SUPREME COURT OF CANADA

CITATION: Galambos *v.* Perez, 2009 SCC 48

DATE: 20091023
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BETWEEN:

Michael Z. Galambos and Michael Z. Galambos Law Corporation, both carrying on business as "Galambos & Company" and the said Galambos & Company
Appellants
and
Estela Perez
Respondent

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 88) — Cromwell J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

Michael Z. Galambos and Michael Z. Galambos Law Corporation, both carrying on business as "Galambos & Company" and the said Galambos & Company *Appellants*

v.

Estela Perez *Respondent*

Indexed as: Galambos *v.* Perez

Neutral citation: 2009 SCC 48.

File No.: 32586.

2009: April 15; 2009: October 23.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Negligence — Fiduciary duty — Bookkeeper making unsolicited and voluntary cash advances to employer law firm which was experiencing financial difficulties — Law firm acting

on bookkeeper's behalf in preparing two wills and in handling two mortgage transactions while she was working for it — Law firm going bankrupt and bookkeeper finding herself unsecured creditor — Whether duty of care under negligence principles or per se fiduciary obligations arose within solicitor-client relationship — Whether ad hoc fiduciary duties arose from power dependency relationship existing between bookkeeper and lawyer — Whether in such relationships, fiduciary duties may arise simply on basis of reasonable expectations of weaker party and without any mutual understanding of both parties that one must act in interests of the other — Whether fiduciary duties may arise although fiduciary has no discretionary power to affect other party's legal or important practical interests.

P made voluntary sizeable advances of cash — some $200,000 in total — to her employer, a law firm founded by G, often without informing G beforehand. Although P was hired as the firm's part-time bookkeeper she effectively became the office manager, overseeing the firm's income, expenses and accounting and had unlimited signing authority on the firm's non-trust bank accounts. Initially, to resolve a cash flow problem, P obtained a personal loan and deposited $40,000 into the firm's bank account. G did not ask her to advance this money and he did not even know about the advance until several days later. G instructed P to reimburse herself with interest, an instruction she did not follow other than by repaying herself $15,000. As the firm's financial situation deteriorated, P made several more deposits of her own funds into the firm's account and covered some firm expenses with her personal credit card. The firm, during the time she worked for it, handled the preparation and execution of new wills for P and her husband as well as two mortgage transactions. The firm did not expect to be and was not paid for these services. When the firm was placed in receivership and G went bankrupt P found herself an unsecured creditor. She

recovered nothing. P then sued G and the defunct firm for negligence, breach of contract and breach of fiduciary duty.

The trial judge dismissed P's claims, finding that her rights were those of a creditor and nothing more. The Court of Appeal set aside that decision and granted P judgment for $200,000. The court concluded that P was entitled to equity's protection because there were *ad hoc* fiduciary duties owed to her by G and his law firm in relation to the cash advances, which they had breached. It held that: there was a power-dependency relationship between P and G; it is not necessary that there be any mutual understanding that G had relinquished his self-interest in favour of P's for the duty to arise; P was vulnerable; and, the evidence overwhelmingly supported the conclusion that G took advantage of her trust.

Held: The appeal should be allowed and the trial judgment should be restored except that, if the parties cannot agree, the question as to whether P is entitled to a judgment in debt against the law firm and, if so, whether there is any impact on the costs ordered at trial or on appeal to the Court of Appeal flowing from that judgment, should be remanded to the Court of Appeal.

The Court of Appeal exceeded the limits of appellate review and unduly extended the scope of fiduciary obligations. Absent an error of law or a palpable or overriding error of fact, of which there is none, the trial judge's findings of fact and conclusion that a fiduciary duty did not exist must be upheld on appeal. In this case, the Court of Appeal retried the case on the basis of the written record and substituted its view of the facts and their significance for that of the trial judge. [3] [49] [53]

In holding that the relationship between P and G and his firm gave rise to an *ad hoc* fiduciary duty, the Court of Appeal erred in three respects. First, the conclusion that G was in a position of power and influence relative to P is directly at odds with the clear findings of fact at trial. The trial judge found that P was not vulnerable in terms of her relationship with G, that she probably had more knowledge of the state of G's financial affairs than he did, that she had not relinquished her decision-making power with respect to the loans and that G had no discretion over her interests that he was able to exercise unilaterally or otherwise. The trial judge specifically rejected P's contention that due to the power dynamics of their relationship she was simply unable to refuse requests for loans. There was no evidence accepted by the trial judge of any express requests for loans, which makes it illogical to conclude that P was unable to refuse requests when there were in fact none. [48][51-55][57]

Second, not all power-dependency relationships are fiduciary in nature and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is fiduciary or not. It follows that there are not, and should not be, special rules for recognition of fiduciary duties in the case of power-dependency relationships. Here, the Court of Appeal erred when it held that, in the case of a power-dependency relationship, a fiduciary duty may arise even in the absence of a mutual understanding that one party would act only in the interests of the other provided there is proof of an expectation on the part of the plaintiff, which is reasonable in all of the circumstances, that the defendant would act in his or her best interests. The Court of Appeal found P to have such a reasonable expectation. While a mutual understanding may not always be necessary — a point that need not be decided here — it is fundamental to all *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or

implied, that the fiduciary will act in the best interests of the other party, in accordance with the duty of loyalty reposed on him or her. The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty. The Court of Appeal's analysis went wrong when it found a fiduciary duty without finding an undertaking, express or implied, on the part of G that he would act in relation to the loans only in P's interests, and based its conclusion that a fiduciary duty existed on P's expectations alone. [63-64][66][74-75][77][80]

The third error arises by implication because the Court of Appeal appears to have accepted the proposition that a fiduciary duty may arise even though the fiduciary has no discretionary power to affect the other party's legal or important practical interests. The nature of this discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. It may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations by the beneficiary's entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power. While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not. The presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the existence of such a duty. The findings of the trial judge that the evidence did not establish that P relinquished her decision-making power with respect to the

loans to G, and that G had no discretionary power over P's interests that he was able to exercise unilaterally or otherwise, with which the Court of Appeal did not disagree, are fatal to P's claim that there was an *ad hoc* fiduciary duty on G's part to act solely in her interests in relation to these cash advances. [50][84-86]

Moreover, given the limited nature of the retainers and the unusual nature of the advances, the trial judge did not err in finding that G and the law firm did not breach their duty of care arising from the solicitor-client relationship between them and P. There was no actual conflict of interest between the firm's duties to her in connection with the limited retainers and its interest in receiving the advances. Similarly, there could not be in these unusual facts any reasonable apprehension of conflict. Given the very limited nature of those retainers and the manner in which the advances were made — unsolicited and frequently without advance notice — there was no duty on the firm under negligence principles to give P advice about those advances or to insist that she obtain independent legal advice about them. [33]

With respect to P's contractual claims against the law firm, out of an abundance of caution and if the parties cannot agree, the question of whether a judgment in debt in P's favour against the firm should issue and, if so, its impact, if any, on the costs ordered at trial and on the appeal to the Court of Appeal should be remanded to the Court of Appeal. [46]

Cases Cited

Referred to: *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377; *MacDonald Estate v. Martin,*

[1990] 3 S.C.R. 1235; *Meadwell Enterprises Ltd. v. Clay and Co.* (1983), 44 B.C.L.R. 188; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Mustaji v. Tjin* (1995), 24 C.C.L.T. (2d) 191, aff'd (1996), 25 B.C.L.R. (3d) 220; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Frame v. Smith*, [1987] 2 S.C.R. 99.

