Date: 19980828 Docket: C.A. 143446
143752

NOVA SCOTIA COURT OF APPEAL
Cite as: Gaudet v. Barrett, 1998 NSCA 109

Pugsley, Jones, Cromwell, JJ.A.

BETWEEN:

GILBERT L. GAUDET	)	Harry E. Wrathall, Q.C.,
	)	and Michelle C. Awad
	)	for the Appellant
	)	Gilbert L. Gaudet
Appellant	)	
(and Cross Respondent)	)	
	)	
- and -	)	
	)	William M. Leahey
	)	for the Respondents
WAYNE BARRETT and MARLENE BARRETT	)	Wayne and Marlene Barrett
	)	
Respondents	)	
(and Cross Appellants)	)	
	)	Daniel W. Ingersoll
- and -	)	for the Respondent
	)	Canadian Imperial
CANADIAN IMPERIAL BANK	)	Bank of Commerce
OF COMMERCE	)	
	)	
Respondent	)	Appeal Heard:
	)	April 8, 1998
	)	
	)	Judgment Delivered:
	)	August 28, 1998
	)	
	)	

THE COURT: Appeal of Gilbert L. Gaudet allowed in part, cross-appeal of Wayne Barrett and Marlene Barrett allowed in part, appeal of Wayne Barrett and Marlene Barrett against Canadian Imperial Bank of Commerce allowed per reasons for judgment of Pugsley, J.A. and Cromwell, J.A.; Jones, J.A. concurring in both.

PUGSLEY, J.A.:

Introduction

This is a case of material nondisclosure in which the respondents allege their solicitor breached his fiduciary duty to them during a transaction involving the sale of their home. They further allege their banker misrepresented the status of the financing arranged by the purchaser.

It involves consideration of three separate appeals from the judgment of Justice Robert Anderson of the Supreme Court.

The first appeal is brought on behalf of the solicitor, Gilbert Gaudet, who alleges that Justice Anderson erred:

- in concluding he breached a fiduciary duty owed to the respondents, Wayne and Marlene Barrett, in connection with the sale of their home;
- in finding that any such breach caused damage to the Barretts;
- in finding that he was jointly and severally liable to the Barretts for the damages awarded against the purchasers, David and Brenda Reynolds, for their failure to fulfill their contract to purchase the Barretts' home;
- in finding that he was jointly and severally liable for the breach of the fiduciary duty of the defendant Brunswick Capitol Incorporated (Brunswick), the real estate agent retained to sell the home;
- for awarding non-pecuniary damages in the amount of $10,000 against Mr. Gaudet, in addition to general damages awarded as a result of Brunswick's breach of fiduciary duty;
- in awarding costs to the Barretts on a solicitor and client basis.

The second appeal is filed by way of Notice of Contention on behalf of the Barretts, (a proceeding more properly brought by way of Cross-Appeal, a point conceded, and accepted, by all counsel without objection) alleging that Justice Anderson erred :

- in not holding Mr. Gaudet "fully liable" for all interest accruing due on a line of credit owed by the Barretts to the Canadian Imperial Bank of Commerce (CIBC);
- in not finding that Mr. Gaudet was "fully liable" on a joint and several basis for all damages assessed against the co-defendants.
- in limiting damages for mental anguish to the Barretts to the sum of $10,000.

The third appeal is also brought on behalf of the Barretts respecting the dismissal of their action against CIBC. The Barretts allege Justice Anderson erred, and I paraphrase:

- in concluding CIBC owed no fiduciary duty to them;
- in finding that CIBC employees (particularly one Lohnes) had not made material misrepresentation to the Barretts by words, actions, or silence, which led the Barretts to conclude that CIBC had approved financing unconditionally for the purchase of the Barretts' home by the Reynolds;
- in failing to determine CIBC was in a conflict position by representing the interests of the Barretts, and the Reynolds, whose interests were "fundamentally opposed to each other";
- in failing to conclude that Mr. Gaudet's knowledge, as solicitor for the Barretts, as well as solicitor for the Reynolds, was deemed to constitute knowledge of CIBC, as Mr. Gaudet also acted for CIBC throughout.

The eight-day trial commenced in March, 1994, and was finally concluded in September of 1996 after several delays, arising out of appeals to this Court, respecting matters not relevant to these appeals.

Prior to the conclusion of the trial, Brunswick was placed in receivership.

This opinion deals with the first two appeals, while the opinion of Justice Cromwell deals with the issue raised in the third appeal.

Background

Although the trial judge referred at some length in his written decision to the evidence, he made no findings respecting the credibility of the witnesses.

The Barretts were married in 1979. There are no children of the marriage. Mr. Barrett was employed as an optician. Mrs. Barrett, an R.N., had been employed as a staff nurse at the Grace Maternity Hospital in Halifax. At the time of trial, Mr. Barrett was 44 and Mrs. Barrett was 40.

On February 23, 1990, the Barretts entered into an agreement to sell their home located on Lot A at Hatchett Lake, Halifax County, to the Reynolds for $255,000. Lot B, an adjoining lot, owned also by the Barretts was not included. The agreement was re-executed on March 6, 1990, and that date is accepted by all parties as the effective date.

The Reynolds delivered cheques dated February 23 and April 2, 1990, each in the amount of $2,500, to Brunswick in purported response to the deposit requirement of $5,000. The February 23 cheque was cashed immediately and the money deposited in Brunswick's account. The second cheque was mislaid by Brunswick. It was not deposited until late June, 1990, at which time it was returned "NSF".

The agreement of purchase and sale, contained a "deemed financing" clause, which provided:

> (1)(b) This offer conditional upon purchaser arranging a first mortgage of approximately $160,000 at a recognized lending institution at current interest rate on or before 14 banking days from acceptance of this offer. It shall be deemed that the financing has been arranged unless the vendor or vendor's agent is notified to the contrary, at which time this offer will become null & void and the purchaser's deposit refunded in full without interest or bonus.
>
> . . .

The agreement provided for a closing date of July 2, which was subsequently changed by agreement of the parties, to June 29, 1990.

On February 21, 1990, in anticipation of the obligations to be assumed by them under the agreement, the Reynolds applied to a personal loans officer (Barbara Lipsett) at the Bayers Road branch of CIBC for financing of $190,000. Ms. Lipsett was advised that the proposed agreement of purchase and sale was not made conditional on the sale of the Reynolds' existing home.

She advised the Reynolds that CIBC would not approve financing unless the Reynolds' property was sold, as the equity for the purchase of Lot A would "have to come from the sale of their home".

On March 6, 1990, the Barretts retained Mr. Gaudet and delivered to him the agreement of purchase and sale re-executed that day.

Mr. Gaudet testified that he noted “with some surprise" the name David Reynolds as one of the purchasers because he was acting for Mr. Reynolds at that time on another matter.

When Mr. Reynolds subsequently confirmed that he wished Mr. Gaudet to act on his behalf in the property transaction Mr. Gaudet testified that he spoke, individually, to the Barretts as well as to the Reynolds:

> I would have indicated to him that I could only represent both parties provided both parties - that each side knew I was representing the other and that I was doing it with their full consent, and, also, only for so long as there wasn't a conflict develop between the two of them. If there was any matters come up that were - that they were at odds with each other in relationship to the transaction, then I would have to withdraw and both parties would have to get their separate lawyers. And I recall indicating the most obvious example would be if Reynolds was unable to sell his home. . .. Well, I think that's just the - that's the most common area of difficulty, or it's the most prominent problem that could develop. I mean there could be any number of problems that could develop between the parties, but I think in a case where a person is buying a property and they are also selling their own home, if there is a problem in the sale it's going to create problems in the other transaction.

On March 9, Ms. Lipsett called the Reynolds to advise them their financing with CIBC had been approved. The approval was subject to the condition that the Reynolds would be able to sell their property, and also convert a car lease to a bank loan.

On March 16, the Reynolds signed the acceptance papers to implement the CIBC financing.

Within the next few days, Mr. Gaudet received mortgage instructions from CIBC respecting the Reynolds' financing. The instructions contained the following conditions of financing:

> Our approval is conditional upon car lease for $12,000 being converted to bank plan loan with the maximum payments of $425/month.
>
> Our approval is conditional on the sale of the applicants' existing property.

On March 20, Gaudet received a real estate commission statement from Brunswick. It disclosed that Reynolds had paid one-half of the deposit required, by delivery of a post-dated cheque for $2,500.

Mr. Gaudet testified that he was now acting for the Barretts, the Reynolds, and CIBC. He further confirmed that once he received the CIBC documents he was aware that the Reynolds' financing was subject to the two conditions noted.

He did not advise the Barretts of the conditions. He offered these explanations:

> Well, initially it didn't seem to be relevant, or didn't seem to be of significance at that time. The Reynolds' mortgage financing was conditional on many things. It was conditional on the sale of his home and it was conditional on the taking over of the lease of his motor vehicle by CIBC and it was conditional upon various factors. You know, there were four or five conditions in there, standard conditions that are in every mortgage commitment letter. A survey of the property, clear title, etc. etc. etc. It didn't, sort of, occur to me that there was anything there that should be disclosed to Mr. Barrett until, I suppose, we get into the month of June, when all of a sudden it appeared that there could be some problems. And at that stage I was under the impression at the time that this was a matter that was confidential to Reynolds and should not be disclosed.

Mr. Gaudet phoned Mr. Reynolds on or about the 26th of March:

> ...bringing his attention, or reminding him, that he had a 14-day clause in his agreement and that he had better make up his mind whether to let the 14 days go by or do something about it. . . He didn't seem to be too concerned, for the main reason that, again, the closing was not until July, and he felt that he had plenty of time to sell his property.

