Huff v. Price

Huff et al. v. Price et al.

76 D.L.R. (4th) 138
CASE-HISTORY : Leave to appeal to S.C.C.

refused 83 D.L.R. (4th) vii

British Columbia Court of Appeal

Taggart, Lambert and Wallace JJ.A.

DECEMBER 14, 1990

Damages -- Breach of fiduciary duty -- Financial advisor failing to sell shares -- Damages to be measured by value of shares at time of breach of duty.

Damages -- Breach of fiduciary duty -- Certainty -- Proof of causation -- Minimal evidence sufficient to discharge plaintiff's evidentiary burden.

Judgments and orders -- Interest -- Prejudgment -- Rate -- Exemplary damages -- Interest to be added at minimum rate -- Principal amount to be adjusted to take account of award of interest -- Court Order Interest Act, R.S.B.C. 1979, c. 76.

Agency -- Vicarious liability -- Financial advisor acting as agent for several persons -- Wrongfully taking shares from one account and putting them in another -- Holder of second account liable to holder of first account.

Agency -- Stockbrokers -- Account opened in name of plaintiff by plaintiff's financial advisor -- Stockbroker having reason to know of advisor's unreliability -- Stockbroker has duty to warn plaintiff.

In 1979, the plaintiffs entrusted their assets to the defendant chartered accountant for investment. This person opened accounts with the defendant stockbroker, a member of the defendant firm. The broker co-operated with the accountant in severalof the transactions involving the plaintiffs. Shares were purchased for the plaintiffs in a company in which the accountant had an interest. The accountant manipulated the trading of the shares, which rose in value. In 1981, one of the plaintiffs asked the accountant to pay for a purchase of an automobile out of her account, but the latter, with-

out authority, instead of selling shares, arranged for the account to be margined in order to raise the money. Some shares were transferred from the plaintiff's account to the account of the accountant's wife, who did not participate in and had no knowledge of the accountant's activities. In an action for damages, the trial judge held the accountant liable for breach of fiduciary duty and assessed damages on the basis of the amounts transferred to him in 1979, plus the profit that the plaintiffs would have received from a properly managed portfolio. He also awarded punitive damages of $150,000 and $100,000 respectively. He held that the accountant's wife was liable for the value of the shares transferred to her account. The broker and the firm were held liable for failing to warn the plaintiffs to seek independent advice. [page139]

On appeal and cross-appeal to the British Columbia Court of Appeal, held, varying the judgment, damages should be measured at the date in 1981 when the accountant was in breach of his fiduciary duty. Accordingly, the plaintiffs were entitled to damages measured by the value of the shares at the time of the breach of duty. Aggravated damages were not appropriate, but punitive damages in the amount of $20,000 in respect of each plaintiff were appropriate. There was no discretion under the Court Order Interest Act, R.S.B.C. 1979, c. 76, to refuse interest on punitive damages, but interest should be awarded at the minimum rate and the court should take into account the award of the interest in fixing the amount of the award of punitive damages. The wife was properly held liable for shares deposited in her account since the accountant had acted as her agent even though without her authority or knowledge. In the circumstances, the broker owed a fiduciary duty to the plaintiffs since they were known to be unsophisticated financially, and since the broker knew them to be dependent on the accountant and the broker was involved with the accountant in transactions that he knew or should have known were not authorized by the plaintiffs and that could not be for their benefit. When a plaintiff proved a fraud or a breach of fiduciary duty and a loss, a minimum amount of evidence of causation would suffice to discharge, at least prima facie, the evidentiary burden of proof of causation.

Cases referred to:

R. v. Guerin (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, 20 F.T.R. 6, 36 R.P.R. 1, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 55 N.R. 161; McNeil v. Fultz (1906), 38 S.C.R. 198; Fales v. Canada Permanent Trust Co. (1976), 70 D.L.R. (3d) 257, [1977] 2 S.C.R. 302, [1976] 6 W.W.R. 10, 11 N.R. 487; Canson Enterprises Ltd. v. Boughton & Co. (1989), 61 D.L.R. (4th) 732, 45 B.L.R. 301, [1990] 1 W.W.R. 375, 39 B.C.L.R. (2d) 177, 17 A.C.W.S. (3d) 342 [leave to appeal to S.C.C. granted 65 D.L.R. (4th) vii, 105 N.R. 400n]; Howard v. Cunliffe (1973), 36 D.L.R. (3d) 212; Jacks v. Davis (1982), 141 D.L.R. (3d) 355, 22 C.C.L.T. 266, [1983] 1 W.W.R. 327, 39 B.C.L.R. 353; London Loan & Savings Co. of Canada v. Brickenden, [1934] 3 D.L.R. 465, [1934] 2 W.W.R. 545; Ruxton v. Kelly, Peters & Associates Ltd., [1985] 1 W.W.R. 66, 58 B.C.L.R. 317; Diack v. Bardsley (1983), 25 C.C.L.T. 159, 40 B.C.L.R. 240; Snell v. Farrell (1990), 72 D.L.R. (4th) 289, [1990] 2 S.C.R. 311, 107 N.B.R. (2d) 94, 110 N.R. 200, 22 A.C.W.S. (3d) 493; Vorvis v. Insurance Corp. of British Columbia (1989), 58 D.L.R. (4th) 193, [1989] 1 S.C.R. 1085, 42 B.L.R. 111, 25 C.C.E.L. 81, 90 C.L.L.C. 14,035, [1989] 4 W.W.R. 218, 36 B.C.L.R. (2d) 273, 94 N.R. 321, 16 A.C.W.S. (3d) 17; Rookes v. Barnard, [1964] A.C. 1129; Cassell & Co. v. Broome, [1972] A.C. 1027; Austin v. Rescon Construction (1984) Ltd. (1989), 57 D.L.R. (4th) 591, 48 C.C.L.T. 64, 36 B.C.L.R. (2d) 21, 14 A.C.W.S. (3d) 391; Horseshoe Bay Retirement Society v. S.I.F. Development Corp. (1990), 66 D.L.R. (4th) 42, 3 C.C.L.T. (2d) 75, 19 A.C.W.S. (3d) 791; Lloyd v. Grace, Smith & Co., [1912] A.C. 716; Morris v. C.W. Martin & Sons Ltd., [1965] 2 All E.R. 725; Barwick v.

English Joint Stock Bank (1867), L.R. 2 Ex. 259; Barker v. Furlong, [1891] 2 Ch. 172; Burns v. Kelly Peters & Associates Ltd. (1987), 41 D.L.R. (4th) 577, 41 C.C.L.T. 257, [1987] I.L.R. 1-2246, [1987] 6 W.W.R. 1, 16 B.C.L.R. (2d) 1; Lac Minerals Ltd. v. International Corona Resources Ltd. (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574, 44 B.L.R. 1, 35 E.T.R. 1, 6 R.P.R. 1, 69 O.R. (2d) 287n, 36 O.A.C. 57, 101 N.R. 239, 16 A.C.W.S. (3d) 345; Jaegli Enterprises v. Ankenman (1981), 124 D.L.R. (3d) 415, [1981] 2 S.C.R. 2, 40 N.R. 4 sub nom. Taylor v. Ankenman; Loewen, Ondaatje, McCutcheon & Co. v. Bechthold Resources Ltd., B.C.C.A., Vancouver Reg. CA004143, October 28, 1985 (unreported); C.R.F. Holdings Ltd. v. Fundy [page140] Chemical Int'l Ltd., B.C.C.A., Vancouver Reg. CA821022, September 30, 1982 (unreported)

Statutes referred to:

Court Order Interest Act, R.S.B.C. 1979, c. 76, ss. 1(1), 2 Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 138(3)(a) Judicature Amendment Act, 1977 (No. 2), c. 51, s. 3 Prejudgment Interest Act, S.B.C. 1974, c. 65

Rules and Regs referred to:

Court of Appeal Rules (B.C.) (as amended), Rule 18(1.1), (2) Supreme Court Rules (B.C.), Rule 42A(1), (15)

Appeal and cross-appeal from a judgment of Taylor J., 25 B.C.L.R. (2d) 364, 9 A.C.W.S. (3d) 416, and 14 A.C.W.S. (3d) 283 (supplementary reasons), in favour of the plaintiffs in an action for damages for breach of fiduciary duty; application by the plaintiffs (respondents) for an order requiring the defendants (appellants) to post security for the amount due to the plaintiffs.

Irwin G. Nathanson, Q.C., for appellant, Leslie P. Price.

J.B. Kowarsky and John Nalleweg, for appellant, Arlene Price.

Dwight C. Harbottle and Dale B. Pope, for appellants, J. Arthur Charpentier and Continental Carlisle Douglas Ltd.

John N. Laxton, Q.C., and Robert D. **Gibbens,** for respondents.

By the Court: The plaintiffs in this case, Bobby Huff and Ann Donnelly, were, at the relevant times, women of middle years in marginally comfortable circumstances who had come to be living alone. Neither of them was knowledgeable about investments, and both of them preferred not to be troubled by financial concerns.

The defendants are Leslie Price, Arlene Price, Arthur Charpentier and Continental Carlisle Douglas Ltd. At the relevant times, Leslie Price was a chartered accountant engaged in financial dealings, including stock promotion; Arlene Price was his wife; Arthur Charpentier was a stockbroker; and Continental Carlisle Douglas Ltd. was a firm of stockbrokers in which Arthur Charpentier was a partner.

Bobby Huff and Ann Donnelly were defrauded by Leslie Price, to whom they had entrusted all their investable assets. Leslie Price did not give evidence at trial though he was represented by counsel.

The trial involved issues of liability and issues of damages with respect to all four defendants. There were 15 days of evidence. That evidence occupies six volumes of transcript. The Appeal Books consist of 15 volumes of documents. Even with that [page141] abundance of information there were aspects of this case on which neither the witnesses nor the documents yielded up sufficient information to permit the trial judge, Mr. Justice Taylor, to be sure of precisely what occurred.

Mr. Justice Taylor gave two sets of reasons. The first set reached conclusions on liability and gave a structure for the assessment of damages. That set summarized the relevant facts and gave Mr. Justice Taylor's findings of fact on the relevant questions. Those reasons are reported at 25 B.C.L.R. (2d) 364, 9 A.C.W.S. (3d) 416. After the first set of reasons was delivered, Mr. Justice Taylor heard five days of further submissions on damages. He then gave a second set of reasons in which he reached his final conclusions on the issues of damages (File No. C834847, November 4, 1988 [summarized 14 A.C.W.S. (3d) 283]).

Mr. Justice Taylor did not give a precis of the oral evidence and the documents. We do not intend to do so either. We propose to give only a very short outline of the background, simply for the purpose of setting out a context for the issues.

