SPECIAL PAPER
EDWARD VEITCH – PROFESSOR EMERITUS

The author of this next piece refers to himself as a "sometime professor of law" at the University of New Brunswick, yet this couldn't be further from the truth. Edward Veitch has instead been a mainstay of the University of New Brunswick's Faculty of Law since 1979 when he accepted the post of Dean of Law. Since that time he has invested immeasurably in Ludlow Hall and the people who walk and work in its halls. For this reason, Edward Veitch was honoured with the designation of Professor Emeritus in Law in October of 2014 at the University of New Brunswick's 60th convocation ceremony.

Professor Emeritus Veitch has a plethora of impressive accomplishments. During his tenure as Dean he recruited an intellectual core of legal professionals who remained at the University of New Brunswick for their academic careers and who together turned the Faculty of Law into a serious academic institution of high repute within the Canadian and international legal communities. This author has lectured internationally in Nigeria, Uganda, and Ireland; has worked as a Professor of Law at both the University of New Brunswick and University of Windsor; as well as a Visiting Professor at the Universities of Illinois and North Carolina. Professor Emeritus Veitch lectures on a broad range of topics including judicial remedies, torts, practice, intellectual property, and municipal law. Furthermore he researches and has published extensively on an equally broad range of areas including contracts, torts, legal education, civil procedure, and practice. He has published 67 articles and commentaries, 7 chapters, and 42 book reviews, including the Canadian Chapter in the International Manual of Civil Procedure (first edition in 1994 and the second in 2007). He has made six major addresses and in 2003, was awarded the Queen's Silver Jubilee Medal for legal services to Canada and the Distinguished Service Medal from the Canadian Bar Association.

As Dean, colleague and instructor, Professor Emeritus Veitch has encouraged junior faculty members in their work and is beloved by generations of students. He formally retired in 2007, yet remains an active "sometime" Professor at the University of New Brunswick receiving the Faculty of Law's Award for Teaching Excellence in 2014 – an award initiated by the student body. His Scottish wit comes through in this piece. We hope that you enjoy the best that Professor Emeritus Veitch has to offer in his latest publication with our Journal.

Michael Ellison-Uyede
Gwenyth Stadig
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WHEN THE COURT FINDS A BREACH OF FIDUCIARY OBLIGATIONS, SHOULD EQUITABLE OR LEGAL REMEDIES FLOW?

Edward Veitch*

All law students can recite the judicial remedies utilized in their respective settings. In equity the list comprises an account of profits, restitution damages, the disgorgement of ill-gotten gains, the imposition of a constructive trust, rescission of contract, the decree of specific performance, and injunctive relief. And at common law, the range is somewhat constrained – damages ranging from compensatory to prophylactic to punitive do the trick. Pedants will no doubt argue that what is in the equitable grouping above should instead fall within the common law territory. But such quibbles can only lead to an extended stay in a psychiatric unit as we must cope with what our courts *actually do* and not fret over how much we would prefer judges to explain their judgments in light of *our* superior academic understanding.

A comparative reading of the recent jurisprudence of Canada's superior courts – with an occasional glimpse at that of our 'neighbours-in-law' – reveals that questions remain not only as to the nature of the fiduciary duty itself but also regarding the appropriate remedy to be employed in any particular dispute. For instance, should the remedy be legal or equitable? Interestingly – yet not surprisingly – the obvious questions for litigants and their counsel regarding this conundrum differ. Litigants ask whether these differences even matter. And their legal counsel query, "Well, yes, the type of remedy matters, but how we to render a reasoned opinion as to any possible outcome are?"

The diversity of judicial responses to these queries is nicely observed in the case law of the late 20th century. Earlier in the 20th century it was deemed inappropriate to award punitive damages for a breach of fiduciary duty,[1] but later decisions reversed this position in Canadian jurisprudence.[2] Our neighbours in the Antipodes were not impressed with this switch. They've stated: "The separation of equity and common law is of greater strength in Australian jurisprudence than appears to have become the case in other nations with similar traditions, including Canada and, it appears New Zealand."[3] And again: "Canadian authorities on equity must be treated with considerable caution."[4] Ouch!!! If there are fundamental questions still being posed

* Edward Veitch, M.A.,LL.B. (Edin.), sometime Professor of Law, University of New Brunswick.

