during a time of fear and potential loss, as opposed to a commercial decision to part ways; and what may have started as a viable working relationship, had (upon the facts presented) now deteriorated into a loss-making exercise, therefore termination of the partnership seemed the logical choice.

Unfortunately, in a rush to keep the business afloat, the appellants overlooked their respective duties as business partners in favour of a hastily executed departure package; even belying deception through collusion with the local authority (who had themselves declared a position of neutrality), by disclosing future plans while still trading within the old partnership. Ultimately, the desire to remain livestock auctioneers overrode any sense of equitability, thus resulting in a retrospective calling to account as fiduciaries and a reminder of why fiduciary duties should never remain narrow in application.

From an acquisition perspective and taken its greater context, the application of fiduciary duties reveals that early on in the judgments, ownership through advantage was key to the reasoning behind the appellants actions; and while the focus appeared to be on wrongful profits arising from a breach of fiduciary duty, all three appeal court judges seemed to adopt the strictest approach, albeit better explained through the analogy of a trustee self-dealing in order to obtain trust property, as opposed to using goodwill and *chose in action* to secure partnership assets for self-benefit.

This is a principle propagated in *Keech v Sandford,*[53] where acquisition deriving from trust property held by a trustee would render such action as unlawful; this was also demonstrated through the appellants' use of business contacts, a long-standing relationship with the local authority and knowledge of market policies to gain possession of a new licence whilst operating under a different partnership. This further supports the view taken at trial, which was that the burden of proof rested upon the defendants when showing that use of partnership assets did not facilitate acquisition of the new licence and subsequent use of the premises afforded them.

In conclusion, it is suggested that despite the line taken by the trial and appeal judges, the aims of the fiduciaries were relatable to the strictest equitable measure when examining fiduciary breaches or even relationships; therefore, it would seem evident that the theory proposed within this research has been proven accurate on the merits of this particular case.

7.2 Bhullar v Bhullar[54]

7.2.1 Case Overview

The facts of this appeal case concerns the actions of company directors of a long-standing, family owned business. Two brothers were joint directors of a limited company which had recently

recruited their respective children as additional directors. The business had a history of dishonesty and divided opinion as to how best to operate, while the involvement of the children exacerbated this tension considerably, as per the lengthy notes contained within the original hearing.[55]
Not long after the administrative changes were implemented, dealings between the families broke down, leaving the respondents in a position where continued involvement in the firm conflicted strongly with their personal principles. It was at this point they announced a wish to leave the company and take their share of the assets, specifically stating their unwillingness to be a party to any further property investment projects (contrary to a familial presumption).

After fully agreeing to the terms put forward by the respondents, the appellants discovered a property for sale adjacent to the company's location, subsequently negotiating with the vendors before making the purchase under the company name using private funds, after assurance from the company solicitor provided that no conflict of interest was evident. Unfortunately the purchase was never disclosed to the respondents, nor were they consulted prior to vendor negotiations; both of which, resulted in a claim for breach of fiduciary duty and that the acquired property remained on trust for the company.

The purpose of the appeal was to refute that any fiduciary obligation existed on grounds that the purchase was intended as that of a private nature; and that it was the demands of the vendor and the absence of a conflict of interest which justified a company purchase to prevent a loss of acquisition.

7.2.2 Judgments

With Parker LJ forming the presiding decision, it was considered that although the appellants claimed to have acted in a manner beyond their scope as directors and that the transaction was of a private nature, they were fully aware of the needs of the company so far as the respondents extended, yet still took the decision to purchase under the company name.

This ignorance showed a clear and fundamental breach of fiduciary duty in favour of property acquisition, a breach further supported in the clandestine nature of the transaction (although not directly attributable to the final judgement). It was held that regardless of time constraints and any fear that the sale would fall through, the obligation to disclose such intentions remained, despite any last-minute assurances from the firms solicitor. It was for those reason that the appeal was dismissed and both Schiemann LJ and Brooke LJ concurred.

7.2.3 Analysis

When factoring in the original hearing, taking into account the inherent dysfunction of the family and the relevance of a severance between the directors, it brings to the fore, exactly why a greater understanding of fiduciary duty is needed. Not only was there a lack of professionalism on the part of the appellants, there appeared to be a degree of self-entitlement through privilege of position, two ingredients bound to create trouble for those involved. More importantly, it was only because negotiations between the family members broke down that the dissolution process had become protracted; therefore, had all parties conducted themselves accordingly, a private purchase or at the very least a company purchase of good intention, may have occurred. Ultimately, this case touches upon numerous fiduciary qualities, but with so many of them lacking, the end did not justify the means.