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69.4.

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APPEAL from a judgment of the British Columbia Court of Appeal (Rowles, Levine and Thackray JJ.A.), 2008 BCCA 91, 78 B.C.L.R. (4th) 268, 253 B.C.A.C. 149, 425 W.A.C. 149, 291 D.L.R. (4th) 537, [2008] 7 W.W.R. 39, 55 C.C.L.T. (3d) 243, [2008] B.C.J. No. 309 (QL), 2008 CarswellBC 339, reversing a decision of Rice J., 2006 BCSC 899, [2006] B.C.J. No. 1396 (QL), 2006 CarswellBC 1523. Appeal allowed.

George K. Macintosh, Q.C., and *Tim Dickson*, for the appellants.

Robert D. Holmes and *John W. Bilawich*, for the respondent.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] This appeal arises out of the developing jurisprudence about fiduciary obligations. The facts are unusual, if not unique. At the centre of the case are sizeable advances of cash — some $200,000 in total — made by Ms. Perez to her employer, the appellant law firm founded by Mr. Galambos. Ms. Perez made these advances voluntarily, much on her initiative and often without

informing Mr. Galambos beforehand. When the firm was placed in receivership and Mr. Galambos went bankrupt, she found herself an unsecured creditor. She recovered nothing. With the necessary leave of the court (under s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3), she sued Mr. Galambos and the defunct firm for negligence, breach of contract and breach of fiduciary duty, no doubt in the hope that, as the trial judge observed, success in these claims might allow her to recover from the appellants' professional liability insurance.

[2] Ms. Perez's claims failed at trial where the judge found that her rights were those of a creditor and nothing more (2006 BCSC 889, [2006] B.C.J. No. 1396 (QL)). The Court of Appeal, however, set aside that decision (2008 BCCA 91, 78 B.C.L.R. (4th) 268). It concluded that Ms. Perez was entitled to equity's protection because there were fiduciary duties owed to her by the appellants which they had breached. The appellants now appeal to this Court. Although there are several issues, the main question is whether the Court of Appeal was correct to find the appellants owed and breached fiduciary duties to Ms. Perez.

[3] In my respectful view, the Court of Appeal exceeded the limits of appellate review and unduly extended the scope of fiduciary obligations. The trial judge was right to dismiss Ms. Perez's claims and the Court of Appeal erred in law by reversing that decision.

II. Issues

[4] The focus of the appeal is the appellants' contention that the Court of Appeal wrongly found that they were Ms. Perez's fiduciaries in relation to the cash advances which she made. Ms.

Perez, in responding to the appeal, not only defends the Court of Appeal's decision, but also renews other arguments which she advanced unsuccessfully at trial. She submits that the appellants acted throughout as her lawyers and in the course of doing so, breached fiduciary duties inherent to the solicitor-client relationship, acted negligently and in breach of contract. She also raises arguments based on her employment contract and her claim in debt against the firm.

[5] I find it more convenient to address Ms. Perez's submissions on these points first and then turn to what I view as the heart of the appeal, the appellants' challenge to the Court of Appeal's decision. A brief overview of the facts, claims and proceedings will set the stage.

III. Overview of Facts, Claims and Proceedings

A. *Facts*

[6] Ms. Perez was hired in May 2001 as the firm's part-time bookkeeper. She did excellent work and in October 2001 she started to work full-time, effectively becoming the office manager. As part of her duties, she oversaw all of the firm's income, expenses and accounting and had unlimited signing authority on firm bank accounts, except trust accounts.

[7] In January 2002 the firm experienced a cash flow problem. To resolve it, Ms. Perez obtained a personal loan and deposited $40,000 into the firm's account. The trial judge found that Mr. Galambos did not ask her to advance this money and that he did not even know about the advance until several days later (para. 61). It is common ground that Mr. Galambos instructed Ms.

Perez to reimburse herself with interest, an instruction she did not follow other than by repaying herself $15,000.

[8] During and after 2002, the firm's financial situation deteriorated. Ms. Perez made several more deposits of her own funds into the firm's account and covered some firm expenses with her personal credit card. The trial judge found that Ms. Perez made several of the advances without informing Mr. Galambos beforehand and that she extended the loans voluntarily, much on her own initiative and without undue influence by Mr. Galambos (paras. 62-63). The trial judge described what happened this way:

> As the [financial] decline continued, Mrs. Perez began to deposit more monies of her own into the general account of the firm. On February 12 and 21, 2003, she deposited cheques for $10,000 and $22,000. She testified that she would observe that the funds were needed and inform Mr. Galambos. According to her, he would simply ask her to "do something". She would then, without necessarily telling him first, deposit more funds of her own into the firm's account.
>
> In addition to these deposits, Mrs. Perez frequently paid for the firm's supplies with her own credit card and then reimbursed herself for those expenses. She even used her card to make certain personal purchases for Mr. Galambos, such as two suits when she accompanied him once to Harry Rosen's and a down payment when she accompanied him once to sign a lease for a Mercedes. Mr. Galambos was aware that this was her practice. He said she volunteered to use her personal credit card in this way so that she could pick up frequent flyer points as a perquisite.
>
> All the while, throughout 2003 and early 2004, the decline in the firm's fortunes continued, and clearly so. The DOJ work, which had made up most of the firm's revenue, continued to drop. The firm laid off staff. The bank overdraft was constantly at its limit and beyond. The plaintiff kept advancing money, asserting several times in her testimony that she did so in reliance on Mr. Galambos's promises that the firm's fortunes would improve and that he would pay her back. According to Mrs. Perez, he told her that there were one or two files soon to be completed with high contingency fees and that he was on the verge of obtaining lucrative new legal work. He even took her to meet the new client. By March 2004, the firm owed Mrs. Perez approximately $200,000. [paras. 17-19]

[9] During the time she worked for the firm, it handled the preparation and execution of new wills for Ms. Perez and her husband as well as two mortgage transactions, with respect to at least one of which the firm also acted for the lender. The firm did not expect to be and was not paid for these services.

