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FIDUCIARY DUTY AND CONSTRUCTIVE TRUST: Lac Minerals Ltd v International Corona Resources Ltd

LLM Research Paper
Equity and Restitution (LAWS 545)

Law Faculty
Victoria University of Wellington
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I INTRODUCTION

In 1989, the Supreme Court of Canada in Lac Minerals Ltd v International Corona Resources Ltd ("International Corona") [1] handed down a decision on the ownership of the Page-Williams Mine which has been estimated to be worth between C$1.5bn and C$3.0bn. The case had occupied the trial Judge [2] for 5.5 months, the Ontario Court of Appeal [3] for 10 days and the Supreme Court for two days. The judgments in the various courts run to some 200 pages.

Apart from deciding the ownership of the invaluable property, the case is also of great interest to the commercial community since it contains observations from high judicial places on two important yet controversial issues - the concept of **fiduciary relationship** and the remedy of **constructive trust**.

Although the concept of fiduciary relationship has been in our books for a long time, there is little consensus as to its underlying principles. The difficulty is compounded by the misuse of the term "fiduciary" in two main contexts. The first is where this concept has been used in a purely **instrumental** manner. The second relates to the application of the fiduciary concept in situations that are truly **inappropriate**.

The fiduciary term is used in an instrumental sense where a fiduciary relationship is seen as the gateway for an in rem remedy, such as equitable tracing and constructive trusts. Thus, when an in rem remedy is appropriate in a case, a judge may "find" a fiduciary relationship simply to justify the award of that remedy.

The inappropriate use of the fiduciary term describes a situation where, instead of using some other more appropriate legal concepts which may be less developed or less sophisticated, the fiduciary concept is invoked so that justice and the intended result can be achieved. The finding of a fiduciary relationship brings with it a number of specific duties which are strict. The range of remedies available is also greater.

It will be argued in this paper that while the Canadian Courts in International Corona, in line with some earlier cases, abandoned the instrumental use of the fiduciary concept, the trial

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[1] (1989) 61 DLR (4th) 14.
[2] 25 DLR (4th) 504.
[3] 44 DLR (4th) 592.

Court and the Court of Appeal had perpetuated the inappropriate use of the fiduciary concept. By a bare majority of three to two, the Supreme Court of Canada managed to prevent this inappropriate use of the fiduciary concept on the facts of International Corona.

The last decade witnesses an unprecedented leap in the judicial appreciation and development of the fusion of Law and Equity. As a result of major cases and decisions on this point, we have come to a stage where the availability of a remedy is no longer impeded by the historic divide between Common law and Equity. Remedies are now neither hierarchical (depending on jurisdiction) nor dependent on special rights but are available in a wide range of situation. International Corona presents a further opportunity for the examination of this fusion and its practical significance.

Traditionally, the remedy of constructive trust will only be awarded if there is a breach of a pre-existing property right or fiduciary relationship. In line with some earlier cases, this traditional approach was not followed in International Corona. Instead, inquiries were directed to the facts of that case to see whether the remedy of constructive trust was most appropriate. The New Zealand Court of Appeal in Elders Pastoral Ltd v Bank of New Zealand [3a] had indicated that a fiduciary relationship need not be shown before a constructive trust could be imposed.

It is a submission of this paper that the court should only use the fiduciary concept in situations that are truly trust-like, where one person undertakes to act **in the interest and for the benefit** of another person in the exercise of a **particular power or discretion** delegated by that person, or some other person. The fiduciary concept is a concept purporting to promote a particular kind of commercial morality, not all kinds of commercial morality.[4]

It is also submitted in this paper that the dropping of the requirement of fiduciary relationship before an in rem remedy - constructive trust - can be granted is to be warmly welcomed. The mission of the courts, including the New Zealand Courts, is to come up with a **principled approach** to the remedy of constructive trust with some guidelines as to the circumstances in which the remedy will be awarded.

[3a] [1989] 2 NZLR 180.

[4] See Finn, "The Fiduciary Principle" in Youdan (ed) Equity, Fiduciaries and Trusts (1989), 1 generally.

II FACTS AND ISSUES

International Corona Resources Limited ("Corona") was a junior venture mining company conducting a drilling programme in its property near Hemlo, Ontario. It was fairly clear from its drilling results that an adjacent property to Corona's, the Williams property, was likely to be potentially gold bearing. Some, but not all, of the results were published in a local mining journal. After reading the results published, Lac Minerals Limited ("Lac") got in touch with Corona and visited Corona's property with a view to entering into some joint venture or partnership agreement with Corona. During the visit, Lac examined a variety of geological data and discussed the programme with Corona's geologists. The parties were seriously interested in negotiating some joint venture agreement. As a result, there were two other meetings, an exchange of letters, some telephone conversations and a further delivery of geological data by Corona to Lac.

In the course of negotiations, it was found by the trial Judge that confidential and private information - that the Williams property was likely to be gold bearing and the basis for that belief - was disclosed by Corona to Lac. Notably, this was to attract Lac and to enable Lac to evaluate the possibility of a joint venture with Corona. It was further found that, during the discussions, nothing was said expressly about the confidentiality of this information. Nevertheless, the Judge held it to have been obvious to Lac that the information was confidential and that it was divulged only in the context of the discussion.

Corona made clear to Lac that it was interested in the Williams property and that it had already instructed an agent to obtain that property. Although, Lac did not say that it was not going to purchase the property, it encouraged Corona to actively pursue it's claims.

In due course, Corona's agent contacted Mrs Williams, the owner of the Williams property. Unknown to Corona, Lac also made offers to Mrs Williams. Eventually, Lac's offer, though less attractive than Corona's, was accepted by Mrs Williams.

It was a significant finding that Corona would have acquired the Williams property but for Lac's action. It was also found to be important that Lac would not have acquired the Williams property but for the confidential information it received from Corona.

Inevitably, the joint venture negotiations broke down. Lac, with knowledge of Corona's possible claim to the Williams' property, effected some improvements - a mine and a

mill - on the property. This was valued at $153,978,000 to Corona. Corona then brought an action seeking an order that Lac "deliver up" the Williams property to Corona. Shortly after that, Corona entered into an arrangement with Teck Corporation ("Teck") under which Teck obtained an interest in the Corona property together with an interest in the result of Corona's law suit against Lac.[5]

The major issues raised in the various Courts are:[6]

(1) Did Lac misuse **confidential information** obtained by it from Corona and thereby deprive Corona of the Williams property?

(2) Did a **fiduciary duty** exist between Corona and Lac, when negotiating towards a possible joint venture or partnership, which was breached by Lac's acquisition of the Williams property for itself?

(3) What was the **appropriate remedy** if the answer to (1) or (2) was in the affirmative?

(4) Given that Lac effected those improvements on the Williams property with knowledge of Corona's possible claim, was Lac nevertheless entitled to compensation on those improvements if the property were to be delivered to Corona?

At the trial, Holland J found that Lac had committed a breach of confidence. His Honour also found that there was a fiduciary relationship between the parties, which Lac had also breached. His Honour declared that upon Corona's paying to Lac $153,978,000, Lac was to transfer the property to Corona. On appeal, this position was upheld by the Ontario Court of Appeal.

On a further appeal, the Supreme Court unanimously held that there was a duty of confidence between Corona and Lac which was breached by Lac. However, the Court was divided on the second and third questions. Sopinka J, with Lamer and McIntyre JJ concurring, found that there was no fiduciary relationship between Lac and Corona. La Forest J and Wilson J, in separate judgments, held that there was a fiduciary duty which was breached by Lac.

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[5]For these findings of facts see above n 2, 511-538.

[6]In the trial the action was also pleaded in contract, but since a contract could not be shown to exist it was subsequently withdrawn.

On the question of an appropriate remedy, La Forest J, with whom Lamer J concurred, and Wilson J held that constructive trust was an appropriate remedy. On paying the value of the improvements on the property, Corona was entitled to the property. Sopinka J, with McIntyre J concurring, disagreed. Their Honours held that the appropriate remedy was compensatory damages and ordered Lac to pay $350,000,000 to Corona. This was one half of the total value of the Williams property. In contrast, the Court of Appeal, approved by La Forest J, held that if compensatory damages was appropriate, the full amount of the value of the property would be awarded.

These issues will be discussed in this paper in the order set out. As previously noted, emphasis will be given to the Supreme Court's rulings on the point of fiduciary duty and the remedy of constructive trust. Other issues will only be covered in brief.

III CONFIDENTIAL INFORMATION

General - Breach of Confidence

It is a widely accepted view that an action for a breach of confidence has a multi-jurisdictional basis in contract, equity and property. This composite jurisdictional basis has produced many lingering problems in the remedial area.[7] However, the lower Courts and the majority in the Supreme Court of Canada held that a constructive trust was the appropriate remedy for a breach of confidence without touching upon the jurisdictional basis of this action.[8] On the other hand, Sopinka J (McIntyre J concurring) held that compensatory damages were the appropriate remedy after giving some regard to the jurisdictional basis of breach of confidence.[9]

All Judges adopted the test enunciated in Coco v A N Clark (Engineers) Limited [10] as being appropriate to find whether there has been a breach of confidence. It requires essentially three elements:

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[7]Gurry Breach of Confidence (1984) 25.

[8]This seems to be the first clear Commonwealth decision for the authority that constructive trust can be granted in a breach of confidence action. Previously, a breach of confidence was regarded as a personal obligation: see Moorgate Tobacco Co Ltd v Phillip Morris Ltd (1984) 156 CLR 414.

[9]Above n 1, 75.

[10][1969] RPC 41 (Ch).

(1) The information must have the necessary quality of confidence;

(2) That information must have been imparted in circumstances imparting an obligation of confidence (or for a limited purpose);[11]

(3) There must be an unauthorised use of that information to the detriment of the party communicating it.

The Court's Finding on Breach of Confidence

All Judges in all three Courts were satisfied that these elements were met on the facts of International Corona. All Courts agreed that:

(1) Corona had communicated information that was private and confidential which had not been published;[12]

(2) While there was no mention of confidence, there was a mutual understanding between the parties that information was communicated in the context of negotiations towards a potential joint venture. As such, the information was imparted to Lac under circumstances giving rise to an obligation of confidence; and

(3) Lac, without being authorised by Corona, made use of that information to obtain the Williams property. The information produced by Corona was the springboard that led to the acquisition of the Williams property.[13]

Limited Purpose

Although all Judges agreed to the test and its application to the facts of International Corona, La Forest J and Sopinka J differed in the nature and scope of the breach of confidence

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[11] See Gurry Breach of Confidence (1984) at 113: "The test ... for establishing the assistance of an obligation of confidence is predicated on the basis of a disclosure of confidential information for a **limited purpose** - an obligation will exist whenever confidential information is imparted by a confider to a confidant for a limited purpose."

[12] The distinction between "public" and "private" information - where arguably both are used by a recipient may be extremely problematical. The recipient must then segregate the two. Although free to use the former, the recipient must take no advantage of the latter. There is a problem with the remedies for breach of confidence in such cases as the defendant may be liable only for such profits attributable to his wrongful use of the plaintiff's property. As such, apportionments of profit may be necessary: see Siddell v Vickers (1982) 9 RPC 152.