We propose to organize the reasons in this way:

1. Summary of the Background

2. Leslie Price

2.1 The Trial Judge's Conclusions on Liability and Damages

2.2 The Issues on Appeal and Cross-Appeal

2.3 Damages: Pecuniary Loss

2.4 Damages: Aggravated and Punitive Damages

2.5 Court Order Interest on Aggravated and Punitive Damages

3. Arlene Price

3.1 The Trial Judge's Conclusions

3.2 The Liability Issue

3.3 The Liability of Arlene Price

3.4 Damages: The Relevant Transactions

3.5 Damages: The Amount

4. Arthur Charpentier and Continental Carlisle Douglas Ltd.

4.1 The Trial Judge's Conclusions on Liability and Damages

4.2 The Issues on Appeal and Cross-Appeal

4.3 Fiduciary Duty [page142] 4.4 Breach of Fiduciary Duty

4.5 Causation

4.6 Damages

5. Disposition

I. Summary of the Background

Bobby Huff's husband died in 1979. At that time she had her house, subject to a mortgage, and furniture; she had $230,000 as the proceeds of life insurance; and she had $45,000 in a Swiss bank account. Mr. and Mrs. Price lived across the street. They had been friends of both Mr. and Mrs. Huff when Mr. Huff was alive, and they continued to be friends of Mrs. Huff. Mrs. Huff liked and trusted Leslie Price. She asked him for advice. He gave it and he helped her with financial decisions. Very soon, in the latter part of 1979, she entrusted her $230,000 to him. At the beginning of 1980 she entrusted him with the $45, 000 from the Swiss account. Mr. Price was to pay the mortgage, give her enough for living expenses, and invest for capital appreciation.

In the latter part of 1979 Ann Donnelly was working as a pharmacist. She had become friendly with Bobby Huff. Mrs. Huff told Mrs. Donnelly that Mr. Price was managing her financial affairs, that she liked and trusted him, and that he was producing good results. Mrs. Donnelly also decided to leave the financial management of her assets to Mr. Price. She entrusted him with $57, 000 worth of stock by transferring it from her previous broker. At the beginning of 1980 she also entrusted him with $88,000 worth of assets which had come to her from her father's estate. Those assets were held for her, through a Liechtenstein establishment, ina Swiss bank.

Arlene Price left her financial affairs entirely in the hands of Leslie Price, her husband. She knew he operated several accounts in her name at brokerage firms. She never discussed the conduct of those accounts with him. She never read the mail that came to her about the accounts. She left all those matters entirely to him. One of the accounts in her name was maintained by her husband at Wolverton Securities Ltd., a brokerage house.

In 1979, Arthur Charpentier was a qualified chartered accountant and a proprietor and partner in the business of Continental Carlisle Douglas Ltd., a brokerage house. Continental Carlisle Douglas Ltd. included, as a part of its business, the underwriting of shares in resource companies listed on the Vancouver Stock Exchange. Arthur Charpentier had known Leslie Price for many [page143] years. They had practised accounting with the same firm. He had experience of Leslie Price's abilities as a stock promoter.

Still in 1979, Continental Carlisle Douglas Ltd. agreed to underwrite an issue of stock in Cumo Resources Ltd., a company engaged in the oil exploration business. At the time of the underwriting, Mr. Charpentier met the guiding mind of Cumo who lived in California. Mr. Charpentier said that the company needed an administrator in Vancouver. He suggested Leslie Price. That arrangement was made. Mr. Price became corporate secretary. His duties included administration and stock promotion. He later became president. Arthur Charpentier's son was appointed a director of Cumo Resources Ltd.

Still in 1979, Mr. Price set up brokerage accounts for Bobby Huff and for Ann Donnelly at Continental Carlisle Douglas Ltd. Mr. Charpentier was the responsible broker for each of the accounts. Both Bobby Huff and Ann Donnelly left the management of those accounts in the complete discre-

tion of Leslie Price. Leslie Price also opened accounts in their names with other brokerage firms and obtained their signatures on the necessary documents. Eventually, Leslie Price was to open further accounts in their names with yet other brokerage firms by forging their signatures.

In early January, 1980, Mr. Price and Mr. Charpentier went together to Switzerland. They together made arrangements for the Swiss assets of Mrs. Huff and Mrs. Donnelly to be transferred to the control of one or other or both of them in Vancouver. Leslie Price brought back documents from Handelskredit Bank in Switzerland. After that the Swiss assets of Bobby Huff were dealt with in an account at Continental Carlisle Douglas Ltd. known as Handelskredit Bank Account No. 2164, and the Swiss assets of Ann Donnelly were dealt with in an account at Continental Carlisle Douglas Ltd. known as Handelskredit Bank Account No. 2584. Among the documents used in each case for the setting up of the accounts were powers of attorney, a fiduciary agreement, and an opening of an account agreement. The powers of attorney were signed by Mrs. Huff and Mrs. Donnelly in blank. Then the names of Mr. Price and Mr. Charpentier were filled in as attorneys. Both Mr. Price and Mr. Charpentier signed the powers of attorney. Mr. Charpentier alone signed the two fiduciary agreements. He did so as "Principal", though Mrs. Huff and Mrs. Price were described in the documents as being the "Principals". Presumably Mr. Charpentier signed in his capacity as holder of the powers of attorney. Mrs. Huff and Mrs. Donnelly signed the opening of account documents in blank. In both of those opening of account documents Mr. [page144]

Charpentier and Mr. Price were shown as holding powers of attorney.

At the end of 1979, Mr. Price was investing the assets of Mrs. Huff and Mrs. Donnelly in conventional investments. But when the promotion of the stock of Cumo Resources Ltd. began, Mr. Price invested some of the two accounts in Cumo stock. At the end of February, 1980, both the personal accounts and the Handelskredit Bank accounts of both Mrs. Huff and Mrs. Donnelly contained between 15% and 20% of Cumo stock.

In 1980, 1981 and 1982, Leslie Price was involved in a continuing manipulation of Cumo stock. He had approximately 100 accounts over which he had complete authorization to trade, including both real and forged accounts in the names of Mrs. Huff and Mrs. Donnelly.

Mr. Charpentier was aware of the stock manipulation. Indeed, as underwriter of the stock, and having regard to his relationship with Leslie Price, it is probable that Mr. Charpentier was more than merely aware of the stock manipulation. His office was right across the street from Leslie Price's office. Mr. Charpentier dropped into Mr. Price's office every day or every second day. He was aware that Leslie Price was constantly on the telephone dealing with the stock. He saw the trades that were being made in the stock through his firm and he saw the many trades through the accounts of Mrs. Huff and Mrs. Price.

The stock of Cumo went up. It started at 65 cents in the fall of 1979. By May 30th of 1981, Mrs. Huff's personal account and Handelskredit Bank account at Continental Carlisle Douglas Ltd. and Mrs. Donnelly's personal account and Handelskredit Bank account at Continental Carlisle Douglas Ltd. contained almost nothing else but Cumo stock. Cumo stock represented between 97% and 99% of the total stock held in the accounts.

In June, 1981, Cumo stock was trading at $39.75 per share. The total value of Mrs. Huff's and Mrs. Donnelly's portfolios was over $2.5 million. Mrs. Huff's personal account showed a total value of over $1 million. She decided to follow the wishes of the late Mr. Huff and bought a Rolls Royce. She requested Mr. Price to pay for the Rolls Royce out of her account. Mr. Price did not want to sell

her Cumo stock on the market. So he arranged through Mr. Charpentier for Continental Carlisle Douglas Ltd. to margin Mrs. Huff's account. The account was a cash account. There was no authority to margin it. But Continental Carlisle Douglas Ltd. did so, on the approval of Mr. Charpentier and one of the managing partners, Mr. Faye. The same type of margining soon took place in Mrs. Donnelly's personal account. [page145]

In addition there was activity in the accounts that could not possibly have been for the benefit of the account holders. For example, on July 23, 1980, 2, 000 Cumo shares were sold from Mrs. Huff's personal account for $5,628.40. On the same day, 2,000 Cumo shares were purchased by Mrs. Huff's Handelskredit Bank account for $6,556.99. Continental Carlisle Douglas Ltd. and Mr. Charpentier earned commissions. The price of the stock was maintained. But no benefit accrued to Mrs. Huff, just a loss of $1,000 or so.

Stock certificates in Cumo Resources Ltd. were delivered out from Mrs. Huff's Handelskredit Bank account and Mrs. Donnelly's Handelskredit Bank account between August, 1981, and the end of April, 1982. In the same period, equivalent stocks appeared, sometimes on directly corresponding days and sometimes on less clearly corresponding days, in Mrs. Arlene Price's Wolverton account. The shares that were delivered out of the accounts cannot have been delivered to anyone other than Mr. Price. There are forged initials on some of the delivery out documents comparable to the initials of Mrs. Huff and Mrs. Donnelly. Almost all the shares were removed from those two accounts in that way and neither Mrs. Huff nor Mrs. Donnelly received any benefit at all from the removal. In short, their shares kept in those accounts were stolen.

The unauthorized margining of Mrs. Huff's and Mrs. Donnelly's personal accounts continued. The price of the stock of Cumo Resources Ltd. dropped. Mr. Charpentier knew by this time that there were no assets supporting the stock of Cumo Resources Ltd. Eventually, Continental Carlisle Douglas Ltd. sold off all the Cumo stock in the personal accounts of Mrs. Huff and Mrs. Donnelly. After those sales, there still remained a deficit in Mrs. Huff's personal account of $167,411, and in Mrs. Donnelly's personal account of $10,017. Those deficits, of course, were created by the unauthorized margining of the accounts.

This statement of facts is intended as a summary only. It is designed to show the context of the issues raised on the appeal and cross-appeal. It is not intended to be complete or to mention every fact relied on by the trial judge in reaching his decision, or by the parties at trial or in the argumentof the appeal.

2. Leslie Price

2.1 The Trial Judge's Conclusions on Liability and Damages

We will use Mr. Justice Taylor's own words [at pp. 366-9]:

> Mr. Price applied the plaintiffs' money almost wholly to a stock manipulation he was conducting for himself, his wife and his associates, forged their signatures on numerous documents and stole certificates representing shares [page146] he had purchased for them. He did not contest these allegations at trial, electing not to give evidence.
>
> While Mr. Price is plainly liable in damages for breach of fiduciary duty, including the value of the stock he stole from them, I do not believe it proper that compensation awarded should be such as to give the plaintiffs the return on investment which they would have received had the dishonest stock

promotion scheme in which Mr. Price was engaged been operated successfully for their benefit. The evidence does not establish what actual profit was made by Mr. and Mrs. Price from the Cumo scheme, and no attempt was made to "trace" benefits received from abuse of the plaintiffs' trust into any property other than the brokerage account, maintained at another house, which Mr. Price operated for his wife.

I find that the defendant Leslie Price was in breach of his fiduciary duty to each plaintiff from the time he first invested her funds in Cumo stock. I find that each is entitled to receive as damages the full value of her account at that date increased at 20 per cent per annum compounded annually for four years, in the case of Mrs. Huff from 15th June 1979, and in the case of Mrs. Donnelly from 16th November 1979, as a reasonable increase in value of a properly managed portfolio up to the date when they could reasonably have been expected to reassert control over their investments. They are entitled also to simple interest on the whole sum thereafter to this date at the prejudgment interest rates allowed from time to time during that period by the district registrar on default judgments.

Because Mr. Price committed gross breaches of trust in his frauds against the plaintiffs, and encouraged them to make expenditures they would not otherwise have made, and because no other penalty appears to have resulted from his conduct, nor has he sought to explain, apologize or make amends for it, the case is one in which substantial punitive damages are warranted. I assess punitive damages in favour of Mrs. Huff at $150,000 and in favour of Mrs. Donnelly at $100,000.

There will be prejudgment interest on the punitive damages from the respective date of first investment at the registrar's rates.

In Mr. Justice Taylor's second set of reasons he said:

Judgment against the defendant Leslie P. Price will be for the amounts actually transferred to him for investment by each plaintiff less the amount received back, both as shown in the document "Admissions of Fact" agreed to by counsel and entered as ex. 80, after adjustment as agreed during submissions on damages and in accordance with these reasons, plus 20% annual capital increment, punitive damages, prejudgment interest and solicitor-client costs all as provided for in the reasons for judgment dated April 26, 1988, and solicitor-client costs of the further proceedings on these damage issues.

