

Equitable Compensation for Breach of Fiduciary Duty

The Hon Mr Justice Robert Ribeiro PJ*

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1. The modern development of equitable compensation for breach of fiduciary duty is often traced back to *Nocton v Lord Ashburton*,¹ which, as Justice Gummow writing extracurially noted, ‘stressed the existence, in cases of breach of fiduciary duty, not only of remedies *in specie* conferred by constructive trust and tracing principles, but also of a personal remedy requiring the fiduciary to effect compensation for loss arising from his breach of duty’.² As Viscount Haldane put it:

“Operating *in personam* as a Court of conscience [the Court of Chancery] could order the defendant ... to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury.”³

A. *The controversy*

2. Perhaps unexpectedly, highly controversial questions have arisen regarding the nature and boundaries of that remedy. Some of the issues may be illustrated by considering the situations which arose in two of the key cases fuelling the debate.

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¹ [1914] AC 932.

² W M Gummow, “Compensation for Breach of Fiduciary Duty” in T G Youdan (Ed), *Equity, Fiduciaries and Trusts* (The Law Book Company Limited, 1989) at 59. That decision has been called “a robust root” for the modern principles of equitable compensation: J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (5th Ed, Lexis Nexis Butterworths 2015) at [23-105].

³ [1914] AC 932 at 952. Please note that citations from authorities and academic articles are made generally omitting internal footnotes and references.

3. The first is *Target Holdings Ltd v Redferns (A Firm)*,⁴ which involved proceedings against solicitors for breach of fiduciary duty. Target lent £1.7 million to Crowngate as mortgage finance for the latter's purchase of a property which it claimed to have acquired for £2 million. In fact, that was an inflated price pumped up by contrived intermediate sales from the initial purchase price of £775,000. The solicitors, Redferns, acted both for Target and Crowngate and one of its partners, Bundy, was complicit in the fraud.
4. Target transferred the loan funds to Redferns who were to release them to Crowngate and the vendors after the property had been conveyed and a mortgage executed. Redferns therefore received the monies as fiduciaries. However, Bundy caused £1.5 million to be released before the property had been conveyed and before a mortgage had been executed, falsely informing Target that the transaction had been completed. Nonetheless, about a week later, the conveyance and mortgage were in fact executed. Crowngate then defaulted on the loan and became insolvent. Target sold the property as mortgagee, realising £500,000. It sued Redferns for the balance of the sum lent to Crowngate, arguing that because the solicitors had released the funds without authority, they came under an immediate duty to restore the whole of the money paid away in breach of trust, it being irrelevant that the property transactions had been completed a week later.
5. That the English Court of Appeal⁵ gave summary judgment upholding Target's claim was, one might think, somewhat surprising. The issue

⁴ [1996] 1 AC 421.

⁵ By a majority, Hirst and Peter Gibson LJJ, Ralph Gibson LJ dissenting [1994] 1 WLR 1089.

which that Court's decision posed was stated by Lord Browne-Wilkinson in the House of Lords in these terms:

“Is the trustee liable to compensate the beneficiary not only for losses caused by the breach but also for losses which the beneficiary would, in any event, have suffered even if there had been no such breach?”⁶

6. His Lordship elaborated as follows:

“Target allege, and it is probably the case, that they were defrauded by third parties ... to advance money on the security of the property. If there had been no breach by Redferns of their instructions and the transaction had gone through, Target would have suffered a loss in round figures of £1.2m. (i.e. £1.7m. advanced less £500,000 recovered on the realisation of the security). Such loss would have been wholly caused by the fraud of the third parties. The breach of trust committed by Redferns left Target in exactly the same position as it would have been if there had been no such breach: Target advanced the same amount of money, obtained the same security and received the same amount on the realisation of that security.”⁷

7. Lord Browne-Wilkinson was therefore focussing on the lack of causal connection between Redfern's breach and Target's loss. The House of Lords reversed the Court of Appeal on that basis, finding support in the minority judgment of McLachlin J in *Canson Enterprises Ltd v Boughton & Co.*⁸ However, any thought that issues touching on causation in this context had been put to rest would have been mistaken.

8. Eighteen years later, a similar situation arose in the UK Supreme Court in *AIB Group (UK) plc v Mark Redler & Co Solicitors.*⁹ Lord Toulson JSC commented:

“The debate which has followed *Target Holdings* ... is part of a wider debate, or series of debates, about equitable doctrines and remedies and their inter-

⁶ [1996] 1 AC 421 at 428.

⁷ *Ibid* at 431.

⁸ [1991] 3 SCR 534.

⁹ [2015] AC 1503.

relationship with common law principles and remedies, particularly in a commercial context.”¹⁰

9. His Lordship lamented that “140 years after the Judicature Act 1873 (36 & 37 Vict c 66), the stitching together of equity and the common law continues to cause problems at the seams”,¹¹ adding that “[the] parties have provided the court with nearly 900 pages of academic writing.”¹²
10. AIB lent £3.3 million to the borrowers against the mortgage of a house valued at £4.25 million. The funds were transferred to the defendant solicitors, Redlers, who were to apply them first to clearing prior legal charges in favour of Barclays who were owed a total of £1.5 million so as to enable AIB to register a first legal mortgage. Redlers should therefore have paid Barclays £1.5 million to discharge the borrowers’ liability but, negligently, they only paid them £1.2 million and released the balance of £2.1 million to the borrowers, leaving in place a legal charge in favour of Barclays securing the £300,000 balance of their prior debt. After the borrowers defaulted, the property was sold for £1.2 million of which AIB received £867,697, having had to cede priority to Barclays for the negotiated amount of £273,777.42 in respect of its undischarged security.
11. Like Target, AIB sought to argue that Redlers had paid away the trust monies without authority, ie, without ensuring that the property was unencumbered, and claimed the entire sum of £3.3 million paid out less the mortgage sale proceeds on the basis that Redler’s liability for their breach of trust was unlimited by causation or remoteness. As Lord Reed JSC points out:

¹⁰ *Ibid* [47].

¹¹ *Ibid* [1].

¹² *Ibid* [47].

“Redler is sought to be made liable for the consequences of the hopeless inadequacy of the security accepted by AIB before Redler's involvement, despite the fact that Redler's breach of trust did not affect that security except to the extent, initially, of £309,000, and finally of £273,777.42.”¹³

12. AIB's argument failed at all levels, with the Courts endorsing Lord Browne-Wilkinson's requirement for causation and stressing the need to limit relief to the loss actually caused by the breach.

B. Why the controversy?

13. One might have thought that the lenders' claims against the solicitors were obviously over-ambitious. However, there are two major aspects to the controversy which have caused much ink to be spilled. First, two related lines of reasoning have been advanced in support of the contention that causation and loss are not relevant at all. I shall refer to them as “the dissentient views”. Secondly, in so far as causation is relevant, exactly how that concept operates in tandem with related doctrines has generated considerable debate.

B.1 Analogy with traditional breach of trust rules

14. The first of the dissentient views stems from the courts' approach to non-trustee breaches of fiduciary duty by analogy with traditional rules regarding breaches of trust by errant trustees. Emphasis is laid on the primary duty of a trustee to maintain and administer the trust in accordance with its terms and the concomitant duty to restore the fund in case of loss. This has led to the suggestion that the liability of a defaulting fiduciary does not depend on proof of loss having been caused by a breach of duty.

¹³ [2015] AC 1503 at [140].