[13] Above n 1, 20.

on the facts. There was some suggestion that Lac was "only restricted from using the information imparted by Corona to acquire the Williams property for itself," and that "had Lac acquired the property on behalf of both Corona and Lac, there would have been no breach of confidence."[14] Notably, Sopinka J would not have held there to be a breach if Lac acquired the property for Corona and itself.[15] La Forest J remarked that this was erroneous since the evidence showed that both Lac and Corona contemplated Corona's acquisition of the Williams property.[16]

This difference in opinion arose out of the application of the second element of the test of breach of confidence to the facts of International Corona. The essential question was: what was the limited purpose for which the confidential information was disclosed? Was it disclosed so that it could be used to purchase the property for the joint benefit of both parties or was it disclosed so that Lac could assess in its own interest for itself the desirability of the joint venture? If it was disclosed for the use of the joint benefit of both parties, then Sopinka J's approach was right. The purchase of the property for the joint benefit of Lac and Corona would not be a breach but an implementation of the arrangement. Conversely, if it was to be used for the limited purposes of assessing the possibility of the joint venture by Lac's in its own interest, La Forest J's finding is correct. Lac could only use the information for assessing the desirability of a joint venture, and not to use that information to purchase the property.

It is submitted that the latter is the correct view. It was obvious that Corona disclosed the information so that Lac could realistically assess the possibility of a joint venture with Corona. Lac could only derive a benefit from that information if the joint venture eventuated. If the joint venture fell through, it would appear to be the intention of the parties that Lac was not to use that information.

Detriment

Another interesting point is the formulation of the test in Coco v A.N. Clark (Engineers) Ltd which requires that the unauthorised use of the confidential information be to the **detriment** of the confider. This requirement was missing in the formulation of the test by La Forest J.[17] Indeed, La Forest J at some point remarked that the information need not be

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[14]Above n 1, 22. Dennis R Klick "The Rise of the "Remedial" Fiduciary Relationship: Comment on International Corona Resources Limited v Lac Minerals Limited" (1988) 33 McGill L J 600.

[15]Above n 1, 74.

[16]Above n 1, 22.

[17]Cf A-G v Guardian Newspaper (No:2) [1988] 3 WLR 776, 795-796, 806.

used to the detriment of Corona.[18] However at other places, His Honour seemed to suggest that the unauthorised use must be to the detriment of the confider.[19]

It has been argued by Klinck that this requirement is unnecessary.[20] He suggests that there are circumstances in which this requirement might cause problems, for example, if the acquisition of the Williams property was ultra vires Corona.[21] It is arguable whether in this situation Corona should receive the property at all. Why should Corona be better off had there been a breach of Lac's duty? Corona would not otherwise be able to receive the property.[22]

Klinck adds that insistence on the requirement of detriment would result in a situation where a breach of confidence action might fail but an action for a breach of fiduciary duty might succeed.[23] One does wonder why it is so undesirable that an action in breach of confidence fails but a breach of fiduciary relationship succeeds.

Besides, Klinck notes that another factor militating against the requirement of detriment is the availability of accounting for profits as a remedy for breach of confidence. However, it could be argued that the requirement of detriment goes to the elements establishing a breach of duty of confidence, whereas the accounts of profit relates to the remedy available. It is not entirely at odds to require detriment to be shown for establishing a breach, and in the award of remedy, accounts of profit be made available.

Klinck further suggests that the inquiry is not into the plaintiff's loss but into the defendant's gain.[24] This suggestion will collide head-on with Sopinka J's observation that "in a breach of confidence case, the focus is on the loss to plaintiff".[25] In future cases, an adequate consideration by the courts on this requirement of detriment is clearly desirable.

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[18]Above n 1, 22.
[19]Above n 1, 36.
[20]Above n 14, 608.
[21]Above n 14, 608.
[22]Cf Keech v Sandford (1726) Sol Cas T King 61.
[23]Above n 14, 608.
[24]Above n 14, 609.
[25]Above n 1, 76.

IV FIDUCIARY RELATIONSHIPS

The Fiduciary Concept

The fiduciary concept is said to be "equity's blunt tool,"[26] a concept frequently invoked but uncertain in its precise boundary. It appears that the court has no difficulty in enforcing fiduciary obligations in specific circumstances but at a more fundamental level, the court is unable to define the precise principle on which that obligation is based.[27] Thus, we have assertions like "the real question is not who is a fiduciary but what is a fiduciary"[28] and "we are not sure what we are looking for, but we will know when we have found it"[29] and that "the fiduciary relationship is a concept in search of a principle."[30]

Attempts have been made to locate the underlying themes - a fiduciary principle - for this concept. The conclusions are far from unanimous. Various doubts are expressed thus: "the principle governing fiduciary obligation may indeed be undefinable,"[31] "whether there can be any universal, all purpose definition of the fiduciary relationship"[32] and that "the mystique of fiduciary law is beginning to melt."[33]

To this end, some questioned the need for such a search arguing that it might be desirable to have a residual equitable category for enforcing commercial morality based on courts intuition on what is just and proper.[34] On the other hand, there are others who felt it desirable to pin down the theoretical basis for this concept. Meanwhile, the language of trust, confidence,[35] influence, abuse of power, reliance, inequality, loyalty, vulnerability,

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[26]Above n 1, 60.

[27]Above n 1, 26. Hospital Products Limited v US Surgical Corp (1984) 55 ALR 417, 432 per Gibbs C J.

[28]Gautreau, "Demystifying the Fiduciary Mystique" (1989) 68 Can B Rev 1, 2.

[29]Above n 14, 624.

[30]Sir Anthony Mason, "Themes and Prospects" in Finn (ed) Essays in Equity (1984), 246.

[31]Above n 1, 26.

[32]Above n 27, 432-3 per Gibbs CJ; 458-9 per Mason J; 488 per Dawson J.

[33]Above n 28, 1.

[34]Tate v Williamson (1866) LR 2 Ch App 55 per Lord Chelmsford.

[35]See Marr v Arabco Trading Limited [1987] 1 NZBLC 102,372 (Tomkins J); and Loughlin, "Comment on Recent Developments in the Law: Fiduciary Liability and Constructive Trust Marr v Arabco Traders Limited" (1989) Otago L Rev 179. Tomkins J held:

> [F]iduciary relationships are founded on the existence of **mutual trust and confidence** of each in the skill, knowledge and integrity of other ....

selflessness, fiduciary care and the like continues to be flung around in courts only to overwhelm, not to illuminate.

It is suggested that two uses of fiduciary concepts have resulted in this confusion. The first is where the use of this concept has been instrumental - invoked apparently only to permit a particular remedy to a situation where the remedy can only be granted if a fiduciary relationship exists. Thus, a thief was classified a fiduciary to his victim to enable equitable tracing;[36] and payments into wrong hands was sufficient to find a fiduciary relationship to enable a constructive trust to be imposed.[37]

Secondly, the confusion arises out of the application of this concept in a context where more appropriate terms and concepts could have been used. This describes a situation where concepts of unconscionability, good faith or others should be invoked, but instead, the fiduciary concept is employed to find some special duty or consequence that is traditionally associated with fiduciary concepts. Otherwise the special duty does not ensue or an action may not even succeed. It is the submission of this paper that the fiduciary concept was employed in precisely this inappropriate way by the lower Courts and the minority of the Supreme Court in International Corona. Instead, what should have been involved was the concept of good faith.

The following discussion attempts to mark out this improper use of the fiduciary concept in order to come up with a practical working definition of fiduciary principle.[38] This paper does not attempt to define the relationship or the demarcation line showing the exact transition points between fiduciary relationships and non-fiduciary relationships. It is only a small step towards this task. It sets down an essential element of the fiduciary relationship which has been much watered down in recent case law.

The Identification of Fiduciary Relationship

The Fiduciary Principle

It is a basic submission of this paper that a fiduciary relationship will arise when a person undertakes, expressly or impliedly, to act in the interest and for the benefit of another in

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[36] GoodBody v Bank of Montreal (1974) 47 DLR (3d) 335.

[37] Sinclair v Brougham [1914] AC398, Chase-Manhattan NA v Israel British Bank (London) Ltd [1981] Ch 105.

[38] Finn has completed a significant piece of writing in that direction. Above n 4.

a particular matter understood by them. To that end the fiduciary has been entrusted with a special power or discretion to affect that other's interest.

Finn has the following to say about fiduciary relationships:

> [T]he actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interest in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement...the role that the alleged fiduciary has...must so implicate that party in the other's affairs or so aligning him with the protection or advancement of that other's interest that a foundation exists for the "fiduciary expectation."[39]

This is in line with the general test enunciated in the High Court of Australia in Hospital Products Limited v US Surgical Corp:

> The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person....[40]

The same point has been squarely made in Standard Investments Limited v Canadian Imperial Bank of Commerce:

> It is the undertaking to act for and on behalf of another which imports the fiduciary responsibility. The conflicts of duty and interest rule applies not simply because of the placing of trust and confidence but ... because of the undertaking of the fiduciary to act for or on behalf of his principal.[41]

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[39]Above n 4, 46.
[40]Above n 27, 454.
[41](1983) 5 DLR (4th) 452, 483.

Similar views have been expressed by many judges and prominent writers, such as, Scott,[42] Weinrib,[43] Shepherd,[44] Frankel,[45] Dickson C J,[46] Gibbs C J,[47] Somers J,[48] to name a few.[49]

The existence of a fiduciary relationship is therefore determined by two elements. The first is the **representative** element, which is the undertaking to act by the fiduciary in the interest and for the benefit of another. The second is the **special power** element which is a discretion delegated or entrusted to the fiduciary with the result that the beneficiary is in a peculiarly vulnerable position. Confidence, undue influence, duress, unequal bargaining power and so forth may be probative factors in establishing these two ingredients giving rise to a fiduciary relationship, and thus the ensuing fiduciary duties.

Thus, the fiduciary principle is not about whether a person overstepped the bounds of acceptable commercial morality, such as a lack of good faith, or took advantage of another's weakness (the notion of unconscionability). These situations can be dealt with by other more relevant and appropriate legal concepts and not the fiduciary concept.

The above working definition does not purport to be an all-embracing definition for a fiduciary relationship. Indeed, it may be impossible to find such a definition. The submission of this paper is that the expectation that a person will act in the interest and for the benefit of another, constitutes a necessary and essential ingredient to find for the existence of a fiduciary

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42Scott, "The Fiduciary Principle" (1948) 37 Calif L Rev 539.

43Weinrib, "The Fiduciary Obligation" (1975) 25 UTLJ 1, 4.

44Shepherd, "Towards A Unified Concept of Fiduciary Relationship" (1981) 97 LQR 51, 75.

45Frankel, "Fiduciary Law" (1983) 71 Calif L Rev 795, 809.

46Guerin v Canada DLR (4th) 321, 384.

47Above n 27, 435.

48Elders Pastoral Limited v Bank of New Zealand [1989] 2 NZLR 180, 192.

49For a contrary view that there is no difference in substance between fiduciary duties and other duties, see Gautreau, "Demystifying the Fiduciary Mystique" (1989) 68 Can B Rev 1,17.Even then, the writer remarked:

> the only difference is that the degree of power, reliance and vulnerability in relationships that we designate as fiduciary is generally greater than in the usual contract or duty of care situations with the result that a higher degree of duty and good faith is exacted from the fiduciary and more restrictive rules of behaviour are impressed on it.