Because the agreed statement of facts does not establish the dates at which payments were made to, or for the credit of, the plaintiffs, the agreed total will be credited on the assumption that it was paid in equal monthly instalments on the first day of each month commencing the third month after the month in whichthat plaintiff's funds were first committed to Mr. Price, and continuing [page147] for 30 months. Prejudgment interest on punitive damages for the preceding month will be calculated on the balance before each credit is made.

2.2 The Issues on Appeal and Cross-Appeal

Counsel for Leslie Price put the issues raised on his appeal in this way:

I. The learned Trial Judge erred in awarding punitive damages which were inordinately high.

II. The learned Trial Judge erred in awarding different amounts of punitive damages to each Respondent.

III. The learned Trial Judge erred in ordering prejudgment interest to be paid on the punitive damages awards.

IV. The learned Trial Judge erred in awarding both substantial punitive damages and solicitor and client costs.

The issue raised by the cross-appeal was raised in the same way with respect to each appellant. It was stated in the factum of counsel for Mrs. Huff and Mrs. Donnelly in this way: "The learned trial judge erred in his underlying principles of assessment when determining the monetary award to the Plaintiffs for breach of fiduciary duties by the Defendants." We intend to deal with the issues relating to Leslie Price under these headings:

2.3 Damages: Pecuniary Loss (Raised by Cross-Appeal)

2.4 Damages: Aggravated and Punitive Damages (Raised by Appeal)

2.5 Court Order Interest on Aggravated and Punitive Damages (Raised by Appeal)

2.3 Damages: Pecuniary Loss

The general principle underlying the assessment of damages in tort is that the plaintiff is to be put in the position that he or she would have been in if the tort had not been committed. The general principle underlying the assessment of damages in contract is that the plaintiff is to be put in the position that she or he would have been in if the contract had been performed. The damages for breach of a fiduciary duty must start from whichever of those general principles is appropriate, though, as we will note, there are particular rules about inferences relating to causation and remoteness in the case of damages for breach of fiduciary duty.

In our opinion Mr. Justice Taylor's award of damages against Leslie Price was measured by the losses suffered by Mrs. Huff and Mrs. Donnelly from having entered their arrangements with Mr. Price at all rather than obtaining the advice of a qualified and honest financial advisor. Alternatively, it could be said that the [page148] damages awarded by Mr. Justice Taylor were based on the view that the breach occurred as soon as Mr. Price moved away from traditional investment and that the damages awarded relate to that breach. But there was no finding that that was a breach, and from the evidence it may not have been a breach.

In our opinion the award of damages must relate directly to the specific breaches of fiduciary duty found to have been committed by Mr. Price. The damages must be measured by an assessment of the losses flowing from the breach of fiduciary duty, as of the time of the breach. The fiduciary duty was broken when the accounts were margined in June, 1981, at a time when the investment portfolios were already limited to the stock of Cumo Resources Ltd. Mr. Price may have been in breach of his fiduciary duties earlier than June, 1981, in investing in, or concentrating the investment accounts in, a speculative stock, though the precise date of that breach is uncertain. In any case, it is subsumed for purposes of damages in the breach of June, 1981.

Counsel for the plaintiffs say that the principle applicable to the measure of damages is the principle that equity will grant to a trust beneficiary, or to a person who is deprived by breach of fiduciary duty, damages equal to the highest price at which the property of which that person was deprived could have been sold in the period before the breach of duty was discovered.

Reliance was placed on the decisions of the Supreme Court of Canada in R. v. Guerin (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, 20 F.T.R. 6; McNeil v. Fultz (1906), 38 S.C.R. 198, and

Fales v. Canada Permanent Trust Co. (1976), 70 D.L.R. (3d) 257, [1977] 2 S.C.R. 302, [1976] 6 W.W.R. 10. Counsel for the plaintiffs placed particular reliance on a passage from the reasons in Guerin and a passage from the reasons in Fales.

The passage from the reasons in Guerin, at p. 366, is in these terms:

> Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee (see McNeil v. Fultz (1906), 38 S.C.R. 198), so also it should be presumed that the band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease.

The passage from Fales, at p. 270, is this one:

> ...there is simply no explanation for the languor shown in retaining shares in a venture known to be speculative, for an extended period, during which period the market afforded ample opportunity for profitable sale. Canada Permanent was never seized with a sense of urgency, yet the shares constituted over 60% of the assets of a substantial estate. [page149]

Counsel for the plaintiffs also argued that different principles applied to the assessment of damages for fraud and for breach of fiduciary duty, on the one hand, than for breach of contract on the other. That is clearly so. The point was put this way by this court in Canson Enterprises Ltd. v. Boughton & Co. (1989), 61 D.L.R. (4th) 732 at p. 736, 45 B.L.R. 301, 39 B.C.L.R. (2d) 177:

> The decision of this court in Jacks v. Davis is indistinguishable from this case on all the relevant points. The damages that should be borne by a solicitor who fails to disclose to his client material facts about the secret profit on a real estate transfer are to be computed in a similar way to damages for fraud, namely, by determining the amount of the overpayment for the land in excess of what it was worth. Additionally, where the transfer would not have occurred if the true facts had been known, the damages should also include all further consequential losses, even if those losses are not such as would reasonably have been foreseeable or as would reasonably have been in the contemplation of the parties, subject only to considerations relating to the plaintiff's own actions in mitigation, to legal remoteness determined by a common-sense view of the strength of causation and not by foreseeability, and to such interrelated factors as new intervening acts.
>
> While Jacks v. Davis says that the characterization of the wrong and the approach to damages do not depend on whether the solicitor himself shared in the secret profit that was not disclosed, it is important to note that when the solicitor has shared in the secret profit he must be required to disgorge the profit as part of the damages awarded against him. That disgorgement will introduce an additional element into the calculation of the award, though it will not necessarily change the amount. Whether it does so will depend on whether the amount of the secret profit is equal to the difference in value between what the plaintiff paid and what the land was worth.
>
> Canson v. Boughton & Co. has been appealed to the Supreme Court of Canada but the appeal is on behalf of Canson and it seeks even larger damages than would be assessed on the principles stated in the quotation we have set out.

Not only are damages for fraud and breach of fiduciary duty the same for the purposes of calculation, they are also the same for the purposes of the treatment they should receive in relation to the issues of causation and remoteness and they are the same with respect to the discharge of the burden of proof. Once the fraud or breach of fiduciary duty is shown, then the court assessing damages will

not be exacting in requiring proof of the precise loss in circumstances where all reasonable efforts have been made by the plaintiff to establish the amount of the loss and the cause of the loss. The burden of leading the evidence to disprove the amount of the loss and the cause of the loss will then fall on the defendant who has been found to have been fraudulent or in breach of fiduciary duty. Reference should be made to Howard v. Cunliffe (1973), 36 D.L.R. (3d) 212 (B.C.C.A.); Jacks v. Davis (1982), 141 [page150] D.L.R. (3d) 355, 22 C.C.L.T. 266, [1983] 1 W.W.R. 327 (B.C.C.A.), particularly at pp. 360-1; London Loan & Savings Co. of Canada v. Brickenden, [1934] 3 D.L.R. 465, [1934] 2 W.W.R. 545 (P.C.), particularly at pp. 469-70; Ruxton v. Kelly, Peters & Associates Ltd., [1985] 1 W.W.R. 66, 58 B.C.L.R. 317 (S.C.), and Diack v. Bardsley (1983), 25 C.C.L.T. 159, 40 B.C.L.R. 240 (S.C.).

The principle is much the same as the principle discussed in the reasons of Mr. Justice Sopinka, for the Supreme Court of Canada, in Snell v. Farrell (1990), 72 D.L.R. (4th) 289, [1990] 2 S.C.R. 311, 110 N.R. 200, that all the circumstances should be considered, and that if the circumstances justify it, a very slight amount of evidence led on the part of the plaintiff will shift the evidentiary burden to the defendant. In a case where fraud or breach of fiduciary duty has been established, the burden of proof in relation to causation and damages will readily be discharged, at least in a prima facie way, by the plaintiff.

We add, also, that where there is specific trust property the remedy for breach of trust, fraud, or breach of fiduciary duty may include return of the property or restitution measured by its highest value in the period after the breach and before the breach is discovered.

We return to the assessment of damages in the particular circumstances of this case. We have quoted the relevant passages from the reasons of the trial judge. He said that he did not think that the plaintiffs should recover an award of damages equal to the return on investment that they would have received if the dishonest stock promotion scheme in which Mr. Price was engaged had been managed successfully for the plaintiffs' benefit. No authority was relied on by the trial judge for that proposition. There was no authority in any of the appellants' factums or arguments which supported it.

In our view the fact that Mr. Price, by his stock manipulations in 1980 and 1981, had enhanced the value of the Cumo stock which he had wrongfully acquired for the plaintiffs' accounts, is not a reason for depriving the plaintiffs of that enhanced value. The plaintiffs did no wrongful or criminal acts. They had not participated in or been aware of Mr. Price's stock manipulations. It does not lie with the defendants to say that the plaintiffs should not recover the value of their stock because the defendants created that value by their improper stock manipulations. The plaintiffs were entitled to have their Cumo shares traded as though they were legally acquired and had attained their enhanced value through proper trading. The defendant Price was in breach of his [page151] fiduciary duty to the plaintiffs in not directing the orderly disposition of the stock after June, 1981.

The trial judge also said that the evidence did not establish what actual profit was made by Mr. Price from the Cumo scheme, and that no attempt was made to trace benefits received from abuse of the plaintiffs' trust into any property other than the brokerage account at Wolverton Securities in the name of Mrs. Price. Certainly it is part of the principles applicable to the assessment of damages for fraud or for breach of fiduciary duty to deprive the wrongdoer of the fruits of the fraudulent acts, but the inability of the plaintiffs to prove the amount of the benefits to Mr. Price does not require the court to assess damages as the value of each of the plaintiffs' initial stake, plus a market return, if the plaintiffs can be shown to have suffered greater losses than that.

In this case, counsel for Mrs. Huff and Mrs. Donnelly did not ask for any greater assessment of damages against Mr. Price than was asked for against Mr. Charpentier and Continental Carlisle Douglas Ltd. Mr. Price is said to be "judgment proof". The claim against him will certainly not be smaller than the claim against Mr. Charpentier and Continental Carlisle Douglas Ltd. We suppose those are the reasons why the claim against him was not calculated by the plaintiffs separately from the claim against Mr. Charpentier, even though the basis of the claim against Mr. Price may be slightly different from the basis of the claim against Mr. Charpentier and Continental Carlisle Douglas Ltd.

It may have been possible for the plaintiffs to argue that their damages should be based on the maximum price of Cumo stock in June, 1981. Counsel for the plaintiffs decided not to try to make that argument. That may well have been the soundest tactical decision. We would not award damages against Leslie Price in any higher amount than the amount that has been claimed in the cross-appeal.