15. In support, reliance has been placed on statements in the authorities to the effect that the remedy against the defaulting fiduciary is restitutionary in nature.¹⁴ Support has also been sought in what Professor Charles Mitchell¹⁵ has called “a widely quoted but widely misunderstood dictum” of Street J in *Re Dawson; Union Fidelity Trustee Co v Perpetual Trustee Co*,¹⁶ where, after observing that a trustee’s obligation “has always been regarded as tantamount to an obligation to effect restitution in specie”, His Honour stated, “considerations of causation, foreseeability and remoteness do not readily enter into the matter”.
16. As Lord Toulson JSC points out,¹⁷ the majority decision of the English Court of Appeal in *Target* was underpinned by such an approach:

“Peter Gibson LJ (with whom Hirst LJ agreed) held that the basic liability of a trustee in breach of trust was not to pay damages, but to restore to the trust fund that which had been lost to it or to pay compensation to the beneficiary for what he had lost. If a trustee wrongly paid away trust moneys to a stranger, there was an immediate loss to the trust fund and the trustee came under an immediate duty to restore the moneys to the trust fund. The remedies of equity were sufficiently flexible to require the finance company to give credit for moneys received on the subsequent realisation of its security, but otherwise the solicitors' liability was to pay the whole of the moneys wrongly paid away.”

17. But, as Justice Gummow had earlier cautioned:

“The duty to restore the fund in case of loss may not always provide an appropriate guide to the assessment of loss for which a fiduciary adviser is to

¹⁴ Eg, *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 547; *Hodgkinson v Simms* [1994] 3 SCR 377 at [73]; *Swindle v Harrison* [1997] P.N.L.R. 641 (CA) at 665; *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* (1999) 1 NZLR 664 at 687; *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 [341].

¹⁵ Charles Mitchell, “Equitable Compensation for Breach of Fiduciary Duty” (2013) 66 *Current Legal Problems* 307.

¹⁶ (1966) 84 WN (Pt1) (NSW) 399 at 404.

¹⁷ [2015] AC 1503 [23].

be made liable. ... Much will depend upon the nature of the breach of trust or fiduciary duty and the remedy sought.”¹⁸

18. Indeed, it is now widely accepted that the duty to restore the trust fund should be understood to arise only in cases involving the misapplication of the trust assets by custodial fiduciaries. In academic writings, stress has been laid on the distinction between “reparative” and “substitutive” remedies¹⁹ (to which I shall return). It has been asserted that reconstitution of the trust estate without needing to deal with issues of causation and loss is the appropriate “substitutive” remedy where a fiduciary has failed to perform the basic obligation of accounting for and producing the trust assets. The fiduciary is consequently required to substitute payment (or restoration *in specie*) for such performance.²⁰
19. That approach, while differentiating among different types of breach, does not necessarily involve acceptance of the need to prove causation and loss in cases like *Target* and *AIB*. Thus, for instance, Prof Charles Mitchell²¹ argues that, in contrast to reparative claims which focus on breach of duty and loss, in substitutive claims, causation and loss:

“... are irrelevant because the claim does not assert a breach of duty triggering a liability to pay compensation, and so there is no need to ask whether there is any causal link between the trustee’s breach of duty and loss: the only thing that matters is ‘what is required to restore the trust fund’.”

¹⁸ W M Gummow, “Compensation for Breach of Fiduciary Duty” in T G Youdan (Ed), *Equity, Fiduciaries and Trusts* (The Law Book Company Limited, 1989) at 73.

¹⁹ See for example Steven B. Elliott, “Remoteness Criteria in Equity” (2002) 65 MLR 588 at 592; and Charles Mitchell, “Equitable Compensation for Breach of Fiduciary Duty” (2013) 66 Current Legal Problems 307 at 322-323. The concepts were endorsed by Edelman J in *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 at [349].

²⁰ See Charles Mitchell, “Stewardship of property and liability to account” [2014] Conv 215 at 216 *et seq.*

²¹ Charles Mitchell, “Equitable Compensation for Breach of Fiduciary Duty” (2013) 66 Current Legal Problems 307 at 323.

20. He is critical of Lord Browne-Wilkinson's contrary approach:

“Unfortunately, the English law governing substitutive performance claims was muddled by the House of Lords' decision in *Target Holdings Ltd v Redferns*, where Lord Browne-Wilkinson mischaracterized the claimant's substitutive performance claim as a reparation claim, and held that such claims are subject to a causation rule, at least when they are made in the context of 'bare' trusts in a commercial setting. This rule is conceptually inapt because it rests on a mistaken premise.”²²

21. Such an approach, if adopted without further qualification, gives no credit for the fact that the conveyance and mortgage were executed a few days after release of the funds and, as Lord Browne-Wilkinson pointed out, that “[the] breach of trust committed by Redferns left Target in exactly the same position as it would have been if there had been no such breach”.²³

B.2 *An equitable debt*

22. The second of the dissentient views relies on the status of trustees and fiduciaries as accounting parties as a reason for excluding causation as irrelevant.²⁴ Once a custodial fiduciary relationship is established, the beneficiary is entitled to an account of the trust assets as of right (without establishing any breach or default). If the account (taken as “an account in common form”)²⁵ discloses an unauthorised disbursement, the beneficiary has the option²⁶ of falsifying it and asking for that

²² *Ibid.* See also Charles Mitchell, “Stewardship of property and liability to account” [2014] Conv 215 at 223-224, where the same point is made.

²³ [1996] 1 AC 421 at 431.

²⁴ For an exposition of this doctrine see James Edelman, “An English misturning with equitable compensation” in Simone Degeling and Jason NE Varuhas (Eds) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing 2017) at Ch 5.

²⁵ See *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 at [334].

²⁶ Or, if the disbursement has proved profitable, the fiduciary may elect to affirm the transaction as one made on behalf of the trust and follow or trace the property and demand that it or its traceable proceeds be restored to the trust: *Libertarian Investments Ltd v Hall* (2013)

disbursement and any associated unauthorised investment to be disallowed (treating it as a transaction effected for the trustee's own account). If disallowed, the fiduciary must make good the resulting deficit in the fund, either *in specie* or in money.²⁷ As Lord Millett NPJ pointed out:

“Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative. The amount of the award is measured by the objective value of the property lost determined at the date when the account is taken and with the full benefit of hindsight.”²⁸

As noted above, this is what has been called a “substitutive” remedy, and is the focus of the present discussion.

23. If the account discloses instead that the defendant has, in breach of duty, failed to obtain certain property for the benefit of the trust or caused loss to the trust estate, the beneficiary can surcharge the account by asking for it to be taken on the basis of “wilful default”. As Lord Millett noted extracurially:

“In this context, ‘wilful default’ bears a special and unusual meaning; it means merely lack of ordinary prudence or due diligence. The trustee is made to account, not only for what he has in fact received, but also for what he might with due diligence have received.”²⁹

24. Where wilful default is established, the trustee has to bring the account to the state it ought to have been in had the defendant duly performed his

16 HKCFAR 681 at [169]; *Tang Ying Loi v Tang Ying Ip* (2017) 20 HKCFAR 53 at [21]. See Lusina Ho and Rebecca Lee, “The beneficiaries’ right to elect remedies for misapplied funds” (2017) 133 LQR 565-570.

²⁷ *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [167]-[168].

²⁸ *Ibid.*

²⁹ Lord Millett, “Equity’s Place in the Law of Commerce” (1998) 114 LQR 214 at 225-226.

duty.³⁰ In contrast with cases of misapplication and falsification, the plaintiff in such cases has to establish a breach of duty causing loss. The surcharge represents the loss caused to the trust estate. Causation and loss are thus central to this exercise.