The Barretts were planning to build a new residence for their own occupation on Lot B and wanted to confirm that Reynolds' financing was in place. On March 20 Mr. Barrett met with Lee Lohnes, a lending officer for CIBC at the Quinpool Road branch. Mr. Barrett requested bridge financing for the construction of his new house. During the course of the meeting, he asked Mr. Lohnes to confirm that the Reynolds' financing had been arranged with CIBC.

Lohnes then contacted Ms. Lipsett at CIBC's branch at Bayers Road and was told that the Reynolds' financing had been approved, and may also have been informed of the condition that the Reynolds had to sell their own property. Lohnes asked for a copy of the mortgage commitment and received at least the first page of the document. He could not recall whether the conditions of the CIBC financing were attached.

On March 29, Lohnes met with the Barretts and advised them that the Reynolds' financing had been arranged. The Barretts then executed CIBC documents providing for a line of credit of $150,000 to provide bridge financing for the construction of their new home on Lot B.

Gaudet testified that on at least two occasions in May, 1990, he had telephone discussions with Barrett wherein he advised that the Reynolds' property had not been sold. He testified that he did not recall Barrett expressing any concerns.

While he considered the details of the Reynolds' financing arrangement with CIBC were confidential and should not be passed on to Mr. Barrett, Gaudet concluded that reference to the failure of Reynolds to sell his own property was a "roundabout effort" to fulfil his obligation to the Barretts to disclose.

On June 11 Gaudet noted in his DayTimer that he had a telephone conversation with Reynolds who advised:

> No sale yet. May pull out of deal. Discussed car lease. Advised must wait until September.

Although Gaudet spoke with Barrett on June 12, he did not advise him that Reynolds was considering "pulling out of the deal".

On June 18 Reynolds telephoned to advise that he had no sale or offers. He was advised by Gaudet that he could be sued by the Barretts.

Gaudet made a note in his own file on June 18 that:

> Can't represent both sides now.

Later that same evening he phoned Barrett and testified:

> So I advised Mr. Barrett that I could see some problems, that Reynolds' property had not sold and it was getting close to the deadline, and that I felt that he should get his own lawyer. And, as I recall, he couldn't understand why, which I couldn't understand why he couldn't understand why. In my own mind, I had mentioned to him several times, since some time in May that - I had brought it up specifically that the topic of - the fact that Reynolds had not sold his property, and I was quite at a loss why he wasn't catching the hint, as it were. And so in this conversation again I started out by telling him that, "Reynolds' property is not sold" and he might not be able to complete. And he couldn't understand that. And so I was a little more specific and I said "Well, his bank may not advance his mortgage funds because his property is not sold". And that he'll have to get his own lawyer, both parties would have to go and get - I would have to withdraw and each party would have to get their own independent lawyer.

Barrett responded that he had been advised by CIBC Quinpool Road that Reynolds' financing was "okay".

Gaudet continued:

> So at that time, for the first time perhaps, I realized why Mr. Barrett had not responded the two or three times previously that I had sort of brought up the subject, or mentioned the subject, that "Reynolds hasn't sold his place yet,".

Even at this late stage, Gaudet did not advise Barrett that Reynolds' financing had been conditional upon the sale of his own house as this, in Gaudet's mind, would have constituted a breach of confidential information he had received as Reynolds' solicitor.

In April, 1990, Mr. Barrett had left his job as an optician and started working full time on the construction of the new home on Lot B.

As of June 29, all walls were up, some inside partitions had been completed, roof trusses were in place, and some of the electrical work had been completed. The Barretts had drawn approximately $64,000 on their line of credit with CIBC. They also owed approximately $30,000 on a mortgage to Central Trust on Lot A.

On June 29, the Barretts, through a new solicitor, tendered closing documents. The Reynolds were unable to complete, as no buyer for their property had been located and they were unable to fulfill the conditions placed upon the financing by CIBC. The sale of Lot A fell through.

Barrett, as a consequence, went to Lee Lohnes, who agreed that it was necessary for the new house to be "roof tight" as soon as possible. Mr. Barrett then divided his time between constructing the home on Lot B and carrying out landscaping improvements on Lot A in an attempt to render it more attractive for sale.

The work on Lot B to make it "roof tight" was completed in December of 1990.

In January, 1991, the Barretts advised CIBC that they would commence action against CIBC for misrepresentation.

CIBC froze the Barretts' line of credit in February of 1991. The Barretts were not able to resume construction of the residence on Lot B until after the sale of Lot A was completed in April of 1992 for the sum of $200,000. They lived in a mobile home

located on Lot B from April of 1992 until the new residence was completed in August of 1992.

At trial, Mr. and Mrs. Barrett testified they each had suffered depression from the financial pressure arising from the failure of the Reynolds to complete the June, 1990 purchase and the subsequent delays incurred in selling Lot A and completing the construction of the house on Lot B.

Appeal of Gilbert Gaudet

First Issue - Did Mr. Gaudet Breach a Fiduciary Duty Owed to the Barretts?

On this issue, the trial judge determined:

> There is no need to repeat the facts already related. It is sufficient to say that Gaudet was representing too many of the parties involved in this action. . . .
> The significant facts are that Gaudet was acting for both the Reynolds and Barretts at the relevant time. He received a copy of the agreement and commission statement for the realtor (only one-half of the deposit paid). He was aware that the Reynolds' financial arrangement with CIBC was conditional. It was necessary to sell the Central Avenue property and convert the auto lease to a car loan. This information was not conveyed to the Barretts.
> I agree with the submission of the plaintiffs, that Gaudet was in breach of a fiduciary duty to the Barretts.

While counsel for Gaudet acknowledge that the relationship of solicitor and client is a fiduciary relationship, they stress that not every breach of duty in the context of that relationship constitutes a breach of a fiduciary duty, but only those that go to the heart of the fiduciary relationship and those that are characterized by a "stench of dishonesty". Neither prerequisite, counsel submits, was met here.

Counsel refers us to the following comments of Justice Southin in **Girardet v. Crease & Co**. (1987), 11 B.C.L.R. (2d) 361 (S.C.) at 362:

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

There is no question in my mind that Gaudet's knowledge of the CIBC conditions respecting the Reynolds' financing, was material and critical knowledge. Gaudet's failure to communicate this information went to the:

> ...heart of the duty of loyalty that lies at the core of the fiduciary principle.
>
> (LaForest, J. speaking on behalf of the majority in **Hodgkinson v. Simms** (1995), 117 D.L.R. (4th) 161, at 208 (S.C.C.).

While there is no finding by the trial judge that Mr. Gaudet made a personal profit at the expense of Mr. Barrett, or that improper motives, such as the deliberate favouring of the Reynolds' interests in order to obtain a pecuniary advantage prompted Gaudet's actions, I am satisfied that these are not essential ingredients to be established, in this case, before a finding of breach of fiduciary duty can be upheld.

As a result of being in a fiduciary relationship with his clients, a solicitor must take steps to avoid situations where a conflict of interest may develop (**Boardman et al v. Phipps**, [1966] 3 All E.R. 721 at 756).

Justice Wilson, as she then was, on behalf of the Ontario Court of Appeal, put it succinctly, in **Davey v. Woolley, Hames, Dale & Dingwall** (1982), 133 D.L.R. (3d) 647 in these words, at p. 650:

> ... This is not confined to situations where his client's interest and his own are in conflict although it of course covers that situation. It also precludes him from acting for two clients adverse in interest unless, having been fully informed of the conflict and understanding its implications, they have agreed in advance to his doing so. The underlying premise in both these situations is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith. (emphasis added)

Here Mr. Gaudet failed to fully inform the Barretts of the conflict with which he would be faced if he acted as well for the Reynolds. In addition, Mr. Gaudet completely failed to explain to the Barretts the implications of that conflict. It may be that Mr. Gaudet did not fully appreciate those implications but that does not assist him in defending an allegation of breach of fiduciary duty. It was Mr. Gaudet's choice to act for both sides in a transaction that had significant potential for problems.

The words of Laskin, C.J. in **McCauley v. McVey**, [1980] 1 S.C.R. 165 at 168 are apposite:

> ... However simple and uncomplicated a real estate transaction may appear, it is the prudent course, if other solicitors are available in the area, for a solicitor to act in one interest only and thus avoid the embarrassment of possible later withdrawal, to the detriment of both parties for whom he had agreed to act.

When Gaudet decided to act for both sides in a transaction that carried high risk of conflict, he was walking the "tight rope of fiduciary obligations" (*Finn, Fiduciary Obligations*, The Law Book Company Limited (1977) p. 80).

Mr. Gaudet should have directed the Barretts to seek alternate counsel when he first received instructions from CIBC respecting the conditions attached to the Reynolds' financing. He was too late in appreciating his conflict of interest position. He continued to represent the Barretts when he should have directed them elsewhere. In so doing, he breached his fiduciary duty to them.

I am disturbed by Mr. Gaudet's failure to act in accordance with the undertaking he gave both the Barretts and the Reynolds.

He testified that he told each of them on March 7, 1996, that:

> If there was any matters come up . . . that they were at odds with each other in relationship to the transaction that I would have to withdraw and both parties would have to get their separate lawyers.

The "odds" arose when Gaudet received written instructions from CIBC shortly after March 16. These instructions contained two conditions which went to the heart of the Bank's commitment to Reynolds. Gaudet knew that Reynolds had not sold his

house at the time and had no offers on the horizon. Gaudet also knew, because of his earlier representation of Reynolds with the lessors of his vehicle, that there was difficulty in involving the negotiations respecting the conversion of the car lease to a bank loan.