B. *Claims*

[10] Ms. Perez claimed that there was an ongoing solicitor-client relationship between her and Mr. Galambos's firm because free legal services were part of her employment contract. She submitted that Mr. Galambos and the firm breached an implied term of the retainer and their fiduciary duties to her by failing to provide her with the legal advice she required in connection with her loans to the firm and by acting for her while in a conflict of interest. She also asserted that Mr. Galambos and the firm were fiduciaries even apart from the solicitor-client relationship and that they had breached their obligations to her. She made other claims in contract and negligence.

C. *Proceedings*

[11] At trial, all of Ms. Perez's claims were dismissed. The trial judge, Rice J., found that there were no fiduciary duties in relation to the cash advances. He rejected Ms. Perez's contention that there was any ongoing, general solicitor-client relationship; he found, contrary to her position, that free legal services were not a term of her employment. He concluded that the retainers for the wills and mortgages were each distinct and limited to the services requested and that the loans were outside the ambit of the limited solicitor-client relationship which existed between the parties (paras.

24-40). He also found that there was no fiduciary relationship apart from these retainers since Ms. Perez was not vulnerable and had not relinquished any decision-making power to Mr. Galambos (paras. 41-46). As for Ms. Perez's negligence claim, the trial judge concluded that Mr. Galambos had not been negligent in his conduct of his business, that he owed no special duty to Ms. Perez in that regard in any case, that she did not rely on Mr. Galambos' expressions of hope that things would turn around and that it would have been unreasonable for her to do so, given her detailed knowledge of the firm's finances. Finally, the judge firmly rejected Ms. Perez's allegations of coercion and undue influence by Mr. Galambos (paras. 54-55).

[12] Writing for the Court of Appeal, Rowles J.A. agreed with the trial judge that it was not a term of Ms. Perez's employment that the firm would provide free legal services on all matters or act as her lawyer generally. Also in apparent agreement with the trial judge, the court doubted that the limited solicitor-client relationships that did exist between Ms. Perez and the firm provided a basis for finding any breach of the *per se* fiduciary obligations arising from the relationship of solicitor and client. However, the court concluded that Mr. Galambos had breached an *ad hoc* fiduciary duty which arose in all of the circumstances, even though Ms. Perez did not specifically submit before the Court of Appeal that there was a duty arising that way. The court held that: there was a "power-dependency" relationship between Ms. Perez and Mr. Galambos; it is not necessary for the duty to arise that there be any mutual understanding that Mr. Galambos had relinquished his self-interest in favour of hers; Ms. Perez was vulnerable; and the evidence "overwhelmingly" supported the conclusion that Mr. Galambos took advantage of her trust (paras. 16 and 50-56). The Court of Appeal therefore allowed the appeal and granted Ms. Perez judgment for $200,000.

IV. Analysis

A. *Respondent's Issues*

[13] Ms. Perez submits that the appellants acted throughout as her lawyers and that, in doing so, they acted negligently, in breach of contract and in breach of a fiduciary duty flowing from that solicitor-client relationship. She also makes brief submissions with respect to her contract of employment and her claim in debt against the now-defunct firm.

[14] Except in one aspect, I am not persuaded that these points have merit. I will first address the submissions arising from the solicitor-client relationship and then turn to the other claims.

1. Claims Arising from the Solicitor-Client Relationship

a. *Negligence*

[15] At trial, Ms. Perez submitted that the appellants had a duty of care towards her under negligence principles, both within the solicitor-client relationship and apart from that relationship. In this Court, her submissions about negligence are limited to breaches of duty within the solicitor-client relationship.

[16] In June of 2002, a Galambos & Co. lawyer handled the preparation and execution of new wills for Ms. Perez and her husband. The firm also handled mortgage transactions in January and

September of 2003.

[17] The foundation of Ms. Perez's negligence submission is that there was a general and ongoing solicitor-client relationship between the appellants and herself. She maintains that this relationship existed throughout her employment and covered all necessary legal work during that time including, of course, the period during which she advanced funds to the firm. Ms. Perez submits that the appellants breached the duty of care which was inherent in this solicitor-client relationship, saying that they were negligent by placing themselves in a position of conflict of interest with her, failing to advise her in connection with the cash advances and failing to require or suggest that she seek independent legal advice before making the cash advances to the firm.

[18] In the particular and admittedly unusual facts of this case, these submissions cannot be accepted. Given the strong findings of fact by the trial judge, the particular nature of the appellants' retainers and the nature of the advances themselves, I see no reviewable error in Rice J.'s rejection of these claims.

[19] The trial judge made three especially important factual findings which in my view cannot be disturbed on appeal.

[20] The first is that, contrary to Ms. Perez's contentions, there was no ongoing, general solicitor-client relationship. While Ms. Perez claimed that she had been promised free legal work as a condition of her employment, the judge concluded that this was not a term of her employment and that the firm had not undertaken to be her lawyer generally or to provide her with any specific

legal service (para. 27). This was a finding of fact made by the judge after consideration of conflicting evidence and no basis has been made out for setting it aside. It follows that an important factual element of Ms. Perez's claims does not exist.

[21] The judge's second finding related to the legal work undertaken by the firm on Ms. Perez's behalf. He found that each retainer was limited to the specific services requested and was unrelated to the advances she made to the firm. While the judge did make a factual mistake in his discussion of this issue as I shall describe, I see no proper basis to interfere with his conclusions about the nature of the retainers.

[22] With respect to the wills, the trial judge noted that Ms. Perez herself acknowledged that this legal work had nothing to do with the previous or subsequent advances of funds that she made to the firm (para. 29).

[23] With respect to the mortgages, the judge found that these retainers were unrelated to the cash advances and were limited to the particular services requested. He put it this way, at paras. 36-37:

> On the whole, the evidence indicates that Mrs. Perez retained Galambos & Company for three specific legal purposes: to obtain a new will and to complete two mortgage transactions. Aside from those, Mrs. Perez's only relationship with the firm was as an employee and a creditor. There was, at the time these services were performed, no commitment of the firm to provide Mrs. Perez with any legal service in the future. There is no evidence that Mrs. Perez consulted anyone in the firm for legal advice on any matter outside the confines of the three specific transactions. In particular, there is no evidence that she ever asked Mr. Galambos or another lawyer at the firm to advise her about the loans or about her financial circumstances generally. On the contrary, she made some advances on her own initiative without telling Mr. Galambos beforehand.

> In the circumstances, I find that each retainer was separate, distinct, and limited to the specific services Mrs. Perez requested. [Emphasis added.]

[24] The judge's third finding was that Ms. Perez did not ask for or receive advice about the advances, that she did not rely on anything Mr. Galambos told her when she decided to make the advances and that, even if she had so relied, that reliance would have been unreasonable in the particular circumstances of the case (paras. 47-53).

