ERRATA

(i) Footnotes 49 and 50, page 33: ‘[1902] 2 Ch 809’ for ‘(1889) 14 App Cas 337’.

(ii) Footnote 84: Delete, and replace with: Supreme Court Act 1970 (NSW) s 68; Supreme Court Act 1986 (Vic) s 38; Equity Act 1867 (Qld) s 62; Supreme Court Civil Procedure Act 1932 (Tas) s 11(13); Supreme Court Act 1935 (WA) s 25 (10); Supreme Court Act 1935 (SA) s 30; Supreme Court Act 1979 (NT) s 14 (1) (b); Supreme Court Act 1933 (Cth) s 11(a).


(vii) Page 312, line 10: ‘had not transferred’ for ‘had not’.

(viii) Footnote 265, page 319: Add ‘See also Jennings v Rice [2002] EWCA Civ 159’.

(ix) Page 353, paragraph (i): ‘raised’ for ‘railed’.
EQUITABLE COMPENSATION IN AUSTRALIA
PRINCIPLES AND PROBLEMS

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THESIS ABSTRACT

This thesis examines the remedy of equitable compensation and its use in Australian law. Recently, the remedy has grown in popularity, impelled by the view that equitable compensation is not subject to the causation and remoteness limitations of common law damages. This has been accentuated by the marked increase in allegations of breach of fiduciary obligations. A trend may be emerging to extend the remedy to a wider range of equitable causes of action, despite continuing problems concerning the remedy’s underlying principles.

This thesis argues that the remedy does not present uncontrolled opportunities for recovery of unlimited compensation, merely because equity’s attention has been attracted. The remedy has limits to both application and quantum that often go unnoticed. One of these limitations stems from the nature of equity. In Australian law, equity’s scope is limited to protection of economic interests. Equity aims to restore the plaintiff to the position that it should have occupied, had its economic interests not been interfered with. Equitable compensation is justified as a remedy to the extent that it can perform this task of restoration. In some cases, equitable compensation is the only remedy that can achieve such restoration, but in others, alternative remedies in equity’s arsenal can adequately perform that task.

Other limitations derive from the nature of the remedy. Compensation is addressed to reversing loss. Equitable compensation is only available as a remedy if the plaintiff can show that a loss has been suffered. Different equitable causes of action call for different remedies. It is not possible to discern one overarching ‘principle’ of quantification for equitable compensation. The remedy appears in different guises depending upon the cause of action for which redress is sought. However, in all cases, it is limited in terms of quantum to an amount required to restore the plaintiff to the position it should have occupied.

This thesis examines six equitable causes of action. In three of these, namely, breach of trust, breach of fiduciary obligation and breach of confidence, it is well-accepted that equitable compensation is an available remedy. However, the remedy is calculated differently in each case; equitable compensation is specific to the duty breached. Three
causes of action where the remedy’s availability is not so clear are also examined, namely, undue influence, unconscionable conduct and equitable estoppel. While equitable compensation is not a necessary remedy for undue influence and unconscionable conduct, there are indications that it may expand into those fields. Calculation of the remedy in such cases is discussed. The remedy appears to be available in cases of equitable estoppel, however, the remedial basis of the Australian doctrine remains uncertain.

The impact of common law modifications on the calculation of equitable compensation is discussed. Contributory fault, mitigation and exemplary awards are examined in light of recent Australian authority. The thesis concludes that if quantum is assessed in such a way as to restore, there is little need for these modifications.
CANDIDATE’S STATEMENT

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution. To the best of my knowledge, the thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Vicki Jegomette Vann
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Vicki Vann
Melbourne
December 2004.
CHAPTER ONE

INTRODUCTION

1.1 EQUITABLE COMPENSATION AS A REMEDY

Plaintiffs and defendants care about remedies. As Wright noted in 1955, every litigated case, without exception, necessarily includes a question of remedy. This thesis is concerned with the remedy of equitable compensation and its place in the Australian legal system of the 21st century. The principles of equitable compensation have presented notable problems, largely involving the application and quantification of the remedy. A view has grown that there are few controls attaching to it. This thesis argues that the remedy's potential for providing a generous cure to all equitable wrongs has been exaggerated.

Since its rediscovery as a remedy in 1982, (when Davidson had reasonably modest aims for its application) it has been said to have enormous scope to extend equity's ability to remedy wrongs, to the point that it has become seen as the equivalent of common law damages, though with fewer of the limitations of common law damages. Getzler says we are witnessing the expansion of equitable compensation from the field of trust law into other equitable areas, because 'the “but-for” causal liability tests and the eschewal of common-law remoteness doctrines and other defences have made equitable compensation an attractive head of remedy for plaintiffs'.

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Chapter One: Introduction

There are considerable indications of a trend to attach the label ‘equitable compensation’ to all monetary awards made in equity, however they are generated. This would allow the remedy’s further expansion; ‘meta damages for a meta tort’. This thesis argues that equity must instead identify and articulate consistent applications of the remedy. This is a difficult project, which involves deciding which equitable actions attract the remedy, and how quantum is to be calculated when an award is justified. Nevertheless, it is essential that the workings of the remedy be explained. Predictability of outcome is a justifiable goal in our legal system; plaintiffs, defendants and their representatives need to know where they stand. But more importantly, justice requires that the remedy be appropriate to the wrong complained of. If the remedy does not appropriately correct the wrong, injustice results for either the plaintiff or the defendant.

This thesis argues that equitable compensation is not the wide-ranging panacea for all equitable wrongs it is often thought to be, and in fact, has both limits to application and quantum which are ill-recognised. It is a relatively uncommon remedy, with relatively low availability. To view the remedy in this way is not to behave (as Rickett puts it) as a purist, regarding equity as a jurisprudence to be maintained free from common law, with a very contained role, simply because equity’s historical blueprint must be respected. This thesis does not deny that there is scope for the remedy of equitable compensation to develop. This thesis does, however, deny that equity has an unlimited role in the regulation of transactional interaction. The remedy’s potential for development cannot be fulfilled until the remedy is understood.

---


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1.2 THE ARGUMENT

This thesis argues that:

1. Equitable compensation is not available for all equitable causes of action. It is dependent upon demonstration of loss and, therefore, is not appropriate unless the cause of action requires demonstration of loss.

2. It is a misconception that there can be one overarching theoretical framework for equitable compensation. Because different causes of action cure different ills, equitable compensation appears differently in different cases. In short, equitable compensation is specific to the duty breached. The nature of the duty breached determines both the availability and quantum of the remedy.

3. In all cases where equitable compensation is available, there is an underlying limitation on quantum. When equity is performing a compensatory function, it is limited to restoring the plaintiff to the position that would have pertained had the breach not occurred.

4. The appropriateness of awarding a particular remedy in respect of a duty breached can be assessed against this limitation. Equitable compensation is justified if it satisfies equity’s limited interest in restoring the plaintiff to its proper position. However, in many cases, equity can restore the plaintiff without resort to equitable compensation. This is why equitable compensation ‘has consistently been treated as a remedy of last resort, to be applied only when a more traditional equitable remedy is inappropriate or unavailable.’

5. Once this restoration interest has been satisfied, common law concepts which limit or extend recovery such as contributory fault and exemplary damages are generally excluded.

---


Chapter One: Introduction

Particular problems have been caused by the fashion for over-pleading breach of fiduciary duty and by the equation of breach of fiduciary duty with breach of trust. The extent of the territory covered by equitable compensation for breach of fiduciary duty is sometimes overstated. When attempts are made to extend equitable compensation past its restorative basis, connection is lost with the equitable cause of action. These attempts stray into areas covered by the common law and deviate from equity's legitimate interest in restoring the plaintiff to the proper position.

These arguments will be addressed by considering two questions. The first question for this thesis is stated thus: In what situations will equitable compensation be an appropriate remedy? It will be argued:

(a) that not every equitable cause of action can support the remedy of equitable compensation, either because:

(i) the cause of action will not support a remedy of compensation at all; or

(ii) equity's restoration and unconscionability concerns can be satisfied by another remedy; and

(b) even in cases where the remedy can be supported, it may not be the remedy of preference. These factors limit the availability and utility of equitable compensation.

The second question for this thesis concerns calculation of the remedy of equitable compensation in cases where it is an appropriate and available remedial response. This will concern causation and adjustments which might be made to the award. It will be argued that the causation standard equity should use is the 'but for' standard, which, however, must be viewed in the context of the duty breached. Causation in context limits the quantum of equitable compensation. Once equitable compensation is calculated according to this standard there is little, if any, scope for the application of common law concepts that might reduce or increase levels of quantum.

This thesis will examine six equitable causes of action, namely breach of trust, breach of fiduciary duty, breach of confidence, undue influence, unconscionable conduct,
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and equitable estoppel. The first three have been selected as clear examples of causes of action where equitable compensation is an available remedy. The remedial response with respect to the latter three is not so clear.

It will be shown that equitable compensation has a specific meaning in relation to breaches of trust. Its specific application is largely limited to reconstitution of the trust fund. Because trust invariably involves a trust fund, loss occurs in that context. In those cases where equitable compensation is available for breach of trust, it can be seen that equity is restoring the trust fund and thus guards against unconscionable outcomes for the beneficiary.

It will be argued that equitable compensation is not available for all breaches of duty by a fiduciary. In those cases where it is available, its outer limit reflects the restorative underpinning of the remedy and is intimately connected to the specific cause of action itself. The outer limit of the remedy is to remove the effect of the fiduciary’s conflict as it affected the relevant transaction; this accomplishes the task of removing the fiduciary’s unconscionable behaviour. However, the remedy goes no further than this. The same is true of undue influence and unconscionable conduct. If the remedy is available for those causes of action, the outer limit is restoration.

Breach of confidence has always presented remedial problems. Although the basis of the action appears to be equitable, it has long been remedied by reference to common law approaches. While this can be attributed to historical influences, it is also explained by the difficulties in extending the restoration model to many modern examples of breaches of confidence. In these situations it is better to accept the common law models as being appropriate. However, in traditional cases of breach of the equitable duty of confidence, the remedy can be explained by and assessed against equity’s restoration model. Likewise, the remedy for equitable estoppel can be explained as achieving equity’s restorative goal, although there is significant doubt about the basis of the cause of action.

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10 In the past there have been doubts expressed concerning the basis of the action of breach of confidence. However, it is now generally accepted as being an equitable cause of action susceptible to the equitable remedies. This is discussed in Chapter 5.
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Causation has long been regarded as raising doctrinal difficulties for equitable compensation. Causation plays little part in reconstitution of trust funds and, because of the links between trust law and other equitable duties, it was often assumed that causation likewise played no role in respect of other equitable causes of action. The difficulty lies in the risk that apparently limitless recovery principles may cause injustice when transplanted to other equitable doctrines.

This thesis argues that causation poses no insurmountable issues when it is remembered that equity aims to restore the plaintiff to the position the plaintiff would have occupied had the duty not been breached. Difficulties have arisen because the duty-specific nature of the remedy has not been considered closely. The law relating to reconstitution of the trust has been given unwarranted deference in relation to other equitable breaches, which has distorted both doctrine and outcomes. But when the duty breached is considered, it becomes apparent that the equitable compensation to cure the breach does not admit of one overarching causative test which can be applied without reference to the duty. \(^\text{11}\) Causation can only be understood in the context of the duty breached.

This thesis conforms to the basic thesis proposed by Rickett, Davies and Getzler. Rickett says that the ‘type and content of the duty allegedly breached must be very carefully articulated’ so that compensation is causatively linked to the breach ensuring the plaintiff is not over-compensated. \(^\text{12}\) Davies speaks similarly in relation to fiduciary obligations. \(^\text{13}\) Getzler agrees that ‘different levels of equitable duty may dictate different type and extent of remedy.’ \(^\text{14}\) This thesis suggests that when causation in the context of duty is properly considered, the limits of the remedy of equitable compensation become clear. It is not a means to the end of unlimited compensation.

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\(^\text{11}\) Rickett, above, n 7, 32, says that ‘equitable compensation cannot in fact be neatly packaged as if it were a single item encompassing only one exclusive set of stipulated rules’.

\(^\text{12}\) Rickett, above, n 8, ‘Compensating for Loss in Equity’ 175-6; Rickett, above, n 7, 34.


\(^\text{14}\) Getzler, above, n 3, 246.
1.3 PRELIMINARY MATTERS

(i) The focus of equity

Equity is something of an historical accident. There was no Hamurabi in equity's design. Instead, it is 'a fragmentary thing', an ad hoc collection of doctrines each responding to a particular deficiency in the common law. Thus trusts developed as a method of defeating medieval land-holding practices, the doctrine of undue influence as a means of overcoming the strictness of the law of contract, and breach of confidence as a method of protecting information where tort, contract and property law could not, and so forth. In each of these cases equity protects the plaintiff's economic interests.

Equity's greatest use is as a corrective. What equity 'corrects' is an unconscionable outcome in individual cases. But equity does not attack all of the world's injustices. It only corrects a narrow range of human interactions. These are civil transactions that the common law would regard as supportable, but equity regards as warranting intervention. It is inherent in this that the defendant's acts scrutinised by equity are otherwise lawful. The common law allows the defendant the apparent ability to do what he has done; equity steps in to regulate the fairness of what would otherwise be valid. This can be seen in the causes of action discussed in this thesis.

The common law regards the trustee as the owner of trust property, and therefore able to do with it as she pleases. Equity corrects to protect the beneficial ownership that is invisible to the common law. Those who are fiduciaries are able at law to act for two

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16 And see Wright, above, n 1, 382-3.


18 See, for example, *Cream v Bushecolt Pty Ltd* [2004] WASCA 82 (unreported, Malcolm CJ, Miller and Mckechnie JJ, 22 April 2004). There, a contractual clause was held to be void as an unreasonable restraint of trade. The purchaser argued that the promise was then enforceable in equity via estoppel. The Western Australian Court of Appeal held that the fact that the restraint was contrary to public policy was a complete obstacle to relief in equity.
masters (including themselves), but equity corrects to require that the fiduciary act only in
the interest of one master. This corrective focus is why the fiduciary relationship 'moulds
itself to the context' of the common law relationship between the parties, rather than
changing the nature of the relationship between them. By and large, the common law
encourages the dissemination of information for reasons of economic efficiency. Equity
forbids the defendant disseminating information that has come to him in confidential
circumstances. Likewise, the common law generally expects that those who contract do so
as free and independent actors. But equity will correct the transaction if one party has used
undue influence or unconscionably exploited the limitations of the other party. Finally, the
common law allows a person to walk away from a promise unless sufficient steps have
been taken to give the promise contractual force. Equity, though, will not permit the
promisor's escape if the promise has resulted in the promisee's detrimental reliance upon it.

In all these cases, the common law would have permitted the defendant's behaviour.
This corrective focus in fact limits equity's scope. Equity has no exclusive place where the
common law or statute already disallows the defendant's behaviour. As Maitland said, 'at
every point, equity presupposed the existence of the common law'. The existence and
shortcomings of the common law give equity its focus. Equity can only be asked to correct
what the common law will allow. Therefore, equity can insist a trustee return or
compensate for trust property, but cannot comment on physical injury the trustee may have
inflicted on the beneficiary. The trustee's conscience is made clear in equity when she
accounts for the trust property. The common law has been corrected because the trustee is
not able to assert that the trust property belongs to her. The common law sets its face
against the behaviour that caused physical injury to the beneficiary, and already provides a
scheme for the beneficiary's recovery. Equity's assistance is not needed. Therefore,

19 P U Ali and T Russell, 'Investor Remedies against Fiduciaries in Rising and Falling Markets' (2000) 18

20 See Cream v Bushcolt Pty Ltd [2004] WASCA 82 (unreported, Malcolm CJ, Miller and McKechnie JJ,
22 April 2004). Equity should then be excluded from cases involving bodily harm and sexual abuse etc.
Criminal law and torts law are the appropriate regulators in these cases.

21 F W Maitland, Equity: a course of lectures (A H Chaytor and W J Whittaker, eds) (2nd ed, Cambridge,
Cambridge University Press, 1936) 19.
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equity's ambit is limited to economically correcting behaviour the common law would allow. In the modern context, this is most commonly in a transactional setting.

It should not be assumed then that equity's ambit is static, or its limits solidified. It is natural that they should change according to time and tide and in response to the common law. For example, a large part of the exclusive jurisdiction discussed in Nocton v Lord Ashburton\(^2\) (misleading advice) has been overtaken by developments in tort law,\(^3\) and equity is now rarely needed where misleading professional advice results in economic loss. On the other hand, the common law's continued insistence that only a promise concerning existing fact could ground an estoppel resulted in equity gradually expanding its jurisdiction. This is graphically illustrated in the cases discussed in Chapter 6. We are able to witness this process of resurveying the boundaries between common law and equity in action during the current debate about regulation of privacy interests, discussed in Chapter 5.

Society functions more efficiently with these equitable doctrines in place than it might in their absence.\(^4\) Because equity generates doctrinal expansions in response to specific economic or social need,\(^5\) it might have been the case that equitable doctrines would have little or nothing in common. Indeed, they can be a disparate lot. Contrast, for example, the institution of the trust, with the obligation of confidence that might be imposed upon the chance finder of a secret document in the street.\(^6\) Nevertheless, 'those doctrines may represent the outcome of an interplay between various themes and values of concern to equity'.\(^7\) One characteristic value held in common by all the equitable doctrines

\(^{21}\) [1914] AC 932.

\(^{22}\) Hadley Byrne & Co Ltd v Heller& Partners Ltd [1964] AC 465.

\(^{23}\) A Duggan, 'Is Equity Efficient?' (1997) 113 Law Quarterly Review 601. This may call into doubt Maitland's venerable observation that the common law can function without equity, but equity cannot function without the common law: Maitland, above, n 21. The efficiency argument suggests common law would not function so well without equity.

\(^{24}\) For a notable example, see W v G (1996) 20 Fam LR 49.

\(^{25}\) Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 281 (Lord Goff).

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discussed in this thesis is concern with the unconscionable interference with the plaintiff’s
economic interests. No matter that the defendant is committing no common law wrong or
is insisting on rights given by the common law; unconscionability on the part of the
defendant can result in equitable intervention. It is undeniably the case that this represents
one clear link between these equitable doctrines.

This is not to imply though that unconscionable actions at large are subject to
equitable intervention, or to imply that unconscionability is a particularly strong guiding
principle. In operation, unconscionability appears to behave more as a lowest common
denominator. But this loose guiding principle informs equity’s remedial responses. In
general, equity’s response is to do the minimum required to remove whatever
unconscionability impinges upon the dispute. In any given dispute, some remedies will
neatly remove any unconscionability, but other remedies would be overkill for the dispute
concerned. Equity’s remedies reflect its corrective focus. Thus, while rescission may
adequately remedy some wrongs, equitable compensation may be needed for others. Equity
aims to correct, but no more.

(ii) Equitable compensation and restitution

One of the ways in which equity considers unconscionability is to question what
remedy is required to remove whatever unconscionability exists. This removal can also be
expressed in positive terms. Thus expressed, equity asks what remedy is required to put the
plaintiff back into the position he would have attained in the absence of the
unconscionability. This response is restitutionary in the natural sense of the word because it
‘restores’ the plaintiff.

Unfortunately, the terms ‘restitution’ and ‘restitutionary’ now have a more
complicated connotation. ‘Restitution’ is now largely thought of as a remedial response to

\[28\] However, see Chapter 5.5, which discusses privacy issues in relation to the equitable obligation of
confidence.

\[29\] For example, see Stern v McArthur (1988) 165 CLR 489.

\[30\] Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd. (2003) 197 ALR
153, 164 (Gummow and Hayne JJ).
unjust enrichment. It is fair to say that considerable confusion has surrounded the question of whether or not equitable compensation is a restitutionary remedy in recent times. Many commentators have noted difficulty here. Tilbury notes that the remedy’s ‘essentially compensatory function is acknowledged notwithstanding the description of its object as “restitution” in the classical authorities.’\textsuperscript{31} McInnes notes the term ‘restitution’ is used indiscriminately in the courts, in at least three senses, describing the topic as ‘terminologically, an area almost designed to defy comprehension.’\textsuperscript{32} Just as the terms ‘equitable’ and ‘compensation’ invite conflict and confusion,\textsuperscript{33} so does the term ‘restitution’. As a word, ‘restitution’ is capable of meaning ‘compensation’ in the sense that if a plaintiff is compensated for the harm done, restitution to the pre-breach condition is achieved. This is the natural meaning of restitution, the restoration of the status quo ante.

The conceptual difficulty here is similar to the one faced by Fuller and Perdue in 1936. Discussing expectation damages for breach of contract as compensation for injury, they noted:

Yet in this case, we ‘compensate’ the plaintiff by giving him something he never had. This seems on the face of things a queer kind of ‘compensation’. We can, to be sure, make the term ‘compensation’ seem appropriate by saying that the defendant’s breach ‘deprived’ the plaintiff of the expectancy. But this is in essence only a metaphorical statement of the effect of the legal rule. In actuality the loss which the plaintiff suffers (deprivation of the expectancy) is not a datum of nature but the reflection of a normative order. It appears as a ‘loss’ only by reference to an unstated ought.\textsuperscript{34}

\textsuperscript{31} M Tilbury, ‘Restitutionary Damage’ in R Carroll (ed) Civil Remedies: Issues and Developments (Sydney, The Federation Press, 1996) 1, 4.


\textsuperscript{33} Rickett, ‘Compensating for Loss in Equity’, above, n 8, 173.

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The same often occurs when the plaintiff is compensated in equity. Particularly in the cases of breach of fiduciary obligation, breach of confidence and estoppel, equity sometimes gives the plaintiff something he never had. There is loss in the sense that equity restores to him what he ought to have had; equity restores to him what he would have had, but for the defendant's unconscionability.

The restitutionary nature of equitable compensation is reflected in the language used by the courts. Street J's dictum in Re Dawson, that the 'obligation of a defaulting trustee is essentially one of effecting restitution to the estate' remains the best example here, but there are many others. A similar term is used by Viscount Haldane in Nocton v Lord Ashburton. 'Many equitable remedies have 'restitutionary patterns' but in the case of equitable compensation this is not its only pattern. It also has compensatory patterns. Equitable compensation is not restitutionary, as that term is now frequently understood, namely as a response to unjust enrichment. Equitable compensation is not based on any enrichment of the defendant; instead, it is based upon a consideration of the loss suffered as a result of the breach of duty.