Professor Finn notes at p. 254:

> ... A solicitor, for example, while advising both the seller and purchaser of shares - the parties consenting to his so acting - might discover that the purchaser's existing financial commitments make it unlikely that he will be able to meet his obligations in the purchase. His duty to the seller requires him to disclose this. His duty to the purchaser prohibits the disclosure. This is obviously the very predicament which it is the ultimate object of the rule to prevent occurring - a conflict arising because the proper discharge of one duty assumed, necessitates breach of another. (emphasis added)

The problem that arose is exactly the problem that Gaudet contemplated and discussed with both parties. When the problem arose, he did not withdraw as he promised he would. The information was vital to the Barretts. By failing to disclose the information to them because he considered the information "confidential to Reynolds", Gaudet was favouring Reynolds.

In **Ridge View Dev. & Hldg. Co. v. Simper**, [1989] 5 W.W.R.133, Assoc. Chief Justice Miller of the Court of Queen's Bench of Alberta, suggested three prime areas that a solicitor is obligated to cover with his clients when he agrees to act for both sides in a transaction of this kind. Those comments, as applied to this situation, required the following action:

1. Gaudet had a duty to go through the proposed contract with both parties explaining to each of them their rights and obligations and the general course the matter might be expected to take. Gaudet failed to carry out this injunction.
2. Gaudet had a duty to explain to both parties that if a conflict arose he would have to immediately retire from acting for either side and would have to advise each to retain their own independent counsel. While Gaudet in part gave this advice, he failed to stress that he would be obliged to retire at the first indication of a potential conflict.
3. Gaudet had a duty to inform both sides that the usual solicitor/client privilege would not pertain to this transaction and that he had an obligation to pass on any relevant information he learned about either side's position to the other side as soon as practicable. This advice was, of course, never given and the mandate was never followed by Gaudet.

While the Handbook of the N.S. Barristers' Society was adopted on February 23, 1990, shortly before Gaudet's meeting of March 6, 1990, the Handbook was not declared to apply to the conduct of the Society's members until August 1, 1990. It is of interest, however, to note that Mr. Gaudet's conduct is not consistent with the guiding principles set out in Chapter 6 respecting a lawyer acting for two clients who may have conflicting interest. The Handbook suggests that the clients "informed consent" should be preferably given in writing and further provides that, unless the clients agree, preferably in writing:

> No information received from one client respecting the matter may be treated as confidential with respect to any of the others.

Rather than directly advise the Barretts of the problems arising from CIBC's conditional financing of Reynolds, apparently because of concerns that he would breach an obligation to the Reynolds to disclose confidential information, Mr. Gaudet went half way. He made suggestions, or "hints", to Mr. Barrett during several telephone conversations in May that Reynolds had not, or might not, have made arrangements to sell his own house. Barrett failed to realize the significance of these hints in view of assurances he felt he had received from the Bank.

This tactic was not a professional approach to the problem.

I would dismiss the first ground of appeal.

It is convenient to consider the next three issues together.

Second Issue - **Did the trial judge err when he found Gaudet jointly and severally liable to the Barretts for damages awarded against the Reynolds for breach of contract?**

Third Issue - **Did the trial judge err when he found Gaudet jointly and severally liable to the Barretts for damages awarded against Brunswick for breach of fiduciary duty?**

Fourth Issue - **Did the trial judge err when he awarded non-pecuniary damages in the amount of $10,000 against Mr. Gaudet in addition to general damages already awarded?**

Background

The trial judge awarded damages against the Reynolds arising from their breach of contract in failing to complete the purchase of Lot A on June 30 1990, in the amount of $100,551.065, made up as follows:

$47,112.20	- loss on resale April 1992, less commission
$ 5,019.27	- municipal taxes paid after expected closing date
$13,100.19	- landscaping for purposes of resale
$ 500.00	- packing (pre-judgment interest not applicable)
(2,500.00)	- less credit for deposit paid by the Reynolds
$63,231.66	- subtotal
$36,820.40	- prejudgment interest
$ 100,052.06	Total

The trial judge concluded that Brunswick had been guilty of a breach of fiduciary duty to the Barretts. The breach of fiduciary duty consisted of the passing of false and misleading information to the Barretts concerning the financial situation of the Reynolds.

Damages assessed against Brunswick aggregated approximately $155,000, made up of:

$ 200.00	Renewal of building permit for Lot B
$ 3,072.00	Builder's Risk Insurance for Lot B
$ 631.20	Power bill for Lot B

$ 3,852.98	GST on building materials and expenses incurred after January, 1991 for Lot B
$15,583.05	Lost sick days (Mrs. Barrett)
$10,000.00	General damages for mental anguish, physical injuries and clinical depression suffered by both Mr. and Mrs. Barrett, as well as damages to compensate Mr. Barrett for employment losses during 1992 due to stress and clinical depression
$120,763.38	Bank interest charges on personal line of credit.
$154,102.61	Approximate Total

Justice Anderson, however, reduced the award against Brunswick by 50% because:

> The plaintiffs' obsession with owning a mortgage-free home contributed to their eventual ill health. The desire to attain their goal resulted in hasty decision making which led to more severe economic consequences and a higher degree of anxiety.

The trial judge also determined:

> The defendant Gaudet is jointly and severally liable for all damages already set forth above plus $10,000 for non-pecuniary damages.

The reference to "damages already set forth above", refers to the damages assessed against Brunswick and the Reynolds.

Opinion

Counsel for Gaudet submit that even if Gaudet were to be found responsible for breach of fiduciary duty, his liability for damages is not unlimited.

There are, it is argued, limiting principles applicable to damages assessed even in fiduciary cases. Counsel refers us to the following comments of Justice McLachlin, in a dissenting judgment, expressed in **Canson Enterprises Ltd. v. Boughton & Company,** [1991] 3 S.C.R. 534 at 551:

> While foreseeability of loss does not enter into the calculation for breach of fiduciary duty, liability is not unlimited. Just as restitution *in specie* is limited to the property under the trustee's control, so equitable compensation must be limited to loss flowing from the trustee's acts in relation to the interest he undertook to protect. Thus Davidson states "it is imperative to ascertain the loss resulting from breach of the relevant equitable duty."

This paragraph should, however, be read in the light of the more recent comments of Justice LaForest, on behalf of the majority, in **Hodgkinson v. Simms, supra.** Justice LaForest made it clear that the proper approach to damages, or equitable compensation for breach of a fiduciary duty, is still restitutionary. He said at p. 201 (D.L.R.):

> Contrary to the respondent's submission, this result is not affected by the *ratio* of this court's decision in *Canson Enterprises, supra*. *Canson* held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. (emphasis added)

Justice LaForest reaffirmed the longstanding equitable principle that:

> ... where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach. (p.200)

As breaches of fiduciary duty may take a variety of forms, a Court should feel free to fashion a variety of remedial considerations in order to find one that is appropriate (at 201).

Counsel for Gaudet submit that their client's actions had no effect on the losses which inevitably arose from the Reynolds' breach of contract on June 30, 1990, a contract which was concluded prior to March 6, when Gaudet was first retained.

If, however, Gaudet had advised the Barretts shortly after March 20, as his fiduciary duty required, that the Reynolds' financing was subject to two conditions, it is a fair inference that the Barretts would have taken immediate steps to withdraw from the agreement of purchase and sale. At the very least, Gaudet was obliged to forthwith advise the Barretts that a conflict had arisen, that he was obliged to withdraw as counsel as he had promised, and that the Barretts should seek new counsel. New counsel would presumably have advised the Barretts that they were no longer bound by the agreement of purchase and sale in view of the Reynolds' failure to comply with the deposit requirement of $5,000.

Mr. Gaudet deprived the Barretts of the opportunity of selling their house to another party between the end of March and June 29, 1990, when he failed to advise them of the conditions imposed by CIBC.

I conclude that the trial judge committed no error when he determined that Mr. Gaudet should be held jointly and severally liable for the damages awarded against the Reynolds for beach of contract, as well as the damages awarded against Brunswick, for breach of fiduciary duty.

Counsel for Mr. Gaudet submits that it is inconsistent to conclude that Mr. Gaudet is jointly liable for the damages assessed against the Reynolds, on the basis the sale closed in accordance with the agreement, as well as jointly liable for the damages assessed against Brunswick on the basis that the Barretts would have opted out of the agreement if Brunswick had not breached its fiduciary duty.

The trial judge failed, however, in my opinion to properly assess all the damages arising from Brunswick's breach of fiduciary duty. Brunswick, as noted, was placed in receivership, before the trial was concluded. The Barretts, perhaps understandably, did not appeal the assessment of damages made against Brunswick.

I am satisfied, however, there is no duplication of the damages awarded against Brunswick and Gaudet, except for the sum of $10,000 non-pecuniary damages on which I subsequently comment. Brunswick's breach of fiduciary duty deprived the Barretts of the opportunity to sell their property to someone else. The evidence does not establish that the Barretts could have found an equally beneficial offer if they had been properly advised, and repudiated the Reynolds' contract in time.

I reach this conclusion for the following reasons:

- the proper approach for assessment for Mr. Gaudet's breach of fiduciary duty is restitutionary;
- Mr. Gaudet has not satisfied the onus that the Barretts would have suffered the same loss regardless of Mr. Gaudet's breach of fiduciary duty.

Finally, there is nothing in the evidence to persuade me that it is necessary to give consideration to the principles of remoteness, causation, and intervening act, in order to reach a just and fair result between the parties.

I do not find it necessary to give effect to these principles because of the breach of fiduciary duty committed by Mr. Gaudet. I concur, however, with Justice Cromwell's opinion respecting causation in connection with the issues between the Barretts and CIBC.