25. The argument that causation and loss are irrelevant in the present context seeks to rely on the strictness of the substitutive rules based on falsification mentioned above. As Edelman J explains:

“When an account in common form was sought, it did not matter whether the dissipation of the asset would have occurred even without the unauthorised act. The analogy for an account in common form is with specific performance or a common law action in debt. In *Ex parte Adamson* [(1878) 8 Ch D 807 at 819] James and Bagallay LJ described the rights arising from an account in common form as ‘an equitable debt or liability in the nature of debt ... a suit for the restitution of the actual money or thing, or value of the thing’. When payment was sought following an account in common form there was a direct analogy with an order for specific performance or payment of a liquidated debt which was due. In each case it is no answer for the defendant to allege that the plaintiff had suffered no loss.”³¹

26. Because his Lordship referred to the need for causation of loss in *Target*, Lord Browne-Wilkinson has been criticised for confusing the substitutive claim in *Target* subject to falsification rules with an inapplicable reparative claim brought on a wilful default basis. The dissentient suggestion is, that applying the accounting rules, causation should not have been treated as relevant.

C. *Should the dissentient views be accepted?*

27. It would be difficult to find convincing arguments for accepting the claims advanced by the appellants and for disagreeing with the results

³⁰ *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [170].

³¹ *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 at [336]-[337].

arrived at by the Courts in *Target* and *AIB*. The controversy concerns the doctrinal basis upon which those results were arrived at.

28. Notice may first be taken of arguments which assert the correctness of the two decisions but without accepting the relevance of causation and loss to substitutive claims. Two such arguments are made by Lord Millett.

First, he argues that the House of Lords in *Target*:

“... put right the error which the Court of Appeal had made in failing to identify the relevant breach of trust, which was not in parting with the money but in failing to obtain the title deeds in return. This put the trust fund at risk-- but the risk did not materialise.”³²

29. This may be said to amount to the argument that the House of Lords was not, after all, concerned with a substitutive claim for dissipation of the trust funds – a debatable proposition – but a claim against the solicitors for breach of trust by negligently failing to obtain the title deeds, turning it into a reparative claim where causation and loss were relevant. It leaves unaddressed the question whether, in substitutive claims, causation and loss are relevant.

30. Secondly, viewing the case through the prism of the duty to account, Lord Millett proposed that “the solution to the problem in *Target*” is to recognise that once a disbursement is falsified, the law treats it as never having been made and the funds as remaining in the solicitors’ client account to be applied in accordance with the client’s instructions. On that basis, since the title documents were obtained some days later:

“The plaintiff could not object to the acquisition of the mortgage or the disbursement by which it was obtained; it was an authorised application of

³² “Equity’s Place in the Law of Commerce” (1998) 114 LQR 214 at 224. A similar approach, involving a “defence of satisfaction of liability” is explained in Meagher, Gummow and Lehane (5th Ed) at [23-190].

what must be treated as trust money notionally restored to the trust estate on the taking of the account.”³³

31. Justice Edelman has argued extracurially that this unsatisfactorily relies upon a fiction and suggests that:

“A better explanation may be that Target Holdings waived its right to refuse the mortgage when it ultimately accepted the mortgage and relied upon it in the sale of the property. Hence the disbursement of trust funds would not be treated as unauthorised on the ground that it had been paid out without having obtained the mortgage.”³⁴

32. The aforesaid arguments do not accept any need to prove causation in a substitutive claim. They seek instead to emphasise the importance of the duty of fiduciaries to account for their stewardship of the trust assets and to preserve the coherence of the traditional accounting approach to enforcing that duty. However, some of these arguments may be questioned as possibly too case-specifically designed to cater for the *Target* situation to be able to provide a general basis for maintaining coherence of the accounting approach.

33. Justice Gummow’s analysis³⁵ in an article published in 2015 may be thought to be capable of more general application. Having pointed out, by reference to *Re Dawson*,³⁶ that in cases of a wrongful disposition of trust moneys, the obligation of restoration is a continuing one, he pointed out that:

“... in meeting that continuing obligation the trustee will have the benefit of a requirement to ‘do equity’ by off-setting items which might properly be

³³ *Ibid*, at 227.

³⁴ James Edelman, “An English misturning with equitable compensation” in Simone Degeling and Jason NE Varuhas (Eds) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing 2017) at Ch 5.

³⁵ Hon William Gummow AC, *Three cases of misapplication of a solicitor’s trust account* (2015) 41 Aust Bar Rev 5 (footnotes omitted).

³⁶ *Re Dawson; Union Fidelity Trustee Co v Perpetual Trustee Co* (1966) 84 WN (Pt1) (NSW) 399.

treated as restorative of the misapplied funds or as partially so. ... The sum when assessed by the court has the character not of ‘damages’ but of a liquidated amount being an ‘equitable debt’. Accordingly, settled principle may be thought to deal with the restoration of the trust account misapplied by the solicitor. True enough, utilisation of the trust account may have been an integer in a wider transaction in which the client retained the solicitor. True also, that transaction may have been completed as between the client and the other parties to the transaction. But these circumstances do not answer the case by the client against the solicitor as defaulting trustee. Utilisation by the client of the law of trusts underlay the placing of settlement moneys with the solicitor.”³⁷

34. Recent authorities have, however, tended to favour regarding the misapplication of the trust moneys as a breach of trust and the duty to restore the fund as being dependent on quantifying the loss caused by that breach. This asserts that *Target* and *AIB* correctly held that causation and loss must be established even in cases involving substitutive claims for dissipation of trust assets. Thus, in *AIB*, Lord Reed JSC branded it a “fallacy” to assume that liability in such cases “does not depend on a causal link between the breach of trust and the loss”.³⁸ And Edelman J has suggested that a possible approach:

“... is effectively to deem the ‘but for’ test to be satisfied in a case where an unauthorised dissipation occurs. In other words, the inquiry in cases of a common account is only into whether the act without authority produced the dissipation of the trust asset.”³⁹

D. The requirement to prove causation

D.1 Limits to borrowing from traditional trust rules

35. It is undoubtedly true that non-trustee fiduciary liabilities have evolved by analogy with traditional trust rules. It is however also clear that today,

³⁷ Hon William Gummow AC, *Three cases of misapplication of a solicitor’s trust account* (2015) 41 Aust Bar Rev 5 (footnotes omitted) at 7-8.

³⁸ *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [140]. See Lusina Ho, “Equitable compensation on the road to Damascus?” (2015) 131 LQR 213.

³⁹ *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 at [345].

fiduciary obligations arise in a far wider and more disparate range of situations which may differ greatly from cases involving traditional express trusts. Thus, for example, fiduciary duties have been resorted to when dealing with claims by indigenous groups for Government mishandling of lands or natural resources governed by their historic treaty rights;⁴⁰ with claims concerning the relationship between doctor and patient;⁴¹ and with claims regarding the activities of statutory collective sale committees in Singapore.⁴²

36. Fiduciary obligations are no longer seen to be confined to established relationships, such as (apart from trustee and beneficiary) agent and principal, solicitor and client, employee and employer, director and company and partners *inter se*.⁴³ Instead, the focus is on the nature of particular obligations undertaken within relationships which may simultaneously be governed by contract and may not traditionally be regarded as fiduciary.⁴⁴ Conversely, not every obligation undertaken by a person in a traditionally fiduciary relationship involves a fiduciary duty.⁴⁵

⁴⁰ Eg, *Guerin v The Queen* [1984] 2 SCR 335; *Whitefish Lake Band of Indians v A-G* (2007) 287 DLR (4th) 480 in Canada; and *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 in New Zealand.

⁴¹ Eg, *Norberg v Wynrib* [1992] 2 SCR 226; cf *Breen v Williams* (1996) 186 CLR 71.

⁴² *Ng Eng Ghee and Others v Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd, intervener) and Another Appeal* [2009] SGCA 14.

⁴³ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 per Mason J at 96; *Guerin v The Queen* [1984] 2 SCR 335 at 384; *Breen v Williams* (1996) 186 CLR 71 at 107; *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [53].

⁴⁴ *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 at 206; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* (1999) 1 NZLR 664 at 686; *Amaltal Corporation Ltd v Maruha Corporation* [2007] 3 NZLR 192 (NZSC) [21].