Remedies are generally seen as having four basic aims or purposes. These are to compensate the plaintiff for the loss suffered, to effect restitution between the plaintiff and the defendant, to cause the defendant to disgorge a profit made as a result of the breach.

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35 Re Dawson (deed); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd [1966] 2 NSW R 211, 214 ('Re Dawson').


37 [1914] AC 932.


complained of, and to punish the defendant. A consideration of the aims of remedies demonstrates that equitable compensation and restitution for unjust enrichment are not coextensive. The first of these aims, compensation, involves making good the plaintiff’s losses. The classic example here is damages in tort for negligence. 40 Gain to the defendant is irrelevant when considering compensation to the plaintiff. 41 The second category, restitution, involves restoring an asset to the plaintiff. As it is currently understood, restitution involves a restoration to the plaintiff of an asset, in situations where the defendant has in some way taken the asset, or its worth. In these cases both gain to the defendant and loss to the plaintiff are relevant. The paradigm here is restitution in cases of unjust enrichment. 42 The third category merely involves disgorgement of a gain made by the defendant, in cases where the law will not allow that gain to be made. Here, loss to the plaintiff is irrelevant. The most obvious example of a disgorgement remedy is a trustee accounting for a profit made, 43 but recently an award disgorging a gain was made for breach of contract in the United Kingdom. 44 The final category involves a deliberate attempt to punish the defendant for a wrong done to the plaintiff. These kinds of punishments are usually administered according to the criminal law, but it is possible to have awards of punitive damages in tort 45 and also, but more controversially, in equity. 46 In theory, a punitive award is not dependent on either gain to the defendant or loss to the plaintiff. At either common law or equity, punitive damages are exceptional. Considerable debate has been generated concerning whether such awards should be available at private law at all. Because their main functions include deterrence and punishment, rather than the

40 However, there are numerous explanations of compensation. See for eg, Fuller and Perdue, above, n 34.
41 As McInnes puts it, ‘Compensation .....usually hurts in a way that restitution does not. It generally requires the defendant to repair a loss even though he did not receive a corresponding gain’: M McInnes, ‘The Measure of Restitution’ (2002) 52 University of Toronto Law Journal 163, 184.
43 Eg Boardman v Phipps [1967] 2 AC 46.
44 Attorney-General v Blake [2001] 1 AC 268.
46 The availability of exemplary damages in equity is discussed in Chapter 7.
achievement of justice between the parties, this category of remedy does not have the same resonance here as the first three remedial aims.

The cases show that equitable compensation is available whether or not the defendant makes a gain,\(^47\) therefore disgorgement as a purpose cannot explain equitable compensation. Generally an account of profits is available for breach of trust or breach of fiduciary duty, and at the very least rescission is available for equitable wrongs such as undue influence. These remedies serve to strip the defendant of the gain and fulfill the disgorgement purpose. They may be viewed as restitutionary in the unjust enrichment sense when equitable compensation cannot be.\(^48\) Further, the cases clearly show that it is not necessary to show both a gain to the defendant and a loss to the plaintiff to trigger a remedy of equitable compensation.\(^49\) As Gareth Jones puts it, ‘(t)here is a fundamental distinction between a claim for loss suffered and one for unjust enrichment gained at the expense of another.’\(^50\) If restitution for unjust enrichment does not explain the remedy of equitable compensation, ‘accordingly, there is little to be gained by using restitutionary analysis to justify or limit equitable compensation.’\(^51\)

But there is one important caveat to this argument concerning the law of restitution. Unjust enrichment is not the only situation in which restitutionary analysis is applied.

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\(^{47}\) For example, *Target Holdings Ltd v Redfern* [1996] 1 AC 421; *Guerin v The Queen* [1984] 2 SCR 335; *Stewart v Layton* (1992) 111 ALR 687.

\(^{48}\) ‘As a matter of principle, equitable compensation is quite distinct from the other standard in personam equitable remedies of an account of profits and rescission. First, an account of profits appears designed to strip a defendant of any gain he or she has made through breach of an equitable obligation, irrespective of whether the plaintiff has suffered loss. Conversely, equitable compensation appears designed to indemnify the plaintiff in respect of loss he or she has incurred through that breach; it is immaterial whether or not the defendant has made any gain.’: C Rickett and T Gardner, ‘Compensating for loss in equity: The evolution of a remedy’ (1994) 24 *Victoria University of Wellington Law Review* 19, 25.

\(^{49}\) For example *Target Holdings Ltd v Redfern* [1996] 1 AC 421, where there is no corresponding gain to the defendant.

\(^{50}\) Jones, above, n 42, 10. Likewise, the authors of Ford and Lee comment, ‘it is preferable not to confuse compensation with restitution because they belong to different causes of action: compensation being for breach of trust causing loss, and restitution for the recovery of trust property’: H A J Ford and W A Lee, *Principles of the Law of Trusts* (3rd ed, Sydney, LBC Information Services, 1996) August 2002 supplement [S17120].

\(^{51}\) Ali and Russell, above, n 19, 331.
Restitution is also a remedial response to certain wrongs. The term ‘restitution’ then is being used in two senses. Restitution can be based either upon unjust enrichment or upon wrongs. If based upon unjust enrichment, restitution is made because there has been an unjust enriching of the defendant at the plaintiff's expense. This can be quite asset-specific. If restitution is based upon wrongs, the theory replaces a specific asset by which the plaintiff is enriched with a condition to which the plaintiff wants to be returned. Both the ingredients of ‘enrichment’ and ‘at the plaintiff’s expense’ are supplied by the existence of a wrong. The wrong does double-duty. The defendant did wrong by the plaintiff, when the plaintiff was entitled to have right done by the defendant. Therefore the defendant must place the plaintiff in the position as if the defendant had done right by the plaintiff. This is accomplished by returning the plaintiff to the position he or she would have been in, had right been done. There is no obvious sense of enrichment of the defendant, and therefore disgorgement is an illusory remedy. The plaintiff still wants to be returned to a particular condition but there is nothing which can be stripped from the defendant. What the plaintiff wants is restoration.

This is what equitable compensation is about. It concerns restoring the plaintiff to the position that should have been occupied. Equity acts as if right was done. Equitable compensation is restitutionary in the wider, natural sense of restoration; therefore, equitable compensation can be categorised as restitution for wrongs. There may be no real difference

52 Boardman v Phipps [1967] 2 AC 46.
53 McCamus, above, n 6, 296.
56 This is justified by viewing the plaintiff's interest in having right done as a ‘property like right’ (E Weinrib, ‘Restitutionary Damages as Corrective Justice’ [2000] 1 Theoretical Inquiries in Law 1, 34) or the ‘normative loss of a right’ (J Brock, ‘The Propriety of Profitmaking: Fiduciary Duty and Unjust Enrichment’ (2000) 58 University of Toronto Faculty of Law Review 185, 190). At this point it becomes nearly impossible to differentiate between a restitutionary remedy for a wrong and a compensatory remedy for a wrong, because ‘compensation’ suffers from the structural abstractness noted by Fuller and Perdue, above, n 30. For a criticism of analysis of restitution for wrongs by reference to unjust enrichment, see Birks, above, n 5, 11-15.
57 McCamus, above, n 6, 297.
between a restitutionary and compensatory response to wrongs. Both are primarily concerned with corrective justice. It is tempting then to conclude that it does not matter if the remedy is classified as loss-based restitution or loss-based compensation. However, it is of significance because 'restitution' has become conceptually limited to disgorgement through its association with unjust enrichment. Equitable compensation must be distinguished from disgorgement for gains; otherwise a small but important group of breaches will remain unremedied.  

The underlying purpose of the remedy of equitable compensation is restorative or reversing, in the sense that the aim is to return the plaintiff to the position he would have been in but for the breach. This resembles restitution for unjust enrichment. Frequently the cases have not distinguished between remedies that are in fact rescissionary and those remedies that are compensatory. Rescission can be plainly seen as restitutionary where the transaction being rescinded is between the fiduciary and the principal. Equitable compensation on the other hand only looks to the loss suffered by the plaintiff. Equitable compensation is only necessarily restitutory in the sense that it is restorative or aims to reverse; to turn back the clock to the pre-breach situation.  

Birks and Pretto's warning is noted here:  

First, only chaos can attend the continued use of 'restitution (of a person to a condition)' to denote a particular measure of compensation for loss. 'Restitution (of a thing to a person)' must be kept for those remedial rights which aim to achieve surrender of a gain. Secondly, nothing good can come from supposing that 'equitable compensation' can do anything other than compensate for a loss. In short, equitable compensation is compensation, and compensation is the making good of a loss.  

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58 For example, Brock, above, n 56, argues that breach of fiduciary duty is an example of unjust enrichment because the plaintiff's loss of a normative right satisfies the need for the defendant's gain. Logically, this would limit recovery to disgorgement by a defendant.  

59 Birks and Pretto above, n 54, xi.
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While it is plain that confusion can follow from the use of the term ‘restitution’ in at least two senses, it is important to keep in mind what equity is trying to accomplish. Restitution in the sense of restoration is the other side of the coin of unconscionability. It is necessary to keep the two sides of the coin firmly in the mind’s eye, because absent this discipline, it is easy to fall into the trap of overcompensation. Equitable compensation may be the making good of a loss, but it is not the making good of all losses. It is the making good of those losses, and only those losses, that stem from the defendant’s unconscionable actions. The removal of the unconscionability ends the liability to compensate, because the plaintiff has been restored in accordance with equity’s requirements. Equity has achieved correction. Although equitable compensation can be categorised as ‘restitution for wrongs’, there is too little to be gained by reference to that term. Semantic confusion tends to lead to doctrinal confusion, where none is necessary. The term ‘restitution’ has become entwined with ‘unjust enrichment’, perhaps inextricably, and therefore it is better to refer to equity’s interest in restoration, as this does not automatically carry with it concepts of unjust enrichment. Therefore, that is the term adopted in this thesis.

It is thus fair then to judge a particular remedy applied in equity against this ‘restoration’ benchmark. Does the remedy perform the task of restoring the plaintiff to the state as if no unconscionability had occurred? It is only to the extent that remedies in equity respond to this task that they are justified. Thus, if a particular remedy will not restore the plaintiff, more will be called for. But if a particular remedy puts a plaintiff into a position

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60 The Australian High Court may be moving towards an explanation that would combine these two strands of meaning (possibly doing away with unjust enrichment in consequence). In Roxborough v Rothmans of Pall Mall Ltd (2001) 208 CLR 516, 543-58, Gummow J’s focusing upon the defendant’s unjust retention (even in the absence of loss by the plaintiff) moves restitution for unjust enrichment into the realm of restitution for wrongs, and makes all cases of unjust enrichment wrongs. This would open up room for extension of the remedy of equitable compensation: See Birks, above, n 5, 17-18; R Grantham, ‘Restitutionary Recovery Ex *Æquo Et Bono’ [2002] Singapore Journal of Legal Studies 388, 399.

61 Mclnnes, above, n 39,163.

62 But see Birks: above, n 5.
he could not possibly have occupied assuming no unconscionability, too much is being done. All equitable remedies should satisfy equity’s interest in correction.

(iii) Remedies in general

In the past few years, extensive debate has flourished concerning the use of remedies. Two distinct, diametrically opposed schools have emerged; the ‘discretionary remedialists’ on the one hand, and the ‘anti-discretion party’ on the other. These titles are misleading. Neither side is quite so black or white. But the bare bones of the dispute are that there are those who believe choice of remedy should be at the discretion of the court, untied to any preconceived concept of common law or equity, while their opponents deride such liberalism. The discretionary remedialists favour a ‘basket of remedies’ approach, with the best remedy chosen according to the facts. The anti-discretionists insist on an essential link between wrong and remedy. The debate in some ways mirrors the division between those who see fusion between the common law and equity as ‘fallacy’ and those

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63 For example, in *GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers Pty Ltd* [2002] VSC 487 (unreported, Mandie J, 19 November 2002), the plaintiff claimed the whole of the profit diverted from a joint venture in breach of fiduciary duty. The plaintiff was one of three joint venturers, and could only ever have received a third of the profits. Mandie J held that the plaintiff could not receive more by way of equitable compensation for breach than it could possibly have made had the fiduciary duty been performed.

64 The High Court has shown little sympathy for the debate. Mr Justice Gummow has commented extracurially that the debate is ‘conducted at several removes from the life of the law’ and is ‘unrewarding, not the least because it is conducted at too great a remove from daily life in legal offices, Chambers and the courts’: Hon Justice W M C Gummow, ‘Equity: too successful?’ (2003) 77 *Australian Law Journal* 30, 41-2; Mr Justice Hayne has commented extracurially that the debate is in any event being overtaken by statutory developments, which tend to the remedial menu approach: Hon Justice K M Hayne ‘Commercial Law – Private Business/Public Concern’, Centre for Commercial Law Conference 2002, ANU http://law.anu.edu.au/CCL/upcom.PDF at 14/10/03.

65 The term appears to have been coined by Birks: P Birks, ‘Three Kinds of Objection to Discretionary Remedialism’ [2000] 29 *University of Western Australia Law Review* 1.

66 This term comes from Jensen, above, n 39, 178.


68 For example, see P Birks, above, n 50; Mr Justice Smillie ‘Uncertainty and Civil Obligation’ (2000) *Otago Law Review* 633; Jensen, above, n 39.

69 Meagher, Heydon and Leeming, above, n 15, [2-100-2-110].
who dispute that conclusion. The debate is probably unavoidable. Even though the Judicature legislation may not have brought about fusion, it did bring with it the joint administration of law and equity, and inevitable cross-pollination. Complete fusion would encourage more discretion in judicial remedial selection, but Australian jurists are far from convinced it is necessary.

This thesis takes some of the middle ground. Causes of action address the matters that society has decided need correction. Remedies need to address the wrong complained of; therefore there is a link between wrong and remedy that cannot be ignored. If society has decided kidnapping is wrong, we must ask why it is wrong. For example, it may be wrong because it puts the victim at risk of injury or death, it may be wrong because it involves extortion, or it may be wrong because it results in breakdown of social controls. It is then expected that remedies should address such matters. Thus, compensation to the victim for injury might be appropriate, as might refusal to allow the kidnapper to profit, while social issues are probably addressed by criminal sanction. But an order, say, disqualifying the kidnapper from owning real estate has no apparent link to the wrong; it would not address any of the reasons why society regards kidnapping as a wrong.

Similarly, even if it can be said that a remedy addresses the reasons for the wrong, it may fail to sufficiently address those reasons. To the extent that remedies under or over achieve in regard to the particular wrong, they are inappropriate for selection. Discretionary remedialists would not disagree with this – their aim is to make the punishment fit the crime. In equity, the circumstances of most cases will indicate the appropriate remedy, either because the doctrinal basis of equitable intervention tends to indicate the parameters of the necessary remedy, or because the obligation breached provides relevant

70 Tilbury, above, n 2.
information on the remedy to be awarded. 73 The ‘remedy rectifies the injustice and thereby reflects its structure and content’. 74 In short, the nature of the right infringed determines the nature of the remedy.

McInnes 75 argues that remedies are tied to the cause of action they need to address. Therefore, the appropriate remedy for a cause of action is revealed by the constituent elements of the cause of action. In McInnes’ scheme, causes of action that require proof of loss by a plaintiff can support a compensatory award. Causes of action that require proof of gain to a defendant can support disgorgement awards. Causes of action requiring proof of both loss to the plaintiff and gain to the defendant call for restitution (in the sense of unjust enrichment). Finally, causes of action that require neither proof of loss to the plaintiff or gain to the defendant can in theory support either compensation or disgorgement awards.

Support for McInnes’ general approach can be found in Flower & Hart v White Industries (Qld) Pty Ltd 76 which establishes that the availability of a remedy depends upon a cause of action. A firm of solicitors had a judgment entered against them, including an order for costs. The successful plaintiff sought a further order for interest on the costs, which the trial judge granted. The solicitors appealed the interest award, arguing that the relevant legislation 77 did not give power to make such an award. Interest was only available for claims in respect of a cause of action. The matter then turned on whether the plaintiff’s underlying claim for costs could be regarded as proceedings ‘in respect of a cause of action’. 78 It was held that it could not. A mere right to apply for a favourable exercise of the discretion to award costs could not be regarded as a cause of action. A cause of action

74 Weinrib, above, n 56, 4.
75 M McInnes, above, n 39, 118.
77 Federal Court of Australia Act 1976 (Cth) ss 43(1), 51A(1).
required that the plaintiff be able to plead facts necessary to establish the particular cause of
action. The Full Court of the Federal Court commented:

the availability of equitable relief has always depended upon the prior existence of
an appropriate right, either legal or equitable. See Forster v Jododex Australia Pty
Ltd (1972) 127 CLR 421 (per Gibbs J at 433-436). Equitable relief is available
where some legal or equitable right requires vindication. In other words, there
must be a cause of action...Thus a party entitled to equitable relief will be able to
plead the relevant facts necessary to establish his or her cause of action regardless
of whether, or to what extent, the availability of equitable relief is discretionary.

There can be no remedy without a cause of action and the remedy is logically linked
to the cause of action. It is unsurprising then, that particular causes of action call for
different remedies which reflect the constituent elements of those causes of action. It is not
possible or sensible to obtain absolutely any remedy, regardless of the claim being made.
This is just as true in equity as it is at common law. Logic dictates the selection of only
some remedies from the continuum in respect of certain kinds of factual situations.
Equitable remedies must be considered in the equitable context. The conjoined aims of
equity, restoration for the plaintiff and the removal of unconscionability, must be served by
the particular remedy. The remedy must perform the task of returning the plaintiff to the
hypothetical place where no unconscionability has occurred. It is only to the extent that the
remedy performs this task that its use in equity is justified. If equitable compensation is
available, its use must be as a corrective to the common law.

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79 Ibid, 298.
80 (Drummond, Dowsett and Hely JJ)
82 Worthington says this approach is efficient; '(1)t imposes the minimum degree of legal intervention
necessary to achieve the ends desired, this is what justifies the imposition of different remedies for
different obligations, and why it seems incongruous to suggest that the entire remedial menu of the
common law should be available to remedy any cause of action': S Worthington, above, n 55, 237.
1.4 THESIS OUTLINE

Chapter 2 of this thesis will examine the remedy of equitable compensation through a tour of the landmark cases. The major cases establishing and explaining the jurisdiction will be considered, as a means of discerning the aim of the remedy.

The following chapters will discuss the specific availability of equitable compensation for six equitable causes of action. Chapters 3, 4, and 5 cover breach of trust, breach of fiduciary duty and breach of confidence respectively. These three causes of action have been selected because equitable compensation is generally accepted as being available in those cases. Chapter 6 will discuss three emerging areas of possible application for equitable compensation, undue influence, unconscionable conduct and equitable estoppel. Calculation of awards of equitable compensation shall be considered for all the wrongs examined.

Chapter 7 discusses whether other adjustments, which might perhaps limit or extend equitable compensation, are available or justified for the causes of action examined in this thesis. Finally, conclusions will be drawn in Chapter 8.

1.5 SCOPE OF THE THESIS

This thesis deals only with the remedy of equitable compensation, which stems from equity's inherent jurisdiction. It does not concern the remedy of equitable damages (generally referred to as Lord Cairns' Act damages), which gives a court of equity power to award damages in lieu of, or in addition to, the equitable remedies of injunction and

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83 Nocton v Lord Ashburton [1914] AC 932.
84 Supreme Court Act 1970 (NSW) s 68; Supreme Court Act 1986 (Vic) s 38; Judicature Act 1876 (Qld) (repealed); Supreme Court Civil Procedure Act 1932 (Tas) s 11(13); Supreme Court Act (WA) s 25 (10); Equity Act 1866 (SA) s 141; Supreme Court Act 1979 (NT) s 14 (1) (b); Seat of Government Supreme Court Act 1933 (Cth):
specific performance. Compensatory damages pursuant to the *Trade Practices Act 1974* (Cth) are also beyond the scope of this thesis.

This thesis is limited to the application of the remedy of equitable compensation in Australia. However, because of the relative lack of case law, and the cross-fertilisation between common law jurisdictions, frequent reference will be made to English, Canadian and New Zealand authorities. A gender-neutral approach is adopted: gender-specific words are used interchangeably throughout. The law is stated as at 30th September, 2004.

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CHAPTER TWO

WHAT IS EQUITABLE COMPENSATION?

2.1 INTRODUCTION: A BRIEF DEFINITION

Equitable compensation is a monetary award in equity, designed to compensate the plaintiff for loss suffered because of the defendant's behaviour. It is a personal remedy, and is currently available for losses such as those caused by breach of trust, breach of fiduciary duty and breach of the duty of confidence. It is arguably available for other equitable actions, such as undue influence, unconscionable conduct and equitable estoppel. But this bland statement belies the difficulties with the remedy. The jurisdiction is obscure, and its origins are 'shrouded in a degree of mystery but there can be no doubt today of the existence of such a principle.' Uncertainty has surrounded its application and calculation. Indeed, it seems that the concept of equitable compensation is inherently problematic. As Rickett puts it:

Its very name, equitable compensation, is a combination of two words which, independently, are notoriously slippery and have the potential to free themselves

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1 Evans says that '[e]quitable compensation need not be limited to an award of a monetary sum. There seems no good reason why compensation could not take the form of an order compelling transfer of some asset to the plaintiff': M Evans, Equity and Trusts (Sydney, LexisNexis Butterworths, 2003) 641. However, he offers no justification or authority for this proposition, and it is not a suggestion adopted by other commentators. It is probably the case that an order for money sum is needed as a primary order. An order attaching to a specific asset would be ancillary to the primary remedy.

2 These wrongs have been selected as examples, and are discussed in Chapters 3, 4 and 5. Equitable compensation may also be awarded in other cases, such as fraud on a power: Houghton v Immer (No 155) Pty Ltd (1997) 44 NSWLR 46.

3 These wrongs have been selected as examples, and are discussed in Chapter 6.

4 Citt v Marac Australia Ltd (1987) 9 NSWLR 639, 659 (Rogers J).
Chapter Two: What is Equitable Compensation?

from stable moorings. Linked together, those terms have even greater potential for chaos in the civil law.