Counsel for Gaudet submits the trial judge erred when he awarded the sum of $10,000 for non-pecuniary damages to the Barretts in view of a similar award made in favour of the Barretts against Brunswick. I agree with this submission and would allow Mr. Gaudet's appeal on the fourth issue. The award of $10,000 to the Barretts constitutes double compensation.

I would, however, dismiss the balance of Gaudet's appeal respecting the second and third issues.

Issue No. 5 - Solicitor and Client Costs

The trial judge stated:

> Because of the exceptional nature of this case, the withholding of material facts by a solicitor from a client resulting in a breach of fiduciary duty, costs should be on a solicitor/client basis with respect to Gaudet only. The other costs on a party-and-party basis

Solicitor and client costs are, however, only awarded, in this jurisdiction, in rare and exceptional circumstances (**Brown v. Metropolitan Authority et al** (1996), 150 N.S.R. (2d) 43 (C.A.). This Court has refused to award costs on a solicitor and client basis, even though the conduct of the party in question has been found to be reprehensible.

Counsel for the Barretts refers us to Justice McLachlin's comments in **Norberg v. Wynrib,** [1992] 2 S.C.R. 226 at 301:

> In my opinion, this is an appropriate case in which to order costs on a solicitor and client basis. Orders as to costs are discretionary matters. In cases of fiduciary duty that discretion is often exercised to provide the successful plaintiff with costs on the more generous solicitor and client tariff: see *Ellis, Fiduciary duties in Canada*, *supra* at p. 20-24.

Justice McLachlin’s opinion was, however, a dissenting opinion. The majority ordered costs on a party-and-party basis only.

Of interest are the comments of Justice Sopinka who, concurring with the majority, said at p.317:

> I would allow the appeal with costs throughout. I would not impose costs on a scale higher than party and party which should generally be reserved for cases in which misconduct has occurred in the conduct of or related to the litigation. (emphasis added)

There is no evidence, in this case, of any misconduct of the kind considered by Justice Sopinka.

I conclude that the trial judge erred when he ordered solicitor and client costs. I would allow the appeal on this issue and substitute an award of party-and-party costs. In view of the protracted nature of this litigation, and in order to spare the parties further delay, I would assess party-and-party costs at the trial level in favour of the Barretts in the amount of $25,000 plus disbursements.

Second Appeal (Cross Appeal by Barretts)

Before considering the two issues raised in the Cross-Appeal, it is of assistance to set out the trial judge's comments on these issues:

> The situation took its toll on the health of the plaintiffs. During the summer of 1990, Mr. Barrett had to seek treatment for an ulcer that he claims was aggravated by the stress associated with the failed transaction and its consequences. By April of 1992, he was suffering from abdominal pain, lack of sleep and other medical effects of stress. A psychiatrist diagnosed him as suffering from clinical depression. Mrs. Barrett also claims ill health as a result of stress caused by this situation.. She began experiencing symptoms such as increasing irritability, anxiety and insomnia. She has been diagnosed as suffering from a major affective disorder (depression) by Dr.Mary-Ann Hudec, a consulting psychiatrist.

> The plan for a mortgage free home became more than a goal for the Barretts at the time the deal fell through. They felt they had been dealt with unfairly by the Reynolds, which they had, the bank, their former lawyer and the real estate company. The once commendable goal of a mortgage free home became an obsession which clouded their judgment in making decisions, and consequently their health suffered . . .
>
> The Barretts have also claimed amounts relating to mental anxiety and distress. Mrs. Barrett desires compensation for lost sick days from work due to clinical depression. Mr. Barrett seeks recovery from employment losses during 1992, which he claims are due to stress and clinical depression. Both plaintiffs claim general damages for mental anguish, physical injuries and clinical depression. Although the failure of the sale of Lot A may have aggravated the condition of the plaintiffs, their suffering was due in a large part to the change of their goal for a mortgage free home into an obsession, which affected their judgment . . .
>
> The plaintiffs' obsession with owning a mortgage free home contributed to their eventual ill health. The desire to attain their goal resulted in hasty decision making, which led to more severe economic consequences and a higher degree of anxiety.

First Issue - The trial judge erred in not holding Mr. Gaudet "fully liable" for all interest accruing on the line of credit owed by the Barretts to CIBC.

This issue is rendered moot as a consequence of the conclusions reached by Justice Cromwell, with which I agree, that the Bank should only be entitled to recover interest on the funds advanced under the line of credit up to June 29, 1990.

Second Issue - The trial judge erred when he determined that Gaudet was responsible only for one-half of the award made for mental anguish, anxiety, upset, depression and sick days.

The trial judge concluded that Brunswick's employee passed along "false and misleading information to the Barretts" and that Brunswick was therefore in breach of its fiduciary obligations to the Barretts.

When, however, he considered the assessment of the damages arising from that breach, the trial judge approached the issue as if he was assessing damages for breach of contract, or breach of a duty of care arising out of an agency relationship. He took into account issues of foreseeability and causation, and reduced the assessment of damages by 50%. In my opinion, these issues were not relevant in view of the nature of the breach of fiduciary duty found by the trial judge.

The trial judge determined that Mrs. Barrett's claim for lost sick days arising from clinical depression (brought on by the financial pressure arising from the Reynolds' failure to close on June 29, 1990) aggregated $15,583.05. General damages for mental anguish, physical injuries and clinical depression suffered by both Mr. and Mrs. Barrett, as well as lost wages sustained by Mr. Barrett, were assessed by the trial judge at $10,000.

The combined claims, therefore, aggregated $25,583.05.

The trial judge then reduced the claims by 50%. He found that:

> The desire to obtain a mortgage-free home eventually became an obsession which was a contributing factor in the decline of the plaintiffs' health.

And further concluded that the Barrett's exercised "poor judgment" and "must also take responsibility for their own decision making".

The trial judge thus awarded a total of $13,000 against Brunswick for these claims. (i.e., roughly one-half of the claims as assessed.)

As Gaudet was made jointly and severally liable for the damages assessed against Brunswick, Gaudet became the beneficiary of the 50% reduction.

The trial judge made no finding respecting the cause of the Barretts' “obsession” to own a mortgage-free home. There is nothing in the evidence, including the medical evidence, to suggest that any cause, other than the Barretts’ profound upset arising from the financial pressure arising from the Reynolds' failure to complete the sale, caused, or contributed, to their state of mind, or their actions.

After reviewing the evidence of the physicians who attended both Mr. and Mrs. Barrett, and the evidence of the Barretts themselves, I conclude that the judge committed a palpable and overriding error in reducing these damage awards.

Even if the conclusion of the trial judge had any support in the evidence, a reduction in the Barretts’ damages could not be justified on the basis suggested, in view of Justice LaForest’s comments in **Hodgkinson**, earlier referred to.

The trial judge failed to support his conclusion that the Barrett's "poor judgment" contributed to their loss by reference to any evidence adduced before him.

It may have been prompted by a question put to Mr. Barrett in cross examination questioning his failure to take out a mortgage to pay for the cost of

completing the residence on Lot B after the Reynolds' sale collapsed on June 29, 1990.

If so, it ignored Mr. Barrett's response which I consider to be entirely reasonable.

> I wouldn't have been able to get a mortgage of that size...couldn't have made the payments on a mortgage that big.

The trial judge, in failing to consider this relevant evidence, made an overriding and determinative error respecting this factual issue. There was no other evidence to justify the conclusion that the delay and completion of Lot B resulted from the Barrett's poor judgment.

I would therefore allow the Cross-Appeal and award the Barretts an additional $12,583.05 under this head.

Counsel for the Barretts have also cross-claimed on the ground that the award of $10,000 for mental anguish and loss of employment potential was "woefully inadequate". I do not agree that the trial judge committed any error in this assessment and would dismiss this cross-appeal.

Disposition

I concur in the well reasoned opinion expressed by my colleague Justice Cromwell, respecting the issues considered by him.

Taking into account the conclusions reached by both of us:

we dismiss the appeal brought on behalf of Mr. Gaudet except for the 4th and 5th issues;

we allow the appeal on the 4th issue and reduce the amount awarded against Mr. Gaudet by the sum of $10,000;

we allow the appeal on the 5th issue and set aside the award of solicitor and client costs against Mr. Gaudet and award trial costs against Mr. Gaudet which we set at the sum of $25,000 plus disbursements;

we allow the Cross-Appeal brought on behalf of the Barretts. We hold Mr. Gaudet responsible to pay to the Barretts 100% of the award assessed against Brunswick aggregating in total $25,583.05 for mental anguish, anxiety, upset, depression and sick days;

as the Barretts have been substantially successful on the issues raised in Mr. Gaudet's appeal, and their own cross appeal, we award appeal costs to the Barretts against Mr. Gaudet which we assess at $10,000 plus disbursements;

we allow the Barrett's appeal from the dismissal of their action against CIBC for negligent misrepresentation, but dismiss the appeal with respect to their claim for breach of fiduciary duty. CIBC should be liable to the Barretts, jointly and severally with Mr. Gaudet and Brunswick, for $25,583.05;

CIBC should recover the total principal amount advanced on the line of credit together with the interest charged on the amounts actually advanced to June 29, 1990; and

the Barretts have been substantially successful on the appeal against CIBC, and they are entitled to their costs of the appeal which we fix at $10,000 plus disbursements (roughly 40% of the costs awarded by the trial judge). As the Barretts have been found liable to repay the principal amount borrowed from CIBC, we award CIBC one half of the amount fixed as trial costs by the trial judge plus CIBC's disbursements at trial.