⁴⁵ *Permanent Building Society v Wheeler* (1994) 14 ACSR 109 at 157; *Bristol and West Building Society v Mothew* [1998] Ch 1 at 17.

37. It is the assumption of an obligation to act in the interests of another that is the hallmark of a fiduciary duty.⁴⁶ As McLachlin J put it:

“The essence of a fiduciary relationship ... is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.”⁴⁷

38. And as Brennan CJ noted, such obligations often arise in relationships of agency and of ascendancy or influence by one party over another, or dependence or trust on the part of that other.⁴⁸

39. The point for present purposes is that rules regarding the liability of trustees developed in respect of traditionally constituted trusts may not be well-adapted for application to the much expanded range of fiduciary obligations, especially those arising in a commercial context which may be framed and qualified by contract. In *AIB*, Toulson JSC put it thus:

“...a commercial trust differs from a typical traditional trust in that it arises out of a contract rather than the transfer of property by way of gift. The contract defines the parameters of the trust. Trusts are now commonly part of the machinery used in many commercial transactions, for example across the spectrum of wholesale financial markets, where they serve a useful bridging role between the parties involved. Commercial trusts may differ widely in their purpose and content, but they have in common that the trustee’s duties are likely to be closely defined and may be of limited duration. Lord Browne-Wilkinson did not suggest that the principles of equity differ according to the nature of the trust, but rather that the scope and purpose of the trust may vary, and this may have a bearing on the appropriate relief in the event of a breach.”⁴⁹

40. This arose directly in *Target* where Lord Browne-Wilkinson observed that traditional express trusts generally involve a fund held in trust for a number of beneficiaries having different, usually successive, equitable

⁴⁶ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 99; *Breen v Williams* (1996) 186 CLR 71 at 137;

⁴⁷ *Norberg v Wynrib* [1992] 2 SCR 226 at 272.

⁴⁸ *Breen v Williams* (1996) 186 CLR 71 at 82.

⁴⁹ *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [70].

interests and that “[the] equitable rules of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries’ rights can be protected is to restore to the trust fund what ought to be there.”⁵⁰

41. The emphasis on the restitutionary and substitutive character of the remedy in relation to traditional express trusts is therefore entirely understandable and coherent. Indeed, in such cases, any other remedy may be inappropriate given the interests of the other beneficiaries. As Lord Reed JSC points out:

“The pecuniary remedy for a breach of trust affecting the trust fund cannot involve a payment to a particular beneficiary, unless the beneficiary is absolutely entitled to the fund. Absent such entitlement, the only way to ensure that each beneficiary is appropriately compensated is for the payment to be made into the trust fund, to be held in accordance with the terms of the trust. This is accomplished by adding the appropriate amount to the fund, so that the fund is restored or replenished.”⁵¹

42. However, where a trust arises in a commercial context, such as where solicitors hold client monies to be applied in accordance with their instructions without any other beneficiaries involved, there is no compelling reason to confine the remedy to an order for restoration. This was the context in which Lord Browne-Wilkinson emphasised the need for causation to be shown in a case like *Target*:

“This case is concerned with a trust which has at all times been a bare trust. ... In the case of moneys paid to a solicitor by a client as part of a conveyancing transaction, the purpose of that transaction is to achieve the commercial objective of the client, be it the acquisition of property or the lending of money on security. The depositing of money with the solicitor is but one aspect of the arrangements between the parties, such arrangements being for the most part contractual. Thus, the circumstances under which the solicitor can part with money from client account are regulated by the instructions given by the client: they are not part of the trusts on which the property is

⁵⁰ *Target Holdings Ltd v Redferns (A Firm)* [1996] 1 AC 421 at 434.

⁵¹ *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [100].

held. I do not intend to cast any doubt on the fact that moneys held by solicitors on client account are trust moneys or that the basic equitable principles apply to any breach of such trust by solicitors. But the basic equitable principle applicable to breach of trust is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach. I have no doubt that, until the underlying commercial transaction has been completed, the solicitor can be required to restore to client account moneys wrongly paid away. But to import into such trust an obligation to restore the trust fund once the transaction has been completed would be entirely artificial. The obligation to reconstitute the trust fund applicable in the case of traditional trusts reflects the fact that no one beneficiary is entitled to the trust property and the need to compensate all beneficiaries for the breach. That rationale has no application to a case such as the present. To impose such an obligation in order to enable the beneficiary solely entitled (i.e. the client) to recover from the solicitor more than the client has in fact lost flies in the face of common sense and is in direct conflict with the basic principles of equitable compensation. In my judgment, once a conveyancing transaction has been completed the client has no right to have the solicitor's client account reconstituted as a 'trust fund.'"⁵²

D.2 *Consensus as to causation and loss*

43. The minority judgment of McLachlin J in *Canson Enterprises Ltd v Boughton & Co.*,⁵³ although a case concerned with a reparative rather than a substitutive claim, has proved influential. Her Honour observed that “[the] need for a link between the equitable breach and the loss for which compensation is awarded is fair and sound in policy”⁵⁴ and held that:

“The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.”⁵⁵

44. McLachlin J's judgment was endorsed by Lord Browne-Wilkinson⁵⁶ as “good law”, commenting:

⁵² *Target Holdings Ltd v Redferns (A Firm)* [1996] 1 AC 421 at 436.

⁵³ [1991] 3 SCR 534.

⁵⁴ *Ibid* at 551.

⁵⁵ *Ibid* at 556.

⁵⁶ *Target Holdings Ltd v Redferns (A Firm)* [1996] 1 AC 421 at 438-439.

“Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.”⁵⁷

45. After reviewing post-*Canson* and post-*Target* authorities on the subject from the United Kingdom,⁵⁸ Canada,⁵⁹ Australia,⁶⁰ New Zealand⁶¹ and Hong Kong,⁶² Lord Reed JSC found there to be

“... a broad measure of consensus across a number of common law jurisdictions that the correct general approach to the assessment of equitable compensation for breach of trust is that described by McLachlin J in *Canson Enterprises* and endorsed by Lord Browne-Wilkinson in *Target Holdings*.⁶³

46. The authors of *Meagher, Gummow and Lehane*⁶⁴ see this as “a clear change in the law” that “has quite some attraction” since it “preserves the robustness which monetary relief for loss in this area requires, while ensuring that no more than compensation is awarded”. They regard the matter as settled in Australia by the High Court’s decision in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*.⁶⁵
47. Thus, while the doctrinal importance of the accounting principles must be recognized and kept coherent, it may equally be said that the approach

⁵⁷ *Ibid* at 439.

⁵⁸ *Bristol and West Building Society v Mothew* [1998] Ch 1; and *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2015] 1 AC 250.

⁵⁹ *M (K) v M (H)* [1992] 3 SCR 6; *Cadbury Schweppes Inc v FBI Foods* [1999] 1 SCR 142; and *Hodgkinson v Simms* [1994] 3 SCR 377.

⁶⁰ *Pilmer v Duke Group Ltd* (2001) 207 CLR 165; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484; and *Maguire v Makaronis* (1997) 188 CLR 449.

⁶¹ *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384; and *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664.

⁶² *Kasikornbank Public Co Ltd v Akai Holdings Ltd (No 2)* (2010) 13 HKCFAR 479; and *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681.

⁶³ *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [133].

⁶⁴ *Meagher, Gummow and Lehane* (5th Ed) at [23-210].

⁶⁵ (2003) 212 CLR 484. See *Meagher, Gummow and Lehane* (5th Ed) at [23-215].

which views a wrongful disposition of the trust assets as a breach of trust which has to be causally linked to the loss suffered by the beneficiary, possesses its own doctrinal appeal. I proceed to consider the place of causation in connection with equitable compensation generally (not just in wrongful disposition cases).