Although consideration for acquisition as an area of interpretation is expressed, there is little to say other than that this case is overtly constructed around the proposed theory; a fact which explains why there is no real surprise that only one judge needed to apply the principles in order to reach summary ruling. As a researcher, this outcome has been very encouraging, inasmuch as there were numerous ways for a fiduciary to breach his obligation; and yet, the self-dealing principle came into effect with little assistance from the court. This is not to say that in a majority of fiduciary cases there are elements of greed at play; however, the exacting nature of the trial and appeal (primarily due to domestic complexities), as well as the wrongdoing itself, show that perception often misguides fiduciaries, but can also provide escape from accountability when a lax approach is taken.

8. US Fiduciary Appeal Case Studies

8.1 Ream v Frey[56]

8.1.1 Case Overview

The facts of this case concern the actions (or mis-actions) of both a bank and an employer, that resulted in a loss of investment funds belonging to a company employee. The appellants were a construction company that had opted to establish a government endorsed pension plan on the understanding that the bank involved would act as trustees, while the company served as plan administrators.

The respondent was an employee with a one hundred percent investment stake in the plan, who, after becoming victim to the liquidation of the company, discovered that following an unreasonably prolonged period of non-cooperation from the company through the withholding of administrative behaviours and payable funds, the bank had rescinded agreement of its position as a trustee in accordance with the trust instrument, before handing over what remained of the trust assets to the company. This was done under guidance provided within the plan that when upon resignation of the original trustees, a replacement trustee cannot be found, the plan administrator will by default, become the successor trustee; it was then after this act, that the appellant converted the trust assets for personal use, before declaring bankruptcy.

What later became evident, was that at no point did the trustees or the plan administrator communicate with the respondent with regard to the trust changes or transferral of trust funds, thereby bringing about a respondent claim of breach of fiduciary duty on two fronts; (i) that the bank enabled the administrator breach by transferring trust funds to a co-fiduciary with a history of non-compliance and (ii) that the administrator showed a breach of duty by using trust property in a manner suggesting it belonged to the co-fiduciary themselves.

The purpose of the appeal was to examine whether despite an agreement to repay trust funds owed to the respondent beneficiary and the administrator repaying less than the agreed balance, the bank as former trustees, should be held to account for those monies still outstanding.

8.1.2 Judgments

Speaking in unison, the three appeal judges Sloviter, Greenberg and Scirica wasted little time in finding that when acting as trustees for the pension plan, the appellants owed a duty of care skill and due diligence when protecting and preserving the trust assets in favour of the beneficiary; and that failure to both notify the respondent of the decision to resign and draw upon its own experience as a financial institution (particularly given that the co-appellant had fallen behind on loan repayments during the time of administrative conflict) indicated a fundamental breach of fiduciary duty and abuse of the virtues described. It was upon those grounds, that the district court's earlier decision to hold the bank doubly liable for not only its own breach, but that of the plan administrator (including any costs arising from such breaches) was upheld and the appeal dismissed.

8.1.3 Analysis

As a fiduciary duty case, it is immediately interesting to note that on this occasion, there were two co-fiduciaries acting outside their assigned roles; and both in a manner of self-interest over any forethought for the trust or the beneficiaries concerned. When a lay trustee is presented with a conflict of interests, one would expect a degree of confusion; however, when a professionally regulated institution abandons its industry codes in favour of a quick separation, little sympathy can be shown when reaching an equitable judgment. Likewise, when the head of company decides to ignore its fiduciary duties in accordance with a pension plan, it does so in the knowledge that the damage caused affects multiple victims left unable to protect themselves, or make informed choices of prevention.

With these factors in firm consideration, it is surprising that the courts never applied stricter penalties than those given; and that little time was given to fully consider the facts at hand. This might suggest that a less thorough approach to fiduciary appeal cases is endemic to American jurisdiction; yet contrastingly, perhaps a more expedient process works best (although only broader comparison would provide adequate weight to the evidence found).

As was proposed at the beginning of this research, the cultural influence indicated in U.S fiduciary principle strictness is one of possession; and this is a case that supports such a theory well, with the following reasons given:

1. The co-appellant (plan administrator) while acting in a fiduciary position, seemed only too happy to use the trusts assets as his own; however, this was only permitted through the mistaken assumption that because the appellants (the bank) had written the cheque in the name of the trustee acting on behalf of a state endorsed pension plan while allowing individual endorsement, the appellant was able to have the money deposited into his own account and therefore spend it as if it was his.