Equitable compensation owes much of its recent popularity to rediscovery and reconsideration by academic theorists, and the extracurial attention of respected jurists. This, coupled with a fashion for pleading breach of fiduciary duty as a matter of course, no matter that good causes of action exist in contract or tort, has given the impression that equitable compensation is a general panacea with few effective limitations. This chapter will attempt to strip the remedy back to its historical components, through an overview of some of the major cases contributing to the evolution of the remedy, as a way of understanding the operation of the remedy and assessing its performance of its restorative function.


6 Tilbury has recently referred to the remedy as being 'reinvented'. M Tilbury, ‘Fallacy or Furphy?: Fusion in a Judicature World' (2003) 26 University of New South Wales Law Journal 357, 361.


Chapter Two: What is Equitable Compensation?

It will be argued that the remedy has traditionally come from two bases. The first is in relation to breaches of trust. It will be shown that particular rules apply in those cases due to the nature of the trust, with the primary aim of the remedy being reconstitution of the trust fund. The second and arguably more important base is as an outgrowth of the remedy of rescission for breach of fiduciary duty. Where, for some reason, rescission became unavailable or unwanted on the facts of the case, equity developed an ability to order a monetary award. This in turn developed into an ability to order a monetary award in cases where there was no transaction between the fiduciary and the principal, but instead, a transaction between the principal and a third party. In these circumstances, equity could not undo the transaction between the principal and the third party, and thus sought to undo the effects of the fiduciary’s breach upon that transaction.

The difficulty has been that, because of the close interrelationship of trust and fiduciary obligation, it has been largely assumed that the two bases of the remedy are one, and that the rules in respect of breach of trust apply to breaches of fiduciary duty and vice versa. It is argued that this is not so and has led to unnecessary confusion in the understanding of the remedy. The cases barely differentiate between the two concepts, but it will be demonstrated that they are distinct, leading to different applications of the remedy. This is because equitable compensation is specific to the duty which has allegedly been breached.

Nevertheless, the two separate bases of awards of compensation in equity stem from the same well-spring. In cases of breach of trust, the jurisdiction is obviously restitutionary

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10 E Boros, above, n 7, 274.
13 This is discussed in Chapters 3 and 4.
14 See Rickett, above, n 5, 175; Rickett, above, n 7, 34.
in the sense that the defendant is being asked to restore the trust fund. In cases of compensation for other loss, the jurisdiction is also restitutionary, but less obviously so. In these cases it is not necessary for the plaintiff to be able to point to some asset the plaintiff once held, now in the hands of the defendant or another. Regularly, cases involve loss of an opportunity to have done better. When the plaintiff is compensated, the opportunity (or the benefit of it) is being returned or restored to her, through removal of the effects of the defendant’s behaviour. This is restitutionary in the natural sense of the word, and this is the term most commonly used by courts to describe the remedy. However, because of the particular usage now attached to the term ‘restitution’, equity’s aim in this regard is referred to as ‘restoration’ in this thesis.

This restoratory aim is a reflection of the overriding concerns of equity. In the Anglo-Australian tradition, equity is concerned with economic interests. Indeed, it is almost invariably concerned with transactions. Within these transactions, there is some fault that the common law cannot cure, be it the use of undue influence or unconscionable conduct, unconscionable representations that sustain an estoppel claim, conflict by a fiduciary affecting a transaction with a third party, or the use of trust funds to further the interests of the trustee. Equity’s justification for stepping in when such faults are present is that it would be unconscionable to allow the defendant to proceed, or not to be answerable for the consequences. By removing this unconscionability, equity restores to the plaintiff what would have been the plaintiff’s, but for the defendant’s behaviour. Equity acts as if what should have been done was done, and restores the parties to the position that would then have obtained. In its concern with relief from unconscionability, equity reveals its restorative focus. Therefore, when assessing various remedies employed in equity, it is valid to ask to what extent each remedy serves or fulfils equity’s restoration interest. Equitable compensation is only supportable to the extent that it performs this task. This chapter will consider whether equitable compensation, as it has historically developed, addresses equity’s interest in restoration.

16 See Chapter 1.3 (B).
2.2 THE HISTORICAL DEVELOPMENT OF THE REMEDY

*Nocton v Lord Ashburton*[^17] is almost invariably cited as the seminal decision establishing, or at least recognising, the equitable jurisdiction to award monetary compensation for breach of fiduciary duty. However, as extensive scholarship[^18] has shown, the case is not the earliest example of such an award. It is, nevertheless, authoritative because of its status as a decision of the House of Lords. Arguably it also took the law beyond the boundaries of previous decisions.

The bulk of the cases that precede *Nocton*[^19] come from Victoria. This can perhaps be explained by the conditions following the gold rush of the late 1800’s. Towards the end of the 19th century, Melbourne was the richest city in the world, with a corresponding amount of entrepreneurial activity, such as railway and land development. The eventual economic crash saw the collapse of many corporations and businesses. These circumstances threw up many plaintiffs who had lost money and sought recompense through claims of breach of fiduciary duties. The Australian cases that precede *Nocton*[^20] all arise from crashes at the end of the land boom. It is notable that most of these cases concern questionable behaviour by solicitors. This is an unfortunate feature of many reported cases involving equitable compensation[^21].

[^17]: [1914] AC 932 (*Nocton*).
[^18]: The earliest example of this research seems to be from Owen Dixon AJ in *McKenzie v McDonald* [1927] VLR 134. See also Davidson, above, n 7, 357; W Martin, ‘Principles of Equitable Compensation’ in Robyn Carroll (ed) *Civil Remedies: Issues and Developments* (Sydney, The Federation Press, 1996) 114; Getzler, above, n 7, 235.
[^19]: *Nocton v Ashburton* [1914] AC 932.
[^20]: Ibid.
[^21]: It is arguable that defendants who are at the greatest risk of facing awards of equitable compensation are professional advisers generally, and most frequently, solicitors.
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(i) The Pre-Nocton cases

(a) Ballantyne v Raphael; Curwen v Yan Yean Land Co.

Ballantyne v Raphael\(^{22}\) appears to be the earliest example of a compensatory monetary award for breach of fiduciary duty, closely followed by Curwen v Yan Yean Land Co.\(^{23}\) Ballantyne concerned a syndicate put together to develop land. The defendant Raphael, a solicitor, purchased land with another and issued a prospectus for a syndicate to re-purchase and develop that land. The prospectus did not reveal that the defendant was to be the vendor to the syndicate, and contained misrepresentations about the qualities of the land.\(^{24}\) The defendant was even appointed solicitor to the syndicate, despite being the vendor. This was a clear conflict of interest. Thus, there was both a misrepresentation, such that would allow rescission, and a breach of fiduciary duty.

However, rescission was not an available remedy on the facts\(^{25}\) because a large number of syndicate members who were not party to the action would have been affected. This did not prevent Hodges J ordering a remedy. He said:

I can see nothing to prevent me making an order which will put the successful plaintiffs and the two guilty defendants in the same position as far as possible as they were in at the time the contract was entered into. It seems to me only another way of assessing the damages, and a more certain and sure way. ...If there were only two persons to be considered there can be no doubt that the contract should be rescinded and the money returned.\(^{26}\)

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\(^{22}\) (1889) 15 VLR 538 ("Ballantyne").

\(^{23}\) (1891) 17 VLR 64 ("Curwen").

\(^{24}\) The plaintiffs believed the defendant to be one of the other members of the syndicate.


\(^{26}\) Ballantyne v Raphael (1889) 15 VLR 538.
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His Honour's comment about the availability of rescission in the absence of third parties remains the law today. Rescission is available to set aside a transaction resulting from a fiduciary breach. A recent example of a case in which a contract between a solicitor and client was subject to rescission is the High Court decision, Maguire v Makaronis. However, the point of interest in Ballantyne lies in the fact that an award likened to damages was made. His Honour regarded himself as assessing the damage and undoing it, in a situation where rescission was not an appropriate remedy.

Curwen also concerned an undisclosed vendor. This time, the defendant represented to the plaintiff that he was taking shares in the land development company, while concealing that he was the vendor of the land to the company. Webb J followed the order made in Ballantyne, rescission not being available because 'it is impossible to put the parties in the position in which they were before'. What the two cases appear to have in common is that rescission was regarded as unavailable; in those circumstances the courts were prepared to award a monetary remedy as the best way of returning the innocent plaintiffs to their pre-breach position.

(b) Robinson v Abbott

By far the most important of the early cases that precede Nocton is Robinson v Abbott. Its main interest lies in that it so clearly predicts the later decision. An illiterate but affluent widow and her daughter were clients of the defendant, a solicitor, who regularly provided investment advice for them. He suggested they purchase shares in a land development company, saying he was taking up shares himself. In fact, he was the vendor of the shares. Holroyd J held that the solicitor had not been fraudulent, but merely negligent

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27 (1997) 188 CLR 449.
28 (1891) 17 VLR 64.
29 (1891) 17 VLR 64, 67.
30 Coupled with an indemnity against further calls in Curwen: Ibid.
31 Nocton v Lord Ashburton [1914] AC 932.
32 (1893) 20 VLR 346.
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in the non disclosure of the true position. However, because the solicitor had not made full disclosure and was clearly in breach of the conflicts and profits rule, the plaintiffs were entitled to a remedy.

The defendant's counsel argued that the plaintiffs should have no remedy given that in the circumstances of the case *restitutio in integrum* was no longer possible. Holroyd J thought otherwise. His Honour focused on the relationship between the parties, and the circumstances in which the contact was entered, describing the solicitor defendant as volunteering to ‘prove that his shares were a safe investment, and to make good his representation in the only way he could, that is, by pecuniary compensation.’ He added that ‘the right of the plaintiff is to be replaced as far as possible in the same position as they would now have been in if they had not entered into the contract’.

*Robinson v Abbott* went on appeal, heard the following year. One of the grounds of appeal was that Holroyd J had lacked the ability to order a monetary award. Madden CJ distinguished this case from *Derry v Peek,* on the basis that on these facts, the solicitor had a duty to remedy the lack of full disclosure made to his client. His Honour said ‘where a solicitor selling to his client makes no disclosure as here, ...he is bound to put matters right for his injured client’. A’Beckett J thought that the original judgment rested on the failure of the solicitor as ‘the professional adviser of the plaintiffs, to do that which the

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33 The company had gone into liquidation, and therefore the plaintiffs could not put the defendant back into the position he had previously occupied. Fraud having been negatived, it was argued there was no action for innocent non-disclosure.
34 (1893) 20 VLR 346, 364.
36 Ibid, 370 (reported following the judgment of Holroyd J). The decision was unanimous. However, Williams J (at 384) expressed ‘very great doubts as to the correctness’ of the decision, questioning that anything in the nature of damages or the equitable equivalent were available for an innocent failure to disclose information. His Honour was certain that rescission was prima facie available, but felt that on the facts no remedy should be awarded because *restitutio in integrum* could not be achieved. Despite his misgivings, his Honour said he was not prepared to dissent from the rest of the Court.
37 (1889) 14 App Cas 337.
38 (1893) 20 VLR 346, 380.
position in which he acted demanded of him’. Addressing the argument that no remedy was available, A’Beckett J reached much the same conclusion Viscount Haldane later would in *Nocton*. Noting the absence of fraud from the current case, he commented:

But that to my mind is not a satisfactory reason for saying that this remedy shall not be applied where it is the only one whereby redress can be given. Being legitimate in cases where the element of fraud may have entered, being a mode of redress which the Court may apply in a case of fraud, it is, I think, available in a case where there is no fraud in the ordinary sense, but there is a breach of duty to fulfil obligations which the Court hold that the defendant should have performed.

The case is also important because one of the difficulties troubling the remedy of equitable compensation was first noted there. A’Beckett J, discussing *Curwen*, noticed the difficulty in differentiating between this remedy and rescission:

All lawyers and all laymen who looked at what the Court ordered to be done in that case could say what the effect of it would be; but we find four judges who cannot agree as to what is the proper way of defining it. ... It seems to me that determining the question of whether the Court could in accordance with previous cases apply this particular remedy in this case ought not to depend on whether that particular remedy is more accurately described as rescission or damages.

Davidson describes these early Victorian decisions as being examples of 'qualified rescission' which differs from usual examples of rescission, in that only the innocent party is returned to *status quo ante*. Referring to *Curwen*, (where an order was made that the plaintiff return to the defendant the shares that were the subject of the contract) he notes:

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39 Ibid, 382.
40 *Nocton v Lord Ashburton* [1914] AC 932.
41 (1893) 20 VLR 346, 383.
42 (1891) 17 VLR 64.
43 (1893) 20 VLR 346, 384.
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While in this respect 'qualified rescission' resembles compensation in Equity it is also distinct from that remedy. Because an order that the plaintiff return the property, with relief from the consequences of ownership, was held to be possible the Court had no need to consider how to measure loss which the plaintiff would have suffered if the order could not have been made. It effectively compensated the plaintiff…

The implication here may be that, pre-Nocton, had the Court not been able to order that the plaintiff return the exact property, there would have been no available remedy. If that is so, Nocton is indeed an advance on this position. However, it is suggested that any ability to return the property to the defendants was in form only. In every case the property had become worthless. Whether ‘qualified’ or ‘pecuniary' rescission is actually equitable compensation, or is a distinct remedy, is discussed below.

(c) Re Leeds and Hanley Theatres of Varieties Ltd

Martin comments that the significance of these early Australian decisions is that the courts were granting relief for breaches of fiduciary duty, in cases that the common law would not regard as containing actual fraud. Martin also identifies an English decision pre-dating Nocton, as possibly indicating that English courts of the time also recognised the availability of a monetary award where a breach of fiduciary duty had occurred, without the need to show any common law cause of action. This is the difficult decision of Re Leeds and Hanley Theatres of Varieties Ltd. Here, the prospectus of a company did not disclose that the promoters were the real vendors of two theatre properties to the company, instead

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44 Davidson, above, n 7, 389.
45 Nocton v Lord Ashburton [1914] AC 932.
47 See 2.4 (b) below.
48 Martin, above, n 18, 119.
49 Re Leeds and Hanley Theatres of Varieties Ltd (1889) 14 App Cas 337, cited in Martin, ibid.
50 Re Leeds and Hanley Theatres of Varieties Ltd (1889) 14 App Cas 337.
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representing that the promoters’ trustee was the vendor. When the company went into liquidation, the liquidator claimed an account of profits, or alternatively compensation. Rescission was no longer possible, because mortgagees had enforced their security. The trial judge, Wright J, held that the promoters were liable to disgorge their profits, and as a second head of liability, were liable for damages for the misrepresentation.51

The matter went on appeal, heard in 1902. The decision on appeal is unsatisfactory because the three members of the Court of Appeal based their opinions on differing grounds. Vaughan Williams LJ rejected the argument that the defendant company had purchased the subject properties as agent or trustee for the new company, but held that there was a clear fiduciary breach in the defendant’s failure to disclose a conflict of interest. This entitled the plaintiff to a remedy ‘in the nature of damages’.52 Romer LJ awarded damages for fraudulent misrepresentation,53 while Stirling LJ thought there had been a misfeasance in the nature of a breach of trust.54

This case summarises the difficulties that have plagued, and continue to plague equitable compensation. The decision displays the various models put up to explain equitable compensation, and shows that differences in approach may potentially lead to different quantum results. All the Court agreed a breach of fiduciary duty was involved. Vaughan Williams LJ favoured damages on the basis rescission was not available. He

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51 Re Leeds and Hanley Theatres of Varieties Ltd [1902] 2 Ch. 809, 814.
52 Ibid, 825. It is uncertain what was meant by that comment, because Vaughan Williams LJ continued (on the same page) as follows: ‘To put it in a short common law form, I am not sure that the Theatres Company can, in reference to this breach of fiduciary duty by their promoters, maintain an action in the nature of an action for money had and received. I think the safer way of putting it is to say that their remedy is in damages. The authorities are not all perfectly conclusive that there is no remedy by way of an account of profits, but I prefer to say that, whether there is such a remedy or not, I am clear that there is a remedy in the shape of damages.’ The use of terms such as ‘in the nature of damages’ and ‘in the shape of damages’ may have indicated that Vaughan Williams LJ recognised there was a distinction between this recovery and common law damages.
53 Re Leeds and Hanley Theatres of Varieties Ltd [1902] 2 Ch 809, 830.
54 Ibid, 833. It is arguable, however, that Stirling J can be taken to have meant a breach of fiduciary duty, the term ‘trust’ being used in a wider sense than is usual today
Chapter Two: What is Equitable Compensation?

attempted to calculate this by ‘seeing what injury has really been done’.\(^{55}\) Romer LJ, who thought damages were recoverable for fraudulent misrepresentation, calculated loss as price paid less true value.\(^{56}\) Stirling LJ, who preferred the breach of trust explanation, contented himself with commenting that damages had been proved.\(^{57}\) The report indicates that Vaughan Williams LJ then spoke again, complicating matters further, saying:

We are all of opinion that the true measure of damages is the amount of profit which was made by the promoting company. If necessary, there must be an inquiry to ascertain that amount.\(^{58}\)

Thus the Court of Appeal presented a substitutionary rescission model, a tortious model, a trusts model and a gain-stripping model, without clearly deciding upon any. It is argued though, that the first approach taken by Vaughan Williams LJ is correct; that is, the plaintiff was entitled to a monetary award similar in nature to damages. The cases preceding the *Re Leeds* appeal show that recovery for loss was considered possible in a case where rescission had become impossible. The fact that, in this case, there might be no difference in quantum whichever model was adopted is merely coincidental.

Another difficulty arising from these early cases is that they all concern misrepresentations made by the defendants, either negligent or fraudulent in variety. The question then arises whether the dominant reason for the recovery is because there has been a breach of a fiduciary duty, or whether the fiduciary relationship has elevated representations made to the principal to a level requiring greater care than that called for by the common law at the time. This is a theme that is repeated in *Nocton*.\(^{59}\)

\(^{55}\) Ibid, 826-7. His Lordship attempted to calculate a figure based on purchase price, less true value. However, it seemed firm evidence as to the figures was lacking, though there was clearly sufficient evidence to support the trial judge’s assessment of damages.

\(^{56}\) Ibid, 830.

\(^{57}\) Ibid, 833.

\(^{58}\) Ibid. However, earlier, (at 825) Vaughan Williams LJ appears to have been uncertain as to whether an account of profits was available.

\(^{59}\) *Nocton v Lord Ashburton* [1914] AC 932.
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In summary, there are a number of observations that can be made about the decisions that predate Nocton. First, they appear to recognise a compensatory remedy where the wrong alleged is a breach of fiduciary duty. Secondly, all involved a direct transactional relationship between the fiduciary (as undisclosed vendor) and the principal (as purchaser). Thirdly, for one reason or another, rescission was not available on the facts of the cases. Without equitable compensation the plaintiff would have been denied a remedy. Fourthly, in each case the court appeared to have approached the remedial question upon the basis of finding the most appropriate remedy, the remedy most suitable for returning to the plaintiff to the pre-breach position. That said though, the Australian courts appear to have approached the remedial question from the starting point of rescission of the contract. In none of the Australian cases did the court undertake a separate assessment of damages, as would have been expected in a case of damages for tort. Finally, and most importantly, in all of the early Australian cases the remedy ordered in monetary terms was the equivalent of what would have been available to the plaintiff at common law for breach of an equivalent tortious duty such as deceit, and the equivalent of rescission in monetary terms. These cases clearly exhibit equitable compensation as the outgrowth of the remedy of rescission for breach of fiduciary duty, called up as a remedy of last resort when rescission was unavailable or inappropriate. In all of these cases, equity’s interest in restoration was satisfied because the plaintiff was restored to the position that should have obtained but for the defendant’s breach.

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60 Ibid.

61 There are clear breaches of fiduciary duty in Ballantyne v Raphael (1889) 15 VLR 538 and Robinson v Abbott (1893) 20 VLR 346. However, that is not true of Curwen v Yan Yean Land Company Limited (1891) 17 VLR 64, where possible fiduciary liability is not discussed. We can however say that the cases would all now be regarded as concerning breaches of fiduciary duty.

62 Vaughan Williams LJ attempted to calculate damage before falling back on reference to the defendant’s profit: Re Leeds and Hanley Theatres of Varieties Ltd [1902] Ch 809, 826-7.

63 The assessment of the lower Court was upheld in Re Leeds and Hanley Theatres of Varieties Ltd [1902] Ch 809, 827 (Vaughan Williams LJ), 830 (Romer LJ), 833 (Stirling LJ).
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(ii) Nocton v Lord Ashburton

Nocton continued the trend exhibited in the earlier Australian cases, where the breach of duty alleged was that a solicitor had permitted the interests of a client to conflict with his own. Crucially, there was no direct transactional relationship between the solicitor and the client capable of being set aside. Equally crucial for subsequent discussion, Nocton and Lord Ashburton were not in the position of trustee and beneficiary.

Nocton was Lord Ashburton's solicitor. He became involved in a land development scheme with Lord Ashburton's brother. The land was to be sold to builders, who were to develop the land. In 1904 Nocton advised Lord Ashburton to lend money to the builders, (also Nocton's clients) secured by mortgage. Later, Nocton took securities over the same properties. Lord Ashburton's mortgage was first in time, and therefore took priority over Nocton's interest. In December 1905 Nocton advised Lord Ashburton to release his mortgage, so that part of the land which had been developed could be sold. This duly occurred, but the builders failed to repay Lord Ashburton the amount owing to him. The release of the mortgage had the effect of advancing Nocton's security. For some reason, Lord Ashburton did not commence proceedings against Nocton until March 1911, which meant that he faced limitation difficulties in respect of some of his common law actions.

Although the pleadings alleged facts that would have shown a breach of the solicitor's fiduciary duties to his client, the trial judge, Neville J, 'treated the case as one of fraud simply'. He duly found no intent to defraud, and dismissed the action. The Court of Appeal reversed this decision, holding that Nocton 'had been guilty of actual fraud, so that an action of deceit would lie'. The Court of Appeal treated the facts as only admitting of two alternatives; an action in deceit following actual fraud (in conformity with Derry v

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64 Nocton v Lord Ashburton [1914] AC 932.
65 Lord Ashburton may have been otherwise engaged in the other Court proceedings and commercial disputes that diverted his attention. This is discussed in Chapter 5.
67 Ibid, 945.
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Peek\(^{68}\) or an action in negligence, which the Court of Appeal thought unavailable due to the way the case had been conducted.