E. Aspects of causation for equitable compensation

E.1 “But for”

48. The causal link must of course be between the fiduciary’s breach of duty and the plaintiff’s loss. The loss is what the plaintiff or the trust estate have been deprived of as a result of the breach,⁶⁶ and causation is established by showing that “but for” that breach, such loss would not have occurred. As Lord Browne-Wilkinson put it:

“... the basic equitable principle applicable to breach of trust is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach.”⁶⁷

49. That apparently simple statement harbours two distinct approaches. The first, which one might describe as relatively “hard line” was explained by Justice Gummow as follows:

“The essence of what Street J⁶⁸ held was that the true enquiry is whether the loss would have happened had there been no breach, not whether the loss was caused by or flowed from the breach. Where the loss complained of occurs by a trustee making an investment that was unauthorised, the loss would not have occurred but for the breach. However, the loss may have been caused by or

⁶⁶ *Guerin v The Queen* [1984] 2 SCR 335 at 361; *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [105].

⁶⁷ *Target Holdings Ltd v Redferns (A Firm)* [1996] 1 AC 421 at 436.

⁶⁸ Referring to James J’s judgment in *Re Dawson; Union Fidelity Trustee Co v Perpetual Trustee Co* (1966) 84 WN (Pt1) (NSW) 399.

flowed more immediately from some and other event such as a general decline in the economy.”⁶⁹

50. This approach therefore tends to discount concurrent causes. It has been reiterated in some of the authorities,⁷⁰ recently by Gageler J (in the context of an account of profits) in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd*,⁷¹ where His Honour stated:

“Equity is not ignorant of questions of causation. What it stresses is that questions of causal nexus in a remedial context must be addressed by reference to the equitable obligation breach of which is to be vindicated by the remedy that is sought. ... Because the concern of equity is to vindicate the equitable obligation that has been breached, the ‘but for’ connection will be sufficient even though other contributing causes might be in play.”⁷²

51. The less stringent approach may be illustrated by *Hodgkinson v Simms*.⁷³ Simms, a tax adviser advised Hodgkinson to invest in multi-unit residential buildings (“MURBs”) which, by the conventional wisdom, were safe and conservative. Hodgkinson lost heavily when the value of the four MURBs he acquired fell during a decline in the real estate market. He sued for breach of fiduciary duty on the basis that Simms was acting for the developers in the structuring of the MURB projects, and thus financially interested in them, but did not disclose this to Hodgkinson.

⁶⁹ W M Gummow, "Compensation for Breach of Fiduciary Duty" in J G Youdan, *Equity, Fiduciaries and Trusts* (1989) 57 at 89.

⁷⁰ Eg in *Nicholls v Michael Wilson & Partners Ltd* [2012] NSWCA 383 at [174], citing Spigelman CJ in *O'Halloran v Thomas* (1998) 45 NSWLR 262.

⁷¹ [2018] HCA 43 [at 88]. Gageler J went further and held that where the breach is dishonest and fraudulent, a sufficient causal connection may be found “if the dishonest and fraudulent breach can be concluded to have played a material part in contributing to the benefit or gain of the fiduciary ... even in circumstances where it cannot be concluded that the benefit or gain would not have been obtained but for the breach.”

⁷² *Ibid* at [84] and [88].

⁷³ [1994] 3 SCR 377.

52. La Forest J, writing for the majority, took the hard line, rejecting the argument that the losses were due to the market decline and not attributable to the non-disclosure. He held that “... it was the particular fiduciary breach that initiated the chain of events leading to the investor's loss. As such it is right and just that the breaching party account for this loss in full.”⁷⁴
53. It will be recalled that in *Canson*, McLachlin J had stressed that “it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach”.⁷⁵ In the joint dissenting judgment of Her Honour and Sopinka J in *Hodgkinson v Simms*, it was held that neither a fiduciary relationship nor causation had been established. As to causation their Honours held that:
- “...The loss in value was caused by an economic downturn which did not reflect any inadequacy in the advice provided by the respondent. We would reject application of the ‘but for’ approach to causation in circumstances where the loss resulted from forces beyond the control of the respondent who, the trial judge determined, had provided otherwise sound investment advice.”⁷⁶
54. This difference in approach reflects the courts’ attempts to balance two competing policies. On the one hand, as Lord Dunedin remarked in *Nocton v Lord Ashburton*, stringent duties have been imposed since equity has always sought “to keep persons in a fiduciary capacity up to their duty”⁷⁷ or, as it was put by the Australian High Court in *Warman*

⁷⁴ *Ibid* at [79].

⁷⁵ *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 556.

⁷⁶ [1994] 3 SCR 377 at [154].

⁷⁷ [1914] AC 932 at 963.

International Ltd v Dwyer,⁷⁸ “to ensure that fiduciaries generally conduct themselves ‘at a level higher than that trodden by the crowd’”.

55. On the other hand, as Lord Browne-Wilkinson emphasised in *Target*, to enable a beneficiary to recover more than he has in fact lost “flies in the face of common sense and is in direct conflict with the basic principles of equitable compensation”.⁷⁹ Moreover, as Gageler J recognised, the stringency of the equitable obligation to be vindicated must accommodate “the need to ensure that the remedy is not ‘transformed into a vehicle for the unjust enrichment of the plaintiff’”.⁸⁰
56. The trend in the authorities appears to involve attenuating the hard line approach. As Gault J has pointed out,⁸¹ this might be done by drawing on Lord Hoffmann’s analysis in *South Australia Asset Management Corporation v York Montague Ltd*,⁸² a case involving a contractual duty of care, to limit the recoverable loss to the kind of loss in respect of which the relevant duty is owed.
57. Lord Hoffmann was considering the extent of the liability of a valuer who has provided a lender with a negligent overvaluation of a property offered as security for a loan where the loan would not have been made if the lender had known the true value of the property and where a fall in the

⁷⁸ (1995) 182 CLR 544, citing Cardozo CJ in *Meinhard v Salmon* (1928), 164 NE 545 at 546.

⁷⁹ *Target Holdings Ltd v Redferns (A Firm)* [1996] 1 AC 421 at 436.

⁸⁰ *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43 at [94], citing *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561.

⁸¹ *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* (1999) 1 NZLR 664 at 683.

⁸² [1997] AC 191.

property market after the date of the valuation greatly increased the loss which the lender eventually suffered.⁸³ His Lordship observed that:

“Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.”⁸⁴

58. Lord Hoffmann reasoned that:

“...a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties.”⁸⁵

59. Thus, a distinction has to be drawn, for instance:

“...between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to *advise* someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong.”⁸⁶

60. This may seem an attractive approach. While it would still be no answer for the fiduciary to point to concurrent causes, the recoverable losses would be confined to those caused by the particular breach, eliminating losses which would have been sustained even if there had been no breach.

⁸³ *Ibid* at 210.

⁸⁴ *Ibid* at 213.

⁸⁵ *Ibid* at 214 (*italics in original*).

⁸⁶ *Ibid*.

It may supply a principled basis for holding the balance between the two competing policies mentioned above.

61. Another mechanism for softening the hard line position involves the imposition of an onus on the fiduciary to show that there is no causal connection between the breach and the loss claimed rather than excluding altogether the relevance of possible contributing causes. The fiduciary has the onus of showing that the plaintiff would have suffered the same loss regardless of the breach.⁸⁷ However, questions may arise as to how, and on the basis of what evidence, the fiduciary might discharge that burden.⁸⁸ Moreover, difficult issues may arise as to the extent to which it is relevant to ask: “What would have happened had there had been no breach?”⁸⁹

E.2 Foresight, remoteness and different types of breach

62. The acceptance of a causation requirement does not mean that the rules on the scope of equitable compensation have become the same as those on the measure of common law damages. Different types of breach of fiduciary duty necessarily entail different remedies. Claims for dissipation of the trust assets may call for orders for restoration of the fund while claims such as for breaches of the duty of loyalty where no trust assets have been misapplied, may call for equitable compensation on

⁸⁷ *Hodgkinson v Simms* [1994] 3 SCR 377 at [76]; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* (1999) 1 NZLR 664 at 687; and *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [93] and [116].