Counsel are to submit a draft order to the panel for approval, or, if counsel cannot agree, each should submit a proposed order with supporting submissions. The draft order, or orders and submissions, should be filed by September 9, 1998.

Pugsley, J.A.

Concurred in:

Jones, J.A.

Cromwell, J.A.

CROMWELL, J.A.:

I. Introduction:

On the appeal by Mr. Gaudet and the issues raised by the Barretts in their notice of contention, I agree with the result proposed by Pugsley, J.A. for the reasons he has given.

The following reasons address the Barretts' appeal from the dismissal of their claims against the Canadian Imperial Bank of Commerce and from the judgment in favour of the Bank on the line of credit agreement.

II. Overview of the Facts:

The Barretts' goal was to own their own home, mortgage free. As part of their plan to achieve it, they bought land and constructed a home. When it was completed, they subdivided the lot. They planned to sell the existing home and use the proceeds to finance construction of a mortgage free home on the newly subdivided lot.

In late February or early March of 1990, they entered into an agreement of purchase and sale with David Reynolds and Brenda Hartlin (the purchasers). The agreement, which was initially conditional on the purchasers arranging financing, became unconditional 14 days later. The closing date was set originally for early July but was advanced, by agreement, to June 29, 1990.

The Barretts' plan was to start construction of their new home pending the closing of the sale of their existing home. For this, they required interim financing and so they approached the CIBC (the Bank, respondent on appeal). The Barretts dealt with Lee Lohnes, a personal banking representative, with whom they had dealt for years. A line of credit was set up which they could draw on during construction. They intended to pay it off with the proceeds of the sale.

The Barretts knew that the purchasers were dealing with another branch of the Bank for their financing. Before signing the line of credit agreement, the Barretts wanted to know whether their purchasers' financing was in place. They inquired of Mr. Lohnes. He told them the financing was arranged but that he could not tell them the amount of the mortgage. In fact, the mortgage approval was conditional on the sale of another property and refinancing other debt. The Barretts formed the mistaken belief that their purchasers had the money in place to close the transaction. They pressed ahead with construction of their new home.

The sorry history of the Barretts' sale to their purchasers is fully set out in the reasons of Pugsley, J.A. The purchasers' other property did not sell and so the Bank would not give them a mortgage. Without this financing, the purchasers were unable to close. The Barretts could not find another purchaser for nearly two years and then only at a much lower price. And so the Barretts' dream became a nightmare. The construction of their new house was well advanced. They had drawn extensively on their line of credit and did not have the proceeds of the sale to pay it off.

The Barretts sued CIBC claiming that Mr. Lohnes had negligently misrepresented the state of the purchasers' financing and had breached a fiduciary duty owed to them. CIBC defended the action claiming that there was no negligent misrepresentation and no breach of fiduciary duty. It also counterclaimed for repayment of the line of credit and interest on the money advanced and for other relief.

III. The Decision of the Trial Judge:

The trial judge, Anderson, J., dismissed the Barretts' claim against the Bank and allowed the Bank's counterclaim. He found that there was no fiduciary duty owed by the Bank to the Barretts. He held that, to give rise to a fiduciary relationship, there must be "something significantly unusual about the situation and the bank must obtain some benefit beyond ordinary interest and transaction fees." In his view, these features were not present. The trial judge also found that there had been no negligent misrepresentation by Mr. Lohnes.

The trial judge found that Mr. Lohnes told the Barretts two things: that the purchasers' financing had been arranged and that he could not tell them the amount of the approved mortgage because that was confidential information. It was, in the trial judge's view, unreasonable for the Barretts to assume from the fact that the financing was "arranged" that it was unconditional. He reasoned that "... the failure of Mr. Lohnes to disclose any particulars of the [purchasers'] financing, specifically those with respect to any conditions attached thereto, cannot be said to have misled the [Barretts]

into believing that the financing was unconditional." This I take to be a finding that the information given was accurate and not misleading and that it was unreasonable for the Barretts to have interpreted it as an assurance that the purchasers had the money to close.

The trial judge also held that Mr. Lohnes did not fall short of the applicable standard of care because he had a duty to the purchasers to keep information about their financing arrangements with the Bank confidential. The trial judge summed up his conclusions this way:

> They [i.e. the Bank] owed each one [i.e. the Barretts and the purchasers] a duty of care but that duty ended where it would compromise the interests of another client. Mr. Lohnes had to respond accurately to the questions posed by Mr. Barrett. If Lohnes could not answer, he had an obligation not to give a false impression. The proper response would be that he could not give Mr. Barrett that information. He did not have an obligation to volunteer anything, though if it would be obvious to the reasonable person that the conversation had created a false impression in Mr. Barrett's mind, Mr. Lohnes should have dispelled that notion. In this case, though, the reasonable person would not be aware of a mistaken belief on the part of Mr. Barrett that the Reynolds' financing was unconditional. Mr. Lohnes stated that financing had been "arranged". He also told Mr. Barrett that he could not tell him the amount of the Reynolds' mortgage. In the absence of any indication by Mr. Barrett that he believed there were no conditions on the financing, the reasonable person could not know of his mistaken impression.

IV. Issue on Appeal:

The Barretts submit that the trial judge erred in finding that there was no breach of fiduciary duty and no negligent misrepresentation. The main issue on appeal is whether he did.

V. Analysis:

(a) Negligent misrepresentation:

(i) Scope of appellate review:

This Court should intervene only if the trial judge erred in law or made a "palpable and overriding error" of fact. Finding facts and drawing conclusions from them is the role of the trial judge, not the Court of Appeal: **Toneguzzo-Norvell v. Burnaby Hospital**, [1994] 1 S.C.R. 114 per McLachlin J. at 121. While the phrase "palpable and overriding error" is commonly used to describe the type of error with respect to the facts that will justify appellate intervention, this is simply a convenient way of summing up the relevant principles. In **Stein v. The Ship "Kathy K"**, [1976] 2 S.C.R. 802 at 808, Ritchie, J. equated a "palpable and overriding error" with a finding that is "plainly wrong".

Appellate intervention may be warranted where the trial judge has misapprehended or overlooked material evidence. As McLachlin, J. put it in **Toneguzzo-Norvell, supra,** at 121:

> ... a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, or drawn erroneous conclusions from it. [citations omitted]

Even where this has occurred, intervention is not automatic; the error must be sufficiently serious that it is "overriding and determinative" with respect to the factual

issue under consideration: **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 per Lamer, C.J.C. at 1065 and 1069 and **Schwartz v. Canada**, [1996] 1 S.C.R. 254 per LaForest, J. at 281. This deferential approach applies to all factual findings, but is applied less strictly when the findings do not depend on the trial judge's assessment of credibility: see **Schwartz, supra**, at 278.

(ii) Negligent misrepresentation - general principles

In **Queen v Cognos**, [1993] 1 S.C.R. 87 at 110, Iacobucci J. (writing for 5 of the 6 judges participating in the appeal) set out five general requirements for liability in negligent misrepresentation: 1. there must be a duty of care based on a "special relationship" between the representor and the representee; 2. the representation in question must be untrue, inaccurate or misleading; 3. the representor must have acted negligently in making the misrepresentation; 4. the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and, 5. the reliance must have been detrimental to the representee in the sense that damages resulted.

This list of elements is helpful, but it must be remembered that there will often be overlap among the various considerations. In this case, there is considerable overlap between the question of whether Mr. Lohnes' statements were misleading and whether reliance on them was reasonable.

The trial judge analyzed the case as turning on the accuracy of the information and the duty of care. Essentially, his decision is based on his conclusion that what Mr.

Lohnes told the Barretts would not have misled or been relied on by reasonable people. This conclusion follows, in the trial judge's view, from two facts. First, what Mr. Lohnes told the Barretts was technically accurate because the purchasers' mortgage was approved, although not unconditionally. Second, the Barretts understood, or should have, that the Bank regarded the details of the purchasers' financing as confidential.

Given the paucity of explicit factual findings by the trial judge, it is necessary to review in some detail the evidence about the dealings between the Barretts and Mr. Lohnes.

The trial judge was persuaded that the Barretts formed a mistaken impression about the state of their purchasers' financing, although there is some dispute about whether Mr. Lohnes' statements caused or contributed to it. The trial judge also found that the Barretts, as a result of this mistaken belief, obtained a line of credit from the Bank and drew funds from it to finance construction. There is also a clear finding by the trial judge that Mr. Lohnes told the Barretts that their purchasers' financing had been arranged and that he could not answer the further question of the amount of the mortgage.

Mr. Barrett testified that, before signing the line of credit documentation, he asked Mr. Lohnes whether the purchasers' financing was arranged and that Mr. Lohnes told them that it was, that everything was a go and "... to go ahead and build

our house". Mr. Lohnes clearly remembered telling the Barretts that the purchasers' financing was arranged. He could not specifically recall telling them to "go ahead and build their house" but readily admitted that he could have said so. The trial judge's description of the conversation, to the extent he deals with it, is virtually identical to Mr. Barrett's evidence in chief. It is a fair implication that he accepted Mr. Barrett's evidence about this conversation.

There was some evidence that Mr. Lohnes suggested to Mr. Barrett that he should make his own inquiries. At one point in his testimony, Mr. Lohnes said that, in addition to telling the Barretts that the financing was arranged, he told them "...that all he could say was, in a general way, whether the people had qualified or not." Mr. Barrett testified that after getting the answer that the financing was arranged, he asked Mr. Lohnes the amount of the mortgage and that he had replied this was confidential information. Mr. Lohnes could not remember this question or answer. On the aspect of the Barretts being told to make their own inquiries and the limitation on what Mr. Lohnes could tell them, the evidence of Mr. Lohnes' and that of the Barretts' conflicted to some degree. The trial judge apparently found the Barretts' version to be the correct one as his explicit findings parallel the Barretts' evidence and he makes no reference to them being told to make their own inquiries or that his information was limited other than by Mr. Lohnes' refusal to provide the amount of the mortgage because it was confidential.