The matter went on appeal to the House of Lords. The leading judgment is that of Viscount Haldane L.C. He was dismissive of the struggles of the Court of Appeal:

But I do not take the view that they were shut up with the dilemma they supposed. There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in Chancery to enforce compensation for breach of a fiduciary obligation.\(^{69}\)

His Lordship said that the Court of Chancery, as a Court of conscience, could order a defendant to make restitution, or to compensate the plaintiff by putting him in as good a position as he was before the breach, when exercising concurrent jurisdiction.\(^{70}\) But in addition, the Court of Chancery exercised an exclusive jurisdiction in cases which equity classified as fraud, but which did not necessarily involve actual fraud.\(^{71}\) His Lordship specifically identified "breach of duty by persons standing in a fiduciary relation, such as the solicitor to the client"\(^{72}\) as an example of that exclusive jurisdiction. Thus, Lord Ashburton was entitled to his remedy.

Robinson v Abbott\(^{73}\) was not cited in Nocton.\(^{74}\) But Viscount Haldane LC echoed what had been said in that earlier Australian decision: equity provided a remedy when the behaviour complained of was not classified as fraud at common law.

In Chancery the term "fraud" thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction.

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\(^{68}\) (1889) 14 App Cas 337.

\(^{69}\) Nocton v Lord Ashburton [1914] AC 932, 946.

\(^{70}\) Ibid, 952.

\(^{71}\) Ibid.

\(^{72}\) Ibid.

\(^{73}\) (1893) 20 VLR 346.
...It was thus that the expression "constructive fraud" came into existence. The trustee who purchases trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.\footnote{Nocton v Lord Ashburton [1914] AC 932.}

The Court of Appeal had ordered damages for deceit, and the House of Lords was content to let that stand. Calculation of equitable compensation was simply not an issue before the House of Lords. Nevertheless, it is extremely important that Viscount Haldane L.C. thought that the proper remedy might have been to order Nocton to restore to the mortgage security that amount taken out of it by his breach, plus interest. This effectively set aside the dealing by which Nocton's security was advanced, as between Lord Ashburton and Nocton. This is substituted rescission, with the dealing treated as being between the solicitor and the client. To put this another way, the amount which represented the effect of Nocton's position of conflict was removed from the equation. The House of Lords did not attempt to set aside the entirety of the underlying transaction (i.e., the release of the mortgage) but only so much of that dealing as was referable to Nocton's conflicted involvement. Thus, Lord Ashburton should have been restored to the situation that would have obtained, as if Nocton had not been in a position of conflict.

\footnote{Ibid, 953-4. (Viscount Haldane LC); Lord Dunedin made similar observations, commenting (at 963-4) "(i)In the first place, the word "fraud" in the older cases in Chancery is often used where the thing so characterized is a wrongful breach of duty, without a consideration of whether there is such a mens rea as would found an action for deceit. In the second place, all the cases are based upon the existence of a fiduciary relationship, and subsequently the breach of duty arising."}
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This outcome was likened to damages, but was not the same as damages. Viscount Haldane commented that 'the measure of damages may not always be the same as in an action of deceit or for negligence'.

Lord Dunedin thought similarly:

I agree that the form the remedy would have taken would not have been damages, but, looking to the course the case has taken, I do not think it is incumbent on us to alter the remedy to another which would practically come to much the same.

Certain clear principles concerning compensation in equity can be extracted from *Norton*.

1. Equity administers an exclusive jurisdiction in cases it regards as fraudulent. Breach of fiduciary duty is regarded as equitable fraud, as are 'contracts obtained by persons from others over whom they have dominion, contracts obtained by persons in a fiduciary position, (and) contracts for the sale of shares obtained by directors through misrepresentation contained in the prospectus.'

2. In cases of actual fraud, equity has always administered a concurrent jurisdiction, which allowed the court to order a monetary sum to either make restitution or to compensate the plaintiff.

3. Equity's jurisdiction is not affected by the existence of concurrent liability in either contract or tort.

76 Ibid, 958.
77 Ibid, 965.
78 Ibid.
79 Ibid, 953.
80 Davidson notes in his seminal 1982 article that '(t)here are no examples of compensatory relief in the concurrent jurisdiction where deceit could be established since *Derry v Peek*. The explanation for cessation of this concurrent jurisdiction probably is the adequacy of the common law remedy of damages for deceit. There is now no advantage in seeking equitable relief 'in the nature of damages'.': Davidson, above, n 7, 357.
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4. By way of remedy, equity can direct accounts to be taken, order restitution, or order compensation. The aim is to put the plaintiff in the same pecuniary position he would be in had the breach not occurred. ‘Restitution’ here, must be taken as meaning rescission, as in specific asset restitution. This indicates that compensation is available when account and rescission are inappropriate.

5. Equitable compensation, though a monetary sum, is not the same as common law damages. Nocton gives little guidance as to quantification, other than to indicate it is possible that the measure of equitable compensation will differ from the measure of damages for deceit or negligence. There are several levels at which this observation can operate. It may mean that completely different calculation methods are called for, or it may mean that slight differences will occur due to the nature of the duties involved. But the indications in Nocton itself are that the extent of the remedy is to undo the damage caused by the defendant’s conflict in relation to the transaction. This is reinforced by the pre-Nocton cases, where the aim appears to have been to remove the fiduciary’s conflicting interest in the transaction.

6. Equitable compensation is an available remedy whether or not the conduct complained of results in a transaction between the fiduciary and the principal. There was no resulting transaction in Nocton. Therefore, the compensation awarded attached to the breach of fiduciary duty (the conflict of interest), rather than having arisen simply due to a transaction between the parties. This is the greatest distinguishing feature between Nocton and the earlier cases, all of which involve a more direct vendor-purchaser relationship. Nocton shows an extension of the rescissionary basis for equitable compensation, extending from a two party to a three party transactional situation.

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81 However, it may be that what attracted the Court’s attention in Nocton v Lord Ashburton [1914] AC 932 was the proximity of the relationship and the transaction. Nocton may have effectively self-dealt, in that his security was advanced as a result of Lord Ashburton’s release. This is discussed below, n 83, at n 101 and at 2.2(ii).
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7. It is also obvious from Nocton that ‘compensatory relief is not confined to remedying misappropriation of property’, the breach in that case not involving the solicitor’s direct dealing with the property of the client. But it is moot which aspect of the solicitor’s breach was most important. Nocton leads to several competing interpretations. The first is that it is really concerned with negligent misstatement by the solicitor leading to economic loss. The second is that it is to be understood as a case concerning a breach of the conflicts rule. The third is that it involves an interference with the client’s property, even if that cannot be said to be a misappropriation.

8. Finally, it is inherent in Nocton that the plaintiff must have suffered a loss as a consequence of the fiduciary’s breach. The jurisdiction to award compensation is not enlivened only by the existence of a conflict or a dealing with the client’s property. There must also be a loss, because only losses require compensating.

It is plain from the report that in fixing a remedy in Nocton, the House of Lords was attempting to set aside the effects of the transaction by which Nocton had benefited to the extent that Lord Ashburton had suffered loss, rather than attempting to set aside the overall transactional outcome. What their Lordships effectively ‘rescinded’ was Nocton’s conflict. Thus, a plaintiff in the position of Lord Ashburton needs to demonstrate a fiduciary relationship, an unresolved conflict on the part of the fiduciary, and resulting damage. This is emphasised in the judgment of Lord Shaw of Dunfermline. His Lordship stressed the solicitor/client relationship between the parties, noted that Nocton was personally interested in the transaction, and continued:

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82. Davidson, above, n 7, 351.

83. Sealy believes the mishandling of the client’s property in Nocton v Lord Ashburton [1914] AC 932 to have been decisive, commenting that ‘some element of mishandling or misappropriation of the beneficiary’s property seems to have been a prerequisite’ to an award of equitable compensation: L Sealy, ‘Fiduciary Obligations, Forty Years On’ (1995) 9 Journal of Contract Law 37, 51 and the material at n 101. Sealy supports this conclusion by reference to a passage in Viscount Haldane L.C’s speech (at 956): ‘(w)hen, as in the case before us, a solicitor has had financial transactions with his client, and has handled his money to the extent of using it to pay off a mortgage made to himself, or of getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a mortgage of his own, a Court of Equity has always assumed jurisdiction to scrutinize his actior.’
I am of opinion that the duty of Mr. Nocton was, in view of this fact, to decline to act professionally or as the adviser of his client and to insist that a separate solicitor should be obtained: *Bank of Montreal v Stuart* (1). In the whole circumstances mentioned every step taken by the solicitor which subsequent disclosures shew to have been out of accord with fact became for him a step of danger – a danger of liability if through the erroneous step the client is misled and loss accrues.

The remedy granted in *Nocton* restored Lord Ashburton to his pre-breach position, thereby satisfying equity's interest in restoration. However, *Nocton* leaves many relevant issues undecided. For example, it gives no real guidance as to which remedy is applicable if both common law and equitable remedies are theoretically available to the plaintiff. It does not distinguish between classes of fiduciaries. For example, it does not distinguish trustees from other fiduciaries, or one fiduciary from another. Further, because it gives so little guidance on the issues of causation and calculation of the remedy, it does not clearly indicate the extent to which a fiduciary who has failed in performance of a duty should be liable to compensate the person to whom the fiduciary duty is owed. This lack of detail left the field open for confusion to set in, especially concerning the relationship between breach of trust and breach of fiduciary duty.

(iii) *Nocton*: Breach of fiduciary duty, negligent misstatement or misuse of property?

Interpretations of *Nocton* tend to depend on how the breach of duty is described. There are three interpretations commonly ascribed to the decision. Was it primarily a case of negligent advice from a solicitor, that would not have been actionable (in the days before the recognition of negligent misstatement as an action) but for the fact that it was advice

84 *Nocton v Lord Ashburton* [1914] AC 932, 969.
85 Ibid.
86 There was a degree of estimation in the actual remedy, given that the damages award for deceit was allowed to stand.
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given by a fiduciary? Or is it a breach of fiduciary duty arising because the solicitor had an unresolved conflict of interest, between his client's interests and his own? Of course it is both. The advice Nocton gave to Lord Ashburton was only negligent, actual fraud having been negatived. Nevertheless, Nocton was liable because equity regarded his advice as an example of 'equitable fraud' due to the fiduciary relationship between them. On the other hand, it was a breach of fiduciary duty to allow the unresolved conflict to continue. As Lord Ashburton suffered through that conflict, Nocton had to compensate him.

The third possibility is that Nocton is really a case of misuse of property. Sealy's conclusion is that 'some element of mishandling or misappropriation of the beneficiary's property seems to have been a prerequisite to an award of equitable compensation. This argument focuses on the passage in Viscount Haldane's speech in Nocton, where his Lordship refers to the solicitor's behaviour and likens it to handling money.

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87 Nocton v Lord Ashburton [1914] AC 932.
88 Sheridan classes Nocton v Lord Ashburton [1914] AC 932 as one of these cases: L Sheridan, Fraud in Equity, (London, Sir Isaac Pitman and Sons, Ltd, 1957) 184. This view is shared by McCamus, who says 'It applies to only a very particular kind of careless misstatement - that is, one involved in a breach of the fiduciary duty of loyalty - in the context of a rather particular kind of relationship': McCamus, above, n 7, 302; See also Gummow, above, n 8, 59; M Conaglen, 'Equitable Compensation for Breach of Fiduciary Dealing Rules' (2003) 119 Law Quarterly Review 246, 256. This also appeared to be the view of contemporary jurists: See Robinson v National Bank of Scotland, Limited (1915) 53 SLR 163, 179, where Lord Salvesan said, 'In other words the judgment in Nocton's case appears to me to be just an application of the elementary rule that a solicitor is responsible for the loss occasioned to his client through negligent advice'.
89 Sidaway v Board of Governors of Bethlem Royal Hospital and the Maudsley Hospital [1984] 1 QB 493, 519 (Lord Browne-Wilkinson).
90 Sheridan describes the equation in Nocton v Lord Ashburton as being (equitable) fraud = misrepresentation + fiduciary duty + negligent belief in the truth: Sheridan, above, n 81, 184. This could now be rendered thus in tort: negligent misstatement causing economic loss = misstatement + a relationship connoting knowledge of reliance + negligent belief in the truth.
91 Nocton v Lord Ashburton [1914] AC 932.
92 Sealy, above, n 77, 51 and the material at n 101.
93 'When, as in the case before us, a solicitor has had financial transactions with his client, and has handled his money to the extent of using it to pay off a mortgage made to himself, or of getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a mortgage of his own, a Court of Equity has always assumed jurisdiction to scrutinize his actions': Nocton v Lord Ashburton [1914] AC 932, 956 (Viscount Haldane LC).
Chapter Two: What is Equitable Compensation?

At the time of the decision, *Nocton*\(^94\) may well have been given the first interpretation above \(^95\) (an example of negligent advice), but it is probably fair to say that in more recent years it has been understood in the second sense (a case of conflicted interests). This may have important implications for understanding of the applicable remedy. The first view depicts the fiduciary obligation as merely an element that elevates what would otherwise be an unactionable misrepresentation to the status of 'equitable fraud'; the second view sees the integral fiduciary undertaking as having been undermined. Nowadays, evolution of the law of fiduciary duty has led to the situation where negligent breaches are not generally regarded as breaches of fiduciary duties. The only breaches regarded as fiduciary are breaches of the core fiduciary duties; namely, not to secretly profit and not to suffer a conflict.\(^97\) Much of the more recent learning about the jurisdiction to award equitable compensation depends on the second construction of *Nocton* being adopted as the more important, namely that it concerns a conflict of interest. But the third, and more limited way to view *Nocton*, that it is dependant on some misuse of property, overlaps with the second. This is not surprising. Because relationships which Anglo-Australian law regards as fiduciary always involve economic interests, it is axiomatic that conflicts of interest arise in respect of those interests, and very often in cases directly involving property. It is argued that the second construction takes precedence over the third. The jurisdiction is enlivened by unresolved conflict, but because economic interests are always involved, misuse of property is often present. However, misuse of property is merely an example of a possible scenario of conflict. Misuse of property is not a necessary precondition for enlivening the jurisdiction. It is sufficient that there is an unresolved conflict of interest on the part of the fiduciary.\(^98\)

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\(^94\) [1914] AC 932.

\(^95\) *Robinson v National Bank of Scotland, Limited* (1915) 8 SLR 163, 173 (Lord Dundas), 179 (Lord Salvesan).

\(^96\) This is discussed in Chapter 4.

\(^97\) See Chapter 4.

\(^98\) See Chapter 4.
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If Nocton altered the pre-existing law, it is suggested that it was by a very small increment. No transaction existed between the solicitor and client that could be set aside. Rescission was not appropriate for that reason. The jurisdiction is an outgrowth of the equitable jurisdiction to award substituted rescission. What the Court was seeking to set aside was the damaging effect of the transaction entered into by Lord Ashburton which could be seen as a result of Nocton's conflict. This was the extent to which Lord Ashburton's security was lessened by advancement of Nocton's security. This was what was meant by returning the plaintiff to the position he would have occupied but for the breach.

Nevertheless, it would be a mistake to suggest that the remedy of equitable compensation could be regarded as completely explained in Nocton. As Rickett and Gardner comment, 'Nocton is not quite the repository of jurisprudence on equitable compensation that it is often assumed to be' noting that 'the statements made regarding equitable compensation lack detail'. That detail is in part filled by subsequent case law.

2.3 POST-NOCTON DEVELOPMENTS

(i) McKenzie v McDonald

Few cases where equitable compensation was claimed followed in the years immediately after Nocton. The earliest appears to have been McKenzie v McDonald especially notable because of the high regard in which the judge, Sir Owen Dixon, then sitting in the Supreme Court of Victoria, is held. In McKenzie v McDonald, a widow was convinced by a real estate agent to swap her farm for his house and shop in Melbourne. She

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100 Ibid.
101 Rickett and Gardner, above, n 7, 20.
102 Nocton v Lord Ashburton [1914] AC 932.
103 [1927] VLR 135.
Chapter Two: What is Equitable Compensation?

had wished to sell the farm for a certain amount per acre. The real estate agent checked with an independent valuer that this was a fair value, but convinced the widow the farm was worth some 10 shillings per acre less. He offered to exchange the farm for his property, which he said was worth £2,000. In fact, this was an overvaluation - the Melbourne property was worth about £1,550. After the exchange, the real estate agent sold the farm to a bona fide purchaser for value without notice, at the price originally suggested by the widow.

Dixon AJ held that the real estate agent was in a fiduciary position vis-à-vis the widow, and that he had breached his obligations by the actions described above. Rescission was no longer available to remedy the breach, because the farm had been on-sold, but his Honour applied *Nocton*\(^\text{104}\) to compensate the plaintiff for her loss.\(^\text{105}\) Compensation was assessed as the difference between the true value of the farm and the true value of the property she had received in its place.

Two obvious comments can be made about the measure of compensation awarded. The first is that the amount awarded was the practical monetary equivalent of rescission, in short, pecuniary rescission. Thus, this decision did not stray far from the rescissionary basis of compensation seen in the earlier Australian cases, such as *Robinson v Abbott*.\(^\text{106}\) The second is that the measure equalled exactly what would have been received in an action for deceit, or in an action for negligent misstatement (the latter action not having been available at the time). Therefore, despite the comments of Viscount Haldane LC in *Nocton*,\(^\text{107}\) the measure of equitable compensation was no different from that available for deceit or negligence. These two comments can be made about most cases involving equitable compensation for breach of fiduciary duty. Equally though, *McKenzie v*

\(^{104}\) [1914] AC 932.

\(^{105}\) His Honour also noted the earlier Australian decisions, particularly *Robinson v Abbott* (1893) 20 VLR 346.

\(^{106}\) (1893) 20 VLR 346.

\(^{107}\) *Nocton v Lord Ashburton* [1914] AC 932.
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McDonald is an example of the court restoring the widow’s pre-breach position, by removing the effects of the agent’s conflict. An agent acting properly would have told the widow the true value of her property and the true value of his own. The remedy granted here performed equity’s restorative function by reversing the benefit and thereby removing the effect of the agent’s conflict of interest.

But perhaps the most important point to emerge from McKenzie v McDonald was that as equitable compensation is a remedy in equity, it is subject to the limitations and restrictions that apply to all equitable remedies. Equitable remedies are not of an absolute nature, in the way that common law remedies are seen as absolute. Therefore, Dixon AJ was able to order compensation upon terms. He allowed the defendant to elect whether to take the shop back (as the plaintiff still had the shop in her possession), paying an adjusted amount of compensation, or to pay a given sum as compensation for the entire transaction.

(ii) Re Dawson

Re Dawson is generally seen as the next major development in equitable compensation. Street J’s classic dictum from that case is almost invariably cited in relation to causation, remoteness and foreseeability. But the Re Dawson statement is a double-edged sword. While it cuts to the heart of the matter in relation to breaches of trust, it may be too sharp a blade for non-trust situations. On closer examination the case is doubtful authority for one of the propositions for which it is most commonly cited, and now

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109 Ibid.
110 Gummow, above n 8, 75. However, Beatson says ‘it is not entirely accurate to suggest that common law rights are absolute and to be contrasted with equitable rights which are more qualified in nature’: J Beatson, ‘Unfinished Business: Integrating Equity’ in The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution (Oxford, Clarendon Press, 1991) 250-1. Loughlan suggests that ‘the decision-making process in cases involving pleas for equitable relief is analogous, if not identical, to that found in common law cases where no settled rule dictates the result’: P Loughlan, ‘No Right to the Remedy?: An Analysis of Judicial Discretion in the Imposition of Equitable Remedies’ (1989) 17 Melbourne University Law Review 132, 136.
111 See also Demetrios v Gikas Dry Cleaning Industries Pty Ltd (1991) 22 NSWLR 561, 574.
112 [1966] 2 NSWR 211.
seems almost overwhelming in its vehemence, unless restricted to cases of breach of trust. Different considerations apply for breaches of fiduciary duty. Nevertheless, it is included for discussion at this point because of its indelible influence on subsequent cases.

Re Dawson 114 concerned an executor who had paid money from a trust estate in New Zealand currency in breach of trust. At the time of the breach, there was no difference in value between Australian and New Zealand currency. But many years later, when the breach of trust came to be remedied, the New Zealand pound was worth more than the Australian pound. The question for Street J was whether the amount required to repair the breach could be assessed by reference to the exchange rate at the time of breach, or the exchange rate at the time of trial. The immediate point that is often overlooked must be emphasised - Re Dawson concerns a breach of trust, rather than a breach of a non-trust fiduciary duty, 115 such as has been seen in Robinson v Abbott, 116 Nocton 117 and McKenzie v McDonald. 118

Street J held that the amount payable was to be calculated according to values at the date of trial. He commented:

The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not limited by common law principles governing remoteness of damage. ...if a breach has been committed then the trustee is liable to place the trust estate in the same position as

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113 See below, n 119 and accompanying text.
114 [1966] 2 NSWR 211.
115 It will be argued in Chapter 3 that breaches of trust and breaches of fiduciary duty are, and should be, treated differently when quantifying equitable compensation. The nature of trust is that it implies positive duties to act in relation to the trust fund. Therefore, one of the principal obligations of trust is to preserve and, if necessary, restore, the trust fund. The same positive duties do not apply to fiduciaries who are not trustees.
116 (1893) 20 VLR 346.
117 [1914] AC 932.
118 [1927] VLR 134.
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it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter.\(^{119}\)

It is easy to see why Street J's dictum was leapt upon with some enthusiasm by later courts. Really very little had been said previously about calculation of the remedy. In almost all of the earlier cases, the amount awarded exactly equalled pecuniary rescission. In Nocton\(^ {120}\) the House of Lords was content to allow the amount calculated for the tort of deceit to stand, although Viscount Haldane LC and Lord Dunedin indicated that not in all cases would the amount available at equity equal the amount recoverable in tort. Street J's dictum took matters considerably further than that. After Re Dawson,\(^ {121}\) the law on equitable compensation was often viewed in the following light:

1. Common law control mechanisms (such as causation, foreseeability and remoteness) upon run-away damages do not apply to awards of equitable compensation.\(^ {122}\)

2. No amount of compensation is too remote to be recoverable, as long as the 'but for' test is satisfied.

3. Issues such as novus actus interveniens and contributory 'negligence' have no role in equitable compensation;\(^ {123}\) and

4. The observations made in Re Dawson in respect of a breach of trust apply equally to all breaches of fiduciary duty (and perhaps by extension to all other cases where equitable compensation is or may be available).\(^ {124}\)

\(^{119}\) Re Dawson [1966] 2 NSWR 211, 214-5.  
\(^{120}\) [1914] AC 932.  
\(^{121}\) Re Dawson [1966] 2 NSWR 211.  
\(^{122}\) For example, see Hill v Rose [1990] VR 129; Gemstone Corporation of Australia Ltd v Grasso (1994) 13 ACSR 695.  
Chapter Two: What is Equitable Compensation?