1 See e.g. *Fern Brand Waxes Ltd v Pearl*, [1972] 3 OR 829 (CA); *Worobel Estate v Worobel* (1988), 67 OR (2d) 181 (H Ct J).

2 *Huff v Price* (l990), 76 DLR (4th) 138 (BC CA); *M (K) v M (H)*, [1992] 3 SCR 6 at 82.

3 *Harris v Digital Pulse Pty Ltd*, [2003] NSWCA 10 at para 15, 56 NSWLR 298 [*Digital Pulse*].

4 *Ibid* at para 32.

on remedial choices then there also remain important queries regarding the very nature of fiduciary obligations.

The words of Professor Hector MacQueen – Head of the School of Law at the University of Edinburgh, in an opening address at a conference on point – catch this uncertainty exactly:

> Fiduciaries are of considerable importance in the modern legal system and across a very wide range. Is the subject a wilderness of single instances – trusts, partnerships, agency – or is there a unifying principle covering those areas and others hitherto unidentified as such? What are the remedies for breach of fiduciary obligations?[5]

Professor MacQueen's venue was, of course, Scotland – one of the so-called "mixed jurisdictions" enjoying a Roman or civilian law base with a common law overlay.[6] But that Roman law heritage does not appear to have offered up a unifying principle any more concrete than those the common law jurisdictions have developed by plodding along case-by-case. I suspect that our Canadian law is way too far along the road of serendipity to turn back to the original precepts of the Roman law. But it cannot be too harmful to refresh our memories of this ancient wisdom…

Let's get into the Roman law. The verb *fidere* translates "to trust" and the phrase *pactum fiduciae* describes the contract of trust. Furthermore, the words *actio bonae fidei* speak to the cause of action for breach of trust. Additionally, the term *negotiorum gestio* historically established the duty on the holder of the assets of another to treat them as her or his own. Is this comparable to the common law's officious intermeddler? Perhaps it is. Perhaps we are closer to our Roman roots than previously suspected. Presumably then in the early 20th century the most distinguished of jurist – Justice Cardozo – got it right when he wrote: "The fiduciary is held to something stricter than the morals of the market place."[7]

In Canada – as elsewhere – judges have imposed fiduciary duties on parties in everyday commercial matters by fiat. This has escalated the degrees of legal responsibility in the market place. Those specifically affected have been realtors,[8]

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[5] Address (Symposium on Fiduciary Obligations, Edinburgh Centre for Private Law, Old College, Edinburgh Law School, 16 December 2010) [unpublished]. See also Laura Macgregor, "An Agent's Fiduciary Duties: Modern Law in Historical Context" (2010) 14:1 Edinburgh L Rev 121.

[6] Vernon Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, 2nd ed (Cambridge: Cambridge University Press, 2012).

[7] *Meinhard v Salmon*, 164 NE 545 (NY Ct App 1928).

[8] *Town & Country Market Realty Ltd v Jones*, 2010 NBCA 7 [*Town & Country Market Realty*].

business consultants,[9] architects,[10] corporate directors,[11] and employees.[12] This "judicial creep" has caused some hand wringing in certain quarters – and particularly amongst financial advisers and parties to joint ventures ("JVs"). With regard to the former, their worries stem from the very essence of their operations – to recommend safe investments with low yields or riskier possibilities with higher returns, but all the while their commissions derive from whichever advice is given.[13]

The Alberta Law Review Institute has a considered opinion regarding JVs.[14] It has recommended a JV-specific statute so that participants are protected from the vagaries of judicially imposed fiduciary duties into their operations, which are unwanted. Interestingly, it is in this discrete area of commercial activity that the separation between the approaches of the courts and the expectations of the players in the market place is most discernable. That is, participants in JVs wish to have their liabilities *inter se* determined precisely by contractual provision so that they can obtain appropriate insurance coverage. JVs, therefore, have no desire for their negotiated positions to be varied by the imposition of fiduciary duties by court rulings. Nevertheless, it is only possible to speculate whether or not the parties to a JV can insulate themselves by some "ousting of the jurisdiction" clause, which expressly excludes such additional obligations at this time.[15] In essence, this is not immediately clear.