[25] In light of these findings, Ms. Perez's submissions about negligence cannot succeed. The solicitor-client relationship between Ms. Perez and the appellants was very limited and there is no plausible suggestion that the firm's preparation of the wills and the mortgages breached the standard of care owed to her. As the trial judge put it, "Mrs. Perez has no complaint relating to any of the legal services or advice that the firm provided. Those transactions did not leave her disadvantaged in any way" (para. 40).

[26] Was there a breach of any duty owed in relation to the cash advances? Ms. Perez argues that it is illogical to say that the subject matters of the legal services were distinct from the loans because drawing up a will involves knowing the state of a client's assets and liabilities and that "the relation of the two mortgage transactions to the loans is obvious" (R.F., at para. 66). She submits that the proceeds were used to provide the advances. However, the trial judge found as a fact that the mortgages had nothing to do with her advances to the firm and rejected as inconclusive the only piece of evidence which could have supported the theory that Mr. Galambos helped her obtain one of the loans by attesting to her employment status (paras. 29 and 56-61). Ms. Perez has pointed to no proper basis for appellate interference with these findings.

[27] That said, Ms. Perez correctly submits that the judge was wrong to find that there was no solicitor-client relationship between her and the firm at the time of any of her cash advances. The record discloses that Ms. Perez did make some advances to the firm while there were open files for some of the matters in which the firm acted for her. During these periods, Ms. Perez advanced Galambos & Co. amounts which are difficult to calculate precisely from the record, but which were at least in the tens of thousands of dollars. The judge erred, therefore, in saying, at para. 37, that she was not a client at any of the times when she made loans to the firm. However, this factual mistake does not in my view invalidate the judge's critical finding that the retainers were distinct, limited and had no bearing on these advances.

[28] I would not wish to be thought as saying that the firm complied with all of the applicable rules of professional conduct. The fact that these advances were made outside the confines of this particular solicitor-client relationship does not circumvent the nearly absolute professional standard not to borrow from clients. As provided in rule 4 of Chapter 7 of the Law Society of British Columbia *Professional Conduct Handbook* (1993): "Unless the transaction is of a routine nature to and in the ordinary course of business of the client, a lawyer must not borrow money or obtain credit from a client of the lawyer's firm, or obtain a benefit from any security or guarantee given by such a client."

[29] However, two points must be made with respect to this rule of conduct. The first is that there is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not

breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily negligence. Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 425. They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence: see, e.g., *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1244-45; *Meadwell Enterprises Ltd. v. Clay and Co.* (1983), 44 B.C.L.R. 188 (S.C.); S. M. Grant and L. R. Rothstein, *Lawyers' Professional Liability* (2nd ed. 1998), at pp. 8-10.

[30] The second point relates to the concerns underlying the rules of conduct in relation to borrowing from clients. The rule is a specific application of the general rules about conflict of interest. There is concern that a lawyer's legal skill and training, coupled with the relationship of trust that arises between a solicitor and a client, creates the possibility of overreaching by the lawyer. A further concern is that the lawyer is in a position to arrange the form of the transaction and may therefore further his or her own interests instead of those of the client: see *Restatement (Third) of the Law Governing Lawyers*, § 126 Cmt. b (2000). However, given the trial judge's factual findings in this unusual case, the concerns giving rise to the rule are not in play here.

[31] A situation of conflict of interest occurs when there is a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person": *Restatement (Third), of the Law Governing Lawyers*, § 121, cited with approval in *R. v. Neil*, 2002

SCC 70, [2002] 3 S.C.R. 631, at para. 31. On this point, Rice J. effectively found that there was no risk that the firm's representation of Ms. Perez in connection with the wills or mortgages could be affected by the firm's interest in receiving the cash advances from her. Similarly, the trial judge found no reliance and therefore certainly no overreaching and no effort on the part of the lawyers to structure the advances to their advantage. As the trial judge found, "although it is truly strange, [Ms. Perez] appears to have extended the loans voluntarily and much on her own initiative" (para. 62). He concluded that there was "no evidence of undue influence, or unconscionability" (para. 63).

[32] I cannot fault the judge for reaching this conclusion on the admittedly unusual facts which confronted him. These were routine legal services, wholly unrelated, as the judge found, to the advances and they were provided without fee to an employee. The cash advances were unusual and far-removed from the sorts of loans from clients envisaged by the professional conduct rule. The advances were not requested by the firm or Mr. Galambos, they were sometimes made without Ms. Perez advising the firm that they had been, Ms. Perez, the bookkeeper and employee of the firm, did not obey her employer's instructions to repay the advances even when the firm's finances would have permitted it and she did not provide an accounting to the firm of what it owed to her. This situation is as about as far removed as one can imagine from the typical case of a lawyer improperly borrowing money from a client. In short, there was no conflict between the firm's duties to her in connection with the wills and mortgages and the advances, and the firm did not in any way trade upon its position as her lawyer to obtain them.

[33] I conclude that given the limited nature of the retainers and the unusual nature of the advances, the trial judge did not err in finding that the appellants did not breach their duty of care

arising from the solicitor-client relationship between them and Ms. Perez. There was no actual conflict of interest between the firm's duties to her in connection with the limited retainers and its interest in receiving the advances. Similarly, there could not be in these unusual facts any reasonable apprehension of conflict. Given the very limited nature of those retainers and the manner in which the advances were made — unsolicited and frequently without advance notice — there was no duty on the firm under negligence principles to give Ms. Perez advice about those advances or to insist that she obtain independent legal advice about them.

b. *Contract for Legal Services*

[34] The claim that the solicitor-client contract was breached is essentially a differently labelled repetition of the claim in negligence, and this contractual claim falls with it.

c. *Per se Fiduciary Duty*

[35] Ms. Perez submits that the appellants breached the fiduciary obligations owed by lawyers to clients. In my view, this contention fails for much the same reason as Ms. Perez's claims in negligence.

[36] Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J., at p. 646. These categories are sometimes called *per se* fiduciary relationships. There is no doubt that the solicitor-

client relationship is an example. It is important to remember, however, that not every legal claim arising out of a *per se* fiduciary relationship, such as that between a solicitor and client, will give rise to a claim for a breach of fiduciary duty.

[37] A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary: *Lac Minerals*, at p. 647. This point is important here because not all lawyers' duties towards their clients are fiduciary in nature. Sopinka and McLachlin JJ. (as the latter then was) underlined this in dissent (but not on this point) in *Hodgkinson*, at pp. 463-64, noting that while the solicitor-client relationship has fiduciary aspects, many of the tasks undertaken in the course of the solicitor-client relationship do not attract a fiduciary obligation. Binnie J. made the same point in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 34: "Not every breach of the contract of retainer is a breach of a fiduciary duty." The point was also put nicely by R. M. Jackson and J. L. Powell, *Jackson & Powell on Professional Liability* (6th ed. 2007), at para. 2-130, when they said that any breach of any duty by a fiduciary is not necessarily a breach of fiduciary duty.