Re Dawson\textsuperscript{125} has been followed on almost countless occasions since.\textsuperscript{126} Nevertheless, it is argued that its application has been overstated. While it remains an accurate reflection of the law relating to breach of trust, the picture it paints of equitable compensation as being apparently unlimited is misleading, and now outdated. In fact, the mystery seems to be why it was assumed that \textit{Re Dawson} had automatic application to cases that did not concern a trust. Street J never once referred to \textit{Nocton},\textsuperscript{127} or drew comparisons with it. Street J does not appear to have regarded the case as dealing with anything other than a case of breach of trust, with concomitant reconstitution of the depleted trust fund. Street J was considering an uncomplicated misappropriation of trust funds, and did not consider himself to be remedying a case involving a fiduciary conflict of interest. For this reason, \textit{Nocton} was unnecessary to the decision. There is no apparent reason why recovery following breach of trust and breach of fiduciary duty should be compacted into one concept.

(iii) \textit{Brickenden}

In fact, \textit{Re Dawson}\textsuperscript{128} was preceded by an important Canadian case on appeal to the Privy Council, \textit{Brickenden v London Loan and Savings Co},\textsuperscript{129} a decision that is mentioned later because it suffered ‘decades of forensic oblivion’.\textsuperscript{130} The case was not referred to in \textit{Re Dawson}, but it must be assumed that the omission made no difference to the outcome; indeed, the factual differences between the two cases make analogies between \textit{Brickenden} and \textit{Re Dawson} inappropriate. Since the decision, \textit{Brickenden} has been read as imposing

\textsuperscript{125} For example, see \textit{Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd} [2002] QSC 222, (unreported, Philippides J, 12 August 2002) [14].

\textsuperscript{126} [1966] 2 NSW 211.


\textsuperscript{128} [1914] AC 932.

\textsuperscript{129} [1966] 2 NSW 211.

\textsuperscript{130} [1934] 3 DLR 465 ("Brickenden").
absolute responsibility for losses incurred subsequent to a breach of the duty to make full disclosure upon defaulting fiduciaries. Lord Thankerton’s comments in that case are well known.

When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent’s action would be solely determined by some other factor, such as the valuation by another party of the property the constituent proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.  

The possible far-reaching interpretation that can attach to Brickenden is obvious. Like Nocton it concerned a solicitor who failed to make full disclosure of the true facts surrounding a transaction to his client. Brickenden acted as solicitor for a finance company making a loan to a Mr and Mrs Biggs. Brickenden was interested in earlier loans to Biggs, and Biggs was able to discharge his debts to Brickenden when he received the loan from Brickenden’s client. Brickenden did not disclose his interest in the earlier loans to his client. Biggs eventually defaulted on the loans from the finance company. The Privy Council held that Brickenden was liable to the finance company for the full amount of the loan together with interest. In short, the solicitor was liable for the full loss made by the finance company through the loan to Biggs.

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131 Ibid, 469 (emphasis added).
132 Ibid.
133 Nocton v Lord Ashburton [1914] AC 932.
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The remedy granted appeared to outstrip the limits of the jurisdiction to award compensation as described by *Nocton*. In the earlier case, the indications were that the aim of the remedy was to return the plaintiff to the financial position he would have been in, had there been no breach in the nature of a conflict of interest. Further, this seemed to be accomplished by removing from the fiduciary an amount which represented the extent his conflict had upon the transaction between the principal and the third party. *Prima facie*, in *Brickenden* this would have been to restore to the finance company the lost security (i.e. the amount by which Brickenden's own exposure to Biggs was reduced when Biggs repaid his debt to Brickenden), because this was the only amount linked to the conflict. Instead, Brickenden was liable for the damage suffered by entry into the entire loan. It would appear that the remedy granted in *Brickenden* exceeded restoration of the plaintiff to the required position, and perhaps indicates some punishment of the defendant.

The decision has been interpreted as meaning that Brickenden was liable because he could not be heard to say there was any other cause of the loss. If the non-disclosed fact was material, it appeared that no further issue of causation arose. This impression is strengthened when *Brickenden* is read in conjunction with *Re Dawson*. But there may be little real justification for reading *Re Dawson* in conjunction with *Brickenden*. *Re Dawson* concerns a breach of trust. *Brickenden*, like *Nocton*, involves a breach of the fiduciary rule against conflicts of interest.

*Brickenden* can only be reconciled with *Nocton* if the finance company would not have entered into the transaction at all, had the breach not occurred (which was not

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134 Ibid.
135 *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465.
137 *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465.
138 [1966] 2 NSWR 211; the plaintiffs in *Maguire v Makaronis* (1997) 188 CLR 449 argued for such a reading.
139 *Nocton v Lord Ashburton* [1914] AC 932.
140 *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465.
141 *Nocton v Lord Ashburton* [1914] AC 932.
considered in the report of Privy Council proceedings), or if the lost security equalled the total amount of the advance (which it did not). Otherwise, it would be expected that the finance company would be limited to the amount by which the loan was made less secure (the amount Biggs paid to Brickenden). Brickenden has been the subject of academic criticism but has been applied by various courts. In recent times, a majority of the High Court of Australia has declined to overrule it. It must however be regarded as being of doubtful authority. The case is discussed further in Chapter 4.

(iv) Canson

The Canadian decision Canson Enterprises Ltd v Boughton & Co met head on the issues of causation not addressed by the Privy Council in Brickenden. The facts of the case were complicated, involving a land purchase. Three companies, Canson, Fealty, and Peregrine entered into a joint venture to purchase and develop land. Boughton was the principal of Peregrine and a partner in the firm of solicitors acting for the joint venture. Canson and Fealty did not know that there was an intermediate sale between the vendor and another company that resulted in the other company making a profit of $115,000. However, Boughton (and therefore one of the joint venturers Peregrine) knew about the intervening purchase, and the secret profit being made. This information was not disclosed to the plaintiffs by the solicitor acting on their behalf.

After settlement, the joint venturers erected a commercial building on the site. Unfortunately, engineers and contractors were negligent during construction, at great loss

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142 Heydon, above, n 95, 331-2.
145 (1991) 85 DLR (4th) 129 (‘Canson’).
146 Brickenden v London Loan and Savings Co [1934] 3 DLR 465.
147 A solicitor named Wollen had conduct of the matter. The trial judge accepted that Wollen himself had not realised that two of the joint venturers did not know about the intervening sale, and that he did not know about the secret profit.
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to the purchaser. When the plaintiff was unable to recover a judgment against the engineers and contractors, the plaintiff claimed equitable compensation against its solicitors. The argument followed along the lines in which the *Brickenden* decision has been interpreted: but for the breach of fiduciary duty the plaintiff would not have been induced to buy the land; had the plaintiff not bought the land, it would not have suffered the extensive losses on construction of the building.

Common law principles of causation would reject this argument, the loss being caused by a third party rather than the solicitors' breach of fiduciary duty. But applying a combination of *Re Dawson* and *Brickenden*, the plaintiff might well be able to argue that the solicitors did not disclose material information, and therefore could not be heard to complain that there had been any other causative event (*Brickenden*). If common law limitation devices such as causation, foreseeability and remoteness did not apply (*Re Dawson*), then why shouldn't the solicitors bear the burden of all of the loss?

The Canadian Court of Appeal was unanimous in holding the solicitors were not liable for the loss. However, the members of the Court reached their decision via quite different methodologies. In particular, a dichotomy emerged as to whether tortious or equitable principles should be used to resolve issues of causation and quantum. The majority felt that because similar policy objectives were being pursued when comparing equitable compensation and damages for the tort of deceit, similar recovery principles should apply. However, the other four members of the court held that equitable compensation should not be calculated by analogy with the common law remedies, because of the different doctrinal underpinnings of the remedies. *Canson* will be discussed further in Chapter 4.

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148 *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465.
150 [1966] 2 NSWR 211.
151 *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465.
Chapter Two: What is Equitable Compensation?

*Canson*\(^{153}\) represents a major development in equitable compensation because regardless of the view adopted as to whether an approach analogous to the common law or a purely equitable approach is preferable, not all losses are ‘caused’ by the breach of fiduciary duty. There must be a tangible connection between the breach and the loss. While the majority expressed this by relation back to common law principles, the minority as represented by McLachlin J explained this as being those losses which ‘on a common sense view of causation, were caused by the breach’.\(^{154}\) This is a major departure from the way in which *Re Dawson*\(^{155}\) and *Brickenden*\(^{156}\) are traditionally interpreted, namely, that all losses flow from the breach.

However, *Canson*\(^{157}\) strengthens the view of equitable compensation for breach of fiduciary duty as essentially stemming from the same roots as *Nocton*.\(^{158}\) There was no dealing between the solicitor and the client that could be set aside. Because the solicitor was in a position of conflict in relation to a transaction between the principal and a third party, what the court had to set aside was the effects of the transaction that were referable to that conflict. This should have been the increased price paid on purchase.\(^{159}\) The use of negligent contractors later has absolutely nothing to do with the purchase.\(^{159}\) The use of negligent contractors later has absolutely nothing to do with the purchase at an inflated price.

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\(^{153}\) Ibid.

\(^{154}\) Ibid, 163.

\(^{155}\) [1966] 2 NSWR 211.

\(^{156}\) *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465.

\(^{157}\) *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129.

\(^{158}\) *Nocton v Lord Ashburton* [1914] AC 932.

\(^{159}\) In fact, the solicitor faced no liability at all, because of a finding that Wollen had not known of the conflict. Because it ignores Boughton’s knowledge, it is highly unlikely that this aspect of the decision is good law.
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(v) Target

The House of Lords had the opportunity to return to the remedy of equitable compensation in 1995 in Target Holdings Ltd v Redferns. This is another example of less than perfect behaviour by a solicitor coming under scrutiny. This time, the facts concerned a complicated purchase and mortgage scam. A purchaser entered into a contract to buy land. A series of sham contracts were then entered for the sale of the same property to entities related to the purchaser, each at a higher price. Target Holdings Ltd was to finance the final purchase, taking security over the land. Although a valuation indicated that the land was worth its final purchase price, it would seem that this was not the case. Redferns acted as solicitors for both the purchasers and the financiers. Although they knew about the chain of contracts, they did not pass that information on to their clients the financiers. Further, when the financiers placed settlement monies in their trust account, the solicitors withdrew sufficient to pay out the original vendor, telling the financier/client that the matter had been successfully completed and the appropriate security obtained. This was clearly not the case. Ultimately however, the transaction was concluded within the terms of their instructions.

Counsel for the defendant conceded that a breach of trust had occurred. Normally, a trustee is required to reconstitute the trust fund. But did this mean that Redferns had to reconstitute the trust fund to the amount it should have been before they made the payment to the original vendor, or had the trust fund in effect been reconstituted when Target had got all that it had bargained for, namely, security over the property?

Lord Browne-Wilkinson delivered the leading judgment. His Lordship felt that the principles of common law and equity were the same in that the defendant should only be liable for losses caused by his wrong. While common law concepts of causation and foreseeability do not apply to losses caused in breach of trust:

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160 [1996] 1 AC 421 ("Target").
161 Target Holdings Ltd v Redferns [1996] 1 AC 421.
there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz. the fact that the loss would not have occurred but for the breach.  

While not choosing between the differing views of the Canadian Supreme Court in Canson (the methodology of the common law, or the methodology of equity), Lord Browne-Wilkinson endorsed the views of McLachlin J on the ultimate limitation upon equitable compensation. The right to equitable compensation is not unlimited and must result from the breach of the relevant duty. This, according to his Lordship, was good law:

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.

Target is an example of the general assumptions noted earlier, that principles concerning breach of trust and breach of fiduciary duty are virtually interchangeable. It is not clear from his Lordship's comments relating to Canson whether his observations apply equally to all fiduciary breaches, or to breaches of trust only. Because Target concerns a breach of trust, it is more appropriately linked to Re Dawson than to Canson. Nevertheless, the references made to Canson appear to imply a less strict causation test than that applied in Re Dawson.

However, Capper has commented that 'Target does not diverge from Re Dawson just because it requires causation', and notes that where Re Dawson was concerned with

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162 Ibid, 434.
165 Ibid.
167 There is a criticism of this aspect of the case in Millett, above, n 8, 224.
168 [1966] 2 NSWR 211.
remoteness of damage (events occurring after the breach), *Target* was concerned with causation (the prior question of whether the breach caused the loss).\(^{169}\) This comment is apt, and again illustrates the point that the *Re Dawson*\(^{170}\) dicta may have been over-applied. Causation was not in contention in *Re Dawson*, though it was in *Target*\(^{171}\).

The difficulty of the decision lies in the fact that *Target*\(^{172}\) can be argued as a breach of duty in a variety of ways. First, it was an admitted breach of trust. Secondly, it appears to be a conflict of interest case. Finally, common law duties were presumably breached, such as contractual duties and the duty of care. It is important to note however, that argument concerned breach of trust only. *Target* is strictly only authority as to breaches of trust. This thesis argues that equitable compensation is duty specific, and that different considerations apply in respect of different wrongs. The *Target* facts lend themselves to use for illustrative purposes.

*Target Holdings* were advancing £1.5 million on mortgage, against a valuation (and stated contract price) of £2 million. The property was really being purchased for £775,000, and was eventually sold by the mortgagee for £500,000. It will be assumed that the true value at the time of purchase was £775,000 and the drop in value was caused by a property market crash.

For ease, these figures are repeated in table form:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stated Contract Price</td>
<td>2,000,000</td>
</tr>
<tr>
<td>Amount of Loan</td>
<td>1,500,000</td>
</tr>
<tr>
<td>Real Purchase Price</td>
<td>775,000</td>
</tr>
<tr>
<td>Eventual Sale Price</td>
<td>500,000</td>
</tr>
</tbody>
</table>

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\(^{170}\) [1996] 2 NSWR 211.

\(^{171}\) *Target Holdings Ltd v Redfem* [1996] 1 AC 421.

\(^{172}\) Ibid.
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First, suppose the facts concern a breach of trust only. The trustee is required to reconstitute the trust estate. The trust estate was the amount paid to Redfem in anticipation of settlement, some £1.5 million. It was not clear whether the transaction would have gone ahead, had the early payment of the funds not occurred, however for the sake of argument it will be assumed that the transaction could not have taken place. Reconstitution of the trust fund in that situation would have been accomplished by return of the money after giving credit for the current value of the property at the time of the judgment (namely £500,000) resulting in an award of £1 million.

\[
\begin{align*}
\text{Amount of Loan: (Trust Estate)} & : 1,500,000 \\
\text{Less Eventual Sale Price:} & : 500,000 \\
\text{Balance:} & : 1,000,000
\end{align*}
\]

If Target \textsuperscript{173} is treated as a conflict case, and the principles revealed in the earlier cases are applied, what the court will try to do is to repair the damaging effects of the fiduciary’s conflict, to the extent of the conflict. In this case, the solicitor’s conflict allowed the fraudulent purchasers to extract from Target Holdings an advance of more than the property was worth. The difference appears to be what is required to repair that; later drops in the market price of the property are irrelevant because they are not related to the solicitor’s conflict. This would be the amount of the advance, £1.5 million, less the true value of the property, £775,000, resulting in an award of £725,000. This returns the principal to the position that would have obtained had there been no breach of the conflicts rule. In short, had the solicitor performed his duty properly and not entered the conflict of interest, Target would still have been exposed to the market fall. If Target would not have advanced some or all of the funds, then recovery might be even greater. This was, however, not able to be assumed. \textsuperscript{174}

\textsuperscript{173} Ibid.
\textsuperscript{174} See discussion below.
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Amount of Loan: 1,500,000

Less the True value of the property: 775,000

Balance: 725,000

Thus it becomes critical in such a case to consider what wrong is being alleged. The equitable compensation payable if Target is a breach of trust is different to the equitable compensation payable if the case is argued as a conflict of interest on the part of the solicitor. Reconstitution of the trust fund is essentially an argument between the trustee and the beneficiary. Allegations of conflict of interest concern a transaction between the principal and a third party, in which the fiduciary suffers from a conflict of interest. Different wrongs are being remedied.

However, this analysis leaves to one side the question of whether the transaction could have been avoided had the solicitor properly performed his duty without conflict. If, but for the conflict, the transaction could not have continued to fruition (because completion depended upon early transfer of the funds) then removal of the conflict from the transaction requires that the whole loss be sheeted home to the solicitor. This possibility was allowed for by the House of Lords. Their Lordships gave leave to defend to the solicitors, but indications were plain that if it was proved the fraud would have been discovered if the solicitor had acted properly, full recovery could be expected.

Therefore, in addition to the clear doctrinal points that emerge from Nocton v Lord Ashburton, the subsequent cases add the following:

1. Equitable compensation is discretionary, and like all equitable remedies can be subject to terms.

175 Target Holdings Ltd v Redforns [1996] 1 AC 421.
176 Ibid, 440-1. There is no further record of the Target litigation; therefore it is not known how the matter was finally resolved.
177 [1914] AC 932.
Chapter Two: What is Equitable Compensation?

2. It is a personal remedy, and appears unlimited by common law principles governing remoteness. 179

3. It may be that in the case of non-disclosure of material facts, no further enquiry as to causation is necessary. 180

4. However, causation is generally relevant, either by analogy with tort, 181 or on a common sense view with the benefit of hindsight. 182

5. The cases studied tend to assume a complete confluence of breach of trust and breach of fiduciary duty. This conclusion is not justified. Strictly speaking, Re Dawson 183 concerns remoteness of loss following a breach of trust, Target 184 concerns causation following breach of trust, but the rest of the cases concern breaches of fiduciary duty, and particularly, breaches of the conflicts rule. Instead the cases show that different matters must be shown, depending on whether breach of trust or breach of fiduciary duty is alleged.

2.4 THE NATURE OF THE REMEDY

(i) Is equitable compensation limited to rescission?

It has already been noted that in most of the early cases on equitable compensation for breach of fiduciary duty the remedy actually ordered was the pecuniary equivalent of

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178 McKenzie v McDonald [1927] VLR 134. However, some deny that there is any `clear dichotomy in practice.' See: S Doyle and D Wright, 'Restitutionary Damages - The Unnecessary Remedy?' (2001) 25 Melbourne University Law Review 1, 22. Doyle and Wright also refer to Tilbury's comment that `there is no reason why awards at law should not, where appropriate, be made on terms.' M Tilbury, Civil Remedies Volume I (Sydney, Butterworths, 1990)[6030].
179 Re Dawson [1966] 2 NSW 211.
183 [1966] 2 NSW 211.
rescission. Is equitable compensation then limited to cases where rescission or its pecuniary equivalent would be available? The similarity between the two remedies was first noted in Robinson v Abbott. But in fact, this similarity is illusory. The illusion arises because in many cases the amount that the plaintiff has lost because of the defendant's breach and the amount the plaintiff would recover by way of pecuniary rescission is exactly the same. Robinson v Abbott, Ballantyne v Raphael,186 Curwen v Yan Yean Land Company,187 and McKenzie v McDonald188 are all examples of this. But the two remedies, rescission and equitable compensation are in fact quite different.189 Rescission in this context is directed towards reversing a transaction that is flawed due to a breach of fiduciary duty and is essentially two-party. The transaction in question is between the fiduciary and the principal. Equitable compensation requires a consideration of the amount of loss suffered by the plaintiff as a result of a fiduciary breach, and is typically available in situations where rescission is unavailable or unsuitable. Equitable compensation can be a substitute for rescission.190 This is clearly so in the cases where rescission of a transaction was at one time possible between the parties.191

However, equitable compensation is also available in situations where there is no transaction per se between the fiduciary and the principal that can be set aside, and therefore no possibility of rescission. These cases are not as straightforward as those where compensation is simply a substitute for rescission. Nevertheless, the facts inevitably disclose that there has been a transaction or dealing between the principal and a third party.

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184 Target Holdings Ltd v Redfern [1996] 1 AC 421.
185 (1893) 20 VLR 346.
186 (1893) 20 VLR 346.
187 (1891) 17 VLR 64.
188 [1927] VLR 134.
190 There is no need to rescind the underlying transaction before seeking equitable compensation: Catt v Marac Australia Ltd [1986] 9 NSWLR 639, 660.
191 For example, Robinson v Abbott (1893) 20 VLR 346; McKenzie v McDonald [1927] VLR 134.
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Nocton, Brickenden, Canson, and Target are all examples of this. Equity intervenes in these cases because the fiduciary was in some way interested in that transaction (and is therefore in a position of conflict), either personally, or because he owes duties to the other party. What equity then ‘rescinds’ is the effect of that conflict. Thus, in those cases where rescission between the fiduciary and the principal is possible (because the dealing is between them), rescission and equitable compensation are alternate remedies. In cases where there is no direct transaction between the parties, only equitable compensation is available. In this equitable compensation is fulfilling equity’s restoration aim, because it is restoring the plaintiff to the position the plaintiff should have occupied.

The difference in the two remedies, rescission and equitable compensation, is illustrated by the case of Maguire v Makaronis. Maguire was a solicitor and member of a firm acting for Mr and Mrs Makaronis in the purchase of a chicken farm. The Makaronises could not raise finance to complete the unconditional purchase contract, and it appeared they would have to default, thereby losing their deposit. The solicitors advanced them the purchase price, but did not tell them that the solicitors were the true financiers. Nor were the clients told that the solicitors would be making a profit on the transaction. After the chicken business collapsed, the Makaronises defaulted on their repayments. When the solicitors attempted to enforce their security, the clients resisted, arguing that there had been a clear breach of a fiduciary duty which had caused them loss, thus entitling them to equitable compensation.