I conclude that the trial judge found that the Barretts were told that their purchasers' financing was arranged and that they could "go build their house." They were also aware that the specifics of the mortgage would not be revealed to them, but they were not advised that Mr. Lohnes was merely telling them they had "qualified" or that they should make their own inquiries.

The trial judge does not refer to other evidence, notably that from Mr. Lohnes himself, which is not only relevant, but determinative of the question of whether Mr. Lohnes' statements were misleading. While the trial judge based his conclusion on the technical correctness of what Mr. Lohnes told the Barretts, the evidence which he appears to have accepted but to which he makes no reference was overwhelming that the information provided could not but mislead when viewed in the light of Mr. Lohnes' clear and admitted understanding of what the Barretts wanted to know and its importance to them.

Mr. Lohnes knew the purpose of the personal line of credit and how it fitted into the Barretts' plan for achieving their goal of a mortgage free house. The application documentation which they completed with Mr. Lohnes states that the purpose of the loan was "bridge financing construction of new home pending receipt of funds from sale of present home." The documentation submitted by Mr. Lohnes to the vice-president and regional general manager stated that the purpose of the loan was: " to provide bridge financing to assist with construction of a new home pending receipt of proceeds of sale of existing home." Under the Repayment and Conditions section of

the documentation, the following appears: " Funds will be drawn down as required on PCL [personal line of credit] ... Repayment will come from sale of his existing home. (Sale confirmed & purchaser financing in place through CIBC Mortgage.)" (emphasis added)

Mr. Lohnes understood the importance to the Barretts of the closing of the transaction with Reynolds and Hartlin. He also knew, and admitted knowing, that the reason for the Barretts' inquiry about their purchasers' financing was that they wanted to be sure that their purchasers would be able to close. In the cross-examination of Mr. Lohnes by the Barretts' then counsel, the following appears:

> Q. That's right. He [Mr. Barrett] specifically wanted to know, and you knew why he wanted to know that. You knew he wanted to know that because he wanted to be sure that he would be able to close this house transaction, didn't he?
>
> A. Well, yes. He wanted to know whether the sale was going to go through, yes.
>
> [emphasis added]

And again:

> Q. And you understood that the reason he was asking you about the Reynolds financing was because he wanted to be sure the Reynolds would have financing to pay him, right?
>
> A. He wanted to know if they had money available, yes.
>
> [emphasis added]

And further:

> Q. And you knew, sir, that the Barretts were inquiring about the Reynolds financing, because the issue was important to them, didn't you? You knew it was important to the Barretts?
>
> A. It was important ... the way that they ... the way that the question was put to me was, you know, whether or not the financing has been arranged. It was important for them that the sale go through so that the loan would be paid off at the time that his house sold.
>
> Q. You knew that, whether or not this sale of 7A was going to go through, was a key factor in their making a loan, a Personal Line of Credit Loan, to build the new house. You knew that, didn't you?
>
> A. Yes. It was important to them. I'm not sure what you mean by key factor. It was important to them.
>
> [emphasis added]

The trial judge does not refer to this evidence which establishes that Mr. Lohnes knew the purpose of the Barretts' inquiry and its importance. As Mr. Lohnes himself put it, the Barretts wanted to know whether their purchasers "... had the money available ..." to close the transaction. Neither does the trial judge refer to the Barretts' evidence, which Mr. Lohnes did not contradict, that after telling them that the purchasers' financing was in place, Mr. Lohnes told them that everything was a go and that they could "go and build their house."

In light of this evidence, the trial judge's conclusions that Mr. Lohnes' statements were not misleading and that reliance on them was unreasonable are plainly wrong. The trial judge reasoned that the Barretts should have understood the difference between a mortgage being approved and a mortgage being unconditional and that they should have known the information was not complete because Mr.

Lohnes would not tell them the amount of the mortgage. The evidence which I have reviewed (and to which the trial judge does not refer) shows that this is an unrealistic and wholly erroneous approach to the issue. Mr. Lohnes very clearly understood that the Barretts wanted to know whether Mr. Reynolds and Ms. Hartlin had the money to close the transaction. Mr. Lohnes, who testified that he thought at the time that the sale would close as planned, told them the financing was arranged and that the Barretts could go and build their house. It is apparent from his reasons that the learned trial judge either fundamentally misapprehended or overlooked material evidence, particularly that of the Bank's witness, Mr. Lohnes.

In my view, this evidence was not only material, but overriding and determinative. In the face of this, the learned trial judge's conclusions that Mr. Lohnes' statement that the financing was arranged was not misleading and that it was unreasonable to rely on it are errors requiring intervention by this Court.

Having found that appellate intervention is required, I will briefly review each of the elements of the action in negligent misstatement in light of the trial judge's other findings.

1. Duty of Care

The learned trial judge found there was a duty of care owed by the Bank to the Barretts which he expressed in these terms:

> They [referring to the Bank] owed each one [i.e. both the Barretts and the purchasers] a duty of care, but that duty ended where it would compromise the interest of another client. Mr. Lohnes had to respond accurately to the questions posed by Mr. Barrett. If Lohnes could not answer, he had an obligation not to give a false impression.

The question of the duty of care in negligent misrepresentation cases depends on whether the defendant ought reasonably to foresee that the plaintiff will rely on the representation and whether reliance by the plaintiff is reasonable: see **Hercules Management Ltd. v. Ernst & Young**, [1997] 2 S.C.R. 165 at 188. More simply stated, the question is "... whether, as a matter of simple justice, the defendant may be said to have had an obligation to be mindful of the plaintiff's interests in going about his or her business": see **Hercules, supra,** per LaForest, J. at 190.

I cannot subscribe completely to the way the trial judge expressed the duty of care but there was no suggestion that he erred in finding that a duty of care existed. I agree that it did. The Bank had a duty to be mindful of the Barretts' interests in going about its business with them.

2. Untrue, inaccurate or misleading statement:

The trial judge found that the statement by Mr. Lohnes to the Barretts was not untrue, inaccurate or misleading. For the reasons given previously, this conclusion is plainly wrong. The trial judge did not refer to and appears either to have ignored or fundamentally misapprehended the evidence about Mr. Lohnes' statements to the

Barretts and this evidence is overwhelmingly to the effect that a reasonable person would have been misled by what he told them.

In reaching this conclusion, I stress that I nonetheless agree with the learned trial judge that Mr. Lohnes was not obliged to answer the Barretts' inquiry. Having undertaken to do so, however, his statements were misleading.

3. Standard of Care:

Before Mr. Lohnes (or through him the Bank) may be liable for giving the Barretts misleading information, they must show that he was negligent in doing so. As Iacobucci, J. said in **Cognos, supra**, at 121, the standard of care is that used in negligence law generally: the person making the representations "must exercise such reasonable care and skill as the circumstances require to ensure that [the statements] are accurate and not misleading." This is to be judged objectively from the point of view of what would be expected of a reasonable person in Mr. Lohnes' situation.

The learned trial judge referred to Mr. Lohnes' duty not to mislead, stating that Mr. Lohnes "had an obligation not to give a false impression." He further stated:

> ... if it would be obvious to the reasonable person that the conversation had created a false impression, ... Mr. Lohnes should have dispelled that notion. In this case, though, the reasonable person would not be aware of a mistaken belief on the part of [the Barretts] that the Reynolds' financing was unconditional. ... In the absence of any indication by Mr. Barrett that he believed there were no conditions on the financing, the reasonable person could not know of his mistaken impression.

In my respectful view, this is an incomplete statement of the law as applied to the case before the Court. In assessing the standard of care, the question is whether Mr. Lohnes took reasonable care not to mislead, not simply whether a reasonable person would know that the Barretts were in fact misled. Mr. Lohnes' statements were misleading and the Barretts formed a mistaken impression of the state of the Reynolds-Hartlin financing. The main issue as regards the standard of care is whether Mr. Lohnes took reasonable care not to mislead them. The trial judge either ignored or misapprehended the evidence which shows, in my view, that Mr. Lohnes took virtually no care at all.

Dean Klar, in his treatise *Tort Law* (1991) at 160 provides an overview of the relevant considerations. This passage was quoted with approval by Iacobucci, J. in **Cognos** at 121. These considerations include the nature of the dealings between the parties, the purpose for which the statement was made, the foreseeable use of the statement, the probable damage which will result from an inaccurate statement, the status of the advisor and the level of competence generally observed by others similarly placed.

The learned trial judge made few findings with respect to these considerations. However, the following is clear on the evidence.

The first consideration is the nature of the dealings between the parties. The Barretts were talking with their banker of long standing about information known to the

Bank. They were good customers and Mr. Lohnes took some personal interest in them. He said he would like to come and see the house because he was interested in the property. He understood that, from the Barretts' perspective, he was in the best position to find out about the Reynolds-Hartlin mortgage situation. They knew that Mr. Lohnes had made inquiries and had obtained information. This was no informal chat with a stranger.

With respect to the second consideration, that is, the purpose for which the statement was made, Mr. Lohnes knew exactly what the Barretts wanted to know and that it was important to them. As for the foreseeable use of the statement, the evidence of Mr. Lohnes himself makes it clear that he knew the Barretts wanted the information because they were concerned about proceeding with construction if their sale to Reynolds and Hartlin did not close. The probable damage, too, was obvious. If the transaction did not close, the Barretts would have no proceeds to retire the line of credit.