[38] The launching pad for Ms. Perez's submissions based on the solicitor-client relationship is that there was a general solicitor-client relationship between her and the firm for all necessary legal work during the time that she advanced funds to the firm. As noted earlier, the judge made a finding against her on this point: he found, on conflicting evidence, that it was not a term of Ms. Perez's employment that the firm would provide her with all necessary legal services and that the cash advances were not within the terms of any of the specific and limited retainers which the firm undertook on her behalf. The Court of Appeal agreed. It concluded that whatever fiduciary

obligations arose from the limited solicitor-client relationship, they did not extend to the cash advances. As the Court of Appeal put it:

> While a solicitor-client relationship existed between the parties at certain times and for certain purposes, I question whether that aspect of their relationship, standing alone, would provide a foundation for imposing fiduciary obligations in this case. Unlike the situation in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, (a case which both parties rely on as authority for the extent of the duties of lawyers to their clients where there is a conflict of interest), it appears to me that the nature of the relationship between Mr. Galambos and Ms. Perez and the trust and confidence that formed between them cannot be fully encompassed or explained by their interactions as solicitor and client. I agree with the trial judge that although it was reasonable for the appellant to expect the firm to offer its services for certain discrete transactions, it was not implicit as a term of her employment that the firm would provide free legal services on all matters or act as her lawyer generally. Even if this were the case, I question whether that alone would constitute a sufficient basis on which to impose fiduciary obligations. As the trial judge noted, it is common practice for law firms to act for their employees on discrete, simple matters. Generally speaking, acting on such discrete matters would not alone found a fiduciary relationship giving rise to fiduciary obligations in all dealings with all such employees. [para. 48]

[39] I am not persuaded that there is any basis to interfere with the trial judge's conclusion, endorsed by the Court of Appeal, that the retainers were unrelated to the cash advances and that no obligation arose on the part of Mr. Galambos and his firm to act solely in Ms. Perez's interest in relation to the advances. I conclude that the judge did not err in finding that there had been no breach of the *per se* fiduciary obligations that arose from the solicitor-client relationship.

d. *Conclusion on Solicitor-Client Issues*

[40] In my view, the trial judge did not err by dismissing Ms. Perez's claims in negligence, contract and breach of fiduciary duty arising from the solicitor-client relationship between her and the firm.

2. Other Contractual Claims

[41] Two paragraphs of Ms. Perez's factum are devoted to two other contractual claims: the first relating to an alleged breach of employment contract and the second to an alleged breach of a "covenant to repay" the advances. I will address each in turn.

a. *Employment Contract*

[42] While Ms. Perez's submissions on this point are not easy to follow, the point appears to be that the firm breached an implied obligation under Ms. Perez's employment contract not to undermine the trust and confidence of the employment relationship. The question of whether there was an obligation of trust and confidence arising in the particular circumstances of the parties' relationship will be addressed in the next section of my reasons. I do not discern in Ms. Perez's submissions any other, independent alleged breach of the employment contract.

b. *Covenant to Repay*

[43] Ms. Perez submits that she is entitled to, but did not receive, a judgment in debt against the appellant law corporation. While Mr. Galambos is personally shielded from any action in debt under the *Bankruptcy and Insolvency Act*, she submits that a judgement in debt should issue against the firm, which, so far as may be ascertained from the record in this Court, has not obtained the same protection.

[44] The fact of the debt is not disputed and it appears that the Amended Statement of Claim includes language which may be broad enough to include this claim. (A.R., p. 80, at para. 12). While the law corporation, we are told, is defunct and without assets, Ms. Perez's counsel mentioned during oral argument that a judgment against the firm might have some impact on the question of costs.

[45] This issue is mentioned in neither of the judgments below; the trial judge's order dismissed all claims and awarded scale 3 costs to April 24, 2006 and double scale 3 costs thereafter, and the Court of Appeal set aside this order, gave Ms. Perez judgment for $200,000, prejudgment interest and costs of the trial and the appeal. It was, therefore, not necessary for it to consider the debt claim or the trial judge's costs award.

[46] There is at least some basis to think, therefore, that Ms. Perez may be entitled to the judgment she seeks against the firm for debt and that such a judgment might have some practical value to her. However, the question has not been addressed below and the record and arguments in this Court are too sparse to allow me to resolve the matter confidently. As there appears to be no dispute about the existence of the debt to the corporation, it may well be that the parties can sort out for themselves what, if any, costs consequences should flow from it. However, if they cannot, I would, out of an abundance of caution, remand, pursuant to s. 46.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, to the British Columbia Court of Appeal the questions of whether a judgment in debt in Ms. Perez's favour should issue and, if so, its impact, if any, on the costs ordered at trial and on the appeal to the Court of Appeal now that her appeal in all other respects has been dismissed in this

Court.

3. Summary of Conclusions with Respect to the Respondent's Issues

[47] I conclude that Ms. Perez's claims fail with respect to alleged breaches within the solicitor-client relationship and her contract of employment. Subject to any agreement among the parties, I would remand to the Court of Appeal the questions of whether she ought to have judgment in debt against the Michael Z. Galambos Law Corporation and, if so, whether that judgment has any impact on the disposition of costs in the courts below.

B. *Appellants' Issues*

[48] The appellants' issues address the holding of the Court of Appeal. As noted, it held, reversing the trial judge, that the particular circumstances of the relationship between Ms. Perez and Mr. Galambos and his firm gave rise to what may be called an *ad hoc* fiduciary duty. This means that apart from the categories of relationships to which fiduciary obligations are innate, such obligations may arise as a matter of fact out of the specific circumstances of a particular relationship: see e.g. *Lac Minerals*, at p. 648; *Hodgkinson*, at p. 409. The existence of the fiduciary obligation is thus primarily a question of fact to be determined by examining the specific facts and circumstances: *Lac Minerals*, at p. 648.

[49] This is an important point in relation to the standard of appellate review. Absent an error of law or a palpable and overriding error of fact, the trial judge's conclusion that a fiduciary

duty did not exist must be upheld on appeal: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 13; *Hodgkinson*, at pp. 425-26. As La Forest J. put it in *Hodgkinson*, at p. 426, this principle of non-intervention on appeal "is not merely cautionary; it is a rule of law. Failing a manifest error, an appellate court simply has no jurisdiction to interfere with the findings and conclusions of fact of a trial judge".

[50] The core of the Court of Appeal's reasoning consists of three points, two of which are expressly set out and the third of which is implied. The explicit points are, first, that a "power-dependency" relationship existed between Ms. Perez and Mr. Galambos and second, that in such relationships, fiduciary duties may arise simply on the basis of the reasonable expectations of the weaker party and without any mutual understanding of both parties that one must act in the interests of the other. The third point arises by implication because the court appears to have accepted the proposition, without expressly stating it, that a fiduciary duty may arise even though the fiduciary has no discretionary power to affect the other party's legal or important practical interests.