Yet we must not castigate the judiciary for such interference into commercial matters. Instead we should recognize that they have been encouraged to do so by lawyers through the everyday practice of pleading in the alternative. Since the invitation of the Ontario Court of Appeal in *Fine's Flowers* of l977, no responsible plaintiff's counsel will fail to plead in triplicate – i.e., to plead in breach of contract, in some tortuous omission, and a breach of fiduciary duty.[16] This practice raises the question of whether there is any remedial advantage to be gained through this practice. Or does this just create uncertainty in the jurisprudence?

A recent decision of the Alberta Court of Appeal illustrates one form of the lawyers' response to *Fine's Flowers*. This appellate court assessed the damages at both

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[9] *Oskar United Group Inc v Chee*, 2012 ONSC 1545 [*Oskar*].

[10] *Sokaloff v Harriman Estates Development Corp*, 96 NY 2d 409 (Ct App 2001).

[11] *Sharp Mechanical Ltd v Dowing*, 2012 SKQB 36.

[12] *Ibid*.

[13] *Warman International Ltd v Dwyer* (1995), 182 CLR 544, 128 ALR 201 (HCA) [*Dwyer*]; *Towey EJ Ltd v Bennett*, [2012] EWHC 224 (QB).

[14] Alberta Law Reform Institute, *Joint Ventures* (Edmonton: ALRI, 2012).

[15] Andrew Tuch, "Investment Banks as Fiduciaries: Implications for Conflict of Interest" (2005) 29:2 Melbourne UL Rev 478.

[16] *Fine's Flowers Ltd v General Accident Assurance Co* (1977), 17 OR (2d) 259 (CA) [*Fine's Flowers*]. *Cf Roorda v MacIntyre*, 2010 ABCA 156; *WCI Waste Conversion Inc v ADI International Inc*, 2011 PECA 14; *Smithies Holdings Inc v RCV Holdings Ltd*, 2014 BCSC 1688.

law and equity with a finding that the award was the same for both.[17] This judgment passes neatly over the differing opinions expressed within Canada's final court regarding the similarity or dissimilarity of equitable and legal damages. Their opinions survey whether equitable damages are a differing species or are they to be "informed" by common law notions.[18] These differing views of Supreme Court of Canada justices – coupled with the criticism of the law of equity by Australia's judiciary[19] – prompts the question of whether our law schools are doing a sufficient job. For instance, we have not taken the time to work out just what our foundational laws have – or were – intended to achieve in terms of the inter-relationship of law and equity.

One cannot ignore the deliciously opaque language of section 26(1) of the *Judicature Act* of New Brunswick, for instance. It states: "In every civil cause of action or matter commenced in the Court, law and equity shall be administered therein according to the rules of this section."[20] And again in section 39:

> Generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.[21]

Can these provisions be read as a fusion of law and equity or would that be a fallacious misinterpretation?[22] And furthermore, has such legislation caused a mere administrative change in law or a true jurisprudential fusion?[23] These questions remain.

Interestingly, more recent legislation has imposed quasi-fiduciary obligations on discreet parties suggesting some fusion of the two systems. Examples include New Brunswick's *Business Corporations Act* and the *Franchises Act*.[24] Contrarily, Canadian commercial counsel have been happy to take advantage of the "unfused" jurisdiction of Delaware to the advantage of their corporate Canadian clients doing

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[17] *Evans v Sports Corp*, 2013 ABCA 14. This accords with precedents such as *Johnson v Agnew*, [1980] AC 367, [1979] 1 All ER 883 (HL), and *Semelhago v Paramadevan*, [1996] 2 SCR 415. See also Charles Rickett, "Equitable Compensation: Toward a Blueprint?" (2003) 25 Sydney L Rev 31.