2. This mis-action on the part of the bank, demonstrates that unless trust property is sufficiently earmarked and subsequently protected from fiduciary abuse, the temptation for the trustee to possess those funds for personal benefit is ever present; therefore, perhaps a strict principle of judgment has become necessary.

This further argues that when the bank found itself in a position of conflict, the first measure taken needed to be appointment of an impartial successor trustee and not the administrator himself; primarily because that form of shortsighted deference (one obviously borne out of self-interest) only encouraged fiduciary dysfunction and inevitably undermined the integrity of the trust.

8.2 Mukamal v Bakes[57]

8.2.1 Case Overview

The facts of this case are that the appellants were subsidiary directors of a parent corporation formed and designed for the purchase and conglomeration of small travel companies, prior to auctioning them for profit. The respondents were private investment specialists who in this instance, invested $45m into the parent firm, thereby obtaining a controlling interest through a majority shareholding.

During a period of continued financial difficulty the respondents also provided a $10m loan to the appellants in order preserve their original investment, despite foreclosure appearing the only viable solution. One of the express terms of the loan stipulated that upon liquidation, the respondents were to be given higher priority to both the appellants and their creditors; furthermore, the respondents converted a large portion of their existing equity share into a debt claim in order to recoup any potential loss; an action that would again give them higher priority in the event of dissolution.

As part of the inevitable bankruptcy process, the courts appointed a trustee to watch over two trusts; (i) a trust for the appellants and (ii) a trust for the appellants creditors; whereupon, it was claimed by the trustee that a breach of fiduciary duty had occurred in relation to both trusts. The purpose of the appeal was to determine if the respondents owed a fiduciary duty of care to the subsidiary directors and creditors; and whether their deceptive actions were self-serving and collectively executed without consideration of the other minority shareholders.

8.2.2 Judgments

Judges Camp, Edmondson and Pryor ruled that a difference in geographical location denied any claim for fiduciary breach in relation to the creditors, because the doctrine of internal affairs prevents application of state law upon any company incorporated beyond its jurisdiction.[58] Unfortunately for the trustee *and* the appellants, the parent company was founded in Delaware, whereas the operational issues relating to the trial and appeal took place in Florida. Furthermore, Delaware law did not recognise direct creditor claims of this nature, therefore remoteness intervened and that portion of the appeal was dismissed. Finally, because no factual evidence of a respondent fiduciary breach could be proven, the judge held that no subsequent claim could be enforced; hence, the appeal as a whole was also dismissed.

8.2.3 Analysis

When viewed as a series of commercial disputes arising from arms length tactics, there is great difficulty in extracting evidence to suggest foul play was at the heart of this appeal. But when interpreted as a trust and trustee relationship, things begin to look very different indeed.

When the respondents elected to invest a considerable amount of money into the parent company, it did so in the knowledge that once invested, those funds essentially became company assets, thereby creating a fiduciary duty to consider the overall needs of the beneficiaries (shareholders) when making commercial decisions. Regardless of whether a controlling interest existed through majority shareholding, the principles of equity transcend the grasp of corporate power and serve to ensure that fairness and honesty prevail; and so, when the respondents proceeded to convert their portion of company assets into debt claims, they displayed a clear breach of obligation in favour of self-preservation, as was the case when the conditional loan was provided.

When examining the theory of possession, we are presented again with the opportunity to use the conversion of company assets as an abuse of fiduciary position in order to self-benefit; furthermore, acting in manner that presupposes ownership of the trust property, when in fact once invested, those assets are now part of a trust designed to serve all of the beneficiaries. This lends itself perfectly to the need for earmarking of trust property, especially considering that the company was now in the throes of liquidation and subject to two specific trusts by order of the courts.

It is baffling to this researcher how the appeal judge overlooked the intentions of the respondents when not only was a distinct portion of the equity selected for special treatment, but a further investment brought with it the same self-serving conditions, despite the same equitable principles applying (that of trust property existing for the profit and benefit of all the beneficiaries). It was not helped however, by the fact that the respondents established a complex arrangement where in many respects, they became self-appointed fiduciaries and beneficiaries; which is a position susceptible to abuse when left unregulated.

9. Summary

9.1 Australia

Both cases bear witness to their assigned cultural theory, irrespective of how the judgments were finally presented. In the former, it was the pretence of a horizontal agreement that deceived the appellant into investing, while the latter showed a subordinate abusing his position to serve a dominant post held beyond the working relationship (not forgetting that the third party also abused his position in order to profit from an immoral venture). While it could be argued that straightforward fiduciary breaches of disloyalty, deceit, conflict of interests and non-disclosure prevailed, one simply cannot ignore the power dynamic of the relationships, nor their connection with fiduciary strictness and judicial bias.