[51] The appellants challenge each of these points. For reasons which I will develop, I agree that the Court of Appeal erred in these three respects.

1. Was There a Power-Dependency Relationship?

[52] The Court of Appeal found that the parties' relationship in this case was similar in nature to the "power-dependency" relationship found in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226. By the term "power-dependency" relationship, I understand the Court of Appeal to have meant that Mr.

Galambos had gained a position of overriding power or influence over Ms. Perez: see *Hodgkinson*, at p. 411; *Mustaji v. Tjin* (1995), 24 C.C.L.T. (2d) 191 (B.C.S.C.), aff'd (1996), 25 B.C.L.R. (3d) 220 (C.A.). As the Court of Appeal put it, at para. 50 of its reasons: "As [Ms. Perez's] employer, [Mr. Galambos] was in a position of power and influence relative to [Ms. Perez]. It is clear from the circumstances that the appellant looked up to Mr. Galambos and expected that he would look out for her best interests as a result of the nature of their relationship."

[53] This conclusion is directly at odds with the clear findings of fact at trial. In effect, the Court of Appeal retried the case on the basis of the written record and substituted its view of the facts and their significance for that of the trial judge. This, respectfully, was not the court's function on appeal and it erred in law by doing so.

[54] The trial judge found that Ms. Perez was not vulnerable in terms of her relationship with Mr. Galambos, that she had not relinquished her decision-making power with respect to the loans to Mr. Galambos and that he had no discretion over her interests that he was able to exercise unilaterally or otherwise (paras. 45-46). He found (at paras. 45-46, 54 and 63) that:

> - Ms. Perez was well educated and well experienced in dealing with successful, busy lawyers;
> - she was as knowledgeable and probably more knowledgeable than Mr. Galambos about most aspects of the firm's financial affairs;
> - she was not, as a result of their relative position or her respect for Mr. Galambos, vulnerable to him;

- the evidence did not establish that Ms. Perez relinquished her decision-making power with respect to the loans to Mr. Galambos;

- Mr. Galambos had no discretion over her interests that he was able to exercise unilaterally or otherwise;

- aside from the limited retainers for routine legal services, their relationship was one of friendship between employer and employee which gave rise to a creditor-debtor relationship;

- there was never any suggestion that Ms. Perez's employment evaluations or prospects would be affected in any way by the loans or by any refusal to make them;

- there was no evidence that Mr. Galambos made any efforts to impose his will on Ms. Perez or to convince her to act against her wishes, to appeal to her sympathy or to cultivate hero-worship or subservience on her part.

[55] The trial judge specifically rejected Ms. Perez's contention that due to the power dynamics of their relationship she was simply unable to refuse requests for loans. There was no evidence accepted by the trial judge of any express requests for loans, which makes it illogical to conclude that Ms. Perez was unable to refuse requests when there were in fact none. Moreover, the trial judge was not persuaded on the balance of probabilities that Mr. Galambos's instructions to "do something" when advised of cash flow problems were, or could reasonably have been understood by Ms. Perez as pressure on her to loan her personal funds, a course she frequently took without any solicitation or, in some instances, any knowledge on Mr. Galambos's part (para. 54).

[56] The trial judge's findings do not support the existence of the parallel that the Court of

Appeal found between this case and power-dependency cases such as *Norberg* and *Mustaji*. *Norberg* involved an aging physician extorting sex for drugs from a young woman addicted to prescription drugs. *Mustaji* involved a claim by a nanny brought to Canada under the Foreign Domestic Movement Program. There were findings of fact that the defendants had taken over her affairs concerning her immigration and employment in Canada, that they had the opportunity to exercise power or discretion over her, were capable of using that power or discretion without her knowledge or consent so as to affect her legal and practical interests and that she was especially vulnerable to that exercise of discretion and control: see reasons of Vickers J., at para. 27, and reasons of the Court of Appeal, at para. 12. The trial judge in the present case found nothing of this sort.

[57] The trial judge addressed Ms. Perez's argument that she advanced funds relying on and trusting Mr. Galambos's assurances that the firm's finances would turn around and that there were some major files coming to him. As noted earlier, the trial judge found as facts that she did not rely on these alleged statements, that she knew that the financial circumstances of the firm were not improving, that the influx of new legal work was speculative and that the potential for large amounts of contingency fees was exaggerated. As the judge put it, "both Mr. Galambos and Ms. Perez shared a hope for better times to come and blinded themselves to the true situation" (para. 53). Moreover, the judge also found that even if Ms. Perez had in fact relied on Mr. Galambos's general statements to the effect that things would turn around, her reliance was not reasonable. As the judge put it, "[a] reasonable person in [Ms. Perez's] position would not have relied on [these statements], given especially her personal knowledge of the state of Mr. Galambos's financial affairs. She probably had more knowledge than he" (para. 52).

[58] The Court of Appeal, however, found that the judge's finding of fact that Ms. Perez was not vulnerable to Mr. Galambos was unreasonable. The court based its reversal of the trial judge on this point on the facts that Mr. Galambos had superior legal knowledge and experience, that he understood when professional advice was needed with respect to his financial affairs, that Ms. Perez looked up to and trusted him, that there was a power imbalance in their relationship and that Ms. Perez's conduct could not be explained on the basis of simple friendship (paras. 50 and 64-65).

[59] Respectfully, the reasons of the Court of Appeal disclose no basis for appellate intervention. The most that may be said is that the considerations identified by the Court of Appeal could plausibly sustain more than one conclusion about Ms. Perez's vulnerability. The Court of Appeal identified no finding of fact relevant to the judge's conclusion on this point that was both clearly wrong and determinative of the result. Rather, the Court of Appeal simply drew different inferences from the evidence than the ones drawn by the trial judge. This was not a proper basis for appellate reversal of his findings. The Court of Appeal ought not to have interfered with the judge's finding that Ms. Perez was not vulnerable to Mr. Galambos.

[60] The Court of Appeal also found that the judge erred by concluding that any reliance by Ms. Perez on Mr. Galambos's statements that things would turn around was unreasonable. The court reasoned that Mr. Galambos was in the best position to assess the prospects of the firm and that Ms. Perez had no means of knowing whether the flow of work from the Department of Justice would again increase. On this basis, the court found the judge's conclusion to be "plainly wrong" (para. 61) and this error was part of the justification for appellate intervention. However, there are two difficulties with the Court of Appeal's approach to this issue.