[18] *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534; *Cadbury Schweppes Inc v FBI Foods Ltd*, [1999] 1 SCR 142.

[19] *Supra* note 3.

[20] *Judicature Act*, RSNB 1973, c J-2, s 26(1).

[21] *Ibid*, s 39.

[22] Jill Martin, "Fusion, Fallacy and Confusion: A Comparative Study" (1994) Conveyancer & Property Law 13; Simon Chesterman, "Beyond Fusion Fallacy: The Transformation of Equity and Derrida's 'The Force of Law'" (1997) 24:3 JL & Soc'y 350. And most recently: *AIB Group (UK) plc v Mark Redler & Co Solicitors*, [2014] UKSC 58 ¶ 1, [2015] 1 All ER 747 ("140 years after the Judicature Act 1873, the stitching together of equity and the common law continues to cause problems at the seams").

[23] *Supra* note 3 and accompanying text.

[24] *Business Corporations Act*, RSNB 1973, c B-10, s 117; *Franchises Act*, SNB 2007, c F-23.5, ss 3(1) and 7(1). See also *2240802 Ontario Inc v Springdale Pizza Depot Ltd*, 2015 ONCA 236.

business in the United States.[25] The expertise of the Chancellor's Court in Wilmington, Delaware – operating without juries and without recourse to the remedy of punitive damages – has been brought to bear on what might often appear to be wholly Canadian disputes involving well-known commercial parties.[26]

After this ramble around the substantive issues it is now time to turn to the remedial practice in our fused, unfused, or confused legal system.

1. The Remedies in Equity

(A) Equitable Remedy 1: Account of Profits

The remedy for unjustly acquired profits is most often called upon to aid the recovery of gains from secret commissions by commercial agents, bribes accepted by employees, and monies made by the misuse of another's property.[27] However, this remedy most often used today as a means of recovering funds with respect to employees' improper use of their employers' trade secrets and "know how." This last use accords with long standing practice where remedies are sought to recover from a defendant passing off a plaintiff's product or infringing the trade marks, patents, or industrial designs held by the registered owner. In such cases the question before the court is always whether there is a proprietary claim based on profits that were improperly made or whether there it is simply a personal obligation to pay an amount of money equal to the profits taken?

One English jurist has offered this appreciation for the account of profits remedy: "Equity's softer side was reflected in making an allowance to the fiduciaries for their work and skill in obtaining the shares and profits."[28] Interestingly, Australian jurists posit whether petitioners of this remedy should recover all of the profits made by the breaching party or only a partial recovery of profits as would be equitable.[29] Just over fifty years ago the eminent English academic lawyer, Harry Street, posed the questions our Australian neighbours are presently pondering. Interestingly for Street – and the jurists from the Antipodes – the answers to such questions still await a

[25] Del Code tit 10 § 341 keeps equitable jurisdiction with the Court of Chancery.

[26] Lord Black of Cross Harbour's disputes are prominent examples. See *Sun Times Media Group, Inc v Black*, 954 A (2d) 380 (Del Ch 2008); *Hollinger International, Inc v Black*, 844 A (2d) 1022 (Del Ch 2008).

[27] An admirable survey of the possibilities can be found at: Denis SK Ong, "Breach of Fiduciary Duty: The Alternative Remedies" (1999) 11:2 Bond LR 336. Equally, the United Kingdom Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners*, [2014] UKSC 45, [2014] AC 250, has instructively reviewed all of the law on bribes – both ancient and modern.

[28] *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd*, [2007] EWHC 915 at para 105, [2007] 2 All ER (Comm) 993 (Ch).