9.2 Canada

In both instances, the respondents held positions of substantial power, thereby commanding equal levels of discipline. In the former case, there were opportunities to consider tortious and even common law remedies, yet none of the majority judges hesitated to apply the full weight of equitable law in order to focus deliberate penalty upon such unprofessional behaviour.

In the latter, there was also an inability to recognise wrongdoings in the face of ethical prerequisites, yet despite evidence of non-disclosure, deceit and self-dealing, the adopted approaches clearly endorsed a judicial disposition to stamp out poor disciplinary conduct.

9.3 United Kingdom (UK)

Here were two very good examples within which fiduciary acquisition of (trust) property through improper means received the sternest judgment, despite any claims of 'good faith' on the part of the appellants. There was little doubt that the judges moved quickly to apply the strictest approach on both occasions, regardless of obvious non-disclosure and deceit (or even a failure to observe dissolution protocols) as alternative breaches. This comparative data once again indicates that the culturally inherent social values of the United Kingdom unquestionably support judicial bias through fiduciary strictness.

9.4 United States of America (USA)

To possess or to 'take for one's own', lies at the very heart of these two appeals, despite conflicting state laws and the inability to prove individual breaches. In the first example, a failure by the bank to earmark the trust property, resulted in the strictest application of fiduciary principles; whereas specificity forced the court to dismiss the claims held by the corporate trustee, despite closer analysis suggesting that a conversion of assets constituted the possession of property that once invested, had become part of a trust; an abuse that also occurred in *Ream.* Although the judges failed to enforce the multiple claims in the second case study, it was not due to unwillingness, but rather a basic lack of evidence; and where judgment was found, it ignored evidence of non-disclosure and deceit in favour of unlawful possession of trust funds.

10. Conclusion

When setting out to examine if the effects of cultural anthropology could be felt though judicial bias, there was no sense of certainty regards theoretical connectedness, or even if the concept itself could be explained with clarity. Laws are both designed and regulated in order to promote fairness and social cohesion; and yet, beyond those epidermic parameters resides the human condition. And while confined to a micro-comparison of four common law countries, a pattern of judicial intolerance or even disdain does appear to override impartiality and hard legal thinking in the way that idiosyncrasies become the norm.

Precedent and entrenched legal principles are integral to summary judgments; however, social conditioning is never recognised and removed from the reasoning process, and so, when considering the penal history of Australian civilisation, it is easy to trace that the abuse of power becomes the civic stain most in need of removal. This is because victimisation cannot reasonably occur without an incrimination that by virtue, encourages exploitative treatment. And so it is, that an inherent inequality helps to clarify exactly why judicial power dynamic consideration is peculiar to Australian fiduciary cases alone.

'Grande responsabilité est la suite inséparable d'un grand pouvoir[59] or 'great responsibility follows inseparably from great power', encapsulates perfectly the meaning of discipline; while hardiness,

public humility and deep conservative practices are the embodiments of a culture with a uniquely interdisciplinary history. It would seem plausible then, that a predisposition to punishment of lackadaisical behaviour lends equal influence upon Canadian summary judgment within equity and the law of trusts.

The anglosphere[60] and territorial occupation as a means of propagation, are themes and descriptives relating to both the United Kingdom and the historical nature of acquisition (or even collection) of property for material gain, translating that a judicial proclivity towards the punishment of fiduciary breach, almost always rests upon the *obtainment* of trust property, rather than the means in which it occurred.

Legally distinguished as holding or occupancy, as opposed to actual ownership,[61] possession comes not from explicit permission, but rather an almost violent act of greed. American civil history was born from the possession and settlement of indigenous lands, while the enslavement of a race of people demonstrated a similar degree of wanton control. Thus, it is an ancestry requiring that those who own, or entrust their property to the will of another, must at all times ensure proper identification is present, or run the constant risk of misappropriation. It has been argued here that this 'branding' of property is the direct result of cultural influence and that subsequent judicial bias follows those principles almost automatically.

Fiduciary duties are perhaps the most unforgiving set of legal principles any individual could be subject to; yet by construction, they merely reflect the fickleness and ingenuity of those bestowed the burden of responsibility; and so, while appreciating the approximations this comparative study affords, the cases sourced have nonetheless proven credible examples of numerous fiduciary breaches and the culturally anthropological influence steering fiduciary strictness and judicial approach. It is also acknowledged that while the evidence presented here remains purely subjective, there is a genuine hope that it has not abandoned its audience, rather established firm grounds for debate, as there is much to be gained if later expanded upon.

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