[61] First, the trial judge found as a fact that Ms. Perez did not rely on these statements (para. 53) and the Court of Appeal did not directly take issue with this finding. This makes hypothetical and irrelevant the question of whether such reliance, had it occurred, would have been reasonable; any error by the judge on this hypothetical question provides no basis for interfering with his decision. Second, even if an error on this point were pertinent to the result, the reasons of the Court of Appeal disclose no clear and determinative error in the judge's holding to the effect that any reliance would have been unreasonable. Once again, the Court of Appeal in my respectful view substituted its reading of the record for the trial judge's findings. This was not its role.

[62] In summary, the trial judge's findings of fact should not have been disturbed on appeal and those findings do not support the Court of Appeal's conclusion that there was a "power-dependency" relationship between Ms. Perez and Mr. Galambos.

2. Mutual Understanding or Undertaking by the Fiduciary

[63] The Court of Appeal held that, in the case of a "power-dependency" relationship, a fiduciary duty may arise even in the absence of a mutual understanding that one party would act only in the interests of the other. Respectfully, I do not agree.

[64] Relying on *Hodgkinson*, the trial judge held that in order to find an *ad hoc* fiduciary duty, there must be a mutual understanding between the fiduciary and the beneficiary that the fiduciary party has relinquished his or her own self-interest and agreed to act solely on behalf of the

beneficiary (para. 43). The judge concluded that there was no such mutual understanding here (para. 46). The Court of Appeal, on the other hand, held that as the relationship between Mr. Galambos and Ms. Perez was one of "power-dependency", there need not be a mutual understanding that one party has relinquished his or her own self-interest and undertaken to act in the interests of the other (para. 43). According to the Court of Appeal, what is required in the case of power- dependency relationships is proof of an expectation on the part of the plaintiff, which is reasonable in all of the circumstances, that the defendant would act in his or her best interests (para. 43). It found Ms. Perez to have such a reasonable expectation (paras. 60-65).

[65] The appellants challenge this conclusion, submitting that one party's reasonable expectation is not sufficient and that there must be a mutual understanding that the fiduciary has undertaken to act only in the interests of the other party. Ms. Perez seeks to uphold the Court of Appeal's decision, arguing that equity is inherently flexible and that a reasonable expectation is enough in a power-dependency relationship.

[66] In my view, while a mutual understanding may not always be necessary (a point we need not decide here), it is fundamental to *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party. In other words, while it may not be necessary for the beneficiary in all cases to consent to this undertaking, it is clearly settled that the undertaking itself is fundamental to the existence of an *ad hoc* fiduciary relationship. To explain why I have reached this conclusion, I need to go back to some basic principles of fiduciary law.

a. *Some Basic Principles*

[67] An important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. The law seeks to protect the vulnerable in many contexts and through many different doctrines. As La Forest J. noted in *Hodgkinson*, at p. 406: "[W]hereas undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction, the fiduciary principle monitors the abuse of a loyalty reposed" (emphasis added). This brief sentence makes two important points which help sharpen the focus on the role of fiduciary law.

[68] The first is that fiduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship. La Forest J. in *Hodgkinson*, at p. 406, made this clear by approving these words of Professor Ernest J. Weinrib: "It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength. ... In contrast to the notions of conscionability, the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement" ("The Fiduciary Obligation" (1975), 25 *U.T.L.J.* 1, at p. 6). Thus, while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship: *Hodgkinson*, at p. 406.

[69] The second is that a critical aspect of a fiduciary relationship is an undertaking of

loyalty: the fiduciary undertakes to act in the interests of the other party. This was put succinctly by McLachlin J. (as she then was) in *Norberg*, at p. 273, when she said that "fiduciary relationships ... are always dependent on the fiduciary's undertaking to act in the beneficiary's interests". See also *Hodgkinson*, *per* La Forest J., at pp. 404-7.

[70] Underpinning all of this is the focus of fiduciary law on relationships. As Dickson J. (as he then was) put it in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 384: "It is the nature of the relationship ... that gives rise to the fiduciary duty." The underlying purpose of fiduciary law may be seen as protecting and reinforcing "the integrity of social institutions and enterprises", recognizing that "not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules": *Hodgkinson*, at p. 422 (*per* La Forest J.). The particular relationships on which fiduciary law focusses are those in which one party is given a discretionary power to affect the legal or vital practical interests of the other: see, e.g., *Frame v. Smith*, [1987] 2 S.C.R. 99, *per* Wilson J., at pp. 136-37; *Norberg*, *per* McLachlin J., at p. 272; Weinrib, at p. 4, quoted with approval in *Guerin*, at p. 384.

[71] I return to the Court of Appeal's holding that a fiduciary duty may arise in "power-dependency" relationships without any express or implied undertaking by the fiduciary to act in the best interests of the other party. I respectfully disagree with this approach, for two reasons: "power-dependency" relationships are not a special category of fiduciary relationships and the law is, in my view, clear that fiduciary duties will only be imposed on those who have expressly or impliedly undertaken them.

b. *Power-Dependency Relationships as a Special Category*

[72] As noted by the Court of Appeal, La Forest J. used the term "power-dependency" relationships in *Norberg* and in *Hodgkinson*. In the latter case he wrote, at p. 411:

> I employed this notion, developed in an article by Professor [Phyllis] Coleman, ["Sex in Power Dependency Relationships: Taking Unfair Advantage of the 'Fair' Sex" (1988), 53 *Alb. L. Rev.* 95] to capture the dynamic of abuse in *Norberg v. Wynrib*, *supra*, at p. 255. *Norberg* concerned an aging physician who extorted sexual favours from a young female patient in exchange for feeding an addiction she had previously developed to the pain-killer Fiorinal. The difficulty in *Norberg* was that the sexual contact between the doctor and patient had the appearance of consent. However, when the pernicious effects of the situational power imbalance were considered, it was clear that true consent was absent. While the concept of a "power-dependency" relationship was there applied to an instance of sexual assault, in my view the concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party. [Emphasis added.]

[73] It is clear from these comments that La Forest J. was describing certain relationships which may also be fiduciary, but was not creating a separate category of *ad hoc* fiduciary relationships . In other words, this concept borrowed from academic writing may be useful to describe certain relationships, but it has not been and should not be used as a tool for categorization. Fiduciary relationships, he explained, are "simply a species of a broader family of relationships that may be termed "power-dependency" relationships" (p. 411). The law's approach to the situation of vulnerable people "gives rise to a variety of often overlapping duties" and "the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship"

(pp. 412-13).