⁸⁸ S M Waddams, *Fiduciary Duties and Equitable compensation*, 27 Can Bus LJ 466 (1996) at 470.

⁸⁹ Meagher, Gummow and Lehane (5th Ed) at [23-395]-[23-450]. See *Brickenden v London Loan & Saving Company* [1934] DLR 465 at 469; *Maguire v Makaronis* (1997) 188 CLR 449 at 470-472; discussed in *AHRKalimpa Pty Ltd v Alan Hessel Schmidt (No 3)* [2019] VSC 197 (2 April 2019) at [34].

a reparative basis.⁹⁰ Distinctions must be made regarding the rules on foreseeability and remoteness depending on the nature of the breach.

63. This was stressed by Tipping J in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* who identified three categories of breach:

“Although the relationship between the parties can properly be described as one of trustee and beneficiary, that relationship does not in and of itself dictate how the law should determine issues of causation and remoteness. Breaches of duty by trustees and other fiduciaries may broadly be of three different kinds. First, there are breaches leading directly to damage to or loss of the trust property; second, there are breaches involving an element of infidelity or disloyalty which engage the conscience of the fiduciary; third, there are breaches involving a lack of appropriate skill or care. It is implicit in this analysis that breaches of the second kind do not involve loss or damage to the trust property, and breaches of the third kind involve neither loss to the trust property, nor infidelity or disloyalty.”⁹¹

64. Tipping J’s first category, which relates to loss caused to the trust assets, involves a claim for restoration either in specie or by value. In such cases, he held that “[questions] of foreseeability and remoteness do not come into such an assessment”.⁹² The fiduciary is held responsible if “but for the breach, the loss or damage would not have occurred”, the policy being “to encourage trustees to observe to the full their duties in relation to the trust property by imposing upon them a stringent concept of causation”.⁹³

65. Questions of foreseeability and remoteness also do not arise in cases within his second category where strictness in the rule buttresses the central duties of fidelity and loyalty owed by the fiduciary. Hence:

⁹⁰ *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 546-547.

⁹¹ (1999) 1 NZLR 664 at 687.

⁹² *Ibid.* As had earlier been held in *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 552-553; and *Target Holdings Ltd v Redfern (A Firm)* [1996] 1 AC 421 at 438.

⁹³ *Ibid.*

“...once the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover unless the defendant fiduciary, upon whom is the onus, shows that the loss or damage would have occurred in any event, ie without any breach on the fiduciary's part.”⁹⁴

66. It follows that in cases falling within either of these categories, it is irrelevant that the plaintiff's loss may not have been foreseeable. The court assesses compensation at the time of judgment “with the full benefit of hindsight”,⁹⁵ taking into account any post-breach events affecting the extent of the loss, such as market changes and currency fluctuations. In *Libertarian*,⁹⁶ for instance, funds were transferred to the defendant fiduciary for the specific purpose of his acquiring shares in a certain listed company on his principal's behalf. Instead, he used those funds for his own purposes. By the time of the trial, the value of those shares, if he had duly acquired them, would have risen sharply because of a successful takeover bid involving an exceptionally high public offer price. It was not relevant that the takeover and offer price may not have been foreseeable when the breach occurred. The defendant was ordered to pay equitable compensation on a wilful default basis reflecting the increased value of the shares.
67. The rule that assessment is made with full hindsight at the time of the judgment accords with the rules relating to the taking of accounts in common form and on a wilful default basis. It is at the time when the account is taken that the amount falsified or surcharged is determined. This rule can obviously have a dramatic effect where the assessment or judgment occurs many years after the breach, as occurred for instance, in

⁹⁴ *Ibid.*

⁹⁵ *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 556, citing *Guerin v The Queen* [1984] 2 SCR 335 at 361.

⁹⁶ *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681.

some of the cases concerning the historical rights of indigenous groups mentioned above.

68. Tipping J's third category of breach, involving a lack of appropriate skill or care, stands on a different footing. It is generally recognised that the liability of a fiduciary for the negligent transaction of his duties falls within the general duty to act with care imposed by law on those who take it upon themselves to act for or advise others and that it is the same duty of care as that imposed on bailees, carriers, trustees, directors, agents and others.⁹⁷ There is no reason to exclude the same rules as to foreseeability and remoteness.⁹⁸

69. Thus, Millett LJ held:

“Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case.”⁹⁹

70. As Tipping J explained:

“In the third kind of case, the relationship of trustee (or fiduciary) and beneficiary is, in a sense, incidental. It provides the setting in which the breach of duty occurs, and with it such tortious proximity or contractual privity as may be necessary. The duty to take care is one which arises as an incident of the relationship, but for the purpose of determining the proper approach to causation and remoteness, it is the failure to take care which is the material dimension, not the fact that the relationship also creates duties of a fiduciary kind. Those duties are not relevantly engaged.”¹⁰⁰

⁹⁷ *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 at 205.

⁹⁸ However, the authors of Meagher, Gummow and Lehane (5th Ed) at [23-345]-[23-375] are disapproving of this proposition.

⁹⁹ *Bristol and West Building Society v Mothew* [1998] Ch 1 at 17.

¹⁰⁰ *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* (1999) 1 NZLR 664 at 688. See also Gault J writing for the other members of the Court at 681.

E.3 Other limiting doctrines: a duty to mitigate

71. Attempts have been made on behalf of defendant fiduciaries to limit their liability by reference to a duty to mitigate and to contributory negligence on the beneficiary's part. These attempts must be viewed in the light of the fundamental difference between persons who owe fiduciary obligations on the one hand, and persons in a commercial relationship on the other. Commercial relationships are characterised by arm's length dealings where each of the parties is fully entitled to pursue his own self-interest. However, fiduciary obligations are the antithesis of self-interest.¹⁰¹ They arise where a person has undertaken to act in the interests of another in circumstances which give rise to a relationship of trust and confidence, entitling the principal to the undivided loyalty of the fiduciary. Lord Millett has put this vividly:

“The common law insists on honesty, diligence, and the due performance of contractual obligations. But equity insists on nobler and subtler qualities: loyalty, fidelity, integrity, respect for confidentiality, and the disinterested discharge of obligations of trust and confidence. It exacts higher standards than those of the market place, where the end justifies the means and the old virtues of loyalty, fidelity and responsibility are admired less than the idols of ‘success, self-interest, wealth, winning and not getting caught’.”¹⁰²

72. This fundamental difference dictates the application of different legal principles in the respective relationships. Thus, as McLachlin J explained:

“The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question,

¹⁰¹ *Hodgkinson v Simms* [1994] 3 SCR 377 at [38]-[40].

¹⁰² Lord Millett, “Equity's Place in the Law of Commerce”, (1998) 114 LQR Review 214 at 216.

communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged.”¹⁰³

73. Against this background, it has been held that the wronged plaintiff is not under a duty to mitigate as such. A failure by the plaintiff to act is only material where the omission is so unreasonable and “egregious” that it is regarded as severing the causal connection between the breach and the plaintiff’s loss. McLachlin J expressed this as follows:

“In negligence and contract the law limits the actions of the parties who are expected to pursue their own best interest. Each is expected to continue to look after their own interests after a breach or tort, and so a duty of mitigation is imposed. In contrast, the hallmark of fiduciary relationship is that the fiduciary, at least within a certain scope, is expected to pursue the best interest of the client. It may not be fair to allow the fiduciary to complain when the client fails forthwith to shoulder the fiduciary’s burden. This approach to mitigation accords with the basic rule of equitable compensation that the injured party will be reimbursed for all losses flowing directly from the breach. When the plaintiff, after due notice and opportunity, fails to take the most obvious steps to alleviate his or her losses, then we may rightly say that the plaintiff has been ‘the author of his own misfortune.’ At this point the plaintiff’s failure to mitigate may become so egregious that it is no longer sensible to say that the losses which followed were caused by the fiduciary’s breach. But until that point mitigation will not be required.”¹⁰⁴

74. It is an approach that is activated to avoid the claim being “transformed into a vehicle for the unjust enrichment of the plaintiff”.