We consider that Mr. Price had perpetrated both a fraud and a breach of fiduciary duty by the time 97% to 99% of both accounts of Mrs. Huff and both accounts of Mrs. Donnelly consisted of Cumo stocks, namely by the end of May, 1981. In June, 1981, the share price of Cumo Resources Ltd. reached $39.75 a share, or higher. It was in June, 1981, that Continental Carlisle Douglas Ltd., at the instigation of Mr. Price, started the unauthorized margining of the personal cash accounts of Mrs. Huff and Mrs. Donnelly. So by the end of June, 1981, Mr. Price had committed both a fraud and a breach of fiduciary duty, though he was to do other fraudulent acts after that date as well. The maximum price of the stock of Cumo [page152] Resources Ltd. in the three months after June, 1981, was $12.78 a share. If Mrs. Huff and Mrs. Donnelly had been aware of Mr. Price's fraudulent acts at that time, and if they had been properly advised, and, if, as a result, they had sold their Cumo Resources Ltd. shares at a price of $12.78, they would have realized, in the case of Mrs. Huff, $580, 212 in her personal account and $388,512 in her Handelskredit Bank account, for a total of $968,724; and, in the case of Mrs. Donnelly, $375,732 in her personal account and $511,200 in her Handelskredit Bank account, for a total of $886,932.

We consider that the awards of damages for pecuniary losses arising from the fraud and breach of fiduciary duty of Leslie Price should be in those amounts, less the amounts actually paid to and received by each of them in the period after the date of the hypothetical sale which gives rise to those amounts.

2.4 Damages: Aggravated and Punitive Damages

The reasons of the trial judge were delivered before the reasons of the Supreme Court of Canada in Vorvis v. Insurance Corp. of British Columbia (1989), 58 D.L.R. (4th) 193, [1989] 1 S.C.R. 1085, 42 B.L.R. 111.

The Vorvis case was an action for wrongful dismissal. Two judgments were delivered in the Supreme Court of Canada: one by Mr. Justice McIntyre for himself, Mr. Justice Beetz, and Mr. Justice Lamer, and one by Madam Justice Wilson for herself and Madam Justice L'Heureux-Dube. The issues in that appeal related to whether aggravated damages or punitive damages or both should be awarded, in the particular circumstances of that specific wrongful dismissal, as well as the customary damages based on the length of the period of reasonable notice. Both Mr. Justice McIntyre and Madam Justice Wilson distinguished between aggravated damages and punitive damages. They made the distinction on the same basis as it had been made by Lord Devlin in Rookes v. Barnard,

[1964] A.C. 1129 (H.L.). (Though it is clear from the reasons of Mr. Justice McIntyre, at pp. 206-7, and the reasons of Madam Justice Wilson, at pp. 222-3, that the limited scope accorded to punitive damages by the decisions of the House of Lords in Rookes v. Barnard and Cassell & Co. v. Broome, [1972] A.C. 1027 (H.L.), is not part of the law of Canada. The law of Canada remains as it was before those decisions and as it has developed since then without restriction by those decisions.)

We will set out two passages from the reasons of Mr. Justice McIntyre in Vorvis, at p. 202, to explain the difference between aggravated damages and punitive damages: [page153] Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

[And at p. 201:]

Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory.

So aggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant, that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases, that cannot be said to be fully compensated for in an award for pecuniary losses, and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff's life, can properly be the basis for the making of an award for non-pecuniary losses or for the augmentation of such an award. An award of that kind is frequently referred to as aggravated damages. It is, of course, not the damages that are aggravated but the injury. The damage award is for aggravation of the injury by the defendant's high-handed conduct.

Punitive damages, by contrast, are a separate award against the defendant designed to impose a punishment on the defendant and to set an example to others who might seek to act in a similar way. Punitive damages are measured by the degree of moral culpability of the defendant. They are not designed to compensate the plaintiff and they are not measured by an assessment of the plaintiff's suffering. An element of wilfulness or recklessness such as would underlie a finding of guilt in a criminal act is likely to be present before punitive damages will be awarded. But the defendant's conduct need not be criminal. Mr. Justice McIntyre used such words to describe the conduct that would give rise to a claim for punitive damages as "harsh, vindictive, reprehensible and malicious", but Mr. Justice McIntyre acknowledged that he had not exhausted the available adjectives. The anomaly, of course, about punitive damages is that they are paid to the plaintiff and not to [page154] the state, even though the plaintiff should have been fully compensated by his award of compensatory damages, pecuniary, non-pecuniary, and aggravated.

It is obvious that there is a close relationship between aggravated damages and punitive damages. The harshness of the defendant's conduct may give rise to a proper liability on the defendant's part

for both aggravated damages and punitive damages. But it is important that the plaintiff should not be compensated twice for the same harm and it is important that the defendant should not be punished twice for the same moral culpability.

Accordingly, the best course is to assess the plaintiff's damages for pecuniary losses first and the plaintiff's damages for non-pecuniary losses second. The damages for non-pecuniary losses may be awarded or augmented on the basis of an assessment of the harm suffered by the plaintiff as a result of the high-handedness, or the wilful or reckless indifference to the plaintiff's rights, of the defendant. If such an award or augmented award is made for non-pecuniary losses then it is correct but not essential to refer to and to classify that award as aggravated damages.

It is only after those two steps have been taken that consideration should be givento making an award of punitive damages. The reason why punitive damages should be assessed third is that the degree of punishment inflicted on the defendant by having to pay compensatory damages, including pecuniary, non-pecuniary, and aggravated damages, must first be determined before it is possible to consider whether any further penalty, by way of punishment, should be imposed on the defendant and, if so, the additional amount that is required. So the third step is to consider whether the conduct of the defendant should be punished over and above the requirement that the defendant pay compensatory damages, pecuniary, non-pecuniary, and aggravated. An award of punitive damages should take into account the moral culpability of the defendant, the amount he has already had to pay, and the profits, if any, that he has made from his wrongful acts. (He should not be permitted to retain profits from his wrongful acts: see Austin v. Rescon Construction (1984) Ltd. (1989), 57 D.L.R. (4th) 591, 48 C.C.L.T. 64, 36 B.C.L.R. (2d) 21 (C.A.). The point is also implicit in Horseshoe Bay Retirement Society v. S.I.F. Development Corp. (1990), 66 D.L.R. (4th) 42, 3 C.C.L.T. (2d) 75, 19 A.C.W.S. (3d) 791 (B.C.S.C.).) The award of punitive damages should not try to do again what has been done by the compensatory damages, including the aggravated damages. But if some measure of further punishment is still required then the amount assessed should be [page155] consistent with the concept that it is punishment that is being imposed and not restitution that is being exacted. The award should not be inconsistent with the principles that underlie the imposition of criminal penalties. And, of course, if a criminal penalty has been imposed then that should be taken into consideration. In Vorvis Madam Justice Wilson said this, at p. 225:

> Anderson J.A. would have allowed the appeal on the punitive damages issue and awarded the appellant punitive damages in the sum of $5,000. The quantum that Anderson J.A. would have awarded is, I believe, a reasonable one and in keeping with the Canadian experience in the award, of relatively modest punitive damages. When the purpose of the award is to reflect the court's awareness and condemnation of flagrant wrongdoing and indifference to the legal rights of other people, the award does not need to be excessive.

Before leaving the principles that govern awards of aggravated and punitive damages, we should say that if an award is being imposed as punitive damages then the amount of the award should be calculated on the basis that it will bear interest at the rate of at least 5% per annum from the date on which the cause of action arose to the date of judgment. The requirement that prejudgment interest must run on the award of punitive damages, at least to the extent of 5%, is imposed by the Court Order Interest Act, R.S.B.C. 1979, c. 76. There is no discretion to decline to award court order interest. Accordingly, court order interest should be recognized as part of the penalty and should tend to reduce the amount that is awarded as principal in an award of punitive damages. We propose to

return to this issue under the next subheading of these reasons, namely: "Court Order Interest on Aggravated and Punitive Damages".

We have indicated that we propose to change the basis for the assessment of the plaintiffs' compensatory damages from an assessment based on what their return would have been on a properly managed portfolio (the breach of contract measure) to what their actual losses were from misuse of their assets (the breach of fiduciary duty measure).

The result is an increase in the compensatory damages awarded to each of the plaintiffs against Leslie Price in the order of several hundred thousand dollars. Once that increase is taken into account no further award for non- pecuniary losses is required. The suffering they have undergone should be regarded as assuaged by an award of damages reflecting a hypothetical sale of Cumo Resources stock at what, in retrospect, is an advantageous price.

We consider that the award of "punitive" damages by the trial judge, to the extent that it can properly be said to constitute aggravated damages, may well have been a proper award when [page156] made in conjunction with an award for pecuniary loss calculated on the basis that the trial judge adopted, but that no amount should be awarded for aggravated damages over and above the amount for pecuniary and non-pecuniary losses that we would award as being the amount dictated by the principles applicable to calculating damages for breach of fiduciary duty.

On the other hand the conduct of Leslie Price was such that it is appropriate that it should be marked by the specific condemnation of the court. It has been considered by the trial judge and in these reasons to have encompassed fraud, forgery and theft. We know of no criminal proceedings against Leslie Price that might have resulted in the infliction of some punishment for that conduct. In those circumstances an award of purely punitive damages is appropriate. Taking into account court order interest at the rate of 5% per annum on the amount of our award, we would assess punitive damages against Leslie Price in favour of Bobby Huff at $20,000 and in favour of Ann Donnelly at $20,000.

2.5 Court Order Interest on Aggravated and Punitive Damages

Mr. Justice Taylor awarded court order interest on his awards of damages, including both compensatory damages for pecuniary loss and punitive damages. It is not disputed that awards of compensatory damages for pecuniary loss should carry court order interest nor is any objection taken to Mr. Justice Taylor's selection of the registrar's rate as the appropriate rate of interest on the awards of compensatory damages for pecuniary loss. But counsel for Leslie Price argued that the awards of punitive damages should not carry court order interest, because if punitive damages are punishment of the defendant then the plaintiff has not been kept out of money to which the plaintiff is entitled and there is therefore no rationale for the payment of court order interest.

Sections 1(1) and 2 of the Court Order Interest Act read:

1(1) Subject to section 2, a court shall add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances, but the rate shall not be less than the rate that applies to interest on a judgment under the Interest Act (Canada), from the date on which the cause of action arose to the date of the order.

2. The Court shall not award interest under section 1 (a) on that part of an order that represents pecuniary loss arising after the date of the order; (b) where there is an agreement about interest be-

tween the parties; (c) on interest or on costs; or [page157] (d) where the creditor waives in writing his right to an award of interest.

For the reasons we have set out in the previous subheading "Damages: Aggravated and Punitive Damages", if we had not altered Mr. Justice Taylor's award of compensatory damages we would have divided the awards made by Mr. Justice Taylor under the headingof punitive damages into separate awards for aggravated damages and punitive damages.

Aggravated damages, on the one hand, represent pecuniary compensation to the plaintiffs for non-pecuniary losses. The plaintiffs have been kept out of that money with respect to those losses. There is no reason why the Court Order Interest Act should not be permitted to apply in the usual way to the amount that should properly have been awarded as aggravated damages, if any amount should properly have been awarded by us as aggravated damages.

True punitive damages, on the other hand, are not awarded as compensation and they are outside the scope of the rationale for court order interest. Notwithstanding the absence of any rationale, it seems to us that the Court Order Interest Act is mandatory and that court order interest must be awarded on punitive damages at least at the rate of 5% per annum.