[74] In short, not all power-dependency relationships are fiduciary in nature, and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is fiduciary or not. It follows, in my view, that there are not and should not be special rules for recognition of fiduciary duties in the case of "power-dependency" relationships. I am therefore of the view that the Court of Appeal erred in this respect.

c. *Mutual Understanding and Undertaking by the Fiduciary*

[75] The appellants fault the Court of Appeal for holding that fiduciary duties may arise only on the basis of the reasonable expectations of one party. The appellants say that there must be a mutual understanding that the fiduciary will act only in the interests of the other party. While I agree with the appellants that the Court of Appeal erred by basing a fiduciary obligation on Ms. Perez's reasonable expectation, it is not necessary in order to resolve this appeal to go so far as to say that a mutual understanding is necessary in all cases. It is sufficient to say here that what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her.

[76] I note that in *Hodgkinson*, this Court considered competing bases for the imposition of *ad hoc* fiduciary duties, opposing to a certain extent mutual understanding and reasonable expectations of the alleged beneficiary. While the seven judges sitting on the case

were not fully unanimous in this respect, they all agreed that *ad hoc* fiduciary obligations may be imposed when there is a mutual understanding to this effect, and, following the example of Dickson J. in *Guerin*, at p. 384, left the door open to such an obligation arising from a unilateral undertaking by the fiduciary (see on this point Professor Lionel Smith's insightful comment on *Hodgkinson*, "Fiduciary Relationships - Arising in Commercial Contexts - Investment Advisors: *Hodgkinson v. Simms*" (1995), 74 *Can. Bar Rev.* 714). Thus, what is required in all cases of *ad hoc* fiduciary obligations is that there be an undertaking on the part of the fiduciary to exercise a discretionary power in the interests of that other party. To repeat what was said by McLachlin J. in *Norberg*, "fiduciary relationships ... are always dependent on the fiduciary's undertaking to act in the beneficiary's interests" (p. 273). As Dickson J. put it in *Guerin*, fiduciary duties may arise where "by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another" (p. 384).

[77] The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty.

[78] Commentators support this view. In his seminal work, *Fiduciary Obligations* (1977), Professor P. D. Finn writes at para. 15:

> For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another. This is perhaps

> the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be another's interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular matter. [Emphasis added.]

To the same effect, Professor Smith writes in his comment on *Hodgkinson*, at p. 717 (echoing Dickson J.'s comments in *Guerin*, at p. 384, and Austin W. Scott, "The Fiduciary Principle" (1949), 37 *Cal. L. Rev.* 539, at p. 540):

> The fiduciary must *relinquish* self-interest; that is an act which the fiduciary does, not an act which is done to the fiduciary. This was put slightly differently by Austin Scott, who said that "a fiduciary is a person who *undertakes* to act in the interest of another person." [Emphasis in original.]

[79] This does not mean, however, that an express undertaking is required. Rather, the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship. Relevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.

[80] In my respectful view, the Court of Appeal's analysis went wrong on this point. It found a fiduciary duty without finding an undertaking, express or implied, on the part of Mr. Galambos that he would act in relation to the loans only in Ms. Perez's interests. The court's reasoning is premised on the fact that there was no such undertaking; otherwise, there would have been no need to base the conclusion that a fiduciary duty existed on Ms. Perez's expectations alone.

[81] It is clear from the evidence that there was no explicit undertaking that Mr.

Galambos was to act in Ms. Perez's best interest in relation to the cash advances; she does not even allege as much. Moreover, it would be inconsistent with the judge's findings to conclude that any such undertaking should be implied on the facts of this case. The trial judge found that Mr. Galambos never explicitly requested a loan and that his requests that Ms. Perez "do something" to solve the cashflow problem referred to contacting the bank to extend the firm's line of credit, which had been done several times in the past (paras. 54-55). Having never requested the advances, it is difficult to see how there was any implied undertaking to act only in Ms. Perez's interests with respect to them. The judge also found that if Ms. Perez formed any expectation that Mr. Galambos was to act as her fiduciary, it was unreasonable. Rice J. found that if there was a disparity in knowledge of the firm's finances, it was Ms. Perez who was more knowledgeable (para. 52). In such circumstances, any reasonable person would have understood that he or she assumed the position of a precarious unsecured creditor, not that of a protected beneficiary.

[82] In summary, my view is that the Court of Appeal erred in holding that in the case of power-dependency relationships, a fiduciary duty may arise absent some undertaking on the part of the fiduciary to act in the interests of the other party. The Court of Appeal did not suggest that there was any such undertaking here and in any event, it would be inconsistent with the judge's factual findings to conclude that any such undertaking should be implied.

3. Transfer of Discretionary Power

[83] It is fundamental to the existence of any fiduciary obligation that the fiduciary has

a discretionary power to affect the other party's legal or practical interests. In *Guerin*, Dickson J. spoke of this discretionary power as "the hallmark of any fiduciary relationship" (p. 387) and, while making no comment on whether it was broad enough to embrace all fiduciary obligations, he endorsed Professor Weinrib's description of a fiduciary relationship as one in which "the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him" (p. 384). The influential guidelines set out by Wilson J. in *Frame*, at p. 136, for identifying new categories of fiduciary relationships included that the fiduciary have scope for the exercise of some discretion or power, the exercise of which affects the beneficiary's legal or practical interests. In *Norberg*, McLachlin J. noted that a fiduciary must be entrusted with such power in order to perform his or her functions (p. 275).

[84] The nature of this discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. It may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations such as the professional advisory relationship addressed in *Hodgkinson*, by the beneficiary entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power: see, e.g., *Lac Minerals* and *Hodgkinson*. While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not. The presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the existence of such a duty.

[85] As noted, the trial judge held that the evidence did not establish that Ms. Perez relinquished her decision-making power with respect to the loans to Mr. Galambos or that there was any discretion over her interests that he was able to exercise unilaterally or otherwise (para. 46). The Court of Appeal did not disagree with these conclusions and no basis for doing so has been suggested.

[86] In my respectful view, the finding of the trial judge that Mr. Galambos had no discretionary power over Ms. Perez's interests that he was able to exercise unilaterally or otherwise is fatal to her claim that there was an *ad hoc* fiduciary duty on Mr. Galambos's part to act solely in her interests in relation to these cash advances.

4. Conclusion with Respect to Appellants' Issues

[87] I conclude that the Court of Appeal erred in finding that Mr. Galambos and his firm had an *ad hoc* fiduciary obligation towards Ms. Perez with respect to the cash advances.

V. Disposition

[88] I would allow the appeal and restore the trial judgment, except that, if the parties are not able to agree about whether Ms Perez is entitled to a judgment in debt against the law corporation and the costs consequences if any flowing from it, I would remand to the Court of Appeal the question of whether Ms Perez is entitled to a judgment in debt against the Michael Z. Galambos Law Corporation and, if so, whether that judgment should have any

impact on the question of costs in the courts below. Subject to any adjustment resulting from an agreement between the parties or from the remand, the appellants are entitled to their costs throughout if demanded.

Appeal allowed.

Solicitors for the appellants: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the respondent: Holmes & King, Vancouver.