Inherent in the above statement is the idea that there is a higher standard of duty imposed on the fiduciary. It is submitted that this is a direct consequence of the fiduciary undertaking to act in the interest and for the benefit of the beneficiary (representative element) in exercising the power or discretion delegated to him.

relationship. A discussion on the second element - power or discretion exerciseable by that person will only be covered in passing in this paper.[50]

Categories of Fiduciary

There are two distinct categories of fiduciary relationships, established mainly for practical guidance and administrative convenience. They are:

Category One: Certain **classes of relationships** which are analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, agents and principals.[51] There is a long established line of authorities holding that these classes of relationship, because of their legal or factual incidents, ordinarily give rise to fiduciary relationships and thus fiduciary duties. Therefore, if these classes of relationships are found to exist, there will be a presumption of fiduciary obligations. These fiduciary obligations can, however, be rebutted with evidence. In this category, the focus is on the identification of the class of relationship.[52] Finn has the following to say:

> Such is the law's perception of the legal relationship itself that it characterises, as a matter of course, the purpose of the relationship and the role and reason of one party in it as being to promote the interest of the other, or their joint interest, and not its own. Trustees, we are told, exist "for the benefit of" the fiduciary; partners contractually bind themselves to serve the joint interest within the scope of the partnership business; the function of a director is to serve the company's interests....[53]

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[50] Above n 27, 488 Dawson J; Ong "Fiduciaries: Identification And Remedies" U Tas L R 311, 316. Ong agreed on the representative element - the undertaking to act in the interest and for the benefit of another - as establishing the necessary first element. He remarks that a second element of implicit dependence/vulnerability on the part of the beneficiary was overlooked by the Court of Appeal in Hospital Products. He states:

> the element creating the fiduciary duty ... and common to all fiduciary situations, is that of implicit dependency, objectively expected, by one person upon another in the latters' execution of a special task ... for the former.

It is submitted here that the implicit dependence is a direct result of the undertaking or the fiduciary relationship. As such, it does not give rise to a relationship. Instead, it should be incorporated into the special power element by requiring the power to be one "delegated or entrusted to the fiduciary by the other such that the other is placed into a peculiarly vulnerable or dependent situation."

[51] In Hospital Products and United Dominions Corporation Limited v Brian Pty Limited (1985) 60 ALR 741, the Courts found it unnecessary to set up the joint venture as a new fiduciary category.

[52] Above n 1, 28.

[53] Above n 4, 33.

Category Two: Certain **factual situations** which give rise to a fiduciary expectation that one person is to act in the interests of another in exercising a power delegated by that other person. This fiduciary relationship arises out of particular circumstances of the case as a matter of fact and not as a result of a particular class of relationship. Thus, a dealing between the parties, such as a loan or a sales contract, though not itself fiduciary may nevertheless be subject to a fiduciary regulation.

It is important to note that like the categories of negligence at common law, the category of cases in which fiduciary duties and obligations arise from the class of relationship of the parties and from the circumstances of particular factual situations are not closed.[54] The existence of a fiduciary relationship is, after all, a factual enquiry into the circumstances of the case to see whether one person acts in the interest of another in the exercise of a delegated power or discretion.

As such, it must be stated that just because some classes of relationship normally involve fiduciary obligations, as in Category One, does not mean that they invariably will do so. The parties might have changed the rules they would apply. The presumption of fiduciary obligations can then be rebutted. On the other hand, a particular class of legal relationship will not automatically deny the existence of a fiduciary obligation. Just because some classes of relationship do not normally exhibit a fiduciary component does not mean that they will not do so in a particular fact situation, as in Category Two.

It is submitted that this classification is only a useful starting point for analysis. If a class of relationship analogous to those in Category One exists, fiduciary obligations will be presumed unless rebutted. Otherwise, the existence of a fiduciary duty will have to be proved on the facts. To do so, the court must examine whether one person acts in the interest and for the benefit of another in exercising a special power delegated by that other.

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[54] Elders Pastoral Limited v Bank of New Zealand [1989] 2 NZLR 180,192, Mogal Corp Limited v Australasia Investment Company Limited (25 May 1990, unreported, Auckland High Court, CL 70/87, Smellie J),57-61, Laskin v Bache & Company 33 BLR (3d) 385.

The Incidence of the Fiduciary Duty

The existence of a fiduciary relationship is the first step establishing that some fiduciary duty is owing to the beneficiary. The next step is to determine what is involved in the fiduciary duty - what is the scope, nature, and the standard of the fiduciary duty. It is submitted that the incidence of the fiduciary duty provides further support to the requirements of the "representative" and "special power" elements before a fiduciary relationship can be found.

Scope of Duty

Fiduciary relationships in different situations are of different types carrying different obligations depending on the undertaking of the fiduciary which can vary in a number of ways. It depends on the interest to be served, the duties to be performed, the standards to be attained, and the restrictions to be obeyed, as defined and understood by the parties.[55]

A fiduciary relationship does not necessarily connote an all-embracing duty and loyalty to the principal for all purposes. The undertaking may be of a general character such as a general agency or it may be specific such as to sell a specific asset. Thus a person may be in a fiduciary position "quoad part of his activities and not quoad other parts."[56]

To this end, it may be noted that fiduciaries in Category One will generally have a larger scope of fiduciary duty than fiduciaries in Category Two. This is because as long as a class of relationship is identified to be in Category One, a number of fiduciary obligations will be presumed. In Category Two, however, each fiduciary obligation will have to be proved individually on the facts.

Nature of Duty

A fiduciary owes a duty of loyalty and fidelity to the beneficiary. This means that the fiduciary must act solely in the interests of the beneficiary. The fiduciary must avoid all conflicts of interest ("no conflict" rule) and not profit from the position entrusted ("no profit" rule).

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[55]Gautreau, "Demystifying the Fiduciary Mystique (1989) 68 Can B Rev, 19-20.

[56]New Zealand Netherlands Society "Oranje" Incorporated v Kuys [1973] 1 WLR 1126, 1130 (P.C); Hospital Products, above n 27, 435 per Gibbs CJ; 455, 458 per Mason J; 474 per Deane J; 495 per Dawson J.

Further, not only must the fiduciary avoid actual profit or actual conflicts of interest from its position as a fiduciary, even the possibility of personal benefit or conflict of interest must be avoided. This stringency is designed to keep the relationship pure and to safeguard the absolute loyalty of the fiduciary to the beneficiary. If the fiduciary cannot profit, it will not be tempted to put self interest before its duty. The court goes a long way to prevent any external attack on this concept by prohibiting even the possibility of a potential conflict of interest situation, or of fiduciary profiting from his or her position.

Thus, it is said by Ong [57] that the fiduciary is different from all other obligors because it is liable not only for creating an **actual** conflict between duty and personal interest but also for creating a **possible** conflict between duty and personal interest.

Standard of Duty

The nature of the fiduciary duty requires the fiduciary to act selflessly to secure the paramount interest of the beneficiary. To this end the standard of the fiduciary duty is high and demanding. If a fiduciary derives a profit from the fiduciary position he or she must give up the profit to the beneficiary. It is irrelevant that the beneficiary would never have obtained that profit or that it could not have been made without the fiduciary's effort or that the beneficiary lost nothing. The fairness of the transaction and the good faith of the fiduciary are simply irrelevant.[58]

Recently there have been confusion as to when a breach of fiduciary duty arises.[59] There are two approaches to this question, namely, the "prescriptive notion" and the "proscriptive notion." The "prescriptive notion" says that fiduciary duty is concerned with whether the beneficiary's interests are in fact being served by the fiduciary. If the fiduciary ever acts to the detriment of the beneficiary, the fiduciary duty is breached regardless of whether the injury caused is outside the confines or the scope of the fiduciary duty or concerned with the duty of loyalty and fidelity.

The alternative view, the "proscriptive notion", sees the duty as concerned with the maintenance of loyalty and fidelity to the beneficiary. It is only activated when the fiduciary

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[57] "Fiduciaries: Identification and Remedies" U Tas L R 313.

[58] Keech v Sandford (1726) Sol Cas T King 61.

[59] See above n 4 - Finn, "The Fiduciary Principle" in Youdan (ed) Equity, Fiduciaries and Trusts (1989), 1, 25-26.

seeks improperly to advance his or her own or a third party's interest by exploiting the opportunities arising from the fiduciary relationship.

It is submitted that the latter view, the "proscriptive notion", is the correct one as it corresponds with the scope and the nature of fiduciary duty. Fiduciary duty only relates to the confine of the fiduciary relationship on matters dealing with the loyalty or fidelity of the fiduciary.

Therefore, it is not the case that the pure negligence of a lawyer, an agent's excess of authority, a partner's breach of the partnership contract or a trustee's improvident investment are, as such, breaches of fiduciary duty, no matter how harmful they are to the interest of the principal. If no issue of disloyalty is involved, such matters will be actionable through those primary branches of law which constitute or govern the ordinary incidence of the particular relationship in question - negligence, breach of contract, or breach of trust.

This is well summarised in Re Coomber: Coomber v Coomber:

> All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of cases in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them.[60]

The incidence of the fiduciary duty - the scope, nature and the standard of fiduciary duty, points clearly to one common element already identified - that the fiduciary owes a strict duty of **loyalty or fidelity** to the beneficiary. It is submitted that this duty of loyalty or fidelity is a direct result of the representative element identifying the fiduciary relationship - the **undertaking** of the fiduciary to act **for the benefit and in the interest** of the beneficiary. The incidence of the fiduciary duty is in line with and therefore provides further justification for the representative element as determining the existence of a fiduciary relationship.

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[60][1911] Ch 723 (CA) at 728-729.

The Concept Of Good Faith

All consensual behaviours can be represented as different points in a behaviour spectrum where on one end there is a completely selfish behaviour and on the other a completely selfless behaviour. From one end to the other there is a progression from a selfish behaviour to a selfless behaviour.

The completely selfish behaviour describes a situation where one acts solely in one's own interest and for one's own benefit in a dealing with another. This is clearly the case in a pre-contractual negotiation where the negotiating parties will attempt to maximise their own individual gain or interest. In doing so, the parties act selfishly and solely have regard to their several individual interest.[61]

On the other end, completely selfless behaviour describes a situation where one acts selflessly and with undivided loyalty in the interest of another. The model of trustee-beneficiary is the paradigm for this relationship. However, the completely selfless behaviour also includes a situation where one person acts in the joint interest of itself and another. That person, in such a case, does not act to conserve its "several or separate" interest, but the "joint interest" of itself and another.

It is crucial to distinguish between a **joint interest** and a **several interest** in this context. For example, in a pre-partnership negotiation, parties will attempt to serve their own "several and separate" interest by attempting to strike the best bargain to each of them individually. In contrast, after the partnership is formed, the parties will, instead, act in the interest of the partnership, their "joint interest," rather than their individual "several and separate" interests.

Commonwealth jurisdictions have been evolving various standards of protective responsibility for the regulation of commercial behaviour. "Unconscionability" and "good faith" are two standards developed by courts mainly to temper excessively self interested conduct. The notion of unconscionability recognises that one party is entitled to pursue his or her own self interests vigorously but, it recognises that for some reasons of special disadvantage, the other party may be unable to conserve his or her own interest. Thus, the

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[61]This is particularly true under the classical contract law where parties have unfettered freedom to enter into contract, as the parties have no duty to each other until the magic moment of contract formation. RB Gibbens "International Corona Resources Limited v Lac Minerals Limited - Where Equity Rushes in" (1987-1988) 13 Can B L J 482, 489-501.

notion of unconscionability seeks to prescribe excessively self-interested or exploitative conduct by the stronger party. In such cases, the stronger party has a duty to recommend an independent advice to the weaker party and show that the dealing is fair in the circumstances.