In Ontario, there is a specific provision in s. 138(3)(a) of the Courts of Justice Act, 1984 S.O., 1984, c. 11, which prohibits an award of interest on punitive damages. That provision was enacted in 1977 by the Judicature Amendment Act, 1977 (No. 2), S.O. 1977, c. 51, s. 3. The enactment of the Court Order Interest Act in British Columbia in 1974 as the Prejudgment Interest Act, S.B.C. 1974, c. 65, was preceded by a report of the Law Reform Commission of British Columbia, in 1973, entitled Interim Report on Debtor- Creditor Relationships, Part IV: Pre-Judgment Interest. That report did not discuss whether court order interest should be paid on punitive damages. There was a further report by the Law Reform Commission of British Columbia in 1987. It is entitled Report on The Court Order Interest Act. It made no mention whatever about court order interest on punitive damages. But it was preceded by a working paper, No. 49. At p. 243 of that working paper it was said that court order interest should not be awarded on punitive damages. That view has never been incorporated in a report or recommendation of the Law Reform Commission and it has never been incorporated in the British Columbia court order interest legislation. [page158]

We conclude that the principles that should guide the discretion of a judge in setting the rate of interest under the Court Order Interest Act are, first, that unless there are special circumstances, the rate of interest on pecuniary compensatory damages for either pecuniary or non-pecuniary losses, including aggravated damages, if any, should be the registrar's rate or some other market rate, and second, that the rate of interest on punitive damages should be seen as part of the punishment and should be the minimum rate of 5%, in consideration of which the punitive award itself might properly be adjusted.

3. Arlene Price

3.1 The Trial Judge's Conclusions

The following facts, as found by the trial judge, are of significance when considering the liability of Arlene Price: (1) Leslie Price was in breach of his fiduciary duty to Mrs. Huff and Mrs. Donnelly from the time he first invested their funds in Cumo stock, and certainly from the time the investment accounts were concentrated in Cumo stock. (2) Arlene Price had given her husband, Leslie Price, unlimited authority to acquire stock for her and to trade on her behalf as he saw fit. (3) The

wrongful conversion of Mrs. Huff's and Mrs. Donnelly's stock, which was deposited in Arlene Price's account by her husband, Leslie Price, was an act performed by him for the benefit of Arlene Price. (4) The acts complained of involved fraudulent misrepresentations by Leslie Price on behalf of Arlene Priceto Continental Carlisle Douglas Ltd., which misrepresentations enabled Leslie Price to steal the plaintiff's shares and deliver them to the account of Arlene Price.

The trial judge expressed the following opinions: (1) Arlene Price is liable on "general principles of agency applicable in such circumstances" to pay Mrs. Huff and Mrs. Donnelly the value of the stock which Leslie Price stole from them for Arlene Price. (2) The legal maxim, qui facit per alium facit per se, applies to the conduct of Mr. Price in so far as he was acting as the agent of his wife, Arlene Price. (3) Arlene Price is liable, as principal, jointly and severally with Leslie Price, her agent, to pay Mrs. Huff and Mrs. Donnelly the [page159] market value of the stolen shares deposited into her account on the dates of conversion with interest to date of judgment.

3.2 The Liability Issue

Counsel for the plaintiffs has not referred the court to any evidence from which it can be inferred that Arlene Price had any knowledge of her husband's fraud or that she, in any respect, condoned or authorized such conduct on his part. She did not do any trading in the stock market herself and was unaware of the details of her husband's trading activities. She was not present during any business discussions between Mr. Price and Mrs. Huff or Mrs. Donnelly. She first learned of her husband's trading activities from Mrs. Huff, at which time she made it clear to Mrs. Huff that she, Arlene Price, was not in any way involved in the business activities of her husband, Mr. Price.

The most reasonable conclusion that can be drawn from the evidence is that Mrs. Price left the investment business entirely to her husband and did not participate in, or have knowledge of, his trading activities in any respect.

Given this factual background, is the trial judge's finding that Arlene Price is liable for her husband's fraudulent conduct on the basis of "general principles of agency" a proper one?

3.3 The Liability of Arlene Price

An analysis of Leslie Price's activities and the associated documents reveals that he was the agent of Mrs. Huff and Mrs. Donnelly with unlimited authority to trade in the market on their behalf. He had the same unlimited authority to trade on behalf of his wife, Arlene Price. He was therefore authorized to act as the business agent of both the parties. The market transactions which Mr. Price performedin his role as Mrs. Price's agent included those which resulted in the acquisition for her account of shares owned by Mrs. Huff and Mrs. Donnelly. When Mr. Price, as Mrs. Price's agent, failed to obtain and pay to Mrs. Huff and Mrs. Donnelly proper compensation for the shares which he deposited to the account of Arlene Price, he failed, as her agent, to perform the contractual duty Arlene Price owed Mrs. Huff and Mrs. Donnelly, and which Leslie Price had impliedly undertaken on her behalf. That failure resulted in the wrongful conversion of the shares of Mrs. Huff and Mrs. Donnelly. That wrongful conversion was carried out by Mr. Price in his capacity as agent for his wife, Arlene Price. Presumably, it was carried out for her benefit albeit she personally was unaware of the transactions. [page160]

Counsel for the appellant, Arlene Price, submits that the liability of a principal for the acts of his or her agent is confined to those a (lawful or unlawful) of the agent which fall within the apparent or ostensible authority of the agent. Imposition of liability on a principal for the unlawful acts of his or

her agent is, in the submission of counsel for Mrs. Price, based on the reliance of a third party upon conduct which appears to the third party to have been authorized by the principal. Since, in the present case, Mrs. Huff and Mrs. Donnelly were unaware of Mr. Price's role as agent for his wife and did not rely in any way on Mr. Price's authority to purchase shares on behalf of his wife, counsel asserts that Arlene Price cannot be found vicariously liable for her husband's unlawful conduct.

Furthermore, counsel asserts, if Mr. Price be regarded as acting for an undisclosed principal, the principal should be liable only for the acts of the agent within the actual authority of the agent. Since Arlene Price was never aware of her husband's fraudulent conduct, counsel submits she is not liable for his unauthorized acts, as an undisclosed principal.

In our respectful opinion, counsel for Mrs. Price misconceives the plaintiffs' case. This is not a case of reliance on the apparent authority of the agent to bind the principal. Rather, it is a case of an agent doing fraudulently that which he was engaged to do honestly; namely acquire shares for Arlene Price and, when acquired, trade them for her account as he considered appropriate. When Mr. Price appropriated Cumo shares by depositing them in Arlene Price's trading account, he was doing so as Arlene Price's agent. Furthermore, when he failed to make proper payment for the shares so appropriated, Mr. Price was acting, albeit dishonestly, in the course of his engagement as Arlene Price's investment agent and for her benefit.

In Lloyd v. Grace, Smith & Co., [1912] A.C. 716, the House of Lords held that a principal was liable for the dishonesty and fraud of his agent if it was committed within the course of his employment, no matter whether it was done for the benefit of the principal or the benefit of the agent and regardless of the ignorance of the principal respecting the fraudulent conduct of his agent.

In Morris v. C.W. Martin & Sons Ltd., [1965] 2 All E.R. 725 (C.A.), the court considered the duty of a bailee for reward to a bailor to take reasonable care to keep the bailor's goods safe. The bailee's servant stole a fur garment which had been put in the bailee's care for cleaning. Lord Denning expressed the rationale for the imposition of liability on the principal to be referrable to the [page161] "duty" laid by the law on the master (pp. 725-30). He expressed the view (p. 730) that the bailee"cannot get rid of his responsibility by delegating his duty to another. If he entrusts that duty to his servant, he is answerable for the way in which the servant conducts himself therein. No matter whether the servant be negligent, fraudulent or dishonest, the master is liable."

Mr. Price was authorized to trade the Cumo shares of his clients, Mrs. Huff and Mrs. Donnelly. However, when he appropriated them and delivered them into Arlene Price's account, he was then acting within the course of his engagement as her investment agent. He thereby created a duty upon her to pay the market price for such shares. His improper failure to pay that consideration on her behalf does not relieve the principal of the obligation created by her agent in the course of his engagement. As observed by Willes J. in Barwick v. English Joint Stock Bank (1867), L.R. 2 Ex. 259 at p. 265:

> The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.

Furthermore, in our view, there is no equitable reason why Mrs. Arlene Price should not pay the fair value of the stock which had been deposited in her account. From that time on she had control of this stock and could have disposed of it. The fact that her agent did not market the stock appropriately or, if he did market it, did not deliver the proceeds to her account, is a matter which may form

a justifiable claim against him should she wish to pursue it. It does not, however, affect the rights of Mrs. Huff and Mrs. Donnelly. From the moment their shares were put in Arlene Price's account by Arlene Price's agent, Arlene Price was under an obligation to pay the value of the shares to Mrs. Huff and Mrs. Donnelly.

3.4 Damages: The Relevant Transactions

The remaining task is that of determining what shares were actually deposited in Arlene Price's account. Certainly she is not personally liable for Mr. Price's trading in Mrs. Huff's and Mrs. Donnelly's shares other than when he was acting as his wife's agent.

The evidence discloses that between August 27, 1981 and January 27, 1982, Leslie Price received some 40,000 Cumo shares from Mrs. Huff's Handelskredit Bank account and from a Canarim account that he operated in Mrs. Huff's name and, between October 16, 1981 and January 20, 1982, some 40,000 Cumo shares from Mrs. Donnelly's Handelskredit Bank account. [page162]

An examination of the Arlene Price Wolverton account shows that between August 31, 1981 and April 28, 1982, some 53,500 shares were received into her account without it being debited.

The question the court must deal with is whether all or any of these 53,500 shares were shares taken from the accounts of the plaintiffs, Mrs. Huff and Mrs. Donnelly.

In his discovery evidence, the defendant Leslie Price denied that he deposited any of the shares taken from the plaintiffs' accounts into the Arlene Price account. However, he did not take the stand at the trial in his own defence or as witness for Arlene Price, nor did Arlene Price produce certificate numbers for the shares deposited to her Wolverton account. Had they done so, the source of the shares could readily have been ascertained.

Mr. Price failed to give evidence at the trial of this action and produce evidence which would identify the source of the shares which he deposited in his wife's account. From that failure to give evidence it was open to the trial judge and is open to this court to draw an inference adverse to the defendants Leslie Price and Arlene Price. The records show that Leslie Price received shares owned by Mrs. Huff and Mrs. Donnelly and show that deposits of Cumo shares were made into Arlene Price's account. >From the records and the adverse inference the conclusion can be drawn that 46,500 of the 53,500 shares received by Arlene Price were in fact previously the property of Mrs. Huff and Mrs. Donnelly respectively: see Barker v. Furlong, [1891] 2 Ch. 172 at p. 184; Snell v. Farrell, supra.

The following chart sets out the transactions to which we will be referring and the estimated value of the shares at the time the relevant transaction took place: [page163]

[See paper part for graphic.] [page164] The trial judge found that a total of 41,000 Cumo shares were deposited into Arlene Price's account at Wolverton at the expense of the plaintiffs. The deposits the trial judge considered in reaching this total were the following:

Date Number of Shares Deposited

August 31, 1981 4,000

September 30, 1981 3,000

October 9, 1981 10,000

October 16, 1981 10,000

November 16, 1981 5,000

January 20, 1982 9,000

Total 41,000

Of these 41,000 Cumo shares, the trial judge found that 24,000had been removed from the account of Mrs. Donnelly. This figure is based on a finding that the following deposits into Arlene Price's account involved shares withdrawn from Mrs. Donnelly's Handelskredit Bank account:

Date Number of Shares Deposited

October 16, 1981 10,000

November 16, 1981 5,000

January 20, 1982 9,000

Total 24,000

Although he considered that the remaining 17,000 Cumo shares deposited into Arlene Price's account had not been shown to be shares removed from the plaintiffs' accounts, the trial judge found that Arlene Price received all 41, 000 as a direct consequence of the fraud carried out by her husband for her benefit at the expense of the plaintiffs. He therefore found Arlene Price to be liable for all of the 41,000 Cumo shares deposited into her account between August 31, 1981 and January of 1982.