E.4 Other limiting doctrines: contributory negligence

75. The debate as to whether a plaintiff’s claim for breach of fiduciary duty can be lessened by apportionment on the basis of his or her contributory

¹⁰³ *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 543-544. Often endorsed, eg, in *Pilmer v The Duke Group Ltd* (2001) 207 CLR 165 at [71]; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [40]; and *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 per Lord Millett NPJ at [72].

¹⁰⁴ *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 554. Endorsed in *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [81] and *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [87].

negligence has tended to be entangled with what the Australians have called “the fusion fallacy”.¹⁰⁵ This involves the proposition that after the reforms of the Judicature Acts in the various common law jurisdictions,¹⁰⁶ the substantive rules of equity and the common law have fused and need not be distinguished from one another.

76. The idea of fusion gained impetus from Lord Diplock’s well-known dictum in *United Scientific Industries Ltd v Burnley Borough Council*,¹⁰⁷ in which he rejected Professor Ashburner’s statement that after the Judicature Act, equity and the common law, “though they run in the same channel, run side by side and do not mingle their waters”.¹⁰⁸ Lord Diplock called that a “mischievous and deceptive” metaphor and held that “the two systems of substantive and adjectival law formerly administered by courts of law and Courts of Chancery (as well as those administered by courts of admiralty, probate and matrimonial causes), were fused”.¹⁰⁹ He added:

“As at the confluence of the Rhône and Saône, it may be possible for a short distance to discern the source from which each part of the combined stream came, but there comes a point at which this ceases to be possible. If Professor Ashburner’s fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now.”¹¹⁰

77. In a series of decisions in New Zealand the fusion concept was championed by Lord Cooke of Thorndon (then sitting as Cooke J¹¹¹ and

¹⁰⁵ See eg, *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at [18] per Spigelman CJ. See also Meagher, Gummow and Lehane (5th Ed) at [2-130]-[2-395].

¹⁰⁶ In the UK, the Supreme Court of Judicature Act 1873.

¹⁰⁷ [1978] AC 904 at 924-925.

¹⁰⁸ Ashburner, *Principles of Equity*, 1st Ed (Butterworth 1902) at 23.

¹⁰⁹ *United Scientific Industries Ltd v Burnley Borough Council* [1978] AC 904 at 925.

¹¹⁰ *Ibid.*

¹¹¹ *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354 at 361.

Cooke P¹¹²), grafting onto that doctrine the conclusion that contributory negligence was available by way of defence in a claim for breach of fiduciary duty.

78. Thus, in *Day v Mead*,¹¹³ Cooke P held:

“Whether or not there are reported cases in which compensation for breach of a fiduciary obligation has been assessed on the footing that the plaintiff should accept some share of the responsibility, there appears to be no solid reason for denying jurisdiction to follow that obviously just course, especially now that law and equity have mingled or are interacting. It is an opportunity for equity to show that it has not petrified and to live up to the spirit of its maxims. Moreover, assuming that the Contributory Negligence Act does not itself apply, it is nevertheless helpful as an analogy, on the principle to which we in New Zealand are increasingly giving weight that the evolution of Judge-made law may be influenced by the ideas of the legislature as reflected in contemporary statutes and by other current trends:...”

79. And in *Aquaculture Corp v New Zealand Green Mussel Co Ltd*,¹¹⁴ His Honour stated:

“... the point should now be taken as settled in New Zealand. Whether the obligation of confidence in a case of the present kind should be classified as purely an equitable one is debatable, but we do not think that the question matters for any purpose material to this appeal. For all purposes now material, equity and common law are mingled or merged.”

80. This was followed by Fisher J in *Cook v Evatt (No 2)*,¹¹⁵ who accepted that “contributory responsibility is now a complete or partial defence to a claim for breach of fiduciary duty”.

81. The aforesaid developments gained some support in Canada from the majority in *Canson* stating:

¹¹² *Day v Mead* (1987) 2 NZLR 443; and *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299.

¹¹³ (1987) 2 NZLR 443 at 451.

¹¹⁴ [1990] 3 NZLR 299 at 301.

¹¹⁵ [1992] 1 NZLR 676 at 700-701.

“Lord Diplock's remark to the effect that the two streams of common law and equity have now mingled and interact are abundantly evident in this area. That is as it should be because in this particular area law and equity have for long been on the same course and whether one follows the way of equity through a flexible use of the relatively undeveloped remedy of compensation, or the common law's more developed approach to damages is of no great moment.”¹¹⁶

82. That approach did not, however, gain any traction in Australia. Fusion of the substantive rules of equity and the common law has not generally found favour. Thus, in *Harris v Digital Pulse Pty Ltd*,¹¹⁷ Spigelman CJ stated:

“The separation of equity and common law is of greater strength in Australian jurisprudence than appears to have become the case in other nations with similar traditions, including Canada and, it appears, New Zealand [citing influential extra-judicial writings]. ... The heart of the fusion fallacy — as it has come to be called in Australia — is the proposition that the joint administration of two distinct bodies of law means that the doctrines of one are applicable to the other. That is no more true of equity and common law than it was and is true of tort and contract within the common law context. That is not to say that one body of law does not influence the other. It is only to say that they remain conceptually distinct.”

83. In respect of contributory negligence, in *Pilmer v The Duke Group Ltd*,¹¹⁸ the majority in the Australian High Court stated:

“With respect to ... ‘contributing fault’, it is sufficient to say that the decision in *Astley v Austrust Ltd* [(1999) 197 CLR 1 at 11] indicates the severe conceptual difficulties in the path of acceptance of notions of contributory negligence as applicable to diminish awards of equitable compensation for breach of fiduciary duty. ...Contributory negligence focuses on the conduct of the plaintiff, fiduciary law upon the obligation by the defendant to act in the interests of the plaintiff. Moreover, any question of apportionment with respect to contributory negligence arises from legislation, not the common

¹¹⁶ *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 586-587 per La Forest J (with Sopinka, Gonthier & Cory JJ). See also *Lemberg v Perris* (2010) 76 CCLR (3d) 276 (Ontario Superior Court of Justice) at [88].

¹¹⁷ (2003) 56 NSWLR 298 at [15] and [18]. See also Heydon JA: “It is not the law of New South Wales that law and equity were fused when the judicature system was created by the [relevant Acts]. There was no fusion of two systems of principle but of the courts which administer the two systems...” at [353]

¹¹⁸ (2001) 207 CLR 165 at [86] per McHugh, Gummow, Hayne and Callinan JJ.

law. *Astley* indicates that the particular apportionment legislation of South Australia which was there in question did not touch contractual liability. The reasoning in *Astley* would suggest, *a fortiori*, that such legislation did not touch the fiduciary relationship.”