The High Court of Australia delivered two judgments, a joint judgment of Brennan CJ, Gaudron, McHugh and Gummow JJ, while Kirby J delivered a separate judgment. In the joint judgment their Honours said that once the breach of fiduciary duty occurred, a right to a decree of rescission was immediately generated, because the ‘breach of duty was

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195 Target Holdings Ltd v Redfern (1996) 1 AC 421.
196 (1997) 188 CLR 449.
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patent at the creation of the very thing which is to be set aside'. However, other considerations arise where a plaintiff seeks some remedy other than rescission, such as an account of profits or compensation. If such a remedy is sought, there must be sufficient connection or causation, between the breach of duty and the loss sustained, or gain sought to be attacked.

Therefore, while the Makaronises were entitled to have the mortgage they had entered into rescinded (subject to the requirement to make restitution) they were not entitled to equitable compensation. This was because the causal link between the non-disclosure and the entering of the mortgage transaction was plain on the face of the transaction itself, but there was not a sufficient causal link between the breach of the conflicts rule and the loss of their investment when their business failed. As opposed to rescission, 'an order for ...equitable compensation is not directed to rewriting the contract, but to addressing the consequences of the conduct of the defendant that was collateral to the contract'. In *Maguire v Makaronis*, the High Court was able to 'rewrite the contract' by way of a rescissionary remedy, but as there were no collateral consequences the remedy of equitable compensation was not available.

Rescission and equitable compensation are alternate remedies available for selection by the plaintiff in cases where both remain available. If the plaintiff suffers consequential loss, it will be preferable to seek equitable compensation to recover the higher amount. If there is no consequential loss, it is easier for the plaintiff to seek rescission. Rescission is

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197 Ibid, 467.
198 Ibid, 468.
199 *Aequitas Limited v Australian European Finance Corporation Limited* (2001) 19 ACLC 1,000 [428].
201 See *Warman International Ltd v Dwyer* (1995) 182 CLR 544; In *Aequitas Limited v Australian European Finance Corporation Limited* (2001) 19 ACLC 1,006, 1087, Austin J said 'I would be going somewhat beyond the present case law if I were to order both rescission and equitable compensation in any general sense. ...It is not clear to me that I can both order that a contract be rescinded, and also make a series of specific orders for equitable compensation, if the theory underlying the compensation orders is only that the losses would not have occurred but for the wrongdoing. ...If, however, I order equitable compensation but not rescission, the law requires that the compensation be measured by reference to losses that would not have been incurred but for the breach.'
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directed to reversing a transaction. It is not dependent on showing a loss.\textsuperscript{202} Causation is not relevant.\textsuperscript{203} On the other hand, equitable compensation seeks to remedy loss suffered consequent upon a breach of duty. It is therefore distinguishable from rescission.\textsuperscript{204} Equitable compensation looks beyond the transaction (and there may indeed be no transaction) and considers loss.\textsuperscript{205} Both remedial responses perform the task of ensuring that equity’s restoration interest is protected. The choice between them will depend upon the factual context.

(ii) Should pecuniary rescission be regarded as equitable compensation?

The label ‘equitable compensation’ is frequently used to describe the monetary remedy in cases where there was a transaction between the fiduciary and principal, but rescission is for some reason not available. However, it has been shown that there is a difference between the purposes of the two remedies and the triggers of the two remedies. Justice Gummow has indicated that equitable compensation may be able to be calculated by reference to rescission in cases where the wrong complained of has resulted in a transaction between the parties.\textsuperscript{206} This implies that pecuniary rescission may be the same as equitable compensation, or at least an example of equitable compensation. But does the fact that rescission is being ordered in monetary terms mean that the remedy being ordered is

\begin{thebibliography}{9}
\bibitem{D Wright} D Wright, ‘Fiduciaries, Rescission and the Recent Change to the High Court’s Equitable Jurisdiction’ (1998) 13 Journal of Contract Law 166. See also Edelman, above, n 192, 208.
\bibitem{Maguire v Makaronis} Maguire v Makaronis (1997) 188 CLR 449; Gwembe Valley Development Co Ltd v Koshy [2003] EWCA Civ 1048, (unreported, Mummery, Hale and Carnwath LJJ, 28 July 2003)[144].
\bibitem{There may be other important differences} There may be other important differences between rescission and equitable compensation. Davidson suggests that because equitable compensation may be more onerous to the defendant than rescission, it will be available less frequently than rescission: Davidson, above, n 7, 356: Conaglen suggests that onus of proof and causation are treated differently in each remedy: Conaglen, above, n 81, 266-7.
\bibitem{To move beyond the rescissionary recovery} To move beyond the rescissionary recovery, some very close bond needs to be shown between the conflict, and the alleged consequential loss. In fact, there are very few cases where the plaintiff has successfully moved beyond that barrier. In Maguire v Makaronis (1997) 188 CLR 449 it was not possible for the plaintiff to so move. The solicitor’s conflict involved a self-dealing in the mortgage. The effect of that conflict was set aside by rescission, but equally could have been set aside by a monetary award reflecting rescission. The losses incurred by the plaintiffs in running their business are irrelevant to this. See also Swindle v Harrison [1997] 4 All ER 705.
\bibitem{Gummow} Gummow, above, n 8, 91.
\end{thebibliography}
Chapter Two: What is Equitable Compensation?

Equitable compensation? The question is important because its answer has consequences beyond the range of causes of action that currently support equitable compensation.

If pecuniary rescission is really a subset of the remedy of rescission, then there can be little objection to allowing it as a remedy in cases of undue influence, unconscionable conduct, or any other case where a transaction has resulted. That would be so, whether or not the behaviour complained of is regarded as a wrong, merely a vitiating factor, or an example of unjust enrichment. However, if pecuniary rescission is a subset of equitable compensation, it may be available only upon a more limited basis, for example, only in those cases where equitable compensation is already available. It is also important to locate pecuniary rescission in the remedial scheme, because the amount recovered on the basis of rescission and the amount recovered by way of compensation are potentially different. First, loss can be both direct and consequential, and it may be that consequential loss can be recovered by use of one remedy and not the other. Secondly, pecuniary rescission decisions appear to assess quantum as at the date of the transaction, whereas the traditional view of equitable compensation is that quantum is assessed at the date of judgment with the full benefit of hindsight.

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207 For further discussion, see Chapter 6.
208 This kind of difficulty is presented in the case of Mahoney v Purnell [1996] 3 All ER 61. A contract affected by undue influence could no longer be rescinded. An order amounting to pecuniary rescission, but called equitable compensation was made. However, the judge felt it necessary to also find a breach of fiduciary duty, in order to justify the monetary award. This is discussed further in Chapter 6.
210 Davidson, above, n 7, 353 suggests ‘consequential relief appears to be unavailable when restoration is made for breach of an equitable obligation’. The majority in Maguire v Makaronis (1997) 188 CLR 449, 467-8 (Brennan CJ, Gaudron, McHugh and Gummow JJ) suggest that in some circumstances a plaintiff seeking rescission is entitled to consequential relief, but distinguish this from the remedy available in Nocton v Lord Ashburton [1914] AC 932.
211 Eg McKenzie v McDonald [1927] VLR 134: The value of the widow’s land at the date of the transaction was £4 5s per acre. It was sold by the fiduciary (on vendor’s terms) for £4 10s per acre. Recovery was awarded on the lower figure. See also Hartigan v International Society for Hare Krishna Consciousness Incorporated [2002] NSWSC 810 (unreported, Bryson J, 6 September 2002).
Arguably, pecuniary rescission should be regarded as a variety of equitable compensation, at least in the context of breach of fiduciary duty. Equitable compensation cases involve a conflict of interest between the fiduciary and the principal, and that element of conflict is naturally present in cases where the fiduciary transacted with the principal. Pecuniary rescission may be seen as a variety of equitable compensation for breach of fiduciary duty in those cases where the fiduciary and principal have transacted, but that transaction can no longer be set aside.\(^\text{213}\) In these cases, the loss caused by the conflict is cured by the monetary equivalent to rescission. In short, there are sufficient similarities between the two remedies in cases where the fiduciary and principal contract to regard pecuniary rescission as an example of equitable compensation.

On the other hand it may be better to regard pecuniary rescission as a subset of rescission rather than as a subset of equitable compensation because of the differences between concepts involved in rescission and equitable compensation. In summary, these are

1. Rescission is not dependant on showing loss, and the pecuniary rescission cases do not appear to depend upon loss. Loss is coincidentally inherent in the transaction being set aside, but rescission is still available, whether or not a loss is suffered. Conversely, equitable compensation is dependant upon loss being shown.\(^\text{214}\)

2. Quantum is uncontroversial in cases of pecuniary rescission, and seems to be assessed as at the date of the transaction. In this it closely reflects traditional rescission. Equitable compensation falls to be assessed at the date of judgment.\(^\text{215}\)

3. Causation is irrelevant to cases of rescission and pecuniary rescission because the behaviour complained of and the resulting transaction are inextricably linked.\(^\text{216}\) However, it appears that causation is generally relevant for equitable compensation.\(^\text{217}\)

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\(\text{213}\) For example, *McKenzie v McDonald* [1927] VLR 134.

\(\text{214}\) *Maguire v Makaronis* (1997) 188 CLR 449.

\(\text{215}\) *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129.
Chapter Two: What is Equitable Compensation?

4. The pecuniary rescission cases invariably involve a transaction between the fiduciary and the principal. Equitable compensation cases can also involve a transaction between the principal and a third party.

It is therefore not useful to regard the term 'equitable compensation' as synonymous with pecuniary rescission. Regarding it merely as synonymous leads to confusion and runs the risk of overly limiting the application of the remedy. This can be seen in some cases where courts have incorrectly believed that if rescission as between the fiduciary and principal is not available for breach of fiduciary duty, the principal is left without a remedy. Pecuniary rescission should be reserved for cases where the plaintiff wants rescission of the transaction, but that is no longer possible or practical. Equitable compensation requires an assessment of the loss suffered as a result of the breach of the conflicts rule. Each remedy approaches the problem from a different starting point, and takes into account different factors. As previously mentioned, each remedy is distinct and generally regarded as alternate. Labelling both remedies 'equitable compensation' should be discouraged.

There are many examples of monetary awards in equity called 'equitable compensation' that are more accurately called 'pecuniary rescission'. A disciplined approach is needed to reverse this trend. What must be understood is that, in relation to breaches of fiduciary duty, the damage caused by the conflict the fiduciary failed to resolve is being remedied. In some cases this may equal what would be recovered as pecuniary rescission. But this is merely coincidental, because the dealing is between the fiduciary and

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216 Maguire v Makaronis (1997) 138 CLR 449. It is, however, possible that the objectionable behaviour is only partially linked to the resulting transaction: Vadasz v Pioneer Concrete (SA) Pty Ltd (1995) 184 CLR 102.


218 Conaglen, above, n 81, 253-5. Instead of regarding equitable compensation as the genus and pecuniary rescission as the species, these cases have proceeded as if rescission is the genus. Once that was ruled out, the remedy of equitable compensation was regarded as unavailable.

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the principal. The distinction is of no great consequence in relation to breaches of fiduciary
duty, but assumes greater prominence when considering which monetary awards should be
available for other equitable causes of action. As a base proposition, the differences
between pecuniary rescission and equitable compensation must be recognised. Pecuniary
rescission is available where there has been a transaction between the fiduciary and
principal that might have been set aside earlier. Therefore, its quantum is assessed as at the
date of the transaction. It is not dependent upon proof of loss. Equitable compensation, as
opposed to pecuniary rescission, is the only available remedy in cases where the transaction
is not between the fiduciary and the principal, but between the principal and a third party,
and the fiduciary experiences some conflict in relation to that transaction. If the principal
suffers loss as a result of the fiduciary’s conflict, that is remedied by equitable
compensation. Both remedies result in monetary awards, both are often called ‘equitable
compensation’; but only one is directed to loss rather than rescission of a transaction.

It is then arguably best to recognise three in personam remedies available for breach
of fiduciary duty. These are:

1. an account of profits, whereby the fiduciary is stripped of illicit gains;

2. a monetary award (‘pecuniary rescission’) where rescission is no longer available to
set aside a transaction between the fiduciary and the principal and therefore its monetary
equivalent is ordered; and

3. equitable compensation, which is available in cases where the principal and a third
party transact, but the fiduciary is in a position of unresolved conflict concerning that
transaction, which results in loss for the principal.

All three protect equity’s restoration interest by restoring the plaintiff to the position that
the plaintiff should have occupied.

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220 If specific asset restitution is still possible, the remedy may be categorised as in rem. Edelmann notes
that ‘rescission is a proprietary remedy that is devisable, assignable and has been said to allow priority in
insolvency and bankruptcy’: Edelmann, above, n 189, 207. The status of pecuniary rescission in this
regard is beyond the scope of this thesis.
Chapter Two: What is Equitable Compensation?

(iii) Is equitable compensation for breach of trust co-extensive with equitable compensation for breach of fiduciary duty?

Because of their shared jurisdictional provenance, these forms of relief are often grouped together under the label ‘equitable compensation’ and are thought to be computed on a like basis.221

It is argued that there are sufficient distinctions between the cases concerning breach of trust and breach of fiduciary duty to question whether it is appropriate for courts and commentators to use the concepts interchangeably. There are clear differences between cases on the continuum like

(a) *Re Dawson*222 where trust property has been misappropriated, or

(b) *Target*223 where untimely application of funds arguably led to loss, or

(c) *Nocton*224 where the fiduciary held no property on behalf of the principal, but preferred his own interests, or

(d) A case like *Stewart v Layton*,225 where a solicitor acting for both the vendor and the purchaser preferred the interests of one client over another, thereby causing loss to the vendor.

What all cases have in common is a conflict of interest. But what the latter three cases do not have is the misappropriation of property by the fiduciary. This thesis suggests that different wrongs are being addressed. Breaches of trust fall to be remedied according to the primary obligation to account for the trust fund. This is discussed in the following chapter. Arguably, this obligation also extends to fiduciaries who hold property, though not as

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222 [1966] 2 NSW 211.
223 *Target Holdings Ltd v Redfern* [1996] 1 AC 421.
224 *Nocton v Lord Ashburton* [1914] AC 932.
trustees. But breaches of fiduciary duty involve different wrongs from the failure to satisfactorily account for the trust property. A breach of fiduciary duty involves a breach of the profits rule or the conflicts rule. These have more to do with the fiduciary's position than with property. Compensation for breach of fiduciary duty is discussed in chapter 4. It will be argued that equitable compensation for breach of trust and equitable compensation for breach of fiduciary duty are not co-extensive and cannot be regarded as interchangeable.

2.5 CONCLUSION: WHAT IS EQUITABLE COMPENSATION?

We are now able to add more to the bare definition offered at the start of this chapter. Equitable compensation is a personal remedy. It is compensation in equity for breach of an equitable duty causing a loss. However, not all breaches of equitable duty are co-extensive. Equitable compensation responds to different duties in varying manners. Although the award itself may resemble rescission, rescission is a separate remedial response, and equitable compensation is not limited to the amount that might be available for rescission or dependant upon the availability of rescission. When rescission was once possible because the transaction was between the fiduciary and principal, the pecuniary amount awarded is often referred to as equitable compensation. It is probably better that the two awards remain distinct. Taking a functional view, where the order is compensatory, it is equitable compensation, but not otherwise. However, great discipline is needed to reverse the current usage, and it may be necessary to regard pecuniary rescission as a subset of equitable compensation. It must be kept in mind that the precondition required for equitable compensation, an unresolved conflict on the part of the fiduciary, is met in cases concerning direct transactions between the principal and the fiduciary by the very transaction itself.

Equitable compensation is available in cases of loss whether or not any transaction emanated from the breach of duty and whether or not there is a concurrent common law duty that has been breached. Equitable compensation is an in personam remedy; like all

equitable remedies it is discretionary and may be ordered upon terms. Causation is apparently relevant, in that the breach must be sufficiently linked to the loss. Equitable compensation is duty-specific. The breach of duty must be considered closely, in order to assess quantum of compensation. This point has been overlooked, due to the tendency to apply cases concerning breach of trust in cases of breach of fiduciary duty, and vice versa. Closer examination of those cases show that the principles relating to breach of trust are not necessarily able to be imported uncritically into case involving breach of fiduciary duty, and neither is the reverse true.

Equitable compensation is generally accepted as being available for a number of equitable causes of action including breach of trust, breach of fiduciary duty, breach of confidence and for matters such as fraud on a power. It is not clear to what extent, if any, it is available for other causes of action, such as undue influence, unconscionable conduct, and equitable estoppel. The best known of the causes of action where the remedy is accepted, breach of trust, breach of fiduciary duty and breach of confidence will be examined in Chapters 3, 4 and 5 respectively. An attempt will be made to identify those elements of the actions that dictate the availability of the remedy of equitable compensation following a breach. It will be argued that these three causes of action, breach of trust, breach of fiduciary duty and breach of confidence, call for different applications of the remedy of equitable compensation. There is no necessary coincidence between the three. In each case the purpose of the obligation is crucial; that dictates what losses must be compensated and how that compensation is calculated.

226 The jurisdictional source of the action has not always been clear, and the remedy for breach of confidence is often referred to as 'damages'. This is discussed in Chapter 5.

227 In the following chapter, three causes of action for which equitable compensation is not clearly recognised as currently available will be examined.
CHAPTER THREE

EQUITABLE COMPENSATION FOR BREACH OF TRUST

3.1 INTRODUCTION

It is often said that equitable compensation is available as a remedy for breach of trust. Re Dawson is invariably cited as authority for this proposition. Getzler says that the remedy's 'core territory is compensation by an express trust for breach of trust in such a way as causes loss to the trust assets'. This is the orthodox view. It is correct, but tends to overstate the position. It will be argued that equitable compensation is available for breach of trust, but that it should not be regarded as the paramount remedy for that breach. Most, but not all, breaches of trust resulting in damage to the trust assets can be resolved through the remedy of account. In a small number of cases equitable compensation must be resorted to in order to provide a remedy for the trustee's breach.

A distinction must be drawn between different kinds of breach that can be committed by a trustee. These can be subdivided into breaches of trust that are failures to perform the trust, breaches of the trustee's fiduciary duties (the duty not to profit and the duty not to allow a conflict to continue), and breaches that are neither damaging to the trust fund nor contrary to the fiduciary obligations. Breaches of the first kind, resulting in damage to the trust fund, call for reconstitution of the fund. Sloyal breaches of fiduciary duty call for either disgorgement of profit (in the case of breach of the profits rule) or compensation for loss (in the case of loss-causing breach of the conflicts rule). Breaches

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1. [1956] 2 NSWLR 211.
which do not relate to failure to perform the trust, and are not disloyal, fall to be remedied by other branches of the law.

It will be argued here that:

1. The nature of trust, in the sense of the institution of the trust, dictates the kinds of remedies available for its breach. Trust is primarily concerned with property and remedies for breach of trust largely relate to reconstituting the trust fund. Equitable compensation is therefore clearly an available remedy for breach of trust because it can accomplish the task of restoration of the trust fund.

2. Despite its availability, equitable compensation is not the most common remedy sought for breach of trust. The primary remedies for breach of trust are the remedies of account; accounting for illicit profits, and accounting for the trust fund. The right to an account is more easily established than an entitlement to equitable compensation. Even so, equitable compensation is necessary in cases where reconstitution of the trust fund is pointless.

3. Calculations of equitable compensation for damage to the trust fund follow the trust property, and are limited by reference to the trust property. This differs from calculation of equitable compensation for breach of fiduciary duty, even where the fiduciary is a trustee. The imperatives present when a trust fund must be reconstituted do not necessarily apply when a fiduciary duty is breached.

4. It is not useful to regard equitable compensation in response to a negligent breach of trust as different in any material way to damages for other breaches of care. The fact that the negligence involved occurs within the trust relationship does not attract any special rules concerning causation or calculation. Where the breach by the trustee is a breach of a tortious duty of care, the usual tortious limitation devices (seen in the context of breach of trust) should apply, even though the award is styled ‘equitable compensation’.
3.2 TYPES OF BREACHES OF TRUST

The trust is a metaphysical separation of property into two interests, namely the legal and beneficial interests. Its utility as a means of encouraging economic development has been great, and is probably underappreciated. The trustee has legal ownership of the trust property; the beneficiary has equitable title. This description of the split in ownership simply means that a court exercising equitable jurisdiction will protect the beneficiary's rights in relation to the trust property. The trustee is obliged in equity to hold, manage and account for the trust property, and will be in breach of trust if he fails in those obligations.

Breach of trust can result in awards of disgorgement, restitution or compensation, as well as orders such as for replacement of the trustee or the taking of accounts. Selection of remedy depends upon the particular allegation made against the trustee. The trustee may breach the trust by, for example:

(a) distributing the property to non-beneficiaries;

(b) illicitly profiting from the trust;

(c) allowing a conflict of duty and duty to cause loss to the trust; or

(d) allowing a conflict of duty and interest to cause loss to the trust.

In all these cases the appropriate remedial response can be described as restorative, in that it restores the beneficiary to her rightful position. However, equitable compensation is not the appropriate remedy in all cases. Equitable compensation may be necessary in (a) if the property cannot be recovered. If the property has been lost, compensation is the only

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This thesis is concerned with private express trusts. Charitable trusts, resulting trusts, constructive trusts and statutory trusts are beyond its scope.

manner in which restoration can occur. Equitable compensation is clearly unavailable in (b), but is the only available remedial response in (c) and (d).\(^5\)

Breaches of trust can be categorised into two types. The first category is a breach of a primary obligation to perform the trust.\(^6\) This obligation can be breached by a wide range of poor behaviour. The trustee can fail to consider the range of objects available before appointment of the fund; the trustee can fail to produce accounts; the trustee can fail to get in assets; the trustee can deny the trust altogether. All of these (and many more) amount to failure to perform the trust. This duty stems from the trustee's position as custodian of the trust property for the benefit of another. Equitable compensation is available for such breaches, but it is not the only remedy.

The second category is breach of the trustee's fiduciary duties; the duty not to make an illicit profit and the duty not to suffer a conflict.\(^7\) These are the same obligations placed upon all fiduciaries, whether or not they have custodial duties. Fiduciary duties are prophylactic, designed to encourage the fiduciary to act properly and to discourage the fiduciary from falling into temptation. There is nothing special in the trustee's position here; the trustee does not face any extra fiduciary obligations when compared with other fiduciaries. There will be overlap between the first and second category of breach (failure to perform the trust and breach of fiduciary duty) where, for example, failure to perform the trust is due to misappropriation. Here, there will be a failure to perform the trust, and both a

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\(^5\) It is clearly possible for a trustee's breach to fall into several categories at once. For example, a trustee might distribute trust property to a non-beneficiary in return for a bribe. This falls into categories (a) and (b) above. Two remedies are available because two separate breaches are involved. Alternatively, a trustee's illicit profit may cause loss to a trust estate, and therefore be covered by categories (b) and (d). In this case, the beneficiary can elect whichever remedy is greater.