The trial judge was correct in finding that Leslie Price deposited shares which he received from the plaintiffs into his wife's account. However, although we agree with the trial judge's inference that the plaintiffs' shares were deposited into Arlene Price's account, we have arrived at a somewhat different conclusion with regard to the number of shares deposited into her account and the dates of those deposits. Based on the evidence which was presented at trial, we find the following:

1. The 10,000 shares deposited on October 16, 1981, had been

removed from Mrs. Donnelly's account on the same day. [page165]

2. The 9,000 shares deposited into Arlene Price's account on

January 20, 1981, had been removed from Mrs. Donnelly's account

the same day.

There were a number of other transactions which occurred between August of 1981 and April of 1982 that reflected the same pattern of behaviour -- Leslie Price receiving Cumo shares from the plaintiffs' accounts followed by the deposit of Cumo shares into Arlene Price's account. As we have previously mentioned, neither Leslie Price nor Arlene Price introduced any evidence at trial to show that the shares received by Leslie Price from the plaintiffs' accounts were not deposited into Arlene

Price's account. Therefore, although these deposits and withdrawals are not as perfectly matched in terms of volume and timing as were the transactions listed above, the court can infer the following:

1. The 10,000 Cumo shares removed from Mrs. Huff's Canarim account on August 27, 1981, were deposited into Arlene Price's Wolverton account between August 31, 1981 and October 9, 1981.

2. The 5,000 shares deposited into Arlene Price's account on November 16, 1981, involved 2,500 taken from Mrs. Huff's Handelskredit Bank account and 2,500 shares taken from Mrs. Donnelly's Handelskredit Bank account.

3. The 10,000 shares deposited into Arlene Price's account on March 18, 1982, had been withdrawn from Mrs. Huff's account on January 27, 1982.

4. The 2,500 shares deposited in Arlene Price's account on April 28, 1982, were shares which had been withdrawn from the plaintiffs' accounts at an earlier date. Although it is not possible to determine with any certainty which accounts these shares came from, the court finds that on December 15, 1981, half were withdrawn from Mrs. Donnelly's account and half were withdrawn from Mrs. Huff's account.

3.5 Damages: The Amount

When Leslie Price deposited shares belonging to the plaintiffs into Arlene Price's account, he was under an obligation to compensate the plaintiffs for these shares. Since he was acting as the agent of his undisclosed principal, Arlene Price, when these transactions took place, Arlene Price is also bound by this obligation.

Arlene Price must therefore compensate the plaintiffs for any shares removed from their accounts which were deposited into her [page166] account at Wolverton Securities. The amount of compensation paid for these shares should be determined as of the date of their deposit into her account. Based on the average monthly value of the shares, we find that the plaintiffs are entitled to compensation as follows:

Mrs. Donnelly

Date of Deposit	Number of Shares	Average Monthly Value	Total Value

October 16, 1981 10,000 $9.34 $93,400.00 November 16, 1981 2,500 7.56 18,900.00 January 20, 1982 9,000 7.55 67,950.00 April 28, 1982 1,250 3.55 4,437.00 Total 22,750 184,687.00

Mrs. Huff

Number of Monthly Date of Deposit	Shares	Value Total Value
August 31, 1981	4,000	$9.60 $38,400.00
September 30, 1981	3,000	7.57 22,710.00
October 9, 1981	3,000	9.34 28,020.00
November 16, 1981	2,500	7.56 18,900.00
March 18, 1982	10,000	4.93 49,300.00
April 28, 1982	1,250	3.55 4,437.00
Total	23,750	161,767.00

There are a total of 33,500 shares which were received out of the plaintiffs' accounts but remain unaccounted for.

Although there can be no doubt that these shares were delivered to Leslie Price, there was no evidence presented at trial to suggest that these shares were deposited into Arlene Price's account or that Leslie Price was acting as his wife's agent when he received these shares. Arlene Price cannot therefore be found liable for their theft or conversion.

We therefore find that a total of 22,750 shares belonging to Mrs. Donnelly were deposited into Arlene Price's account, for which Arlene Price must pay damages in the amount of $184,687 plus court order interest. We also find that a total of 23,700 shares belonging to Mrs. Huff were deposited into Arlene Price's account, for which Arlene Price must pay damages in the amount of $161, 767 and court order interest. [page167]

4. Arthur Charpentier and Continental Carlisle Douglas Ltd.

4.1 The Trial Judge's Conclusions on Liability and Damages

The relevant passages in Mr. Justice Taylor's first set of reasons are these [at pp. 370-2]:

I find that the defendants Charpentier and Continental Carlisle acted beyond their only authority from the plaintiffs in permitting Mr. Price to "margin" the plaintiffs' accounts and to remove stock from their custody which they were authorized to deliver only to the plaintiffs' bank account, and that Mr. Charpentier acted without authority in dealing with the plaintiffs' Swiss assets.

I find also that Mr. Charpentier knew Mr. Price to be a person of questionable reliability, to say the least, and that he had no grounds for believing that the plaintiffs were other than unsophisticated people who had mistakenly put complete trust in Mr. Price. Mr. Charpentier made enquiries of the plaintiffs only for the purpose of ensuring that they really existed -- to be certain that Mr. Price was not using fictitious names for the purpose of opening accounts -- and neither then nor at any other time did he give any thought to their interests.

Mr. Charpentier had no basis for believing that the plaintiffs had funds which Mr. Price had not committed to the Cumo promotion and it was obvious to him that commitment of their portfolios to that promotion was highly unwise. Because of his intimate knowledge of, and involvement in, the Cumo affair and his well justified distrust of Mr. Price -- a man he rightly thought capable of using fictitious names for the operation of brokerage accounts -- Mr. Charpentier had a duty arising out of the fiduciary relationship between himself and his firm and the plaintiffs to advise the plaintiffs of the risks to which Mr. Price had exposed them, and to urge on them that they at least obtain independent guidance.

I do not say that a stockbroker normally has such a duty towards clients who have placed their portfolios in the hands of financial advisors for discretionary investment. I say that Mr. Charpentier and his firm had that duty in the peculiar circumstances of this case-- even though the plaintiffs had not sought their advice-- because of the knowledge which he and his firm had of Mr. Price, because he and his firm were deeply involved with Mr. Price in Cumo's affairs, and because they were in a position to profit at the plaintiffs' expense should Mr. Price use the plaintiffs' money in a market manipulation from which Mr. Price and his wife and Mr. Charpentier and his firm would gain, and the plaintiffs would lose. It was this knowledge which extended the obligation of trust ordinarily owed by a broker dealing with the assets of a client, and required that Mr. Charpentier and his firm -

- even though theywere not consulted by the plaintiffs on their portfolios -- caution the plaintiffs with respect to their portfolios, warn them of the dangerous position in which they stood, and urge them to seek independent advice.

It is contended, of course, that Mrs. Huff and Mrs. Donnelly wanted no interference from Mr. Charpentier -- that their misplaced trust in Mr. Price was such that they would not have accepted Mr. Charpentier's advice or tolerated any opposition to Mr. Price's plans for them. It has certainly not been established that they would probably have accepted Mr. Charpentier's cautionary advice had it been offered. But I find that he and his firm [page168] nevertheless had a duty to warn them, and that this ought to have been obvious to them in the circumstances. Instead they treated the plaintiffs as Mr. Price's property -- it seems not to have occurred to them that they were themselves the plaintiffs' agents.

It has not been established by the evidence, as it was presented at the lengthy trial of this action, either that Mr. Charpentier and his firm in fact profited at the expense of the plaintiffs or that they actively participated with Mr. Price in manipulation of the Cumo stock. The plaintiffs have the onus of proving these allegations and they have been unable to meet it.

I find, however, that Mr. Charpentier and his firm, in their handling of the plaintiffs' affairs, acted throughout as the agents of Mr. Price, and not as agents of the plaintiffs. The way in which Mr. Charpentier dealt with other clients of Mr. Price -- in refusing to sell their Cumo stock unless they first obtained Mr. Price's approval -- confirms the fact that he conceived his role in precisely this way. The commissions charged to the plaintiffs, if chargeable at all, should have been charged to Mr. Price, and not to the plaintiffs. The funds which Mr. Charpentier's firm received from the sale of stock in the plaintiffs' accounts ought not to have been applied to the plainly unauthorized indebtedness to their brokerage house incurred by Mr. Price on "margin", without the plaintiffs' approval. The proceeds of those sales should instead be credited to the plaintiffs to the extent that the plaintiffs so elect.

There will be judgment against Mr. Charpentier and his firm for all commissions charged to the plaintiffs and sums received from sale of the plaintiffs' stock for margin calls, together with judgment for the value at date of conversion of all shares delivered to Mr. Price without authority, all to bear interest at the registrar's rates to this date.

In his second set of reasons, Mr. Justice Taylor said this:

The judgment against the defendants Charpentier and Continental Carlisle Douglas in favour of Mrs. Huff will be in the amount of $381,499 plus prejudgment interest since the date of Mr. Kinsey's calculations and that against those defendants in favour of Mrs. Donnelly will be in the amount of $217,317 with similar addition of subsequent prejudgment interest.

The judgment against Mr. Price will, however, be reduced by the amount recovered from the defendants Charpentier and Continental, and to the extent that the liability of Mrs. Price is limited by that of Mr. Price, the maximum liability of Mrs. Price will be reduced similarly.

4.2 The Issues on Appeal and Cross-Appeal

The issues raised by counsel for Mr. Charpentier and Continental Carlisle Douglas Ltd. are stated in their factum in this way:

1. In the absence of a finding that Mr. Charpentier and his firm participated in Mr. Price's dishonest acts, and in light of the nature of Mr. Price's agency and the instructions given to Mr. Charpen-

tier and his firm, did the trial judge err in finding them liable to the Plaintiffs, for carrying out their agent's instructions?

2. Did the trial judge err in proceeding on the assumption that Mr. Charpentier owed a fiduciary duty to each of the Plaintiffs? [page169]

3. In the alternative, did the trial judge err when he found that Mr. Charpentier's conduct caused the loss? Did he err in determining the damages which Charpentier and his firm had to pay?

The issue raised by the cross-appeal with respect to Leslie Price was raised in the same form with respect to Mr. Charpentier and Continental Carlisle Douglas Ltd., namely: "The learned trial judge erred in his underlying principles of assessment when determining the monetary award to the Plaintiffs for breach of fiduciary duties by the Defendants."

We propose to deal with the issues on the appeal and the issues on the cross- appeal with respect to Arthur Charpentier and Continental Carlisle Douglas Ltd. under these headings:

4.3 Fiduciary Duty (Raised on Appeal)

4.4 Breach of Fiduciary Duty (Raised on Appeal)

4.5 Causation (Raised on Appeal)

4.6 Damages (Raised on Appeal and on Cross-Appeal)

4.3 Fiduciary Duty

The elements which give rise to fiduciary duty were stated this way in Burns v. Kelly Peters & Associates Ltd. (1987), 41 D.L.R. (4th) 577 at pp. 598-600, 41 C.C.L.T. 257, 16 B.C.L.R. (2d) 1 (C.A.):

The essentials are "confidence" from which "influence" grows and which is "abused" to obtain an "advantage".