Similarly, the standard of good faith does permit a party to act self interestedly. However, the party must also have regard to the legitimate interest of the other. It is a situation where one subordinates the regular pursuits of one's individual interest to the maintenance of a reasonable community standard in commercial relationships or commercial morality. Finn suggests that the good faith standard emcompasses at least three overlapping themes: the promotion of co-operation between parties to a relationship; the curtailment of the use of one's power over another; and the exaction of "neighbourhood" responsibility in a relationship.[62]

Therefore, it seems clear that a fiduciary relationship refers to circumstances where a person acts completely selflessly to secure the paramountcy of another's interest or their joint interest. In contrast, the notions of unconscionability and good faith relates to the mediation of several interests between different parties to a relationship. Finn has put the distinction thus:

> [U]nconscionability and good faith...are...merely different formulations of a single question - a question concerned simply with mediation between the several interests of the parties to a relationship. This...cannot be said of the fiduciary principle. Its function is not to mediate between interests. It is to secure the paramountcy of one side's interest or in some instances...of a joint interest.[63]

In some recent cases, the courts have employed the fiduciary concept in circumstances where it would be more appropriate for the notion of unconscionability or good faith to be invoked. It is submitted in this paper that in International Corona the lower Courts and the minority of the Supreme Court erred in invoking the fiduciary concept in a situation where it is more appropriate to invoke the good faith concept. It is understandable that in that case the fiduciary concept was employed since the concept of good faith is still undeveloped and has not received legal recognition as such. This is particularly true when the concept of good faith is used outside the context of the contract as traditionally contract was the battle ground for the

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[62]Above n 4, 11. Also see Nicholson v Permakraft [1982] NZCLC 95, 042.
[63]Above n 4, 27.

concept of good faith. Whether it is necessary to give the concept of good faith, at present only a moral postulate, legal force is a question of public policy attracting much writing. [64]

Finn submits that unconscionability standard, good faith standard and fiduciary standard are three hierarchy of standards in a progression from a selfish behaviour to a selfless behaviour. With respect, it is submitted that "unconscionability" and "good faith" standards are not hierarchical, in that "good faith" is not necessarily concerned with more selfish conduct than "unconscionability" or vice versa. These two are simply different legal justifications to curb excessively self interested conduct. In contrast, fiduciary standard is hierarchical with good faith standard and unconscionability standard. Fiduciary standard relates to a selfless behaviour whereas unconscionability and good faith standards relate to different ways of tempering selfish behaviour.[65]

V INTERNATIONAL CORONA - FIDUCIARY OR GOOD FAITH?

In classical contract law, parties to negotiations have no duty to each other until the "magic moment" of contract formation. It is only when a contract is ultimately reached that all rights and obligations flow including the orthodox contractual tools of undue influence, misrepresentation or unconscionability. If the negotiations fail to produce a contract, the common law gives little remedy to the injured party for he or she has the ultimate right to choose not to contract.[66]

In International Corona, the Courts, through the use of equity, had come close to imposing upon negotiating parties a duty of good faith under the guise of fiduciary duty with possible recovery for the breach of this duty even if the negotiations fail to produce a contract. It is submitted that the majority of the Supreme Court rightly ruled that there was no fiduciary relationship between Lac and Corona in their negotiations for a potential joint venture. The trial Judge, the Judges in the Ontario Court of Appeal, La Forest J and Wilson J therefore erred in holding that there existed a fiduciary relationship.

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[64]For example see Lucke "Good faith and Contractual Performance" in Finn (ED) Equity and Commercial Relationships [1987] 155, Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations" (1987) 87 Col L Rev 217.

[65]See Above n 4 generally.

[66]R B Gibbens "International Corona Resources Limited v Lac Minerals Limited - Where Equity Rushes in".(1987-1988) 13 Can B L J 482, 489-501. However there have been various inroads made into classical contract law including quasi-contract, tort and estoppels.

Corona and Lac were negotiating for a potential joint venture. It would be fair to say that Lac did not undertake, expressly or impliedly, to act in the interest and for the benefit of Corona. Nor was there any evidence to suggest that Lac was expected to act in the interest and for the benefit of the intended joint venture. The parties were simply keen to protect and conserve their "several" individual interest. With respect to the confidential information, it cannot be said that Lac undertook to use the information to purchase the property in the interest and for the benefit of Corona; or for their joint interest. The information was disclosed for a limited purpose, that of enabling Lac to evaluate the possibility of a joint venture with Corona. Lac was not expected to use the information for any other purpose. Besides, Lac was not entrusted with or delegated a discretion or power which Lac had to exercise in the interest of Corona or the intended joint venture, with the result that Corona was peculiarly vulnerable or dependent on Lac's action.

It is further submitted that there are two broad categories of situation in which a party in a negotiation situation may owe a fiduciary duty to the other. The first is where one acts in the sole interest and for the sole benefit of the other. This describes a situation where a person in the position of Lac undertakes or is expected to purchase the property for Corona. In other words, Lac acts as agent for Corona. A breach of this duty will result in Lac holding the property solely for Corona. Oddly enough, the lower Courts and the minority of the Supreme Court held this to be the result in International Corona in making out a fiduciary duty even though on the facts it was agreed that Lac did not undertake nor was it expected to purchase the property for Corona.

The second situation is where one party undertakes or is expected to act in the joint interest of itself and the other. This would have been the situation had Lac undertaken or been expected to purchase the Williams property for the joint venture. A breach of this duty would have resulted in Lac holding the property for Corona and itself. Normally if a party is found to be a fiduciary in a negotiation scenario leading to a partnership or a joint venture, the party will be held to be a fiduciary for itself and the other - the joint venture or the partnership.[67]

It is submitted that the facts of International Corona simply do not fall within either one of these situations.

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[67]This was essentially the finding in United Dominions Corporation Limited v Brian Pty Limited (1985) 60 ALR 741, Marr v Arabco Traders Limited (1987) NZBLC 102,732, Fraser Edmiston Pty Ltd v AGT (Old) Pty Ltd Unrept 3 June 1986 (Qd S C).

It is further suggested that International Corona was concerned with the duty of good faith and not fiduciary duty. It is a situation where Lac, while entitled to consider its own several and separate interest, was obliged to have regard to the legitimate expectation of Corona. Thus, Lac was expected "not to act to the detriment of Corona by having regard to Corona's legitimate expectation" rather than "to act in the interest and for the benefit of Corona in performing a fiduciary duty."

The failure of the Judges to make clear the scope and nature of the fiduciary duty owed by Lac to Corona shows that there was simply no case for the finding of a fiduciary duty. It is not a case where Their Honours did not spell out the incidence of the fiduciary duty, it is a case where the incidence could not be spelt out because there was no fiduciary duty. It simply does not make sense to say that Lac owed a duty of fidelity or loyalty to Corona in purchasing the Williams Property as there was no such expectation or understanding between them.

Can Commercial Parties be in Fiduciary Relationships

The fact that an arrangement is of a commercial kind and that the parties to it have dealt at arms length has been consistently regarded as an important, almost decisive, factor in negativing the existence of a fiduciary duty. This reluctance is understandable since the inherent nature of most commercial contracts involve opposing several and separate interests, particularly at the stage of contract formation. This is at odds with a loyalty to the other or an undertaking to act in the interest of the other which constitutes the core of fiduciary duty. These two considerations are mutually exclusive to a point. However, it is important to bear in mind that the existence of a fiduciary relationship is a fact specific enquiry. This means that negotiating parties might not act in their several and separate interests all the time. Neither is a fiduciary required to act in the interests of the beneficiary in every single matter. An absolute rule that arms length parties cannot be in fiduciary relationships would be entirely at odds with this form of factual enquiry.

As has been explained by Lahane:

> [T]he distinction between "commercial" and other transactions must be a red herring ... Agencies, partnerships and trusts are established between substantial parties whose relationship is undoubtedly "commercial" and who act at arms length...the reason why, in commercial contexts, transactions outside the traditional categories do not give rise to fiduciary duties is that most transactions do not, as a matter of fact, satisfy the criteria

(whatever precisely they are) which lead courts to characterise a relationship between private parties as fiduciary. It is because they do not satisfy the criteria not because they are commercial, that such transactions do not usually carry with them fiduciary duties and the remedies following from a breach of such duties.[68]

The Court of Appeal in International Corona rightly held against any absolute rule that barred the operation of fiduciary obligations in arms length commercial negotiation. The Court relied on the "fact specific enquiry" of a fiduciary relationship and the High Court of Australia's decision in United Dominions Corp Limited v Brian Pty Limited ("UDC").[69] The real question was did the facts give rise to a fiduciary relationship between Lac and Corona? This would also seem to be the general consensus of the Judges in the Supreme Court.

I shall now proceed to a close textual analysis of the various judgments by the Court of Appeal and the Judges in the Supreme Court in International Corona. Particular attention will be given to the reasons why the Judges found or did not find an existence of a fiduciary duty. It is also to be shown that the failure of the Judges in making clear the scope of the fiduciary duty clearly suggests that there was no fiduciary relationship between Corona and Lac.

The Courts' Finding on Fiduciary Relationships

The Court of Appeal held that there was a fiduciary duty between Lac and Corona which Lac had breached. By a majority of three (Sopinka J with Lamer and McIntyre JJ concurring) to two (La Forest and Wilson JJ), the Supreme Court of Canada refused to find any fiduciary obligation on Lac to refrain from securing the Williams property for itself.

The Court Of Appeal

The Court of Appeal identified four factors which suggested that a fiduciary relationship existed between Corona and Lac.[70] They are:

(i) Lac sought out Corona in pursuing the joint venture;

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[68]Lehane "Fiduciaries in a Commercial Context" in Essays in Equity Finn (ed) (1984) 104.

[69](1986) 59 ALJR 676. In UDC, though technically without a contract, the joint venturers had already reached an informal arrangement to assume the relationship and had proceeded to take steps towards its implementation. Therefore, arguably, the decision in UDC applied the widely known rule that joint venturers are in a fiduciary relationship to each other to an existing de facto joint venture agreement which eventually emerged as a full fledged joint venture.

[70]Above n 1, 64. Above n 3, 636-646.

(ii) Corona divulged confidential information to Lac during the negotiations;

(iii) There was a practice in the mining industry that negotiating parties do not act to the detriment of each other;

(iv) The negotiating parties seemed to have had a mutual understanding of how each would conduct itself in their negotiations when working towards one common objective.

It is indeed difficult to see from these factors how Lac could be said to act in the interest and for the benefit of Corona; or alternatively for the benefit of the intended joint venture. All of the factors were instances of the negotiations which suggest that Lac should act in good faith by having regard to Corona's legitimate interest. Thus, Lac was not "to act to the detriment of Corona".

The fourth factor suggests that the parties were working towards one common objective. However, this is a vague statement and is quite different from saying that the parties would act in the joint interest of the potential joint venture. Besides, the remedy awarded to Corona - that Lac were to hold the property on constructive trust for Corona alone is at odds with this analysis. If it is right that the parties were "working towards one common objective" and thus each was a fiduciary for the potential joint venture, Lac would have held the property on a constructive trust for the joint benefit of Corona and itself.