\(^6\) Examples of these kinds of cases include Re Dawson (deed); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd [1966] 2 NSWR 211 ('Re Dawson'); Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484 ('Youyang'); Pickering v Smoothpool Nominees Pty Ltd (2001) 81 SASR 175; Partridge v Equity Trustees Executors and Agency Company Limited (1947) 75 CLR 149.

\(^7\) Examples here include Keech v Sandford (1726) Sel Cas T King 61; 25 ER 223; Nolan v Collie (2003) 7 VR 273.
conflict of interest and duty and an illicit profit. Reconstitution of the trust fund will be co-extensive with accounting for the gain, or removing the effect of the conflict.\(^8\)

However, even though there can be overlap between the first and the second category of cases (namely the duty to perform the trust and fiduciary duties), the two are distinct and distinguishable. The first category is dictated by the trustee’s control of trust property. The second category is dictated by public policy. In order to keep the trustee up to the high standards expected, in a situation where the beneficiary is relatively bereft of power to protect her own interests, the conflicts and profits rule apply against the trustee. The fact that the two categories can potentially overlap is not, however, grounds for suggesting that they must always overlap or that the same rules as to remedying breach should apply in both cases. The same rules do not apply. Failure to perform the trust calls for remedies that accomplish performance. Breach of the fiduciary obligations calls for remedies appropriate to fiduciary breaches. Thus, breach of the profits rule calls for a gain-stripping remedy, while breach of the conflicts rule may call for compensation. Failure to draw this distinction between these two categories has led inexorably to the confusion often seen in this area, namely, the equation of breach of fiduciary duty to breach of trust.\(^9\)

It can be argued that there is a third potential category of case, where the breach is neither due to the trustee’s failure to perform a primary obligation nor to a breach of fiduciary duty.\(^10\) These cases are rare. If the breach complained of is not linked to performance of the trust, or to breach of the conflicts and profits rule, it is reasonable to

\(^8\) The general position outlined above appears to conform to Elliott’s analysis. Elliott argues that there are different types of breach of trust, namely, those that relate to loss caused by the trustee and those that relate to the trustee’s primary duty to administer the trust: S Elliott, ‘Remoteness Criteria in Equity’ (2002) 65 Modern Law Review 588, 590; see also Professor C Rickett, ‘Understanding Breach of Trust’ [2003] New Zealand Law Journal 225; S Elliott and J Edelman, ‘Target Holdings Considered in Australia’ (2003) 119 Law Quarterly Review 545. The responsibility to administer the fund is crucial to remedies for breach of trust. Some remedies may only apply to administration (eg, Schmidt v Rosewood Trust [2003] 3 All ER 76) and the most valuable remedy available to equity here (account) comes from the duty to administer.


\(^10\) For example, see Bank of New Zealand v New Zealand Guardian Trust Co Ltd [1999] 1 NZLR 664.
assume that some other body of law must be the source of the duty, such as contract or tort. Thus, it is tempting to include negligent breaches of trust in this category.

However, negligent breaches are best seen as a subset of the first category; breaches of the primary obligation to perform the trust. This is because the remedial response is driven by the same considerations. Negligent breaches of trust are really failures to perform the trust carefully. If failure to perform the trust results in loss to the trust property, the trustee is obliged to reconstitute the trust fund. Negligent breaches causing loss to the trust property still require reconstitution of the trust fund, but only to the extent of the relevant duty of care. Thus, if the loss causing event is beyond the control of the trustee, the trustee is not liable to reconstitute the trust fund. This is discussed further below.

The classification of breach adopted is dictated by the nature of trust and the trustee’s obligations. Its implications are great. Equitable compensation based upon reconstituting the trust fund following a failure to perform the trust has no necessary application to all cases of breach of fiduciary duty. Far too many cases collapse categories one and two into the one concept, resulting in unnecessary confusion. Thus, while equitable compensation is an available remedy for both failure to perform the trust and breach of fiduciary duty, it is not necessarily appropriate to all such breaches, or necessarily calculated in the same way.

3.3 THE NATURE OF THE TRUST

The nature of the trust shapes remedies for its breach. Trust is said to be the paradigmatic or archetypal example of a fiduciary relationship and equity’s greatest

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11. Fouche v The Superannuation Fund Board (1952) 88 CLR 609; Graham v Gibson (1881) 8 VLR 43.
12. See 3.7 below.
13. This position may not be sustainable for much longer. This is especially so when arguments that not all trustees are fiduciaries are considered. For example, Penner says it ‘would not appear that there is any scope for fiduciary obligations in pure bare trusts, nor in Quistclose trusts’: J Penner, ‘Exemptions’ in P Birks and A Pretto (eds) Breach of Trust, (Oxford, Hart Publishing, 2002) 241, 246-247.
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creation. But trust differs from other equitable obligations in a number of important respects. These differences have shaped and defined the remedial responses to breach of trust. Before examining arguments limiting the availability of the remedy of equitable compensation for breach of trust, it is necessary to examine the nature of the trust itself.

(i) Property or Obligation?

In Australia, valid express trusts require certainty of subject matter; that is, the trust must be over some recognised form of property. This differentiates the trust relationship from any other fiduciary relationship, where there is no necessity for actual stewardship of property. The trust property is vested in the trustee, who takes (or already holds) legal title to it. Beneficial ownership of the property is given to the beneficiaries. There is a metaphorical split in the title.

Maitland calls the trust idea 'the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence': Maitland, above, n 4, 272. But see Bryan, who says, 'The claim made by common lawyers, sometimes with a thinly veiled hint of Anglo-Saxon o idescension, that the trust is unique to the common law legal family, (is) inevitably treated with scepticism now that we have a better idea of how trust substitutes such as 'troughand' and 'fideicommissum' operate in other jurisdictions': M Bryan, 'Reflections on Some Commercial Applications of the Trust' in I Ramsay (ed) Key Developments in Corporate Law and Trusts Law (Sydney, LexisNexis Butterworths, 2002) 205, 209.

The importance of institutions like the private express trust cannot however be underestimated. Zak and Knack have established that there is a direct correlation between the level of trust present in societies and economic growth: Zak and Knack, above, n 4.

The text following this note concerning separation of title is not pertinent to some trusts in other countries, such as trusts in the European Union, which may be defined according to obligation rather than property. See Bryan, above, n 14, 208.

Originally, the property was land. Trusts, which in turn originated in ..., involved the transfer of land. Now, however, any form of property recognised by law can form the subject matter of a trust.

Gummow expresses this in the negative: 'It is the absence of that vesting of legal title or property to be held beneficially for another which marks off the express trustee from other fiduciaries': Hon Justice W Gummow, 'Compensation for Breach of Fiduciary Duty' in T G Youdan (ed) Equity, Fiduciaries and Trusts (Toronto, Carswell, 1989) 57, 64.

This split in title between legal title (vested in the trustee) and equitable title (vested in the beneficiary) is perhaps the single greatest distinguishing factor between trust law and other civil law in common law countries. Trusts in other jurisdictions such as South Africa and Malaysia do not rely on recognition of a split between equitable and legal title. Ford and Lee criticise this 'legal title/ equitable title' vocabulary as 'adjectival and parochial': Ford and Lee, above, n 2, [17190].
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Birks refers to the express trust as ‘a system for managing wealth in which the manager owns the wealth to be managed’.\textsuperscript{19} This management of wealth, via the indicia of full ownership (but subject to the holding of the property for the benefit of another), defines the obligations owed by the trustee to the beneficiaries.\textsuperscript{20} Therefore, the most important obligation imposed on the trustee is the obligation to act in the interests of the beneficiaries \textit{in respect of the trust property},\textsuperscript{21} within the powers given by the trust instrument or the general law.\textsuperscript{22} The trustee must act in the interests of the beneficiary,\textsuperscript{23} but the trustee’s responsibilities are solely with respect to the trust property; the trustee has no obligation to the beneficiary in any other way under the trust.\textsuperscript{24}

Because the trustee holds trust property for the benefit of someone else, he must account for his stewardship. To safeguard the beneficiary in the circumstance that the trustee has been entrusted with the trust property, the beneficiary can at any time call for an account, whether or not there has been a breach of trust.\textsuperscript{25} The existence of trust property requires the trustee to account for the state of the trust fund. It is not sufficient that the trust fund is merely preserved; the trustee is also expected to account for what the trust fund

\textsuperscript{20} Ford and Lee, above, n 2, [1000]. Gummow says, ‘(t)he objective of the law with respect to the trust fund is the protection and augmentation of that fund within the charter of the settlor’: Gummow, above, n 17, 64.
\textsuperscript{21} It is important to note that the trustee’s duty is not in respect of anything other than the trust property. The trustee owes no general duty to act in the interests of the beneficiary. Thus, there is no general obligation to see that the beneficiary is healthy, educated, or well advised as to matters outside of the trust.
\textsuperscript{22} Lord Browne-Wilkinson put the duty in the following terms: ‘The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law’: \textit{Target Holdings Ltd v Redfern} [1996] 1 AC 421, 434.
\textsuperscript{23} The beneficiary’s interests are usually its best financial interests: \textit{Cowan v Scargill} [1985] Ch 270; \textit{Harries v The Church Commissioners for England} [1993] 2 All ER 300.

\textsuperscript{24} Thus, the trustee is not required to compensate a beneficiary for being rude or insensitive in dealings with the beneficiaries: \textit{Miller v Stapleton} [1996] 2 All ER 449. The trustee’s duty with respect to the welfare of the beneficiary is limited to the requirement that ‘the beneficiaries ... be treated impartially, that is, equally where they have similar rights and fairly where they have dissimilar rights’: Ford and Lee, above, n 2, [9100].

\textsuperscript{25} \textit{Glazier Holdings Pty Ltd v Australian Men’s Health Pty Ltd (No 2)} [2001] NSWSC 6, [37-8] (unreported, Austin J, 22 January 2001); Rickett, above, n 9, 225.
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should have stood at, properly managed.\[^{26}\] If the trust fund cannot be accounted for, it must
be reconstituted.

The trustee is also a fiduciary. The duty 'to perform the trusts honestly and in good
faith for the benefit of the beneficiaries'\[^{27}\] has been described as part of the 'irreducible core
of obligations'\[^{28}\] owed by the trustee. Because the trustee must act in the interests of the
beneficiaries, equity forbids the trustee from acting in his own interests; he must not profit
from his position without authorisation, and he may not place himself in a position where
his interests conflict with those of his beneficiaries. These are the duties owed by the trustee
that are fiduciary in nature.\[^{29}\] Fiduciary obligations prophylactically protect against the
fiduciary acting in the interest of someone other than to whom the duty is owed. The
trustee, as a fiduciary, must act disinterestedly. Where the trustee's and beneficiary's
interests clash, the trustee must prefer the beneficiary's interests. Any loss caused to the
trust as a result of the trustee's conflict is in principle recoverable.

This characterisation of the nature of trust depends upon property, and rejects the
characterisation of trust as a species of contract.\[^{30}\] This is not to deny, however, that the
genesis of many trusts is indeed contractual, or that contract and trust can coexist. But
rejection of contractual analysis does not necessarily rule out analysis of trust as best
explained as an obligation,\[^{31}\] rather than by reference to property. Expositions of trust as

\[^{26}\] Millett LJ commented that a trustee 'is accountable not only for money which he has in fact received but
also for money which he could with reasonable diligence have received. It is sufficient that the trustee
has been guilty of a want of ordinary prudence': *Armitage v Nurse* [1998] Ch 241, 252. See also *Re
Mulligan* [1998] 1 NZLR 481. The standard of prudence the trustee must use differs between
jurisdictions.


\[^{28}\] Ibid.

\[^{29}\] The nature of fiduciary duties will be discussed in the next chapter.

\[^{30}\] For an example of the contractual justification of trusts, see J Langbein, 'The Contractarian Basis of the
instances of trust law that cannot be explained via contract; for example, third parties (beneficiaries) can
enforce rights, trusts can be created unilaterally, the trust will not fail for want of a trustee, and all
powers and obligations of the trustee flow from the possession of the trust property.

\[^{31}\] A variation on this theme is the explanation of the trustee's duties with respect to trust property as based
on a duty of strict compliance with the trust deed. See R Austin, 'Moulding the Content of Fiduciary
obligation are gaining favour, impelled in part by British exposure to the European Union and also by a series of cases originating in England, where trusts that do not fit traditional patterns have been recognised. Several commentators have recently argued in favour of discarding the proprietary explanation of trusts, at least in part.

Parkinson provides a recent important example of obligation arguments. He calls into doubt the twin tenets of trust law mentioned above, namely, the concept that legal and equitable title is split, and the view that there must be existing trust property for a valid express trust. Parkinson seriously questions whether the modern discretionary trust can always be regarded as one in which there is separation in the legal and equitable title, given that the objects of a discretionary trust do not have a proprietary interest in the trust. Parkinson points out that beneficiaries of certain discretionary trusts cannot effectively join together to put an end to the trust. The kind of discretionary trust being discussed here is the trust with a potentially enormous class of objects of the kind considered in *McPhail v Doulton*, and subsequently in *Re Baden's Deed Trusts (No 2)*. This inability to wind up the trust shows that the beneficiaries do not have a proprietary interest in the trust property.

However, it is generally accepted that, although the objects of such a discretionary class cannot be said to have a proprietary interest in the subject matter of the trust, they do

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32 Civil law trusts and many statutory trusts outside of Britain do not require separation of the legal and equitable title.
33 For example, *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 507; *Twinsectra Ltd v Yardley* [2002] 2 AC 164.
35 Parkinson, above, n 34, 659.
36 Ibid, 661.
37 [1971] AC 424. The class included the current and former officers and employees of a company, and the relatives and dependents of such persons.
have a right to seek proper administration of the trust. If needs be, the court will administer the trust. Therefore, asking whether the beneficiaries can usefully join together to terminate the trust may be of limited utility. Perhaps the better question to ask when considering whether the equitable title exists elsewhere than in the hands of the trustee is to ask whether the trustee can assert to be the holder of the equitable estate, or whether the trustee can assert full ownership rights. Of course he cannot. Objects of a discretionary trust clearly have the right to see that the trust is performed, and therefore are able to see that the trustee does not assert the right to both the legal and the equitable estate.

Saying that the beneficiary can enforce the trust is just another way of saying that the trustee's obligations can be enforced against the trustee. This is the obligation explanation favoured by Parkinson and others. This view may have received some support in the High Court, albeit indirectly. Chief Commissioner of Stamp Duties for New South Wales v Buckle concerned a complicated family trust arrangement. Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ described the ownership of the trust assets in that case in the following terms:

The trustee might accurately be described as the owner of those assets, but as subjected to the equitable obligations imposed by the Deed of Settlement. The second and third respondent had no vested interests in corpus but they did enjoy

39 McPhail v Doulton [1971] AC 424, 456-7 (Lord Wilberforce). Lord Reid (437) and Viscount Dilhorne (446) agreed with Lord Wilberforce.
40 Hence, trust property is not available for distribution to the trustee's personal creditors: Seeley v Mercantile Bank of Australia (1892) 18 VLR 485; Re Australian Home Finance Pty Ltd (in liq) [1956] VLR 1.
41 The fact that the beneficiaries' rights to ensure proper performance relates to the trust property can be seen in the interesting case Re Broughton [1948] Ch 206, which concerned the trustee's duty not to act under dictation. Vaisey J held that, even where the beneficiaries of the trust were entitled under the rule in Saunders v Vautier to terminate the trust, they could not force the trustees to exercise a statutory power to appoint a new trustee in their place. Legislation in the United Kingdom has since altered this aspect of the law: see Trusts of Land and Appointment of Trustee: ct, 1996 (UK) s 19.
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rights to due administration of the trusts of the Deed of Settlement which a court of equity would protect.\(^{43}\)

Their Honours' description of the trustee as the owner, but subject to equitable obligations that enlivened rights to administration of the trust, suggests an acceptance of the obligation explanation of the trust.

It can therefore be argued that the obligation explanation of trust law should be accepted. But the question then arises as to the content of that obligation. It must be remembered that the trustee's obligations are all obligations with respect to property. The trustee owes the beneficiary no further duties outside the proper management of and accounting for the trust property. A beneficiary cannot, for example, insist the trustee resign because the beneficiary would prefer another trustee,\(^{44}\) or insist the trustee invest in a form of investment preferred by the beneficiary.\(^{45}\) Equity will make sure the trustee performs the trust, but is not concerned with the beneficiary's personal preferences. The trustee's performance is demanded with respect to trust property. All trust obligations stem from the fact that the trustee cannot assert to hold the equitable title, because equity will not allow him to do so.

Parkinson accepts that 'the trustee's conscience is bound by an obligation in respect of property'\(^{46}\) and that it is 'the essence of the trust that property is held for the benefit of others'.\(^{47}\) Property and obligation are then inextricably joined. It seems the concept of the trust 'is unstable, oscillating between an obligational and proprietary perspective';\(^{48}\) it is only by reference to both the proprietary and obligational aspects of trust that trust law can

\(^{43}\) Ibid, 242.  
\(^{44}\) Re Brockbank [1948] Ch 206.  
\(^{45}\) Cowan v Scargill [1985] Ch 270.  
\(^{46}\) Parkinson, above, n 34, 678.  
\(^{47}\) Ibid, 680.  
\(^{48}\) Penner, above, n 13, 267.
be understood and applied. Neither aspect can be escaped. Even if the trust is regarded as obligational, the trustee's obligations are still with respect to property and are fashioned accordingly. Thus, if the trustee misappropriates property, it is of little relevance whether trust is best explained by reference to 'legal' and 'equitable' ownership or by reference to the trustee's ownership subject to enforceable equitable obligations. In either case, the beneficiary's remedies are shaped by reference to the property and are limited to the property or its value. The fund must be reconstituted.

(ii) Personality

Trusts differ from other legal relationships in further ways which impact upon the issue of remedy. The trust relationship is unique because of the position of the players. For example, the existence of the trust is not dependent upon the trustee. A trust will not fail for want of a trustee, if the trustee dies, retires or vanishes. The court will replace the missing trustee because the institution of the trust is more important than the personality of the incumbent. While it is widely used shorthand to say that the trustee owes duties to the beneficiary, it is perhaps more accurate to say that the trustee owes duties to the institution of the trust. Thus, a plaintiff with a beneficial interest in a trust can enforce the proper performance of the trust, but cannot enforce fulfillment of any duties to her as an individual; rights only flow from her character as a beneficiary. Because the trustee

49 Glover sums up neatly here: 'Through the creation of the “trust” equity has conveniently bridged the ownership and obligation divide': J Glover, *Equity, Restitution and Fraud* (Sydney, LexisNexis Butterworths, 2004) 13.

50 Penner, above, n 13, 267, suggests that this is another aspect of trust that is not satisfactorily explained by an obligational exposition of trust.

51 Therefore, if a beneficiary sustained personal injury as a result of negligent behaviour by the trustee, the trustee cannot be sued for breach of trust. The duty the trustee owes the beneficiary is such a situation is the duty he owes any neighbour to avoid injuring the beneficiary personally. The beneficiary's status as beneficiary is irrelevant.

52 For this reason, moneys received from a trustee subsequent to a breach of trust are usually not paid directly to the beneficiaries, but used to purchase assets for the trust. 'In most cases of breach of trust, the payment of money to beneficiaries would not be an adequate substitute for performance of the trust. Most trusts are created for the purpose of managing assets over an extended period of time. The important factor is that the settlor chose not to make a gift directly to the beneficiaries, but to create a trust for their benefit. If a breach of trust, causing a loss of trust assets, led to the payment of compensation directly to the trust beneficiary, this would have the effect of collapsing the trust in whole
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owes obligations to the institution of the trust, his primary responsibility is to account for the trust fund. Other duties, such as the duty to supply information to the beneficiaries, may reflect 'the court's inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts.'

(iii) Performance

Most importantly, trust is a rare case in the law where performance of the trust is enforced, rather than a substitute of performance accepted. This differentiates trust from common law doctrines such as contract, where the secondary obligation (to pay damages for non-performance) is generally accepted in the place of fulfillment of the primary obligation (to perform the contract as promised).

Damages for non-performance of the trust are simply not sufficient; performance of the trust is enforced by way of taking of accounts, or other orders necessary for the administration of the trust. This is in part due to the institution of trust being what counts, and has no qualms about ordering specific performance.

See for example, *Pickering v Smoothpool Nominees Pty Ltd* (2001) 81 SASR 175.

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to the fact that the personalities of the players are not as important as the institution of the trust. This remedial attitude enhances the unique variety of wealth management in which trustees and beneficiaries take part. Damages for non-performance are not accepted because nothing but performance can satisfy the relationship of functional trust that is established by the express trust. This has implications for the way in which equitable remedies for breach of trust should be regarded.

A recent example of this principle is provided by Pickering v Smoothpool Nominees Pty Ltd. The trustee denied the existence of a trust over an abalone fishing licence. The trustee alternatively argued that, in any event, he should be entitled to keep the abalone licence and that the beneficiary should be satisfied with damages. This was unsuccessful. Once the existence of the trust was accepted, the trustee's argument that substituted performance was adequate could not stand.

(iv) Conclusion: the nature of trust

Trust exists only as a method of asset management, whereby the legal title is held by a trustee and the equitable title is held by the beneficiary, or, at the very least, the beneficiary is able to enforce performance of the trust. The primary concern of trust is with property, and all the obligations stemming from the relationship refer back to that property. Trustees and beneficiaries are only bound together by the property that is held between them. Trusts must be performed properly; damages are not an acceptable substitute for performance. Usually, when the trust fund has been damaged, the trust must be performed through reconstitution of the trust fund. The remedy that accomplishes reinstatement of the trust fund is thus dictated. This can be either in specie or by monetary equivalent, which is called 'equitable compensation'.