The parallels between an action for breach of fiduciary duty and an action for negligence for breach of a duty of care are manifest. In both cases the duty arises whenever the relationship between the parties brings it into being; in both cases the categories of relationship which will bring the duty into being are not closed and fixed, but are variable and flexible and are influenced by what the parties made of their own relationship; in both cases the duty may arise in respect of one aspect of the relationship but not in respect of another aspect; in both cases the establishment of the duty does not end the search for the nature of the obligation, because even when the duty is established, the standard which must be attained may vary; and, in both cases, where the relationship that gives rise to the duty grows out of a contractuallinkage between the parties, the duty is likely to be influenced in its existence, in its scope, and in its standard, by the provisions of the contract.

Perhaps of more direct relevance, liability has been imposed many times on stockbrokers who have abused their clients' confidence and trust: see Johnson v. Birkett (1910), 21 O.L.R. 319 (H.C.J.); Scherer v. Zacks, [1952] 4 D.L.R. 503 (Ont. H.C.J.); Allen v. O'Hearn & Co., [1937] 1 D.L.R. 17 (P.C.); Glennie [page170] v. McDougall & Cowans Holdings Ltd., [1935] 2 D.L.R. 561, [1935] S.C.R. 257; Burke v. Cory (1959), 19 D.L.R. (2d) 252, [1959] O.W.N. 129 (C.A.), and Elderkin et al. v. Merrill Lynch, Royal Securities Ltd. et al. (1977), 80 D.L.R. (3d) 313, 22 N.S.R. (2d) 218 (N.S.S.C., A.D.).

In my opinion, the concept of vulnerability as expressed in the Hospital Products case is nothing other than a description of the victim's situation when he is in a position where the fiduciary can exert influence over him by abusing his confidence in order to obtain an advantage, to use the words in which the fiduciary obligation was expressed by Lord Chelmsford, in 1866, in Tate v. Williamson, supra.

Just as reasonable reliance, and through it, vulnerability, is at the root of liability under the Hedley Byrne principle; so vulnerability, arising through justifiable reliance or in some other way, is at the root of liability for breach of fiduciary obligation.

Those elements were reaffirmed in the reasons of the Supreme Court of Canada in Lac Minerals Ltd. v. International Corona Resources Ltd. (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574.

The relationship between Mr. Charpentier, on the one hand, and Mrs. Huff and Mrs. Donnelly, on the other hand, was not the usual direct relationship between a stockbroker and his client. The points on which counsel for Mr. Charpentier rely in saying that there was no fiduciary duty owed by Mr. Charpentier to Mrs. Huff and Mrs. Donnelly were stated in this way in their appellants' factum:

1) Charpentier was not asked for advice. He did not contract to give it; 2) no advice was expected from him; 3) he was required to execute the trades at Price's direction. He was an order taker only; 4) the Plaintiffs did not have trust in him. They did not rely on him. 5) Charpentier had no discretion over the Plaintiffs. He could not make the decisions about what to trade. His only function was to execute the trades. The discretion rested with Mr. Price; 6) similarly, he had no right to unilaterally exercise any power over the Plaintiffs; 7) the Plaintiffs were not vulnerable because they dealt with Mr. Charpentier. They were vulnerable because they dealt with Mr. Price. Their reliance was on him, not Mr. Charpentier; 8) the mischief that caused the loss was done by the agent, Price. There was no mischief with respect to the execution of the trades which was Mr. Charpentier's sole responsibility to the Plaintiffs.

But the trial judge, who heard all the evidence, found that there was a fiduciary relationship giving rise to a fiduciary duty on the part of Mr. Charpentier and owed to Mrs. Huff and Mrs. Donnelly. The specific duty referred to by the trial judge was the duty "to advise the plaintiffs of the risks to which Mr. Price had exposed [page171] them, and to urge on them that they at least obtain independent guidance". And the trial judge also found that Mr. Charpentier and Continental Carlisle Douglas Ltd. acted beyond their only authority when they "margined" the plaintiffs' accounts, and that Mr. Charpentier acted without authority in dealing with the plaintiffs' Swiss assets.

We do not think that the legal structure of the relationship between Mr. Charpentier and Continental Carlisle Douglas Ltd. as broker, Mr. Price as intermediary, financial adviser and attorney, and Mrs. Huff and Mrs. Donnelly as investing clients, itself was such as, by its very structure, to create a fiduciary relationship on the part of the broker and the brokerage firm to the clients. The trial judge did not think so, either. The fiduciary relationship, instead, grew out of particular elements of the way the structure was managed and manipulated. We regard these as the principal elements: Mrs. Huff and Mrs. Donnelly were known to Mr. Charpentier to be financially unsophisticated; Mrs. Huff and Mrs. Donnelly relied on Mr. Price, to the knowledge of Mr. Charpentier, who knew Mr. Price to be a stock promoter and who had arranged for Mr. Price to promote the stock of Cumo Resources Ltd.; Mr. Charpentier was party to an arrangement, which he made together with Mr. Price, to obtain control of the Swiss assets of the plaintiffs and to have them managed by Mr. Price

through the Handelskredit Bank accounts with Continental Carlisle Douglas Ltd.; Mr. Charpentier signed his own name as principal and as attorney in documents which had previously been signed in blank by Mrs. Huff and Mrs. Donnelly, when he knew, or should have known, that they did not wish him to sign those documents or to act as their attorney; Mr. Charpentier knew that 97% to 99% of the portfolios of Mrs. Huff and Mrs. Price at Continental Carlisle Douglas Ltd. were invested in Cumo Resources Ltd. stock by June, 1981; and Mr. Charpentier knew that transactions were taking place in Cumo Resources Ltd. stock in the four accounts maintained by the plaintiffs at Continental Carlisle Douglas Ltd. and that at least some of those transactions were of no benefit to the plaintiffs.

In the face of these elements we do not consider that it is open to Mr. Charpentier to say that the fiduciary relationship which frequently arises between a stockbroker and his or her client could not arise in this case because Mr. Price, the financial adviser and the intermediary, insulated Mr. Charpentier from any responsibility to Mrs. Huff and Mrs. Donnelly. In our opinion Mr. Charpentier, through his trip to Switzerland with Mr. Price, and his daily involvement in the promotion of the stock of Cumo Resources Ltd., was so closely involved with Mr. Price that Mrs. Huff and Mrs. [page172]

Donnelly's vulnerability to Mr. Price became their vulnerability also to Mr. Charpentier, a vulnerability that he exploited by failing to warn them of their dangerous financial position and by participation in the manipulation of their accounts to the advantage of Continental Carlisle Douglas Ltd. and himself and to the disadvantage of Mrs. Huff and Mrs. Donnelly.

We add this. We have set out a passage from the reasons in Burns. v. Peters & Associates Ltd. which points out the similarities between the circumstances which give rise to a duty of care in negligence and the circumstances which give rise to a fiduciary duty. Each duty grows out of the factual circumstances of the particular relationship. In many cases, of which Jaegli Enterprises v. Ankenman (1981), 124 D.L.R. (3d) 415, [1981] 2 S.C.R. 2, 40 N.R. 4 sub nom. Taylor v. Ankenman, is only one example, the Supreme Court of Canada has said that when a trial judge has reached the conclusion, on all the evidence, either that there was, or there was not a duty of care, and that there was or there was not a breach of that duty of care, a Court of Appeal should not substitute its own view for the view of the trial judge unless it is satisfied that the trial judge made a material and identifiable error of law or a clear and identifiable error of fact in his appreciation of the evidence. In our opinion the same principles apply in the case of a trial judge's finding that there was or there was not a fiduciary duty, and that there was or there was not a breach of that fiduciary duty. Unless there is a material and identifiable error of law, or a clear and identifiable error of fact, this court should not interfere with such findings.

In our opinion, Mr. Charpentier and Continental Carlisle Douglas Ltd. owed a fiduciary duty to Mrs. Huff and Mrs. Donnelly by June, 1981, to take all reasonable steps to warn them and, to the extent that it was within their powers, to protect them, in relation to the manipulation of their accounts as part of the promotion of the stock of Cumo Resources Ltd.

4.4 Breach of Fiduciary Duty

The trial judge found that the failure to warn Mrs. Huff and Mrs. Donnelly of the dangers arising from the concentration of their assets in the stock of Cumo Resources Ltd. was a breach of fiduciaryduty on the part of Mr. Charpentier and on the part of Continental Carlisle Douglas Ltd. We agree.

The trial judge found that the margining of the accounts of Mrs. Huff and Mrs. Donnelly in June, 1981, without their knowledge and contrary to their specific instructions was done without authority. But it was more than a margining without authority. Since there [page173] was, by that time if not before, a fiduciary relationship between Mr. Charpentier and his firm, on the one hand, and Mrs. Huff and Mrs. Donnelly, on the other hand, we consider that the duty created by the relationship extended to a fiduciary duty, and not merely a contractual duty, not to margin Mrs. Huff's account or Mrs. Donnelly's account contrary to their instructions, and by doing so to increase their vulnerability. We conclude that the margining of the accounts was a breach of the fiduciary duty of Mr. Charpentier and of Continental Carlisle Douglas Ltd.

We also conclude that allowing all the assets, namely shares of Cumo Resources Ltd., to be removed from the Handelskredit Bank accounts of both Mrs. Huff and Mrs. Donnelly by delivering those share certificates to Mr. Price, having regard to Mr. Charpentier'sknowledge of Mr. Price and his stock manipulation, created a risk of loss to Mrs. Huff and Mrs. Donnelly in relation to which they were vulnerable to Mr. Charpentier and Continental Carlisle Douglas Ltd. and that it constituted a breach of a fiduciary duty owed by Mr. Charpentier and Continental Carlisle Douglas Ltd. to them.

4.5 Causation

Mr. Justice Taylor said [at p. 371]:

> It has certainly not been established that they would probably have accepted Mr. Charpentier's cautionary advice had it been offered. But I find that he and his firm nevertheless had a duty to warn them, and that this ought to have been obvious to them in the circumstances.
>
> It has not been established by the evidence, as it was presented at the lengthy trial of this action, either that Mr. Charpentier and his firm in fact profited at the expense of the plaintiffs or that they actively participated with Mr. Price in manipulation of the Cumo stock. The plaintiffs have the onus of proving these allegations and they have been unable to meet it.

If a plaintiff is able to establish a breach of a fiduciary duty owed to that plaintiff, or a fraud perpetrated on him, the evidentiary burden of proving that a loss that he has in fact been shown to have suffered was caused by the breach of fiduciary duty or the fraud will be discharged, at least in a prima facie way, by a minimum amount of evidence indicating that the breach of fiduciary duty or the fraud was linked to the risk that turned out to result in the loss. That, we think, is the principle applied in London Loan & Savings Corp. of Canada v. Brickenden, supra (see particularly at pp. 469-70); Howard v. Cunliffe, supra; Jacks v. Davis, supra (particularly at pp. 360-1), and Snell v. Farrell, supra. [page174] In our opinion the breach of fiduciary duty in relation to the release of the Cumo shares in the Handelskredit Bank accounts was a contributing cause of the loss of those shares.