[29] *Dwyer*, *supra* note 13.

definitive response.[30] In the meantime, however, judges suggest that "[a]ccordingly an account of profits was awarded in situations where the remedy for breach of contract was inadequate."[31] And again "[t]he ordinary remedy against a fiduciary who breaches such obligations and makes a profit out of his trust is an account of profits."[32]

(B) Equitable Remedy 2: Disgorgement of Profits

This remedy has been pursued on occasion where the defendant's misconduct constitutes a crime or when a breach of contract occur due to a breach of a confidence undertaking.[33] In such instances the measure of damages is not measured by any loss by the plaintiff – there may be none – but rather by the gain made by the defendant. In *Strother*, the Supreme Court of Canada created a degree of uncertainty when calculating damages under this heading.[34] The British Columbian courts have found it difficult to follow Mr. Justice Binnie's directions in *Strother* where he stated that the disgorgement of profits is somewhat compensatory, somewhat punitive, but overall prophylactic.[35] Ultimately, the judiciary in British Columbia determined that such an award has a punitive element it should not attract pre-judgment interest. On the facts of the case before them such interest would have amounted to $350,000.

With the British Columbian jurisprudence in mind a question remains regarding what prophylactic damages really are in relation to the disgorgement of profits? A review of the literature reveals that the United States district courts employ this notion to characterize damages awarded under federal legislation prohibiting discrimination of all kinds and where the victims suffer no economic loss.[36] Alternatively, the English judges reach for this head of damages so to reduce an award of equitable account as is appropriate to afford equitable relief in regard to the differing degrees of culpability of diverse defendants.[37] One hopes that an SJD thesis is underway somewhere to help us sort out the confusion.

(C) Equitable Remedy 3: Rescission

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[30] Harry Street, *Principles of the Law of Damages* (London: Sweet & Maxwell. 1962) at 239ff.

[31] *Devenish Nutrition Ltd v Sanofi-Aventis SA*, [2008] EWCA Civ 1086 at para 37, [2009] All ER 27.

[32] *Walsh v Shanahan*, [2013] EWCA Civ 411 at para 37.

[33] On criminal misconduct, see e.g. *Attorney General v Blake*, [2001] UKHL 45, [2001] 1 AC 268. On breach of contract, see e.g. *R v Attorney General for England and Wales*, [2003] UKPC 22, [2003] EMLR 24 (NZ).

[34] *Strother v 3464920 Canada Inc*, 2007 SCC 24. The conclusion of this long-running saga presumably rests with *Re Strother*, 2015 LSBC 7.

[35] *3464930 Canada Inc v Strother*, 2009 BCSC 1286, aff'd 2010 BCCA 328.

[36] See e.g. Tracy Thomas, "Understanding Prophylactic Remedies Through the Looking Glass of *Bush v. Gore*" (2002) 11 Wm & Mary Bill Rts J 343.

[37] See e.g. *Markel International Insurance Company Ltd v Surety Guarantee Consultants Ltd*, [2008] EWHC 1135 (Comm), [2009] Lloyd's Rep IR 77 [*Markel*].

Here we are talking about a remedy for inequitable conduct by which a judge can annul an agreement between the parties and therefore restore them to previous positions – to *status quo ante*. Most lawyers have dealt with cases where sellers did not disclose disguised flaws to a residential property, which left purchasers in an unfortunate situation. Where such a flaw requires a major investment for restoration then rescission is the most efficient means to reach a just outcome. As Angela Swan has cogently written:

> Rescission, being an award that is based on the seller's unjust enrichment, not on the buyer's loss, does not entail some of the consequences of a claim for damages, viz., the application of the principle of avoidable harm or the argument that the buyer had, in any event, made a bad deal and would not have recovered its costs, and this feature may make the remedy attractive in a small class of cases.[38]

But in addition, might the remedy be available only for breach of a fiduciary obligation per se or is it open also to a party who alleges a breach of a promise to act in good faith or to honour an undertaking of fair dealing?[39] The Romans described the claim based on a breach by a fiduciary as the *actio bonae fidei*, which underscores the merging of the concepts in today's law. Our case law speaks to the judicial desire to ensure that the victim of fraud is granted relief where the defendant has been unjustly enriched.[40] Accordingly, is it possible that in addition to the restoration of the parties to their pre-contract positions an award of damages can be made? It would appear that in Canada and in England that this is indeed the case and in the latter example all available remedies were piggybacked so to achieve an equitable resolution.[41]