84. Kirby J, in his dissenting judgment, expressed some sympathy for importing the statutory defence of contributory negligence into equity by analogy, remarking that “all equitable and legal principles must today operate in a universe dominated by the star of statute. It would be surprising if the gravitational pull of statute, felt everywhere else in the law, did not penetrate into the expression and re-expression of non-statutory rules”.¹¹⁹ However, His Honour ultimately accepted that the “severe conceptual difficulties” indicated by the majority excluded acceptance of contributory negligence in this context.
85. The reasoning which helped to convince Kirby J to align himself with the majority had been compelling provided by Justice Gummow¹²⁰ in the following terms:

“[Cases developing equitable doctrines in the High Court of Australia] do not proceed on any footing that equity has ‘mingled’, ‘merged’ or otherwise lost its identity as a coherent body of principle. ... The Judicature system does not compel such a result; it does not give a new twist to the maxim that equity follows the law. ... Equity imposes obligations upon the fiduciary essentially because the fiduciary has undertaken or agreed to act for or on behalf of or in the interests of another in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. This reasoning is reflected in the preference given, through the medium of the tracing remedy, to fiduciary claimants over unsecured creditors claiming merely in debt or contract. While negligence is concerned with the taking of reasonable care, a fiduciary traditionally has more expected of him. His duty is one of undivided and unremitting loyalty. The fiduciary acts in a ‘representative’ capacity in the exercise of his responsibility. One must fear

¹¹⁹ *Ibid* at [170].

¹²⁰ W M Gummow, "Compensation for Breach of Fiduciary Duty" in J G Youdan, *Equity, Fiduciaries and Trusts* (1989) 57 at 85-86. See also Meagher, Gummow and Lehane (5th Ed) at [23-590]: “The responsibility reposed in trustees and fiduciaries is such as to remove the foundation for attributing responsibility to the beneficiary or principal for contributory fault.”

that introduction of concepts of contributory negligence into that setting inevitably will work a subversion of fundamental principle.”

86. The authors of Meagher, Gummow and Lehane pointedly ask:

“... why ever should a statute designed to *enhance* the rights of a plaintiff at common law (by abrogating an absolute defence) produce the result in a legal system with a fused administration of common law and equity that the rights of a plaintiff in equity should be *diminished* by the analogous application of the statute to a defendant who has breached fiduciary obligations owed to the plaintiff?”¹²¹

87. Neither the fusion doctrine nor the application of contributory negligence to fiduciary duty claims appears to have gained support in Hong Kong or Singapore. Indeed, there are recent indications that the New Zealand courts are retreating from the position previously adopted. Although only in a footnote, the New Zealand Supreme Court in *Amaltal Corporation Ltd v Maruha Corporation*,¹²² stated:

“The carelessness of the victim of fraud does not provide a defence of contributory negligence (*Standard Chartered Bank v Pakistan National Shipping Corporation (No 2)* [2003] 1 AC 959). It can be no different when the claim is put forward on the basis of fiduciary duty, assuming without deciding that contributory negligence can be a factor in equitable claims.”

88. It was a footnote relied on by Arnold J in *Simpson v Walker*,¹²³ stating:

“As to contributory negligence, the Supreme Court held in *Amaltal v Maruha* that it is no excuse in the context of a claim for breach of fiduciary duty for someone guilty of fraud to say that the victim should have been more careful and should not have been deceived.”

89. In England, at least in relation to deliberate breaches of the duty of loyalty, by analogy with the rule regarding intentional torts, it has been held that contributory negligence is not a defence.¹²⁴

¹²¹ Meagher, Gummow and Lehane (5th Ed) at [2-345].

¹²² [2007] 3 NZLR 192 at [23] footnote 17.

¹²³ [2012] NZCA 191 at [70].

¹²⁴ *Nationwide Building Society v Balmer Radmore* [1999] PNLR 606 at 677.

E.5 Other doctrines touching on causation

90. Finally, two other doctrines may be noted which have an impact on the extent of a plaintiff's recovery. First, is the doctrine of equitable allowances in cases where the plaintiff seeks an account of profits from the fiduciary. Where causation is established between the breach and the profits made, the defendant may be able to show that it would be inequitable for him to be charged with all the profits because he has conferred "a clear and manifest benefit" on the beneficiary.¹²⁵ The court may, in an evaluative judgment,¹²⁶ make an allowance for the time, energy, skill and financial contribution he has expended or made towards earning those profits, reducing the plaintiff's recovery accordingly.¹²⁷ It is an aspect of the policy against affording unjust enrichment to the plaintiff.¹²⁸
91. Secondly, on the other side of the ledger, attempts have been made to impose punitive or deterrent awards against errant fiduciaries leading to awards which would take the plaintiff's recovery beyond loss causally linked to the breach.
92. New Zealand authorities can be found in support of such awards, again as an incident of fusion.¹²⁹ And in Canada, in a case involving a breach of fiduciary duty by a doctor who had exploited a patient addicted to

¹²⁵ *Amaltal Corporation Ltd v Maruha Corporation* [2007] 3 NZLR 192 at [30].

¹²⁶ *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43 per Gageler J at [93]-[96].

¹²⁷ *Hospital Products Ltd. v United States Surgical Corporation* (1984) 156 CLR 41 at 110.

¹²⁸ *Warman International Ltd v Dwyer* (1995) 182 CLR 544; *Guinness plc v Saunders* [1990] 2 AC 663 at 701.

¹²⁹ *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 at 301-302; and *Cook v Evatt (No 2)* [1992] 1 NZLR 676 at 705.

painkillers by providing her with drugs in exchange for sexual favours, McLachlin J held that “punitive damages” for breach of fiduciary duty were merited to punish the wrongdoer and to deter others from like behaviour.¹³⁰ On the other hand, the New South Wales courts have come out firmly against such awards.¹³¹ The English courts¹³² and the Hong Kong Court of Final Appeal¹³³ are similarly inclined.

93. It remains to be seen how other courts decide on the availability of punitive or deterrent awards. Equitable principles are designed to keep fiduciaries up to their duty and, as Justice Gummow has argued, they have in-built deterrent features reflected, for instance, in “rendering fiduciaries accountable for profits in circumstances where the gaining of the profit has not occasioned the loss [and] ... [as] also appears on the wide form of accounting ordered and the limited allowances permitted in cases of cheating by roguish fiduciaries”.¹³⁴ Similarly Spigelman CJ observed that:

“Equitable remedies, including equitable compensation have elements that may be seen to be more punitive or deterrent than common law remedies available in similar factual situations. This may occur, for example, by reason of the application of different rules of liability, principles of causation or tests for remoteness. The integrity of equity as a body of law is not well served by adopting a common law remedy developed over time in a different remedial context on a different conceptual foundation. The fact that exemplary damages

¹³⁰ *Norberg v Wynrib* [1992] 2 SCR 226 at 299-301.

¹³¹ *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at [20], [47] and [470]; and *Nicholls v Michael Wilson & Partners Ltd* [2012] NSWCA 383 at [171].

¹³² See the discussion of the unreported case of *Perotti v Garrett* (12 June 1998), in Meagher, Gummow and Lehane (5th Ed) at [23-600].

¹³³ *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [83].

¹³⁴ W M Gummow, "Compensation for Breach of Fiduciary Duty" in J G Youdan, *Equity, Fiduciaries and Trusts* (1989) 57 at 79.

are awarded in tort is, in my opinion, not a basis for asking Why not? In equity.”¹³⁵

F. Conclusion

94. Underlying the evolving principles surveyed in this paper are the competing policies of holding fiduciaries to exacting standards of integrity on the one hand, and setting proper limits to their liability on the other. As Prof Charles Mitchell points out: “It seems inevitable that different courts will have different ideas of where to draw the line between inappropriately punitive and appropriately stern treatment of disloyal fiduciaries.”¹³⁶ Nonetheless, as Lord Reed JSC noted, there is a discernible tendency towards consensus on equitable compensation in the jurisdictions represented at this Colloquium.

¹³⁵ *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at [20].

¹³⁶ “Equitable Compensation for Breach of Fiduciary Duty” (2013) 66 Current Legal Problem 307 at 339.