Wilson J

In the Supreme Court, Wilson J found the existence of a fiduciary duty on grounds very different from that relied on in the lower Courts and by La Forest J. Her Honour held that "while no ongoing fiduciary relationship arose between the parties by virtue only of their arm's length negotiation ... a fiduciary duty arose in Lac when Corona made available to Lac its confidential information concerning the Williams property," and thus "Lac became ... subject to a fiduciary duty with respect to that information not to use it for its own use or benefit."[71]

Her Honour's decision on the finding of a fiduciary relationship was premised on the presence of confidentiality between Lac and Corona, rather than the negotiations towards a

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[71] Above n 1, 16.

potential joint venture. This raises the question whether the duty of confidentiality necessarily entails the existence of a fiduciary relationship. Gurry remarks that "the obligation of confidence can itself be regarded as a fiduciary obligation which defines for its own purposes its own class of fiduciary."[72] If this is true, every case of breach of confidence will also be a breach of fiduciary duty. The question is complicated by the fact that the misuse of confidential information is frequently a feature of a breach of fiduciary obligations. These two duties, however, were treated as quite separate issues by all other Judges in International Corona. They were said to be "while intertwined, distinct to a certain extent."[73] It was also pointed out by Gurry that:

> In a breach of confidence action, the court's concern is for the protection of a confidence which has been created by the disclosure of confidential information by the confider to the confidant. The court's attention is thus focused on the protection of the confidential information because it has been the medium for the creation of a relationship of confidence; its attention is not [as in fiduciary relationships] focused on the information as a medium by which a pre-existing duty is breached.[74]

However this is not an entirely satisfactory explanation for the distinction between a duty of confidentiality and fiduciary duty because it could be argued that the disclosure of information creates a fiduciary duty and the misuse of the information is a breach of that fiduciary duty. It is submitted that what really creates a fiduciary duty is the representative element and power element referred to before.

The disclosure of the information to Lac by Corona does not result in an expectation in the parties that Lac was to use that information for the sole benefit and interest of Corona; or alternatively the intended joint venture. Indeed, it was disclosed to enable Lac to evaluate in its own several and separate interest in taking part in the joint venture with Corona. Further, there was no power or discretion delegated to Lac by Corona. All that was passed over to Lac by Corona was the confidential information.

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[72]Above n 7, 159.
[73]Above n 1, 63.
[74]Gurry Breach of Confidence (1984), 161-162.

La Forest J

La Forest J noted that a fiduciary relationship does not normally arise between commercial parties in an arms length transaction. However, His Honour held that there were three factors in International Corona which supported the finding that Corona "should reasonably expect Lac not to act to Corona's detriment by acquiring the Williams property."[75] This finding led the Judge to find a fiduciary relationship between Corona and Lac. The factors were:

(1) Trust and confidence;

(2) Industry practice; and

(3) Vulnerability.

Trust and Confidence: The relationship between Corona and Lac was said to be one of trust and confidence.[76] They were negotiating in good faith towards some joint venture relationship, and it was expected during these negotiations that confidential information would be disclosed.

Industry Practice: This appears to be the most significant factor in the lower courts and La Forest J's finding for a fiduciary relationship.[77] La Forest J. held that the industry practice imposed a "duty" on parties in serious negotiations not to act to the other party's detriment through the misuse of confidential information. His Honour remarked that the issue was not, as submitted by Lac, what is the legal effect of custom in the industry, but what is the importance of the existence of such practice in determining whether Corona could reasonably expect that Lac would refrain from acting against Corona's interest.[78]

Vulnerability: His Honour further found that vulnerability was not a necessary ingredient in every fiduciary relationship, though it was normally required in determining whether a new class of relationship should be taken to give rise to a fiduciary obligation.[79] His

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[75]Above n 1, 35-44.
[76]Above n 1, 35-37.
[77]Above n 1, 37-39.
[78]It is doubtful whether there is a real distinction between these two tags. Even if there is a distinction, it would be semantic.
[79]Above n 1, 39-42.

Honour noted that a fiduciary obligation can be breached without harm being inflicted on the beneficiary as in Keech v Sandford.[80] His Honour continued:

> Not only is actual harm not necessary, susceptibility to harm will not be present in many cases. Each director of General Motors owes a fiduciary duty to that company, but one can seriously question whether General Motors is vulnerable to the action of each and every director...the issue should be whether one party stands in relation to another such that it could reasonably be expected that the other would act or refrain from acting in a way contrary to the interests of that other.[81]

In any event, His Honour thought it beyond doubt that on the facts, Corona was vulnerable to Lac. To countenance the view that Corona did not give up to Lac any power or discretion to affect its interest,[82] His Honour held that Lac acquired a power or ability to harm Corona by obtaining the Williams property. Corona gave Lac that power by giving up information about the property and about Corona's intention.

It is submitted that His Honour's analyses have a number of difficulties.

Trust and confidence: The fact that the parties were negotiating in good faith towards some joint venture relationship is more in line with the doctrine of good faith. As noted before, it is clear from the evidence that in a pre-contractual negotiation each party did not act in the interest, or for the benefit of the other; or alternatively for their joint interest. Instead, the parties acted in their several and separate interest and for their several and separate benefit in achieving the best bargain for themselves.

Industry practice: It may be true that industry practice imposed a duty on parties in serious negotiations not to act to the other party's detriment. However, this expectation not to act to each other's detriment is not sufficient to find a fiduciary duty. The fiduciary expectation has to be such that one party will act, without having regard to its several self interest in the interest and for the benefit of the other, or for their joint interest.

Vulnerability: It is interesting to note that, contrary to La Forest J's opinion, the beneficiary in Keech v Sandford was clearly vulnerable to the act of the trustee though the

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[80](1726) Sel Cas Ting 61.
[81]Above n 1, 40.
[82]See Sopinka J's judgment, above n 1, 35.

breach in question did not cause any harm to the beneficiary. Besides, a corporation is of course vulnerable to the action of its directors as each director has an actual or apparent authority to bind the corporation.

However, it is submitted that vulnerability is not an element leading to a fiduciary relationship. Rather it is a characteristic of the result of the fiduciary relationship. It is the natural result of the reliance placed by the beneficiary on the undertaking given by the fiduciary. As such, it should not be a "conclusive" test to determine the existence or otherwise of a fiduciary relationship. As submitted earlier, it is useful only to the extent that it evidences the essential element that one person undertakes to act in the interest of another in the exercise of a discretionary power.

Further, it is difficult to see how a fiduciary power or discretion was entrusted to Lac simply by Corona's giving up the confidential information about the property and about Corona's intention to acquire the property. The observation by La Forest has significantly watered down the degree of trust and reliance involved in a fiduciary relationship.

La Forest J. held there to be a fiduciary relationship because all the factors mentioned above pointed to a reasonable expectation on the part of Corona that "Lac should not act to the detriment of Corona". This, as has been submitted repeatedly in this paper, is not a fiduciary expectation. To find a fiduciary relationship, there must be a reasonable expectation that Lac would act for the benefit and in the interest of Corona or in the joint interest of Corona and Lac, the potential joint venture, in exercising a power delegated by the beneficiary.

Sopinka J (Lamer And McIntyre JJ Concurring)

Delivering the judgment for the majority on this point in the Supreme Court, Sopinka J held that the Courts below had departed from a salutary rule that fiduciary duties are normally not required in the context of an arms length transaction because the parties have an adequate opportunity to prescribe their own mutual obligations. Besides, the contractual remedies available to them to obtain compensation from any breach of those obligations should be sufficient. This is so as "equity's blunt tool must be reserved for situations that are truly in need of special protection that equity affords".[83]

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[83]Above n 1, 60.

His Honour went on to cite various cases as authority for the proposition that vulnerability is the hallmark for the identification of a fiduciary relationship; and held that the Courts below erred in not giving sufficient weight to this essential ingredient of dependency or vulnerability.

Confidential information: To the above proposition that vulnerability is the hallmark of fiduciary relationship, His Honour added a qualification that "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".[84] In applying this qualification, His Honour found the fact that confidential information is obtained and misused cannot itself create and breach a fiduciary obligation. Thus, though a

> possible incident of a fiduciary relationship is the exchange of confidential information and restrictions on its use. Where, however, the essence of the complaint is misuse of confidential information, the appropriate cause of action....is breach of confidence and not breach of fiduciary duty.[85]

Industry practice: Sopinka J went on to discuss the finding that there is a mining industry practice that imposed an obligation on parties in serious negotiations not to act to the detriment of each other.[86] His Honour felt the finding was not supported by sufficient evidence. Besides, even assuming that the practice was established, His Honour disagreed that a fiduciary duty arose by virtue of that practice. The learned Judge stated:

> It is understandable that, in a contract setting, a practice that is notorious and clearly defined and relevant to the business under discussion should be incorporated as a term. It can readily be inferred that the parties agreed to it. It is a considerable leap from this principle to erect a fiduciary relationship on the basis of such a practice. No authority was cited to the court that this concept can be transplanted in this fashion.[87]

Vulnerability: His Honour distinguished UDC on the ground that the beneficiary in that case was at the mercy of the fiduciary's discretion. It was said that on the facts of

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[84]Above n 1, 63.
[85]Above n 1, 64.
[86]Above n 1, 68-69.
[87]Above n 1, 67.

International Corona, the parties had not advanced beyond the negotiation stage. In addition, Corona did not "confer on Lac any discretionary power to acquire the Williams property."[88]

His Honour then concluded that the vital ingredient of dependency or vulnerability was entirely lacking in the case.[89] The parties were said to be experienced mining promoters who had ready access to geologists, engineers and lawyers. The fact that the parties were anxious to make a deal cannot attract the special attention of equity. If Corona placed itself in a vulnerable position because Lac was given confidential information, then His Honour thought this dependency was gratuitously incurred. Nothing prevented Corona from exacting an undertaking from Lac that it would not acquire the Williams property unilaterally. His Honour concluded:

> Accordingly, if Corona gave up confidential information, it did so without obtaining any contractual protection which was available to it. This and the fact that misuse of confidential information is the subject of an alternative remedy strongly militates against the application here of equity's blunt tool.[90]

It is submitted that though His Honour arrived at a correct result, His Honour failed to consider a number of additional reasons on which the finding that no fiduciary duty existed could have been based.

Confidential Information: It is submitted that a fiduciary relationship could not be found on the facts of International Corona in respect of the confidential information. This is so not because of the reason given by His Honour that to do so would mean the fact that confidential information is obtained and misused both creates a fiduciary obligation and the breach. To overcome His Honour's objections it can be said that the disclosure of information created the fiduciary duty and the misuse of the information created the breach. However this cannot be the basis to find a fiduciary relationship. A fiduciary relationship cannot be found on the ground of the disclosure of information because there was no fiduciary expectation that Lac was to use the information for the benefit and in the interests of Corona. Further, there was also no power or discretion delegated by Corona to Lac to use the information to that end.

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[88]Above n 1, 65.
[89]Above n 1, 68-69.
[90]Above n 1, 69.

Industry Practice: It is important to note that a fiduciary relationship cannot be found because the standard of industry practice in International Corona merely established an expectation that Lac was not to act to the detriment of Corona. It did not generate a fiduciary expectation that Lac was to act in Corona's interest. In other words, the fiduciary relationship was found not to exist not because of "the considerable leap to erect a fiduciary relationship on the basis of a notorious and well accepted practice" but because the practice did not establish that Lac was to act for Corona's benefit. Therefore it can be said that if the practice established that Lac were to act in the interest and for the benefit of Corona, the "considerable leap" will be permitted "to erect a fiduciary relationship."

Vulnerability: As submitted above, vulnerability is the natural result of a fiduciary relationship where one party places reliance on the undertakings given by the fiduciary, rather than an element giving rise to the relationship. His Honour's view that the parties could have protected their interest via a confidentiality agreement and since they did not do so, a fiduciary duty would not be imposed - should not be adopted. La Forest J remarked that the Court should not deny the existence of a fiduciary obligation simply because the parties could, by means of a confidential agreement, have regulated their affairs. La Forest J. continued:

> I cannot understand why a claim for breach of confidence is available absent a confidentiality agreement, but a claim for breach of fiduciary duty is not. The fact that the parties could have concluded a contract to cover a situation but did not in fact do so does not, in my opinion, determine that matter...The existence of an alternative procedure is only relevant if the parties would realistically have been expected to contemplate it as an alternative.[91]

His Honour then concluded that it was not established that the entering of confidential agreement was an expected course of action in the industry.