The next considerations mentioned by Dean Klar are the status of the advisor and the level of competence generally observed by others similarly placed. The trial judge did not make any findings in this regard. However, the evidence from Bank employees establishes a number of relevant facts.

Complete and accurate information was readily available to a Bank employee, such as Mr. Lohnes, who had the mortgage number. Any personal banking

representative, such as Mr. Lohnes, would have been aware from the information he did receive that there were conditions on the mortgage. The evidence was that such a person "would always" be aware of that and review them. Such a person would also know that it was not proper to review with one customer the terms of another customer's mortgage.

Mr. Lohnes testified that he thought that he had received only the first page of the Reynolds and Hartlin mortgage approval and that he was unsure whether or not he was aware that the approval was conditional on the sale of their property, that ".. all [he] wanted to know was whether [they] qualified, whether the thing had been arranged or approved." Mr. Lohnes admitted under cross-examination that, although he thought he had seen only the first page of the approval form, the form could not be properly understood without at least the first two pages and that he could easily have obtained whatever other information about the approval he felt he needed by contacting Regional Office and using the mortgage number.

Mr. Lohnes testified that he was satisfied at the time the Barretts filled out the personal line of credit documentation that "...that the sale [i.e. the Barretts' sale to Reynolds and Hartlin] was going to conclude in accordance with the plans and in accordance with the terms of the Purchase and Sale Agreement." His confidence in this regard was not justified by the facts. No reasonably careful person in his position could have formed this view even on the basis of the incomplete information Mr. Lohnes is sure he had. Moreover, information which he may actually have had or at

least was available to him for the asking would or should have shown him that the closing was doubtful.

In summary, Mr. Lohnes was carrying out duties routinely performed by persons in his position in the Bank. Such persons know, or should, that a mortgage approval cannot be properly understood without looking at the first two pages of the mortgage document. Mr. Lohnes thought he had reviewed only the first page. Whatever other information he required about the approval was readily available to him. He was not sure if he knew whether the mortgage approval was conditional on the sale or not and he did not think it mattered because he could not tell the Barretts anyway. He formed an erroneous, but easily corrected opinion about the likelihood of the transaction closing. He was talking to customers of long standing, knowing that they wanted to know whether their purchasers' financing was in doubt and knowing that they looked to the closing of that transaction to retire the line of credit he was arranging for them. He knew that he could not tell them what they really wanted to know without breaching the confidentiality he thought he owed to Mr. Reynolds and Ms. Hartlin.

Having regard to all of these circumstances, Mr. Lohnes fell below the standard of care expected by failing to have accurate and complete information in his possession when he undertook to respond to the Barretts' question, by failing to make clear to them the true and very limited significance of what he felt able to tell them,

and by failing to make it clear that he could not tell them what he well knew they really wanted to know.

In my view, the trial judge erred in failing to so decide. He failed to apply the correct legal principles and either ignored or fundamentally misapprehended material evidence. He should have found that Mr. Lohnes fell well below the standard of reasonable care expected of him in these circumstances.

4. Reliance:

To succeed in their action, the Barretts had to prove at trial that they, in fact, relied on the negligent misrepresentation and that it was reasonable for them to have done so.

The Bank's position on this issue is that the Barretts did not rely on the information they received from the Bank. This submission has two aspects. First, it is argued that the Barretts intended to proceed with construction regardless of what they found out from Mr. Lohnes. Second, it is submitted that the Barretts' solicitor, Mr. Gaudet, knew the true state of the purchasers' financing in March of 1990 and that they are deemed to know what their lawyer knew. The argument goes that since the Barretts are deemed to know the truth, the misleading information supplied by Mr. Lohnes cannot be said to have been relied on.

The Bank's submission that the Barretts did not, in fact, rely on what Mr. Lohnes told them is simply not borne out by the evidence at trial. The trial judge found

the Barretts were mistaken about the state of the Reynolds-Hartlin financing. Although he found their reliance on Mr. Lohnes was not reasonable, nothing in his reasons casts any doubt on the fact that the Barretts did rely on what they thought they had been told. When the real estate agent passed on word that the purchasers' agent had confirmed that financing was in place, Mr. Barrett told their real estate agent that he had made his own inquiries of the Bank. The Barretts' evidence was, in essence, that they did not want to proceed with the line of credit or construction of the new house unless the sale to Reynolds and Hartlin was assured to close. Although they took some preliminary steps such as securing a building permit beforehand, they did not finalize the line of credit documentation or begin construction until after they had heard from Mr. Lohnes about the purchasers' financing.

The trial judge found that a duty of care existed. It is implicit in this finding, having regard to **Hercules Management**, **supra**, that generally a person in Mr. Lohnes' position would reasonably foresee reliance and that such reliance by people in the Barretts' position would be reasonable. I think the trial judge's conclusion that such reliance was unreasonable in light of the particulars of the exchange was simply another way of stating his conclusion that Mr. Lohnes' statements would not have misled a reasonable person. For the reasons given earlier, this conclusion is plainly wrong. The Barretts did rely on the misinformation and that reliance was reasonable.

The Bank also submits that the Barretts cannot be said to have relied on the information provided by Mr. Lohnes because they are deemed by law to know

information known to their solicitor. There is no suggestion that they actually knew. The argument is expressed as follows in the Bank's factum:

> It is clear that the Barretts' solicitor, Gilbert Gaudet, knew prior to the date the Barretts executed the credit line documentation, that the Reynolds financing was arranged and was subject to various conditions. The knowledge of the solicitor (the agent) in this case must be imputed to his clients (the principals) thereby fixing them with the knowledge as of March 20, 1990 that the Reynolds financing was in fact conditional upon the sale of their home and the conversion of their automobile lease to a loan. Fixed with such knowledge, the Appellants cannot allege that the bank deprived them of this knowledge in breach of an alleged fiduciary duty.

I do not accept this submission.

Mr. Gaudet acted for the Barretts on the sale, for the purchasers on their purchase from the Barretts and for both the purchasers and the Bank on the purchasers' mortgage to finance their purchase from the Barretts. He did not act for the Barretts or the Bank on the line of credit transaction. Any information supplied to Mr. Gaudet by the Bank was provided to him in his capacity as the solicitor for the purchasers and the Bank. The Bank's position, repeatedly stated by Mr. Lohnes and apparently accepted by the trial judge, is that the conditions attached to the purchasers' financing were confidential and could not be disclosed without breaching the Bank's duty of confidentiality to the purchasers. In short, the Bank seeks on this appeal to take advantage of the conflict of duty in which Mr. Gaudet found himself by claiming that he was required to communicate to the Barretts information which the Bank insists it could not tell them.

In my opinion, it is not appropriate or just to impute knowledge where the party seeking to rely on it knows or ought to know that the other party is not, in fact, aware of the information and the person who should have told them (here Mr. Gaudet) was in breach of a fiduciary duty: see **Irving Oil v. S. & S. Realty** (1983), 48 N.B.R. (2d) 1 (C.A.) 13-14; **Halifax Mortgage Services Ltd. v. Stepsky**, [1995] 4 All E.R. 656 (Ch. D.) at 672; G.H.L. Fridman, **The Law of Agency** (7th, 1996) at 352.

On the Bank's submission, the Barretts are to be taken as knowing the financing was conditional before they spoke to Mr. Lohnes on March 20 or signed the line of credit agreement on March 29. It was, or should have been, obvious to Mr. Lohnes that they did not know. Moreover, if the Barretts are to be deemed to have the knowledge which their solicitor ought to have had, the same should hold true of the Bank. It would then follow that the Bank would be deemed to know that Mr. Gaudet did not, in fact, disclose the information to the Barretts. As the case cited by the Bank, **Royal Trust Corp of Canada v. Giuggio** (1993), 32 R.P.R. (2d) 267 (Ont Gen Div) at 282 demonstrates, a solicitor's knowledge, if it is to be imputed at all, is to be imputed to both clients where the solicitor is acting for both sides of a transaction.

I conclude that the Barretts reasonably relied on Mr. Lohnes' misrepresentations.

5. Detriment:

The trial judge made no finding with respect to detriment flowing from reliance on the information provided by Mr. Lohnes. However, he did so, implicitly, in his consideration of the Barretts' claim against Brunswick Capital Incorporated. In that context, he held that as a result of their mistaken belief about their purchaser's financing, the Barretts' proceeded with construction prior to closing, and, as a result, suffered losses. For the purpose of determining whether damage flowed from the Bank's misrepresentation, it is not relevant that the trial judge found that the Barretts' mistaken belief concerning their purchaser's financing was not the sole cause of the damage. It is sufficient that the misrepresentation was one of the factors inducing the plaintiffs' decision to act to their detriment: see e.g. **Kripps v. Touche Ross** (1997), 35 C.L.L.T. (2d) 60 (B.C.C.A.) at 90 and the authorities referred to therein at 88-89. While the Court's conclusion respecting the liability of auditors may require reconsideration in light of **Hercules, supra,** that judgment does not affect the point in issue here. The damage element of the cause of action was established.

6. Conclusion Respecting Negligent Misrepresentation:

The trial judge was plainly wrong in his conclusions respecting the Barretts' claim in negligent misrepresentation. He failed to consider material evidence and misapprehended, fundamentally, the significance of other evidence. He also misstated some of the applicable legal principles. His dismissal of the Barretts' claim in negligent misrepresentation cannot stand and must be set aside.

In my opinion, this is an appropriate case for this Court to substitute the appropriate result for the learned trial judge's conclusion. The necessary conclusions may be made on the basis of the trial judge's unimpeached findings and evidence from employees of the Bank. I would, therefore, find the Bank liable to the Barretts in negligent misrepresentation.