(D) Equitable Remedy 4: The Constructive Trust

Is the concept of the constructive trust institutional or remedial? In England and Australia it is deemed the former, while in Canada is it employed as remedy. The Antipodean jurists have not been impressed: "Further, many of the Canadian cases pay insufficient, if any, regard to the fact that the imposition of fiduciary duties often gives rise to proprietary remedies that affect the distribution of assets in bankruptcies and insolvencies."[42] But despite that admonition, the constructive trust is a prime remedy utilized against wrongdoing fiduciaries in Canada. In essence, a party who has

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[38] Angela Swan, *Canadian Contract Law*, 2nd ed (Markham, ON: Lexis Nexis, 2009) at 653, citing *Redgrave v Hurd* (1881), 20 Ch D 1 (CA).

[39] On breach of a promise to act in good faith, see e.g. *Martel Building Ltd v Canada*, 2000 SCC 60. On failure to honour an undertaking of fair dealing, see e.g. *Sound Contracting Ltd v Nanaimo (City)*, 2000 BCCA 312; *Peel Condo Corp No 505 v Cam-Valley Homes Ltd*, [1999] OJ No 4068 (Sup Ct J).

[40] *Sanitary Refuse Collectors Inc v City of Ottawa*, [1972] 1 OR 296 (H Ct J).

[41] For Canada, see e.g. *Wiebe v Butchart's Motors Ltd*, [1949] 4 DLR 838 (BC CA). For England, see e.g. *Markel, supra* note 37.

[42] *Breen v Williams* (1996), 1786 CLR 71, 43 ALJR 772 (HCA) [*Breen*]. The case *Attorney-General for Hong Kong v Reid*, [1994] 1 AC 324, [1994] 1 All ER 1 (PC), remains the most aggressive example of this remedy, which strategy had not earlier impressed the judges in Australia as evidenced in the quote in the text from *Breen*.

improperly acquired property thereby becomes the trustee of the victim as the beneficial owner of the property in question.[43] The "moral quality of the defendant's act" – in the words of the Supreme Court in *Lac Minerals* – is a highly relevant factor for consideration.[44] This policy is supported by the lucid rationale of the English judgment in *Markel* with regard to the differing responsibilities of the six defendants.[45]

(E) Equitable Remedy 5: The Decree of Specific Performance

It can be argued that the decree of specific performance ought to be granted in each and every contract breach, as this remedy will give the plaintiff exactly what they bargained for. But that has never been Canadian law and the Supreme Court appreciably curtailed the reach of this remedy in 2012.[46] At least with regard to property transactions the decree must give way to the duty to mitigate the plaintiff unless she or he has "legitimate and substantial connection to the property." In the fiduciary field disputes are more often personal and not solely proprietary.

It has been traditional wisdom that courts will not award the remedy in personal service agreements due to the judicial concern for on-going supervision of everyday enforcement of duties between feuding parties.[47] Yet the most recent decisions – at least in the field of franchising – suggest a more relaxed approach. The franchisor/franchisee relationship is the closest of all commercial relationships as the former wants to ensure each and every day that the conduct of the latter does not diminish the reputation of a brand, which is usually at least national – and often international – in its recognition. In short, the franchisor's agents are forever looking over the shoulders of the franchisee and their employees. What, then, to do when the parties become estranged? The decisions here are intriguing. For instance, in *Sultani v Blenz* the decree was awarded for the continuance of the franchise for a further number of years despite very serious differences between the parties.[48] Even more strikingly, the Alberta Queen's Bench issued an order where the parties to the dispute were members of the same family and who had been involved in the bitterest conflict over franchise issues.[49] One is tempted to suggest that in certain personal service agreements the worry over on-going supervision appears to be on the wane?

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[43] *Breen*, *ibid*.

[44] *International Corona Resources Ltd v LAC Minerals Ltd*, [1989] 2 SCR 574 at 678 [*Lac Minerals*].

[45] *Supra* note 37 at paras 232-240. See also the wisdom of Swan, *supra* note 38 at 479.

[46] *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51. See also *656340 NB Inc v 059143 NB Inc*, 2014 NBCA 46 at para 14 (on "Semelhago rules" vis a vis commercial realty). But see *Youyi Group Holdings (Canada) Ltd v Brentwood Lanes Canada Ltd*, 2014 BCCA 388, which has offered some thought provoking refinements of the final Court's observations.