It is submitted that the operation of fiduciary duty should be treated the same as tortious duties. The position is that while a contract produces contractual duties, it will not exclude the generation of tortious duties unless the contract either expressly or impliedly excludes such duties. There is no difference in principle between the operation of fiduciary law and law of tort in this respect. Therefore, the approach shown by the courts when dealing with the contract-tort relationships should also be used when dealing with the contract-fiduciary relationships. In both cases, there are simply additional duties, or duties that differ in quality,

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[91] Above n 1, 41.

over and above the contractual duties.[92] It is important to recall that the reason for the imposition of fiduciary principle is that fundamental decency and honour personal and commercial affairs is something to be valued, and is therefore **imposed** by the law according to the circumstances.

Summary

The holding of the majority in the Supreme Court that there is no fiduciary relationship on the facts of International Corona is clearly the right one. However, as demonstrated, Their Honours' reasons are fraught with no less difficulties compared to the minority's reasonings. As a result of International Corona it might be that vulnerability, rightly or wrongly, by design or by accident, would be regarded as the hallmark for the identification of a fiduciary relationship.[93] It is submitted that this approach is not to be welcomed.

A more vigorous objection should be made to the use of the fiduciary concept by the lower Courts and the minority Judges in the Supreme Court. It is submitted that this inappropriate invocation of the fiduciary concept will perpetuate the confusion about the fiduciary concept despite tremendous efforts by various judges and writers to render the concept certain.

Finally, it is submitted that the fiduciary undertaking - an expectation that one is to act in the interest and for the benefit of another - must be present before a fiduciary relationship can be found to exist. It is likely that this is not the only element, but it is submitted in this paper that it is an essential and indispensable element.

VI RESTITUTIONARY REMEDY - CONSTRUCTIVE TRUST

General

There are two important observations to be made about the judgment of the majority (La Forest J (Lamer J concurring) and Wilson J) in International Corona on the issue of remedy.[94]

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[92]Above n 28, 14.
[93]Above n 1, 63.
[94]See Grant Hammond, "Equity and Abortive Commercial Transactions" (1990) 106 LQR 207.

The first is that, as a result of fusion of law and equity, there is now a flexible and liberal judicial attitude to remedies. This is coined the "remedial flexibility".[95] It means the considerations that justify an initial liability are now dissociated from those considerations that lead to a particular remedy. Remedies are therefore "at large" in a real sense not depending on the existence of some particular liability.

The second point is that, as an instance demonstrating the first point, the remedy of constructive trust is dissociated from the requirement of a pre-existing property right and a pre-existing fiduciary relationship.[95a] It seems the time is now ripe for an argument that a simple breach of common law duty, such as a contract, may result in a remedy of constructive trust.[96]

The "Remedial Flexibility"

The rationale for the first observation is simply that now with a fusion of law and equity, the jurisdictional basis of a cause of action no longer dictates the form of remedy available. Wilson J remarked that the choice of an appropriate remedy should not in these days be impeded by the historic divide between equity and common law.[97]

This means that if a ground of liability is established, the remedy that follows should be the one that is most appropriate on the facts of the case rather than one confined by legal history or over-categorisation. While considerable certainty is required in establishing an initial liability so that parties are aware of their duties and act accordingly, the certainty of remedy should not be accorded as high a priority. This will enable the court to award a remedy which is most appropriate on the facts of the case. There is simply no need "to pass the facts through further conceptual loops" before a particular remedy is awarded. This is the prevailent approach of the Canadian Courts; and it is echoed in the approach recently adopted by the New Zealand Courts, especially the Court of Appeal.

The impact of "remedial flexibility" brought by the intermingling of law and equity was evidenced in New Zealand in Day v Mead,[98] Gilles v Keogh [99] and more recently in

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[95] Above n 1, 47.
[95a] Re Diplock [1948] Ch 465.
[96] Elders Pastoral Limited v Bank of New Zealand [1989] 2 NZLR 180 can be explained on this ground. Also see Birks, "Restitutionary Damages for Breach of Contract: Snepp and The Fusion of Law in Equity" [1987] Lloyd's Mar & Com LQ 421.
[97] Above n 1, 17.
[98] [1987] 2 NZLR 448.
[99] [1989] 2 NZLR 327.

Aquaculture Corp v The New Zealand Green Mussel Company Limited.[100] In Aquaculture the New Zealand Court of Appeal remarked that "for all purposes material, equity and common law are mingled or merged"[101] with the result that "a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute."[102]

In that case, compensatory damages were ordered for an action for a breach of confidence. Further, Their Honours saw no reason in principle why exemplary damages should not be awarded for an actionable breach of confidence in a case where a compensatory award would not adequately reflect the gravity of the defendant's conduct. In Aquaculture, however, exemplary damages were not necessary.

It is submitted that the New Zealand Courts went even further than the Canadian Courts in responding to the impact of the fusion of law and equity has on the availability of remedy. In Canada, even though as a general rule the availability of a particular remedy does not depend on a particular cause of action, it still depends on the existence of some wider ground of liability. In New Zealand, the Courts adopted a "Chancellor's foot" approach where the availability of a remedy depends on what is just and reasonable in the view of the Courts.

For example, as will be seen later in this paper, the remedy of constructive trust is only granted in Canada if a restitutionary claim can be made out and if the constructive trust remedy is most appropriate on the facts. In contrast, a New Zealand Court will grant a constructive trust as long as it is "fair" or"just and reasonable" to do so.

Constructive Trust

This "remedial flexibility" - the flexibility in granting a remedy, was demonstrated in International Corona by the majority's treatment of the availability of constructive trust. La Forest J (Lamer J concurring), in giving the leading judgment on the point of remedy, stated that though there was no unanimous agreement on the circumstances in which a constructive trust would be imposed, no special relationship or fiduciary relationship, between the parties is necessary. The learned Judge said that insistence on a special relationship would undoubtedly lead a court, in coming to the conclusion that a proprietary remedy was the only appropriate result, "manufacturing special relationships out of thin air, so as to justify their conclusion."[103]

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[100] CA 69/87 11 June 1990 (NZCA).
[101] Above n 100, 5 per Cooke P. (Richardson, Bisson, Hardie Boys JJJ concurring).
[102] Above n 100, 6.
[103] Above n 1, 50.

La Forest J also added that constructive trust is not reserved only for a situation where a pre-existing right of property is recognised. It is clear that to do so would be limiting the constructive trust to its institutional function, and deny it the status of a remedy which is its more important role.[104] His Honour accepted that the imposition of a constructive trust can both recognise and create a right of property, endorsing the view advocated by Goff and Jones. The learned authors state:

> [A] constructive trust should be imposed if it is just to grant the plaintiff the additional benefits which flow from the recognition of a right of property.[105]

Interestingly, Sopinka J cited the above passage to support His Honour's view that a constructive trust is ordinarily reserved for those situations where a right of property is recognised."[106]

Traditionally there has also been a tendency to confuse the distinct remedy of equitable tracing with the constructive trust, with the result that the development of the constructive trust has been hindered. The tracing remedy is, unlike constructive trust, a means to obtain specific recovery of a property. It can only be used when the plaintiff held a beneficial interest in property and where the property remained identifiable in the defendant's hands. In contrast, the proprietary interest associated with the remedial constructive trust arises, for the first time, as a result of the imposition of trust. Many writers and judges see the remedy of constructive trust as a legal tool to give priority to certain plaintiffs.[107]

The constructive trust is a remedy as well as an institution. As such, it is submitted that a pre-existing right of property is not necessary when it is used as a remedy.

Further, it is a basic thesis of this paper that a fiduciary relationship should not be required as a pre-requisite for the imposition of constructive trust. To do so would perpetuate a judicial reasoning which is circular and fictional. It compounds the confusion of the fiduciary concept and misdirects the proper enquiry of why a constructive trust should be imposed in a particular situation. In dropping the requirement for a special relationship, the fiduciary

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[104] Above n 1, 50.

[105] The Law of Restitution (3 ed) (1986) 673.

[106] Above n 1, 75.

[107] David Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989) Can B Rev 315.

concept will be saved for the genuinely trust-like relationship. A proper enquiry can be directed to the facts of the cases to see why the remedy of constructive trust is appropriate. Only then the criteria to be taken into account in granting the constructive trust can be ascertained, developed and accordingly followed by other courts.

It is further submitted that the New Zealand Courts should adopt the Canadian position as demonstrated in International Corona. This sets out a two stage enquiry before a constructive trust could be imposed. First, the court determines whether it has the jurisdiction to award constructive trust. The court has that jurisdiction if a claim for unjust enrichment or a restitutionary claim is made out. The second question relates to the exercise of this jurisdiction. Even though a court has jurisdiction to grant the remedy of constructive trust, it needs not exercise this jurisdiction. It depends on the particular circumstances of the case. It will be suggested later that the court should develop some practical guidelines as to situations where it will exercise the jurisdiction to grant a constructive trust remedy.

The Requirement of Fiduciary Relationships

The requirement for a fiduciary relationship before a constructive trust can be imposed reflects a lack of confidence of the courts over the scope of equity's jurisdiction. It is in part a common law victory in the historical tension between Common law courts and Chancery courts in their competitions for jurisdiction. This limitation was imposed to limit the operation of the equitable remedy of constructive trust to equity's traditional jurisdiction - fiduciary relationships - as it is a traditional basis for the intervention of equity.

Consequently, the fiduciary label was used to achieve a remedial end as the remedy of constructive trust, considered to be appropriate in certain circumstances, would not be available unless a fiduciary relationship was present. In this sense the fiduciary label imposes no obligation but is merely instrumental in achieving what appears to be the appropriate result.

This is criticised as a situation where one "argues from a conclusion to a duty and then back to the conclusion" which "reads equity backwards".[108] Professor Birks describes it thus:

> [I]t moves the characterisation of a relationship as fiduciary from the reasoning which justify a conclusion to the conclusion itself: a relationship becomes fiduciary because a

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[108]Above n 1, 32.

legal consequence traditionally associated with that label is generated by the facts in question.[109]

Further, the past emphasis on the fiduciary relationship has played a major role in impeding the development of the constructive trust along remedial lines. It has prompted the courts, in considering whether a constructive trust should be imposed, to place a primary significance on the **abuse of a relationship** between the parties (institutional approach), rather than upon the **wrongful nature of the act or events** through which the property was acquired and retained.

This judicial habit of manufacturing a fiduciary relationship so that a remedy of constructive trust can be imposed should not be perpetuated. The Canadian Courts have abandoned this approach, and the New Zealand Courts have made a start in a similar direction. The courts should openly admit that whenever the plaintiff should be able to assert a proprietary right, the remedy of constructive trust should be awarded. The fact is simply that the plaintiff's claim has a proprietary base and thus a proprietary remedy is called for. The existence or otherwise of a fiduciary relationship should be irrelevant. Only then can proper enquiries be directed to identify precisely what this proprietary base is - in other words - what factors justify the award of a constructive trust. The Canadian Courts are currently working on this principled approach to the award of constructive trust. It is hoped that the New Zealand Court will follow this development closely.

The New Zealand Approach

In Elders Pastoral the New Zealand Court of Appeal recently held that it is no longer necessary to show a fiduciary relationship before the imposition of a constructive trust. Both Cooke P (Richardson J concurring) and Somers J found that all that was required was for the plaintiff to show that it would be against "conscience" for the defendant to retain the asset in the face of the plaintiff's claim, or that it is "just and reasonable" that a constructive trust be imposed.[110] However, Somers J had already found that there was an obligation "fiduciary in character" between the parties imposing a duty to account for the proceeds of sale - therefore it is unclear whether his adoption of the unconscionability test was ratio or obiter.[111]

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[109] Peter Birks, "Restitutionary Damages for Breach of Contract: Snepp and the Fusion of Law and Equity" (1987) 2 Lloyd's Mar & Com LQ 421.