7. Damages:

The trial judge, having found against the plaintiffs on the issue of liability, did not assess damages. Given the long period of time that this matter has been before the courts and the full record before us, I am of the view that this Court should, in the interests of justice, exercise the wide powers conferred by **Rule** 62.23 and address the damages issue.

The object of damages in negligent misrepresentation is to put the plaintiffs in the position they would have been in had the misrepresentation not been made: see **Rainbow Industrial Caterers Ltd. v. CN**, [1991] 3 S.C.R. 3 per Sopinka, J. at 14. The plaintiffs established that the misrepresentation was at least one of the factors inducing them to enter into the line of credit transaction and that they suffered damage as a result. That being so, damages are to be assessed on the basis that the plaintiffs would not have entered into the transaction unless the defendant proves that they would have done so on the same or different terms even if the misrepresentation had not been made: see **Rainbow, supra,** at 15-16; **Hodgkinson v. Simms**, [1994] 3 S.C.R. 377 per LaForest, J. at 441-2.

The record before us shows that the Bank did not discharge this onus. The Bank argued that the Barretts would have gone ahead without Mr. Lohnes' statements. For the reasons given earlier in response to this submission, the record does not support, let alone establish, this to be the case. Accordingly, damages are to be assessed on the basis that the Barretts would not have opened the line of credit or drawn funds against it if Mr. Lohnes had not negligently misrepresented the state of the Reynolds-Hartlin financing. It follows that damages are to be assessed as if:

(a) the Barretts had not drawn against the line of credit;

(b) no liability for interest on the line of the credit had been incurred;

(c) construction on the new house would not have begun and no expenses would have been incurred in relation to it;

(d) the mental anguish, depression, and loss of income attributable to the financial pressure on the Barretts resulting from the draws against the line of credit would have been avoided.

These damages for lost sick days and for distress and depression are similar to the damages claimed under these heads by the Barretts against Brunswick Capital. Pugsley, J.A. has addressed many of these items in his reasons. As found by him, the learned trial judge's reduction of those damages by 50% cannot stand and must be set aside.

As discussed by Pugsley, J.A., the trial judge assessed the Barretts' claims for depression, lost wages and lost sick days at $25,583.05. Those losses flow from the

financial pressure created by the line of credit indebtedness and the Reynolds' failure to close the transaction. The situation in which the Barretts found themselves and the suffering and loss it caused them were readily foreseeable given Mr. Lohnes' detailed knowledge of the Barretts' plans and circumstances. This amount should also be assessed against the Bank and the Bank should be jointly and severally liable for this amount as are Gaudet and Brunswick.

The assessment of damages is to assume that the construction of the new house did not occur. I would therefore not allow, as against the Bank, the damages assessed by the trial judge against Brunswick relating to the delay in its construction.

The Barretts' position is that the Bank should also be liable for damages flowing from the Reynolds' failure to close. In my view, the Bank's liability in negligent misrepresentation cannot go that far. Its liability arises because it misled the Barretts about whether the transaction would close, not because it contributed to the failure to close. There is no causal link between the negligent misstatement and the failure of Reynolds and Hartlin to close. Whether or not the Barretts had opened the line of credit or drawn against it, the transaction with Reynolds and Hartlin would have been lost.

The most significant issue of damages assessment arises out of the Bank's counterclaim for the money advanced and interest payable under the line of credit. In attempting to restore the Barretts, as best money can, to the position they would have

been in had they not drawn against the line of credit, it is, of course, necessary to take into account any benefits flowing to them from the transaction. The Barretts had the use of the principal amount and the new home financed by it. They obviously cannot retain the money borrowed, the new house and the proceeds on the eventual sale of their former home. To restore them to the financial position they would have been in had they not drawn against the line of credit, it is necessary to set off against their recovery from the Bank the principal amount which they drew on the line of credit. This is part of the Bank's claim on its counterclaim and should be recovered by the Bank.

Another significant issue is the interest, if any, which should be allowed on the principal amounts advanced. The Barretts' position is that they should not be liable for any interest. I cannot accept that view, however, because on no plausible view of what should or would have happened would the Barretts have had the use of this money, interest free. There is an economic benefit, albeit one that came with much hardship and heartache, of having the use of these funds. Some reasonable allowance must be made for it in order to put the Barretts in the position they would have been in had they not borrowed the money or built the house.

A fair way to measure this benefit is to consider the amount of interest the Barretts would have paid had everything gone according to plan. As noted, the Bank is not responsible for the failure of Reynolds and Hartlin to close and I do not select this amount of interest on that basis. However, in attempting to restore the Barretts to the pre-tort position, some allowance has to be made for the fact that they have had both

the Bank's money and their new house, a position that would never have arisen on any turn of events. The question is how to measure that benefit. A reasonable, although obviously rough way to measure that benefit, in my opinion, is to allow the Bank to recover its total principal amount advanced and, in addition to this amount, the interest charged pursuant to the line of credit agreement on the funds actually advanced up to the date set for closing, that is June 29, 1990.

(b) Fiduciary Duty:

Did the trial judge err in finding that no fiduciary duty arose in the course of the transaction between the Barretts and the Bank? In my view, he did not.

There is no doubt here that the Bank owed a duty to the Barretts to take reasonable care not to mislead them about the Reynolds-Hartlin financing. That duty is the foundation of the Bank's liability for Mr. Lohnes' negligent misstatements. The question on this part of the appeal is whether the Bank also had a higher duty, akin to that of a trustee, so that it should be found to be in a fiduciary position with the Barretts.

The differences between these two duties may be regarded by some as overly subtle or as legal "technicalities". I do not agree. There are fundamental differences between a duty to take reasonable care and a duty of utmost good faith. LaForest, J. summarized these differences as follows:

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

As LaForest, J. put it in **Hodgkinson**, these differences must be attended to so ". . . civil liability will be commensurate with civil responsibility": at 405.

There is nothing complicated or technical about what the duty of loyalty requires. The fiduciary must act in the client's interests (or in their mutual interest) to the exclusion of his or her own interests. One party has the obligation to act for the benefit of another: **Hodgkinson, supra**, at 407-408.

There are some relationships that are classified as fiduciary because of the discretion, influence and vulnerability inherent in the relationship. Trustee-beneficiary and agent-principal are two examples. In other relationships, their fiduciary nature, while not inherent, may nonetheless arise in particular circumstances: **Hodgkinson** at 409. In the case of relationships that are not inherently fiduciary, the key consideration in assessing whether the circumstances in the particular situation gave rise to fiduciary obligations is whether there was ". . . a mutual understanding that one

party has relinquished its own self-interest and agreed to act solely on behalf of the other party": **Hodgkinson** at 409 - 410.

The relationship between the Bank and the Barretts, in the context of their dealings with Mr. Lohnes, was not inherently fiduciary. In **Lloyds Bank v. Bundy**, [1975] Q.B. 326 (C.A.), it was pointed out that while a fiduciary relationship may arise between a banker and a customer, it does not in the normal course: at 341; see also **Standard Investments Ltd. v. C.I.B.C.** (1985), 22 D.L.R. (4th) 410 (Ont. C.A.) at 432. Similarly, in **Hodgkinson, supra**, LaForest, J. said at 410, that something more is required to give rise to a fiduciary relationship than ". . . a simple undertaking ... to provide information . . ." and that ". . . most everyday transactions between a bank customer and banker are conducted on a creditor-debtor basis." (See also **Vita Health Co. (1985) Ltd. v. Toronto-Dominion Bank** (1994), 118 D.L.R. (4th) 289 (Man. C.A.) at 296; leave to appeal to S.C.C. dismissed [1994] S.C.C.A. no. 457.

In the cases to which we have been referred in which financial institutions have been found to be fiduciaries, they had undertaken to provide significant financial advice to the customer: see **Standard Investment Ltd., supra**; **Lloyds Bank v. Bundy**, particularly at 342-3; **Vita Health, supra**, at 298. Conversely, when no fiduciary relationship has been found, the fact that the financial institution was simply providing information, not advice, was a critical consideration: **Royal Bank v. Altman** (1988), 43 C.C.L.T. 245 (Alta. Q.B.); **Royal Trust Corp. v. Giuggio, supra,** at 281-2. While

I would not attempt an exhaustive definition of what separates information and advice, it seems to me that the giving of advice involves more than providing accurate information and includes the use of skill, knowledge and experience in interpreting that information and assessing its significance.

In this case, the Barretts were seeking factual information from the Bank about two of its other customers. They were not looking to Mr. Lohnes to interpret those facts or assess their significance. They were looking for a straight answer to a simple question. They knew that the Bank would not divulge all of the particulars they wished to know. They were dealing at arms length with the Bank as borrowers. There is nothing in their inquiry, the Bank's answer, or in any other aspect of the transaction that could give rise to a mutual understanding that the Bank had relinquished its own self-interest and agreed to act solely on behalf of the Barretts. While I cannot subscribe to all of the trial judge's reasoning, I agree with his conclusion that no fiduciary relationship arose in this case.

VI. Disposition:

I agree with the disposition of all issues as proposed by Pugsley, J.A.

Cromwell, J.A.

Concurred in:

Jones, J.A.

Pugsley, J.A.

C.A. No. 143446

143752

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

GILBERT L. GAUDET

Appellant
(and Cross Respondent)

- and -

WAYNE BARRETT and
MARLENE BARRETT

Respondents
(and Cross Appellants)

- and -

THE CANADIAN IMPERIAL BANK
OF COMMERCE

Respondent

REASONS FOR JUDGMENT BY:

PUGSLEY, J.A.
and
CROMWELL, J.A.