FIDUCIARY DUTIES IN CANADA

IDENTIFYING when fiduciary duties arise outside the settled categories of fiduciary relationships is notoriously difficult. Even so, over the last 20 years the Supreme Court of Canada has vacillated on the topic more than other jurisdictions (*e.g.*, compare *Lac Minerals Ltd.* v. *International Corona Resources Ltd.* [1989] 2 S.C.R. 574, 599 with *Hodgkinson* v. *Simms* [1994] 3 S.C.R. 377, 405), provoking public expressions of judicial exasperation: *e.g.*, *British Columbia* v. *C.A.* (1998) 166 D.L.R. (4th) 475, at [75]–[82] *per* McEachern C.J.B.C. The unanimous judgment of all nine judges of the court in *Galambos* v. *Perez* 2009 SCC 48, [2009] 3 S.C.R. 247 now provides a steadier hand on the tiller and greater consistency with English and Australian law on the topic.

Perez was the office manager at Galambos's law firm when the firm experienced financial difficulties. Although Galambos had not asked her to do so, Perez sought to resolve the problems by lending money to the firm herself. Perez failed to inform Galambos of this for several days. Upon hearing of it, Galambos instructed Perez to reimburse herself from firm funds, but she did so only partially. Subsequently, and again without informing Galambos beforehand, Perez made numerous further advances to, or payments for, the firm. The firm ultimately went into receivership and Galambos was made bankrupt, with Perez owed approximately $200,000. In an attempt to avoid her fate as an unsecured creditor, Perez obtained leave to sue Galambos and the firm for negligence, breach of contract and breach of fiduciary duty, with a view to those claims being met by professional insurance.

During the relevant period, the firm had acted for Perez in drafting wills and mortgage transactions. However, the court held that each retainer was limited to the specific services Perez had requested, and was unrelated to the advances that she made to the firm. Further, there was no evidence that the firm had fallen below the requisite standard of care. Perez's claims in negligence and contract therefore failed, along with her claim that any such breaches might also be breaches of fiduciary duty by reason of the fiduciary nature of the solicitor-client relationship. Consistently with Anglo-Australian doctrine, the Supreme Court recognised that "not all lawyers' duties towards their clients are fiduciary in nature": at [37] (similarly, see *Bristol & West Building Society* v. *Mothew* [1998] Ch. 1, 18).

So far, so straightforward. It is the resolution of Perez's further argument that is of real interest: she argued that the advances generated a fiduciary relationship outside of the solicitor-client relationship. This argument had failed at first instance but succeeded in the Court of Appeal of British Columbia. The Supreme Court restored the trial

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judge's view that no fiduciary relationship had arisen. In terms of principle, the decision might be considered uninteresting as the court held that the trial judge's factual findings did not support the Court of Appeal's view that Perez was in a vulnerable position *vis-à-vis* Galambos. But the judgment of the court, delivered by Cromwell J., went on to make important statements regarding the principles by which *ad hoc* fiduciary relationships should be identified. Two points, in particular, were emphasised. First, "it is fundamental to *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be express or implied, that the fiduciary will act in the best interests of the other party": at [66]. Secondly, Cromwell J. observed that "it is fundamental to the existence of any fiduciary obligation that the fiduciary has a discretionary power to affect the other party's legal or practical interests … The presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the existence of such a duty": at [83]–[84]. Perez's claim failed on both counts. The fact that Galambos was not even aware that Perez had chosen to make the advances meant she could not sensibly argue that he had undertaken to act in her best interests with respect to them. Nor could he be said to have had any discretionary power over her interests at the time she made the advances, given she did not even consult him.

This decision represents a welcome return for Canada to Anglo-Australian orthodoxy concerning fiduciary doctrine. The second of the two points that the court made is not often acknowledged explicitly, although it is not unknown (*e.g.*, *Hospital Products Ltd.* v. *United States Surgical Corp.* (1984) 156 C.L.R. 41, 96–97), and it is consistent with the decisions that have been reached in England and Australia: it is difficult to think of situations where fiduciary duties have been recognised without the fiduciary holding discretion of some description. But the need for a discretion or power does not itself differentiate fiduciary power from other forms of power: it is the first criterion which does that, and the court's insistence on the fiduciary having undertaken to act on behalf of the principal is consistent with both English and Australian case law (see, *e.g.*, *Mothew*, at p. 18; *Hospital Products*, at pp. 96–97).

In reaching his conclusion, Cromwell J. seemed (at [75]) to reject the idea, increasingly recognised in Anglo-Australian case law (see Conaglen, *Fiduciary Loyalty* (2010), ch.9), that fiduciary duties arise where, in all the circumstances of the case, it is legitimate for the principal to expect that they will be complied with. However, in terms of the substance of the inquiry that the court makes, the difference between the two approaches is more apparent than real (notwithstanding protestations to the contrary: *cf.* Flannigan (2010) 38 Adv. Q. 431, 438).

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Cromwell J. himself repeatedly emphasised that "the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship" (at [79]; see also [66], [71], [75] and [77]). The considerations that inform the implication of terms in this context are very similar to those that are relevant when deciding whether there was a reasonable or legitimate expectation that fiduciary duties of loyalty would be complied with. But a lack of substantive difference between the two approaches does not mean that Cromwell J.'s undertaking criterion is of no use. To the contrary, it usefully focuses attention on what the *fiduciary* has done to justify the expectation that he will comply with duties of loyalty, thereby giving some structure to the evidence that ought to be considered when determining whether the expectation of loyalty is appropriate in all the circumstances of the case.

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PRIVATE INTERNATIONAL LAW – JURISDICTION

THE landscape of Article 5(1) of the Brussels I Regulation concerning the allocation of jurisdiction within the EU has fundamentally changed. In a matter relating to a contract the courts of "the place of performance of the obligation in question" can take jurisdiction. The original wording of Article 5 of the Brussels Convention led to a number of cases which sought to identify the obligation in question and its place of performance. The English courts were particularly adept in locating the obligation in question in England in order to obtain jurisdiction. A more strict rule was subsequently inserted by Article 5(1)(b). The first indent gives the courts of the place of delivery in a sale of goods contract jurisdiction. In a contract for the provision of services the second indent similarly gives jurisdiction to the courts of the place where the services were provided. In *Peter Rehder* v. *Air Baltic Corporation* (Case C-204/08 [2009] E.C.R. I-6073) the Court of Justice of the EU emphasized that both indents of Article 5(1)(b) are to be interpreted similarly. Whatever the issue, from non-delivery to non-payment via breach of warranty and whether the claim is in damages or for a negative declaration, all matters are referred to the courts of the place of delivery or provision of services. In *Color Drack GmbH* v. *Lexx International Vertriebs GmbH* (Case C-386/05 [2007] E.C.R. I-3699) the Court of Justice held that this place is an autonomous linking factor providing a close link to the contract. It is referable neither to national law nor conflict of laws rules. One justification is that those courts are particularly well placed to determine any claim arising out of the contract. Alternatively, the rule is certain and predictable.

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