[47] *Acadia Marble, Tile & Terazzo Ltd v Oromocto Property Developments Ltd* (1998), 205 NBR (2d) 358 (CA).

[48] 2005 BCSC 571.

[49] *760437 Alberta Ltd v Fabutan Corporation*, 2012 ABQB 266.

(F) Equitable Remedy 6: Injunctive Orders

The relationship between parties to a fiduciary obligation is often personal. This consequently begs the question of whether an injunctive order should be issued in such a relationship. Injunctions were historically granted when a party is in breach of a promise not to do something.[50] For example, a restrictive covenant by which former employees promise not to compete with their former employer and which is amply shown in respect of corporate directors.[51] Another example includes employees with regard to employment-acquired "know how" or trade secrets.[52] Interestingly, in apposition to the franchise case law cited above under the decree of specific performance, the Ontario Superior Court declined to issue an order of enforcement within that commercial relationship.[53] The disappointed franchisee-petitioner then resorted to the social media to disparage the respondent-franchisor resulting in a libel order to cease and desist.[54] This only serves to highlight the inter-personal nature of that particular fiduciary relationship.

2. The Remedies at Law

(A) Common Law Remedy 1: Damages

It is usual to observe, when comparing the two systems of our law, that law is directive while equity is discretionary. The common law therefore treats fraud, an abuse of good faith, and a breach of a fiduciary duty as grounds for substantial damages. But even within the common law we can discern two differing ideas, namely, the punishment of the wrongdoer and the restitution to the victim of any ill-gotten gains.[55] Therefore, in *Oskar v Chee*, the defendant's conduct was identified as egregious, intentional, deceptive, and outrageous so meriting a punitive award of $25,000.[56] The reasoning of the trial judge rested on a firm foundation coming from an earlier judgment of the Supreme Court of Canada.[57] In other fiduciary-type cases the courts' rationales have been unexceptionable but always equitable. Therefore, in *Town & Country Market Realty Ltd*, the realtor's commission demand of 9% – rather than the conventional 5% – was deemed a fiduciary breach, but nevertheless the agent who committed the wrongdoing was awarded a fair reward on a *quantum meruit* basis.[58] Lastly, in *Sportsmans' RV Resort* British Columbia's Supreme Court deemed the wrongdoing to be both a breach of fiduciary duty and/or professional negligence – and then moved

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[50] See e.g. *Lumley v Wagner* (1852), 42 ER 687, [1843-1860] All ER Rep 368 (Ch).

[51] *Sharp Mechanical*, *supra* note 11.

[52] See e.g. *Towry EJ Ltd v Bennett*, [2012] EWHC 224 (QB).

[53] *CM Takacs Holdings Corp v 122164 Ontario Ltd*, 2010 ONSC 3817.

[54] *122164 Canada Limited v CM Takacs Holdings Corp*, 2012 ONSC 6338.

[55] See e.g. *Austin v Rescon Construction (1984) Ltd* (1989), 57 DLR (4th) 591 (BC CA).

[56] *Oskar*, *supra* note 9.

[57] *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24.

[58] *Supra* note 8.

on to measure the damages on the basis of "reasonable foresight."[59] This seems to be a fusion of a sort, would you not say?

CONCLUSION

All of the above take us back to Professor MacQueen's opening question – is there a unifying principle or are we wandering in the wilderness? Such a review equally asks what can we make of the jambalaya of ideas above? Is the law an ass? No, but it is an inscrutable siren. One must therefore fall back on the serene wisdom of Oliver Wendell Holmes Jr when he said that "[t]he life of the law has not been logic: it has been experience."[60] Amen!

[59] *Sportsman's RV Resort v Capri Insurance Services*, 2001 BCSC 650.

[60] *The Common Law* (Boston: Little, Brown, and Company, 1881) at 1. See also Brian Hawkins, "The Life of the Law: What Holmes Meant" (2012) 32 Whittier L Rev 1.