[110] Elders Pastoral Limited v Bank of New Zealand [1989] 2 NZLR 180, 186.

[111] Above n 110, 192.

Cooke P quoted Snell's Principles of Equity which states:

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.[112]

This, in essence, was repeated in a much quoted judgment of Dean J in Hospital Product:

> [T]he constructive trust ... should properly be seen as [giving] equitable relief appropriate to the particular circumstances of the case rather than as arising from a breach of some fiduciary duty flowing from an identified fiduciary relationship ... in all the circumstances, [the constructive trust was imposed] in accordance with the principle under which a constructive trust may be imposed...in circumstances where a person could not in good conscience retain for himself a benefit....[113]

It is a suggestion of this paper that while the dissociation of fiduciary requirement from the imposition of the constructive trust is to be welcomed, the Court of Appeal in Elders Pastoral failed to provide any coherent basis or guidelines as to when it would be "conscionable" or "just and reasonable" for the remedy of constructive trust to be awarded. Opinion in close cases often suggests that the decision to grant a constructive trust is based mainly on an instinctive feeling that this relief should be allowed. While it may be conceded that a case-by-case approach has, on the whole, provided a satisfactory resolution of specific problems, the absence of a systematic approach has led to too much uncertainty. It results in a serious and growing confusion in analysis, a lack of overall intelligibility and much difficulty in prediction. It is submitted that the view that a constructive trust remedy can be imposed whenever it is "just" to do so affords little, if any, practical guidance unless indications can be given as to what those situations may be. In La Forest J's language:

> [T]o allow such a result would be to leave the determination of property rights to "some mix of judicial discretion...subjective views about which party 'ought to win' ... and 'the formless void of individual moral opinion.'"[114]

112(28th ed) at 192. Also quoted in Neste Oy v Lloyds Bank Plc [1983] 2 Lloyds Rep 658.

113Above n 27, 496.

114Above n 1, 51. His Honour quoted the observation by Deane J in Muschinski v Dodds (1985) 160 CLR 583, 616.

Therefore, it is submitted in this paper that the New Zealand Courts should adopt the Canadian approach to determine whether the remedy of constructive trust should be awarded. The constructive trust would be available when a restitutionary claim can be made out. If the claim were made out, an enquiry would then be directed into the appropriateness of awarding the remedy of constructive trust in the particular case, having regard to certain factors, such as the adequacy of other personal remedies, the conduct of the parties and other special considerations that are discussed later in this paper.

The Canadian Approach

The Claim for Unjust Enrichment

As noted earlier, the Canadian Courts [115] approach the question of whether a remedial constructive trust should be imposed in a particular situation in two steps. First, the Courts consider whether a claim for unjust enrichment is established. Then, they examine whether in the circumstances a constructive trust is the most appropriate remedy to redress that unjust enrichment.[116]

To make out a claim for unjust enrichment,[116a] it has to be established that:

(1) a party has been enriched;

(2) that enrichment was at another party's expense; and

(3) that enrichment was unjust.

Restitution will often be the appropriate response if this claim is made out. By restitution, I mean giving back to someone either the property that has been taken from that person (a restitutionary proprietary remedy), or its equivalent value (a personal restitutionary remedy).

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115 See Hunter Engineering Company v Syncrude Canada Limited 57 DLR (4th) 321.

116 See Above n 1 generally La Forest J and Sopinka J's judgments.

116a For the generic conception of the law of Unjust Enrichment see Birks An Introduction To The Law of Restitution (1985)

Though the principle of unjust enrichment was already established as a ground of liability in Canada, its limits remain to be developed and probed. In particular, it is the third element which the court would have to refine and develop as cases haphazardly come before the courts.[117] The enrichment must be "unjustified" in order to entitle the plaintiff to the remedy. This means an absence of "juristic reason" for the enrichment. As such, the determination that the enrichment is unjust does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognised and enforceable duty.[118]

For a proprietary relief - a remedial constructive trust,[119] it is obvious that some connection or nexus must be shown between the acquisition of property by the respondent and the corresponding deprivation of the claimant. The question was said to be whether the claimant could reasonably expect to receive an actual interest in the property and whether the respondent ought reasonably to have been cognisant of that expectation.[120] By ordering a proprietary relief there is a clear risk that the interests of a bona fide third party may be prejudiced.

Constructive trust can remedy other wrongs besides unjust enrichment. This is known as the non-restitutionary constructive trust.[121] As a general rule, claims for breach of contract or breach of an expressed trust are not restitutionary, though in some cases the measure of liability may fortuitously turn out to be restitutionary. Constructive trusts imposed for breach of duties of an express trustee or trustee de son tort, constructive trusts arising in respect of consensual arrangements between vendors and purchasers of land, and between mortgagees and mortgagors; and constructive trusts imposed to perfect imperfect gifts or instruments are not restitutionary, since they do not remedy unjust enrichment. There is no enrichment since the property is, in equity, vested in the claimant as from the time the arrangement is entered into.

Where there has been a contractual dealing between the claimant and the respondent, and the respondent has been enriched as a result of the contractual relationship, there should be no finding of unjust enrichment. Unjust Enrichment can exist only where there is no juristic

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[117]Goff and Jones The Law of Restitution(3ed) (1986) 30.

[118]However, new causes of action and duties may be created for this purpose.

[119]The respondent will also be **personally** liable in the same way as a fiduciary or an express trustee.

[120]Sorochan v Sorochan [1986] 2 SCR 38, 52-53 per Dickson J.

[121]David Hayton, "Constructive Trust: Is the Remedying of Unjust Enrichment Satisfactory Approach?" In Youdan (ed) Equity, Fiduciaries and Trust (1989), 205.

reason accounting for the enrichment of the respondent and the corresponding deprivation of the claimant. A contract, in such a case, provides the juristic reason rendering any restitutionary claim unavailable. However, the mere fact that parties are involved in a contractual relationship does not necessarily preclude the application of the remedial constructive trust, since the existence of the contract may not account for the enrichment in question. Thus, if there is an overpayment arising out of a contractual relationship, the remedial constructive trust may be appropriate to capture the overpayment, for it is not explained juristically by the terms of the contract.

However, there are judicial observations from high places [122] holding that the remedial constructive trust may be available when there is a "bad faith" breach of contract. Birks argues that in certain circumstances, even if the contract accounts for the enrichment, a proprietary restitutionary remedy - constructive trust may be available.[123] The main objection to this is from the disciples of the theory of "efficient breach." This theory, in essence, says that if by compensating the contractual party, one can still break the contract profitably, it is good that one should do so. This means that performance of the contract is directed to the point at which it is most valued. Birks regards this as no more than an attempt to clothe a remedial deficiency as an economic virtue.[124]

The Appropriateness of Constructive Trust Remedy

The court will have jurisdiction to award a constructive trust once a restitutionary claim is made out. Then the court will consider whether it will exercise this jurisdiction to grant the constructive trust remedy. The establishment of a **principled** basis for the application of a constructive trust is important. It should provide some guidelines (as opposed to rules) to the lower courts and the commercial community at large as to when and why the imposition of a constructive trust may be appropriate. Consistency in judicial attitude and a degree of certainty and predictability of judicial reasoning are desirable. Furthermore, a constructive trust confers a beneficial interest in a property to the claimant. As such it has the effect of giving the claimant the status of a secured creditor with respect to the property. The basis for the judicial creation of a property right is clearly called for.

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[122] Above n 27. Per Deane J.

[123] "Restitutionary Damages for Breach of Contract: Snepp and The Fusion of Law and Equity" [1987] Lloyd's Mar & Com LQ 421.

[124] Above n 123, 441.

On this question the Canadian law is growing and developing. On the other hand, New Zealand authorities are few and undeveloped. It is believed that the New Zealand Courts will have to consider this important matter soon.

It is submitted in this paper that the New Zealand Courts should attempt to develop guidelines as to when the remedy of constructive trust will be granted as the second stage after requiring a restitutionary claim to be established. In doing so, it is suggested that the Courts should give due attention to the law of remedies as a whole. Regard should particularly be given to the development of specific performance which shares many characteristics with the remedy of the constructive trust. This will enable us to have a more coherent system of remedies.

The Courts should, nevertheless, retain an overriding discretion as to whether to grant a constructive trust. They should be looking at all the circumstances of the case and examining the overall justice of the case to see whether it is just and reasonable that the remedy be granted. To this end, relevant factors are:

(1) The adequacy of other remedy;

(2) The conduct of the defendant;

(3) The conduct of the claimant, and

(4) Other special reasons.

(1) The Inadequacy Doctrine: Equitable remedies developed historically to address situations where the common law was inadequate to remedy a wrong. The inadequacy doctrine asks whether the personal remedy of damages provided by the common law is adequate as a matter of fact to remedy the wrong done to the claimant. Normally, it will not be adequate where the unjust enrichment involves the acquisition by the defendant of a land, or of a unique chattel. If damages are not adequate the remedy of constructive trust can be ordered. The basic jurisdictional doctrine of inadequacy, though criticised by Paciocco as an outdated analysis which has no substance,[125] has been adopted as the primary criteria by many commentators and a number of courts.[126]

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[125]Above n 107, 337.
[126]Above n 1 generally, La Forest J judgment.

(2) The Conduct of the Defendant: Goff and Jones argue that a dishonest defendant should more readily be made a constructive trustee.[127] Paciocco suggests that the wrong doing of the defendant has no bearing on the justification for awarding the claimants a constructive trust remedy.[128]

It is submitted that the view expressed by Goff and Jones should be adopted, as discretionary remedies are one judicial tool by which social policy and commercial morality can be enforced in circumstances where the legislature does not provide incentives. As such, if the defendant is morally culpable, it should be harder for him or her to retain the property wrongfully acquired.

(3) The Conduct of the Claimant: "[H]e who comes to equity must come with clean hands" - the conduct of the claimant may disentitle him or her to equitable relief. There are doubts as to whether the negligence of the claimant is relevant. Goff and Jones suggests that it is relevant in deciding whether a restitutionary proprietary relief should be ordered.[129] Paciocco, however, submits that the negligence of the claimant should be considered relevant only where actual prejudice to the general creditors of the defendant has resulted.[130] It is submitted that the conduct of the plaintiff is as significant as the conduct of the defendant in determining whether the remedy of constructive trust should be granted. No specific and rigid rules are necessary in this regard.

(4) Special Circumstance: There may be other special circumstances in the case why a claimant should or should not be awarded the remedy of constructive trust. An example is where the respondent is insolvent.

An important feature of the remedy of constructive trust is that it confers on the plaintiff a proprietary interest in property, making the plaintiff a secured creditor viz a viz other general creditors of the defendant. In cases where the defendant is insolvent, the result of the imposition of constructive trust is that the plaintiff will have a prior claim over the defendant's estate over and above other creditors.

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[127] The Law of Restitution (3ed) (1986) 62.

[128] David Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989) Can B Rev 315, 347.

[129] Above n 117, 62.

[130] Above n 128, 346.

This violates the basic policy of "pari passu" where property in liquidation should be applied in satisfaction of its liability equally. Questions must be asked as to why the plaintiff should not be on an equal footing with general creditors of the defendant. As opposed to a claim between the defendant and the plaintiff, in the insolvency of the defendant the claim will be between the creditors of the defendant and the plaintiff.