In our opinion, the breach of fiduciary duty in margining the accounts was a contributing cause of all the losses in the personal accounts, because if shares had been sold, instead of margining, as Mrs. Huff and Mrs. Donnelly requested, the shares would have been sold at the current and favourable market prices in June, 1981, and the ensuing months.

In our opinion the breach of fiduciary duty in failing to warn of the risks involved in concentrating all their assets in Cumo shares may well have been a contributing cause of the financial losses to Mrs. Huff and Mrs. Donnelly in their personal accounts. That possibility is sufficient to make Mr.

Charpentier and Continental Carlisle Douglas Ltd. liable for breach of that fiduciary duty even though it might not have been sufficient to make them liable if the cause of action against them had been in negligence or breach of contract.

4.6 Damages

The damages should be measured by the losses suffered by the plaintiffs which can be said to have been caused, in the sense we have indicated in the preceding part of these reasons, by the breach of fiduciary duty of Mr. Charpentier and Continental Carlisle Douglas Ltd.

Those losses were, in our opinion, the same as the losses flowing from the breach of fiduciary duty on the part of Mr. Price, namely, the losses attributable to not selling the shares which were in the personal accounts in June, 1981, at the highest price in the three months following June, 1981, namely $12.78 per share, giving losses of $580,212 for Mrs. Huff and $375,372 for Mrs. Donnelly, coupled with the corresponding losses flowing from the failure to sell the shares in the Handelskredit Bank accounts, giving losses of $388,512 for Mrs. Huff and $511,200 for Mrs. Donnelly.

If, after taking into account the liability for the losses we have set. out in the previous paragraph, it could be said either that additional losses were suffered by Mrs. Huff and Mrs. Donnelly from the margining of their accounts, or that additional benefits were retained by Mr. Charpentier and Continental Carlisle Douglas Ltd. for commissions, even after compensating Mrs. Huff and Mrs. Donnelly for their losses on the basis that we have set out, then further damages ought to be awarded against Mr. Charpentier and Continental Carlisle Douglas Ltd. However, the quantum of damages ordered by Mr. Justice Taylor in relation to such losses and [page175] benefits indicates that on the evidence there would be no additional losses to Mrs. Huff and Mrs. Donnelly and no additional benefits to Mr. Charpentier and Continental Carlisle Douglas Ltd. after the payment of the amounts that we have indicated in the previous paragraph. Consequently, it is unnecessary to make any adjustments to the damages computed by reference to the losses to Mrs. Huff and Mrs. Donnelly as we have set them out in the previous paragraph.

We would award damages to the plaintiffs against Mr. Charpentier and Continental Carlisle Douglas Ltd. in those amounts.

5. Disposition

We would dispose of the appeal and the cross-appeal in the following way.

(a) Mrs. Huff should have judgment against Leslie Price, Arthur Charpentier, and Continental Carlisle Douglas Ltd. for $968,724 plus court order interest at the registrar's rate from July 1, 1981. Since the wrongful acts of all three of those defendants contributed to the same loss, the judgment should impose joint and several liability on those three defendants. The amounts paid by Leslie Price to Mrs. Huff after July 1, 1981, should be credited against this liability. Counsel for the parties should strive to agree on the effect of the payments by Leslie Price to Mrs. Huff on the running of court order interest. If the parties cannot agree, then that matter may be spoken to, at the risk of costs for any unreasonable failure to agree.

(b) Mrs. Donnelly should have a similar judgment to the judgment described in para. (a) against the same three defendants, in the principal amount of $886, 932, but otherwise on the same terms.

(c) Mrs. Huff and Mrs. Donnelly should each have judgment against Leslie Price alone for punitive damages in the amount of $20,000 each, plus court order interest at the rate of 5% per annum from July 1, 1981.

(d) Mrs. Huff should have judgment against Arlene Price for $161,767 and court order interest. The court order interest should run at the registrar's rate from the various dates of deposit of the Cumo Resources Ltd. shares in the account maintained by Leslie Price as agent for Arlene Price at Wolverton Securities on such part of the total amount of $161,857 as is represented by the shares deposited on each relevant date.

(e) Mrs. Donnelly should have a similar judgment to the judgment described in para. (d) against Arlene Price, in the principal amount of $184,687, but otherwise on the same terms. [page176]

(f) Each judgment against Arlene Price should be treated as imposing liability for a part of the same loss as is covered by the judgment in favour of the same plaintiff against Leslie Price, Arthur Charpentier and Continental Carlisle Douglas Ltd. Discharge of all or any part of the last remaining $161, 767 of Mrs. Huff's judgment against Leslie Price, Arthur Charpentier and Continental Carlisle Douglas Ltd. will discharge Mrs. Huff's judgment against Arlene Price, pro tanto. Discharge of any part of Mrs. Huff's judgment against Arlene Price will effect a discharge in the same amount of her judgment against Leslie Price, Arthur Charpentier and Continental Carlisle Douglas Ltd. The same rules will apply in relation to Mrs. Donnelly's judgments.

(g) We would dispose of costs in the following way:

(i) Mrs. Huff and Mrs. Donnelly were each granted solicitor-and-client costs at trial by the trial judge against Leslie Price. Leslie Price's conduct was scandalous. So solicitor-and-client costs were appropriate. We would not interfere with those awards.

(ii) Mrs. Huff and Mrs. Donnelly were also granted solicitor-and-client costs of the trial against Arlene Price. Mrs. Price's conduct has not been shown to have been scandalous or reprehensible. We would award Mrs. Huff and Mrs. Donnelly party-and-party costs of the trial against Arlene Price, rather than solicitor-and-client costs.

(iii) Mrs. Huff and Mrs. Donnelly were awarded party-and-party party costs at the trial against Arthur Charpentier and Continental Carlisle Douglas Ltd. We would not interfere with that award.

(iv) We would award Mrs. Huff and Mrs. Donnelly their costs of the appeal and the cross-appeal, to be assessed as party-and-party costs under App. B of the court of Appeal Rules, against Leslie Price, Arlene Price, Arthur Charpentier and Continental Carlisle Douglas Ltd.

Supplementary Reasons Delivered in Chambers December 14, 1990

Taggart J.A. (orally): I have before me a notice of motion which is brought pursuant to Court of Appeal Rule 18(1.1).

The motion says that the plaintiffs, the respondents on the main appeal and appellants by way of cross-appeal, seek an order that the defendants, Continental Carlisle Douglas Ltd. and J. Arthur Charpentier, appellants on the main appeal and respondents on the cross-appeal, post security in this matter for the amount found to [page177] be due to the plaintiffs further to the Court of Appeal judgment dated December 3, 1990; and for any other order which will preserve the rights of the parties pending the settlement of the formal judgment in this matter.

It will be apparent that two things are sought: first, the posting of the security; and, secondly, a general order to preserve the rights of the parties pending the settlement of the formal judgment. Reasons for judgment in this appeal were handed down on December 3, 1990. The parties have endeavoured, but have been unable, to agree on the formal judgment of the court. The matter which appears to be creating difficulty is agreement on the amount that was repaid by the defendant, Leslie Price, to the plaintiffs. The difference between the parties appears to be in the order of $240,000 to $250,000.

The parties appeared before the registrar but that did not lead to a settlement of the judgment. Efforts were then made to reconvene the division of the court which heard the appeal but because of the absence of judges from Vancouver that has not been possible. Because of the absence of judges and the way the rota has been prepared it will not be possible to have the court reconvened until mid-January to hear an application to settle the formal judgment of the court.

The plaintiffs, who were successful on their cross-appeal in substantially increasing the damages which were awarded at trial, are naturally concerned to obtain security for payment of the damages which now control $1,150,491 in the case of Mrs. Huff and $1,091,619 in the case of Mrs. Donnelly. Those figures are arrived at before giving any credit to Mr. Price for the amount which he says he has already paid and before determining what court order interest should be paid with respect to the various heads of damages.

Counsel for the applicants on this motion have submitted two orders for my consideration. The first order relates to a letter of credit which was posted as security pending the hearing of the appeal.

That security was posted prior to the hearing of the appeal and remains outstanding at the present time. I am told that because of the nature of the security no interest on the amount posted has been paid since June of 1990. The security provided by the letters of credit amounts to about $710,000. It is obvious that that security will go only part way to pay the amounts which are indisputably due under the judgment given by this court on December 3, 1990.

The order proposed by the plaintiffs would have the effect of enabling them to realize on the security so as to give them the fruits of their victory in this court at least to a limited extent. [page178]

The second order that the plaintiffs seek is an order directing that officers of the defendant Continental Carlisle Douglas Ltd. and the defendant J. Arthur Charpentier be examined pursuant to Supreme Court Rule 42A(1) and (5) in aid of execution. The plaintiffs rely on Court of Appeal Rule 18(1.). That rule provides:

18(1.1) After an appeal has been decided, a justice may, on terms he considers appropriate, order that proceedings, including execution, in the cause or matter from which the appeal was taken shall be stayed in whole or in part and the justice may make any other order to preserve the rights of the parties pending further proceedings.

(Emphasis added.) In addition counsel relies on the provisions of Rule 18(2) which provides:

18(2) Without limiting the generality of subsection (1) or (1.1), a justice may order that

(a) documents be delivered, (b) possession of land or personal property be given, (c) property be placed in the custody of a person designated by the justice, (d) an instrument be executed, (e) perishable property be sold and the proceeds paid into the Court of Appeal or the court appealed from, (f) a direction be given to a sheriff or that poundage be disallowed, (g) a person be paid money received by the sheriff under an execution, or (h) security be given for any purpose in a form and manner directed by the justice.

In the first instance the plaintiffs point to the concluding language of Rule 18(1.) which I have emphasised.

Counsel for the defendants say that the order sought by the plaintffs can only be made if there is an application for a stay of proceedings before the court. In support of that position counsel referred to the judgment of Mr. Justice Hutcheon in chambers in Loewen, Ondaatje, McCutcheon & Co. v. Bechthold Resources Ltd. October 28, 1985, Vancouver Registry CA004153 (B.C.C.A.). That judgment was given on October 28, 1985. Relying on an earlier judgment of Mr. Justice Seaton in chambers given September 30, 1982 in C.R.F. Holdings Ltd. v. Fundy Chemical Int'l Ltd., Vancouver Registry CA821022 (B.C.C.A.), Mr. Justice Hutcheon held that he did not have authority under the provisions of Rule 18(1) to make the order requested. In effect the two judgments hold that the old Rule 18(1) could only be acted on if there was before the court an application for a stay of proceedings. [page179]

In my opinion, the new rule which came into effect on November 3, 1989, alters that situation. When one considers Rule 18(1.1) and (2) and especially cl. (h) of the latter, I think a chambers judge is now clothed with authority to make the kinds of orders sought by the plaintiffs. I emphasise again the concluding language of Rule 18(1.1.) and the language of cl. (h) of 18(2).

In the circumstances I am of the opinion that I have authority to make the two orders sought by the plaintiffs and I would grant the relief which they seek.

Now, before leaving this matter I would ask counsel when the settlement of the formal judgment comes on for hearing, and I hope that will be at the earliest possible date when the court resumes sitting in January, to have available for the court the competing forms of order which they support. The plaintiffs should put before the court the form of order which they seek and should file a brief memorandum indicating the basis upon which the proposed order is prepared. Counsel for the defendant should do likewise. The memoranda need not be long but they should state clearly the basis upon which the form of order which they seek has been prepared.

Counsel should take steps immediately to ensure that the motion to settle comes on promptly at as early a time as possible after the court resumes sitting in January. Judgment varied; application granted.