Paciocco purports to resolve this difficulty by "the acceptance of risk" theory. This theory suggests that if the claimant accepts the risk of the defendant's insolvency he should be treated the same as a general creditor. Conversely, if the claimant does not accept the risk of the defendants insolvency when dealing with the defendant, the claimant should have a prior claim over the claim of general creditors of the defendant.[131] This argument is sound and should be adopted. However it is important to bear in mind that this "acceptance of risk" theory should only apply in circumstances where the defendant is insolvent.

For the purposes of this paper, I have confined myself to the considerations for the imposition of the constructive trust remedy in a commercial context. However, it must be noted that the very first question that has to be answered by any court is whether the court should apply different tests, in granting a constructive trust, in respect of a commercial situation as opposed to a domestic situation.

Paciocco suggests that "to achieve appropriate results, courts must apply different principles in commercial settings and family settings.[132] The learned writer says that a spousal relationship is maintained with little formality and little negotiation about how property is to be divided in the event of dissolution. In contrast, in a commercial arrangement, it is anticipated that this will be specifically provided for. Consequently, Paciocco suggests that the court should employ a more relaxed and a less stringent test in a family situation.

Furthermore, it should be noted that the fair treatment of the parties to a spousal relationship has a broad social policy implication which goes beyond the usual commercial considerations. This invites the application of constructive trust. On the other hand, the familiar concerns that the efficiency of commerce depends upon security of title and protection of third parties from undisclosed charges militates against proprietary relief in the commercial context.[133]

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[131] Above n 128, 340.
[132] Above n 128, 327.
[133] Above n 128, 328.

The Court's Finding on Constructive Trust

(1)Whether Constructive Trust is Available

Applying the criteria of unjust enrichment to the facts, a restitutionary claim was upheld by the majority of the Supreme Court (La Forest (Lamer J concurring) and Wilson JJ). It is important to note that the majority found that "but for the action of Lac in misusing the information and thereby acquiring the Williams property, that property would have been acquired by Corona".[134] On the other hand, the minority found that Corona would have concluded with Lac a business arrangement with respect to the Williams property substantially similar to that Corona concluded with Teck - a 50:50 property interest with participation in the development course in the same ratio.

It was argued that Corona never in fact owned the Williams property. As such, the property cannot be given back to them. The majority, however, held that the function of restitution is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or **would have accrued** for his benefit, it is restored to him.

On the whole, the majority held that Lac had been enriched by the acquisition of the Williams property which would have, but for the action of Lac, been acquired by Corona. Thus, there is an enrichment by Lac at the expense of Corona and that enrichment was unjust since the acquisition of the Williams property amounted to a breach of duty to Corona, either in a breach of fiduciary duty or a breach of confidence. Therefore, constructive trust was available as a remedy.

The next question was whether constructive trust was an appropriate remedy on the facts of International Corona.

(2)Whether Constructive Trust an Appropriate Remedy

La Forest J noted the "remedial flexibility" of an action for breach of confidence and breach of fiduciary duty in that a number of remedies such as injunctions, accounts of profit, compensations and constructive trust are available. In view of this flexibility, His Honour thought detailed consideration must be given to the reasons why a remedy measured by Lac's gain at Corona's expense is more appropriate than a remedy compensating Corona for the loss

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[134]Above n 1, 44-46.

suffered.[135] In this case, the Court of Appeal found that if compensatory damages were to be awarded, those damages in fact equated the value of the property.

The inadequacy doctrine played an important part in Their Honours' decision to award constructive trust. La Forest J (Lamer J concurring) was in entire agreement with the Court of Appeal which found that:

> [G]old properties of significance are unique and rare. There are insurmountable difficulties in assessing the value of such a property in the open market. The actual damage which has been sustained by Corona is virtually impossible to determine with any degree of accuracy. The profitability of the mine, and accordingly its value, will depend on the ore reserves of the mine, the future price of gold from time to time, which in turn, depends on the rate of exchange between US dollar and Canadian dollar, inflationary trends, together with myriad of other matters, all of which are virtually impossible to predict.[136]

Besides, La Forest J viewed the imposition of a restitutionary remedy, which restores an asset to the party who would have acquired it but for a breach of fiduciary duties or duties of confidence, acts as a deterrent to a breach of those duties and strengthens the social fabric those duties are imposed to protect. La Forest J remarked:

> The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions. Likewise with the protection of confidences...The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties.[137]

Therefore, if by breaching an obligation of confidence one party is able to acquire an asset entirely for itself, at the risk of only having to compensate the other for what the other would have received if a formal relationship between them were concluded, the former would be given a strong incentive to breach the obligation and acquire the asset.

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[135] Above n 1, 47-50.
[136] Above n 1, 49. Above n 3, 651.
[137] Above n 1, 47.

Hence, a majority of the Court concluded that a constructive trust was most appropriate in the circumstances because of:

(1) the uniqueness of the Williams property;

(2) the difficulty of assessing damages; and

(3) the moral quality of Lac's acts.

While acknowledging that the last factor was the least important as regard restitution, the majority observed that to allow the defendant to retain a specific asset when it was obtained through conscious wrong doing may so offend a court that it would deny to the defendant the right to retain the property.[138]

It has been suggested by Klinck that the decision in International Corona that Lac were to hold the property on a constructive trust solely for Corona is extreme. The argument is that Corona should not be better off when the joint venture did not eventuate. Had there been a joint venture contract, Lac would have held the property on a constructive trust for itself and Corona jointly. Corona would only be entitled to half of the property.[139]

It is submitted that this argument is too simplistic. If a joint venture had been concluded Lac would have held the property on a constructive trust for both Lac and Corona jointly, as Corona, by the joint venture, would have intended the information, and thus the property, to be shared between Lac and itself. However, in International Corona there is no evidence to suggest that Corona intended Lac to benefit from the information, and thus the property, if the joint venture did not eventuate.

Summary

A principled approach to the award of a constructive trust is demonstrated reasonably adequately in International Corona by La Forest J. The first step is a question of jurisdiction. A court will have jurisdiction to award constructive trust if a restitutionary claim is made out. Secondly, the court will exercise this jurisdiction if the remedy is considered to be most

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[138] Above n 1, 47.
[139] Above n 14,614.

appropriate in the circumstances, due regard being given to various factors such as the adequacy of other remedies and the conduct of the parties.

In contrast to the Canadian approach, the New Zealand Courts adopt the "palm tree justice" or the "Chancellor's foot" approach, where a constructive trust is awarded if it is "just and reasonable" on a case-by-case basis. To date, no guidelines (as opposed to rules) have been prescribed as to when it will be "just and reasonable" to impose a constructive trust. As has been submitted in this paper, though absolute certainty is not necessary, some guidelines as to when a constructive trust will be imposed are desirable.

VII COUNTER-RESTITUTIONARY REMEDY

If the Williams property was to be held on constructive trust for Corona, what was to become of the improvements on the property made by Lac during the period where they had possession? If Corona received the Williams property without having to pay for the improvements which they necessarily would have had to incur in order to exploit the property, Corona would certainly be unjustly enriched. But Lac had run the risk, for it had made the improvements with knowledge of Corona's possible claim in the property.

The trial Judge made an order of $153,978,000 in favour of Lac on this improvements on the basis of section 37(1) of the Conveyancing and Law of Property Act 1980. That section allows a person who "makes improvements on other's land under the belief that it is his own" to have a "lien" upon the land to the extent of the amount by which its value is enhanced by the improvements.

Clearly this section does not apply to the facts of International Corona. It only applies to a situation where one unknowingly makes a mistake as to the ownership of a land and thereby effects some improvements on that land.

The Court of Appeal dealt with Lac's claim for the improvement on the doctrine of change of circumstances. It stated:

> We are persuaded of the soundness of the exposition of the applicable principles found in Goff and Jones ... under the heading "Change of Position" ... in arguing that some changes imposition should be permitted to be a partial defence to a restitutionary claim where it would be inequitable to compare a defendant to make full restoration ... the

> circumstances of this case, we believe, justify going further than Goff and Jones propose and permitting the defendant this partial defence ....[140]

This approach of the Court of Appeal was heavily criticised as it employed an equitable defence not as a defence but as an independent cause of action.[141] The doctrine was not used to deplete or to reduce the constructive trust but rather to launch an independent claim for improvements. The claim for the improvements is a counter-restitutionary claim. Professor Birks describes this claim as the "giving up that which the plaintiff must do in order to qualify for restitution from the defendant."[142]

This counter-restitution by Lac is premised on the benefit which the improvement rendered to Corona. It is similar to the action by one who had mistakenly improved anothers chattel, as in Greenwood v Bennett,[143] or that of a breaching fiduciary claiming for just allowance for work and skill in Boardman v Phipps.[144]

In the Supreme Court, La Forest J in delivering the majority judgment of the Court on this point held that Corona would receive an enrichment in the amount of the value of the improvement of the land when Lac hands over the property to Corona. The value is equal to what would have been spent by Corona to develop both properties less what Corona in fact spent. His Honour stated:

> The three elements of a claim for restitution are made out, namely, there is an enrichment (the mine), that enrichment accrued to Corona at Lac's expense, and the enrichment is unjustified. The enrichment is not justified since, on the assumption that Corona had acquired the Williams property, it would of necessity have had to spend funds to develop the mine. In these circumstances Lac is entitled to restitutionary remedy, namely a lien on the Williams property to the extent that Corona was saved necessary expenditure.[145]

In the end, Lac was still entitled to a just allowance for the improvements it had made to the property albeit on different grounds.

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[140] Above n 2, 601.
[141] Gibbens, "International Corona Resources Limited v Lac Minerals Limited - Where Equity Rushes In" (1987-88) 13 Can B L J, 482, 499-500.
[142] Birks An Introduction to The Law of Restitution (1985),
[143] [1973] QB 195.
[144] [1967] 2 AC 46.
[145] Above n 1, 53.

VIII CONCLUSION

Although the instrumental use of the fiduciary concept has been abandoned, "fiduciary" continues to be a protean term. It is now employed in cases where other more relevant and appropriate legal concepts should have been used. As demonstrated above, International Corona is a case where the concept of good faith should have been involved. Instead, the fiduciary concept was employed by the lower courts and the minority Judges in the Supreme Court of Canada to establish a liability.

It is submitted that this inappropriate use of the fiduciary concept should be abandoned. The concept should only be used in a truly trust-like situation where one person acts in the interest, or for the benefit of another in the exercise of a specially delegated power. The authorities on this point are numerous. Besides, the incidence of the fiduciary duty - the strict duty of loyalty and fidelity - points clearly to these criteria as constituting a fiduciary relationship giving rise to the corresponding fiduciary duties.

The fusion of Law and Equity has brought about a "remedial flexibility" - a situation where all remedies, Common law or Equitable, are available in a wide range of situation not depending upon the jurisdictional basis of the cause of action. Consequently, a clear division between rights and remedies is emerging with a probable result of legal developments along two branches of law - the law of obligations and the law of remedies.

In International Corona, the remedy of constructive trust has been awarded, not dependent on the existence or otherwise of a pre-existing property right or fiduciary duty. The Remedy is available when some wider ground of liability - a restitutionary claim - is established, and when the remedy is most appropriate in the circumstances having due regard to some guiding factors.

It is submitted that the Canadian approach is more principled and should be adopted in New Zealand. The current New Zealand Court of Appeal's approach of awarding the constructive trust remedy when it is "fair" or "just and reasonable" to do so, affords little if any comfort to the lower courts and the wider community. Some degree of predictability and certainty about the circumstances in which constructive trusts will be imposed is clearly desirable.

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