58 See Elliott, above, n 8, 590.
59 It is not necessary that there be any real trust placed by a beneficiary in a trustee. There may be real trust, or the beneficiary may have no knowledge of the trustee or even of the trust. Because the law gives full and complete ownership of the trust asset to the trustee, the trustee is legally empowered to do anything at all with the asset and the beneficiary must rely on the trustee's good nature and equity to enforce any rights against a trustee. Therefore, functionally, the beneficiary reposes trust in the trustee.
60 (2001) 81 SASR 175.
The basis of the remedy of equitable compensation when it is called for in response to a breach of trust is therefore restorative. What is being discussed here is failure to perform the trust. A cornucopia of remedies is available for failure to perform the trust; but where the trustee is unable to account for the trust fund and must reconstitute it by payment of money, that award of money is restorative. The trust fund is being restored to its correct position. Such awards are also compensatory because otherwise the trust would suffer a loss. Rickett has commented that ‘these awards are compensatory, even though they are hidden behind the language of accounts’. But the reverse is equally true. What is regularly called ‘equitable compensation’ is more readily understood as the trustee being called upon to account for the trust fund; thus accounts regularly hide behind the language of compensation for loss. The terminology used may be ‘equitable compensation’, but we should not lose sight of the fact that, in reality, the trust fund is being reconstituted. Equity’s interest in restoration is being satisfied.

3.4 RECONSTITUTION FOLLOWING FAILURE TO PERFORM THE TRUST

(i) The Cases

The best examples of the remedial response to this type of case are the venerable decision Re Dawson, and its relatively new companion Youyang Pty Ltd v Minter Ellison Morris Fletcher. Re Dawson concerned a trustee who misappropriated trust funds. He took NZ£4,700 in 1939, when New Zealand and Australian currency were at parity. The breach of trust was outstanding when the matter came before Street J in the NSW Supreme Court in 1966. By this time, New Zealand currency was worth more than its Australian counterpart. The question arose whether the breach of trust fell to be remedied by reconstitution of the trust fund in the amount taken at the time of the breach (£4,700), or the

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61 Rickett, above, n 8, 227.
62 [1966] 2 NSWR 211.
63 (2003) 212 CLR 484.
amount it would then have taken to purchase NZ£4,700 to effect proper compensation (A£5,829).  

The primary breach of trust was failure to perform the trust in that the trustee had misappropriated the sum. The trustee had not accounted for the trust fund (he had, in fact, died in the interim). His estate was therefore required to reconstitute the fund to the level that should have been attained. Issues of foreseeability and remoteness were entirely irrelevant to this enquiry. The fund required reconstitution, no matter that it may not have been foreseeable that the two currencies would eventually achieve different values. Until the fund has been reconstituted, the breach of trust continued. Only the larger sum could reconstitute the fund.

Youyang demonstrates a more modern use of the express trust, as compared to the traditional trust in Re Dawson. There, a firm of solicitors acted as trustee in an investment scheme. The trustee was to receive $500,000 from the investor and obtain an agreed security, before paying over the sum to an investment company, ECCCL. ECCCL was also a client of the solicitors. The solicitors were required under the terms of the trust to hold the sum of $500,000 provided by the plaintiff investor and to disburse it in accordance with the investment agreement, but not otherwise. The solicitors paid the sum over to ECCCL without obtaining the correct form of security. Thus, the solicitors as trustee had not performed the trust. The trustee had to reconstitute the trust fund in order to account for it. The fact that subsequent events meant that the fund would have been lost in any event (novus actus interveniens in the language of tort) was irrelevant. While the breach of trust continued, so did the trustee’s liability to account for the trust fund in full. Both Re Dawson and Youyang are clear examples of reconstitution following failure to perform the trust.

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64 The reference to Australian ‘pounds’ rather than ‘dollars’ in the report may have been a mistake. Australia adopted decimal currency some four months prior to the decision.

65 (2003) 212 CLR 484.

66 [1966] 2 NSWR 211.
On the other hand, the decision in *Target Holdings Ltd v Redferrs* causes difficulties. In *Target*, a purchaser contracted to buy a property and then entered into a series of dummy contracts with related entities, each one at a higher price. A financier (Target) advanced moneys based upon the final and wildly inflated contract price. Redferrs acted as solicitors for both the purchaser and the financier. The financier paid the amount being advanced into Redferrs’ trust account, with instructions that the money was to be paid over to the vendor upon receipt of the usual security and conveyancing documents. Redferrs in fact paid over the moneys before obtaining the documentation. Redferrs admitted that the payment over had been made in breach of trust. The property market crashed, the purchaser defaulted, and the financier incurred a loss upon repossession and sale of the property. Rather than having to prove deceit against the solicitors (who knew about the earlier contracts), the financiers attempted to enter judgment by default on the basis that there had been a breach of trust by Redferrs, a loss, and that therefore Redferrs had to reconstitute the fund.

The House of Lords set the default judgment aside, largely on the basis that it was not proved that the breach of trust had caused the loss. This appeared to be bringing a new element into actions for breach of trust. The decision indicated that reconstitution of the trust fund would not be warranted, unless causation with respect to the loss could be made out. A number of commentators understood this to mean that:

The House of Lords accepted the immediate duty to restore money or property wrongly disposed of, but insisted that the breach must cause the loss. Where it would have happened anyway causation is not established and there is no liability.

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67 [1996] 1 AC 421 ('Target').
68 See Chapter 2.3 (v).
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Rickett has criticised this decision, on the basis that two different concepts involved in breach of trust appear to have been collapsed into one. While the plaintiffs presented the case as being one where reconstitution of the trust fund was automatically required, the House of Lords appear to have considered it as a case where loss consequent to breach of fiduciary duty was alleged; hence the relevance of causation. This criticism is well-founded.

The leading judgment in Target is that of Lord Browne-Wilkinson, who noted that the basic right of the beneficiary is to have the trust duly administered. But confusion arose when his Lordship noted a difference between 'traditional trusts, where the only way in which all beneficiaries' rights can be protected is to restore to the trust fund what ought to be there' (which, if not possible by way of specific asset restitution must be done by way of equitable compensation) and trusts where the trust has come to an end, where compensation can be made to the beneficiary directly.

Lord Browne-Wilkinson then developed this difference into a distinction between traditional trusts where ongoing stewardship is required, and modern commercial trusts that are really bare trusts. His Lordship had '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 this did not allow the wholesale importation of an obligation to restore the trust fund once the underlying transaction had been completed. Meagher, Heydon and Leeming refer to this division of trusts into traditional or commercial

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72 Target Holdings Ltd v Redfern [1996] 1 AC 421, 434.
73 Ibid, 435.
74 Ibid, 435-6.
75 Ibid.
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varieties as creating 'hitherto unnoticed and not easily explicable distinctions'. Capper says it 'offers no real insight.'

More importance lies in Lord Browne-Wilkinson's acceptance that some degree of causal link was required between the breach of trust and the loss. Even in cases of traditional trusts, where the trustee has to restore to the trust what ought to be there, his Lordship indicated 'some causal connection between the breach of trust and the loss to the trust estate' is required. This seems at odds with the Re Dawson assertion that causation, remoteness and foreseeability have no application to reconstitution of the trust fund.

(ii) Reconciling Re Dawson and Target

(a) Is equitable compensation necessary - is account a sufficient remedy?

How then can Re Dawson and Target be reconciled? A variety of explanations has been put forward. Capper suggests that Re Dawson concerns remoteness, rather than causation. Ipp J in Permanent Building Society (in liq) v Wheeler suggested that Re Dawson is merely authority for the proposition that common law rules as to causation, remoteness and foreseeability do not apply to breaches of trust. Another work offers no less than four explanations of Re Dawson, suggesting that in relation to Target it is possible the Re Dawson dictum applies only to traditional trusts, but not to bare trusts.

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77 Capper, above, n 69, 22.
78 Target Holdings Ltd v Redferrns [1996] 1 AC 421, 434.
80 Ibid.
81 Target Holdings Ltd v Redferrns [1996] 1 AC 421.
83 Ibid, 244, n 9.
84 Meagher, Heydon and Leeming, above, n 76, [23-015].
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Writing extrajudicially, Millett LJ suggested that the solution to the *Target* conundrum lay in resort to the remedy of account. In an influential 1998 article, Millett LJ was critical of the approach of the House of Lords describing the decision as ‘important but in some respects unsatisfactory’. Millett LJ explained why Lord Browne-Wilkinson’s explanation of causation in *Target* was misleading:

Lord Diplock has said that a contracting party is under a primary obligation to perform his contract and under a secondary obligation to pay damages if he does not. It is tempting, but wrong, to assume that a trustee is likewise under a primary obligation to perform the trust and a secondary obligation to pay equitable compensation if he does not. The primary obligation of a trustee is to account for his stewardship. The primary remedy of a beneficiary - any beneficiary no matter how limited his interest - is to have the account taken, to surcharge and falsify the account, and to require the trustee to restore to the trust estate any deficiency, which may appear when the account is taken. The liability is strict. The account must be taken down to the date on which it is rendered.

Because the solicitor in *Target* had later obtained the documents according to instructions, 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 what must be treated as trust money notionally restored to the trust estate on the taking of account.

In short, the trust had been performed and there was nothing else requiring account.

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86 Millett, above, n 57, 224-7.
87 Ibid, 223.
88 Ibid, 225.
89 Ibid, 227.
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(b) Account

A little more must be said about the described remedy of account. Modern lawyers tend to equate 'account' with 'account of profits'. This is not what is meant here. The beneficiary can call for an account at any time, whether or not there has been a breach of trust. The beneficiary can either accept, surcharge or falsify that account. Surcharge occurs in the following circumstances:

If the beneficiary is dissatisfied with the way in which the trustee has carried out his trust- if, for example, he considers that the trustee has negligently failed to obtain all that he should have done for the benefit of the trust estate, then he may surcharge the account. ...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.

On the other hand, falsification is concerned with unauthorised disbursements:

Where the beneficiary complains that the trustee has misapplied trust money, he falsifies the account, that is to say, he asks for the disbursement to be disallowed. ...(the trustee) will be required to account to the trust estate for the full amount of the disbursement -not for the amount of the loss. That is what is meant by saying that the trustee is liable to restore the trust property; and why common law rules of causation and remoteness of damage are out of place.

In summary then, according to Millett LJ, the appropriate remedy for breach of trust is account. If the basis of the alleged breach of trust is negligent performance, such that the trust suffers a loss, the account is surcharged. If the basis of the alleged breach is misapplication of funds, the accounts are falsified, and the trustee is required to account to

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90 This may indeed be what Lord Browne-Wilkinson was getting at with his observations concerning bare trusts. If the transaction is performed fully, presumably there are no more trust duties to be performed.
91 See generally, Meagher, Heydon and Leeming, above, n 76, Chapter 25.
92 Millett, above, n 57, 225-6.
93 Ibid, 226. This view is essentially identical with the statement by Street J in Re Dawson. However, Chambers, above, n 52, 7, describes the action somewhat differently: 'an account on the basis of willful default is used to obtain compensation for loss'.
the trust fund for the full amount of the disbursement - the account is taken as if the money had never been disbursed.

The Millett argument has considerable support. Christopher Nugee QC points out that this explanation is more convincing than the explanation that the purpose of the action is to compensate the beneficiary, because it disposes of a number of doctrinal problems:

For example, can a member of a scheme sue for breach of trust when his own pension benefit is unaffected? ...And what is the legal basis under which a new trustee can sue a former trustee for breach of trust (as he undoubtedly can)? ...if the action is to compensate the beneficiaries for losses, then how does the cause of action migrate to the new trustee? ...

The solution to these condundrums is to bear in mind that the liability of a trustee for a breach of trust is not in essence a liability to compensate for loss at all; it is fundamentally a liability to account...

This liability to account applies to breaches of trust because of the unique feature the trust has over other fiduciary duties, namely the existence of trust property. Account completely fulfils equity’s restoration interest, because the trustee must reconstitute the fund.

Getzler has addressed the Millett argument at length. His main objection to the use of account as a remedy is that historically this kind of account was only available in cases of:

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94 C Nugee QC, ‘Suing for Losses to a Pension Scheme- Some Issues’ (2001) 15 Trust Law International 83, 84. Nugee continues at 84-5: ‘This now answers the questions I posed earlier. Since any beneficiary is entitled to have the trustee account in this way, any beneficiary can sue for breach of trust even if he cannot demonstrate any loss to him personally: he has a right to have the trust fund reconstituted to what it ought to be. ...

And it also explains in my view why the new trustee can sue the former trustee for breach of trust: on being appointed he is entitled to have the trust fund handed over to him intact. .....In doing so he is not enforcing the beneficiaries’ rights to compensation but enforcing his own right to have the fund fully and completely constituted in his hands. (And it of course follows...that the (sum) is not then held on trust to compensate the beneficiaries - it is held on the same trusts as the rest of the fund).’
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continuing fiduciary relationship involving general attornment...(which) limitation would cause difficulties in applying the doctrine to temporary bare trusts as in Target. ...Hence the equitable account action cannot easily be applied to remedy losses outside a narrow band of fiduciary relationships, namely continual and custodial trusteeship. Viscount Haldane was well aware of the account remedy when he decided Nocton, as is amply demonstrated by the authorities cited in the judgment; but he chose not to investigate its potential.\textsuperscript{95}

Getzler's reading of history may be accurate.\textsuperscript{96} But in fairness to the Millett argument, the following observations must be made. First, the argument was only concerned with breaches of trust. There is no sense of an attempt to extend the account remedy to non-custodial fiduciary situations. Secondly, Getzler's resort to Viscount Haldane's speech in Nocton\textsuperscript{97} appears misconceived. Target\textsuperscript{98} undoubtedly concerned a breach of trust, bare or otherwise. There was no breach of trust in Nocton because Nocton was not a trustee. The gist of the action in Nocton was the conflict of interest in which Nocton found himself. Those complaints could also be made by the financier in Target. But importantly they were not - Target was argued as a case of breach of trust.\textsuperscript{99} Therefore, the fact that Viscount Haldane did not employ the account remedy in Nocton is irrelevant. Getzler's objection seems to be based upon that common phenomenon - the assumption that cases concerning breaches of trust and cases concerning breach of fiduciary duties are indistinguishable. Target is a case caught in the overlap between failure to perform the trust and breach of fiduciary duty, but it should not be assumed that the rules which operate in both cases are identical.

\textsuperscript{95} Getzler, above, n 2, 250.
\textsuperscript{96} See also Hackney, above, n 53, 142-3.
\textsuperscript{97} [1914] AC 932.
\textsuperscript{98} Target Holdings Ltd v Redferns [1996] 1 AC 421.
\textsuperscript{99} No doubt the financier regretted that decision, as there appears to have been sufficient evidence of deceit, but the financier was attempting to short-circuit an expensive and possibly acrimonious argument by seeking a default judgment for breach of trust.
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The remedy of account is described in similar terms to those employed in the Millett argument in recent Australian authorities. Most importantly for Australian purposes, the Millett approach seems to have the support of the High Court. In Youyang, the court referred specifically to Millett LJ’s article, accepting that the solicitors in Target had performed the trust when they finally received the required documentation. Equally, the solicitors in Youyang were required to perform the trust by restoring the sum of $500,000 paid away in an unauthorised manner because they never received the required documentation. Accounting for the trust fund is the most appropriate method of remedying losses to the trust fund, because that most completely fulfils equity’s goal of restoration.

It would seem that equitable compensation calculated according to loss is a remedy of limited application in the context of breach of trust. Chambers comments:

with all the attention paid to equitable compensation in recent years, there is a growing misperception that it is the main method of compensating for a loss caused by breach of trust. However, it is used for that purpose only when the account is not appropriate.

Chambers explains that account may not be useful in situations where no trust assets are involved, but where some other fiduciary breach has occurred. If loss has occurred, then equitable compensation is the only manner in which beneficiaries can be compensated. Further, equitable compensation is useful where payment into the trust is no longer possible or desirable, for example, in cases where the trust has come to an end. Chambers concludes that:

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100 Glazier Holdings Pty Ltd v Australian Men’s Health Pty Ltd (No 2) [2001] NSWSC 6 (unreported, Austin J, 22 January 2001); Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484.
101 Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484.
103 Chambers, above, n 52, 16.
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The court can rely on the account as the most practical method of compensating for breach of trust and relegate equitable compensation to a subsidiary role to be used only when the account is no longer practical.\(^{105}\)

Chambers splits equity's remedies here into distinct categories, namely, account and equitable compensation. Account is the method by which the trustee accounts for performance of the primary obligations of trust. Equitable compensation is available where account is unhelpful, or for fiduciary breaches not involving trust assets. In Chambers' view, the amount a trustee would have to pay by way of account and the amount of equitable compensation payable in cases where account is not useful, is the same.\(^{106}\) This view is shared by Meagher, Heydon and Leeming,\(^{107}\) and is well illustrated by the decision in *Bartlett v Barclays Bank Trust Co. Ltd (Nos. 1 & 2)*.\(^{108}\) Here, some of the trust property (shares) had become absolutely vested in possession of the beneficiaries by the date of trial. Although the award for breach of trust was payable directly to the beneficiaries who were absolutely entitled to the trust fund, compensation was quantified by what the trust fund should have stood at, but for the breach. The fact that the amount payable by way of account and the amount payable where account is not useful is the same indicates that equitable compensation in such a situation is self-limiting, and not subject to run-away potential. If the amount recoverable is equal to the amount that would be paid to the trust by a trustee subsequent to an account, then causation and calculation of the remedy remain non-contentious.

The recent decision in *Youyang*\(^{109}\) provides a good example of Chambers' points. The outcome of the solicitors' failure to obtain the bearer certificates was that 'the whole of

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\(^{105}\) Chambers, above n 52, 22.

\(^{106}\) See also *Target Holdings Ltd v Redforns* [1996] 1 AC 421, 435; *Miles v Little Caesars Casino Pty Ltd* [2001] NSWSC 33 (unreported, Bergin J, 8 February 2001).

\(^{107}\) Meagher, Heydon and Leeming, above, n 76, [23-015], agree that the measure is the same.


\(^{109}\) *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484.
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the $500,000 was dealt with by Minters in breach of its duties as trustee.' Because the solicitors' obligations as trustee fell to be performed on a certain day, by proper payment out of its trust account, there were no continuing trust obligations for the trustee to perform. Therefore, this was 'not a case of providing a remedy to restore or replenish funds thereafter to be held on trusts yet to be fully performed.' In short, reconstitution of the trust fund was not appropriate. In those circumstances, the beneficiary is entitled to receive equitable compensation, and this was exactly what the court ordered. The amount received by way of equitable compensation was exactly what would have been required to reconstitute the trust fund, had that been appropriate.

The remedy of account is more than 'not useful' in situations where no trust assets are involved, but some other breach of fiduciary duty has occurred. Account is indeed inappropriate to such cases. Account, in the sense of accounting for the trust fund, is only appropriate where trust assets are involved. This is the point of the trustee's obligations. The trustee must account for the trust property. But the trustee cannot account for a conflict that leads to a loss. In cases where breach of the conflicts rule by the trustee causes a loss, equitable compensation is the only available remedy. This usually occurs where the trustee's conflict results in the loss of an opportunity to the trust. Equitable compensation may be the only way a loss of opportunity can be reached.

According to Elliott and Edelman, confusion in this area has arisen because the words 'loss' and 'compensation' are being used in two different senses when breach of trust is discussed. The first relates to losses caused through breach of duty (such as fiduciary duty) while the second is used 'where the claim in equity is for replacement or due

110 Ibid, 498. The High Court was of opinion that the plaintiff's loss crystallised then. The lower Court (NSW CT App) had accepted that the losses were incurred later.
111 Ibid, 499-500.
112 If the trustee has breached the fiduciary obligation contained in the profits rule, he must also account to the trust for the profit illicitly made.
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application of misapplied trust property'. In the second sense, 'compensation' is really calling upon the trustee to account for the trust fund.

(iii) Conclusion: Reconstitution following failure to perform the trust

Account may be relied upon as the primary remedy for breach of the obligation to perform the trust. A beneficiary may call for an account at any time, whether or not the trustee has committed a breach of trust. Account is not dependent upon the existence of a wrong. If the trustee cannot account for the trust fund, either because the trust has been poorly performed, or because the trust fund has been misapplied, he must reconstitute the trust fund.

The inevitable conclusion is that reconstitution of the trust fund does not in any way involve considerations of causation, remoteness or foreseeability. None of those concepts are apt because they are of no use in responding to the question under determination. When a trustee has failed to account, we do not ask whether the breach caused the loss, whether the loss is too remote from the breach, or whether the loss was foreseeable at the time of the breach. We do not ask about loss at all. Instead we ask, simply, what is the trust property and has it been accounted for? None of these considerations involve questions of fiduciary breach. While the trust fund has not been accounted for, the trustee remains liable to reconstitute it. Account can fully satisfy equity's restoration interest. Equitable compensation is only necessary in cases of failure to perform the trust when the trustee is unable to reconstitute the trust fund in specie.

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114 Elliott and Edelman, above, n 8, 548.
115 Negligent performance is discussed below at 3.6.
116 However, according to Elliott and Edelman, above, n 8, 548, 'causation of loss is only apposite insofar as it establishes the trustee's responsibility for (the) disposition'.
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3.5 RECOVERY FOLLOWING THE TRUSTEE’S BREACH OF FIDUCIARY OBLIGATIONS

Trustees are clearly fiduciaries. This thesis adopts the view that the only fiduciary obligations are the proscriptive duties, not to make an illicit profit, and not to suffer a conflict of interests. This will be discussed in the next chapter. Fiduciary duties are imposed upon trustees for reasons of public policy. They are not dependant upon the holding of property. They are directed at extracting loyal performance from the fiduciary (in this case, the trustee). This division of trustees’ obligations into breaches of trust duties (requiring performance of the trust) and fiduciary duties (requiring loyalty) was specifically recognised by the High Court in Youyang.¹¹⁷

It is clear a trustee cannot retain an unauthorised profit made in breach of the profits rule. From the earliest times this has been remedied by the trustee accounting to the beneficiary for the profit.¹¹⁸ This remedy is designed to strip away any gain the trustee has made. Therefore it is not calculated according to loss. Breaches of the conflicts rule causing loss expose the trustee to liability for equitable compensation. Compensation is made to the trust fund for the loss the conflict has caused. But this is not necessarily the same as accounting for the trust fund.

Frequently, compensation for breach of fiduciary duty will have the same appearance as reconstitution of the trust fund in performance of the trust, but the two remedies are different and treated differently. Reconstitution calls for an enquiry as to what the fund should have comprised. The fund is then returned to that level, either by way of specific asset restitution or by payment of a monetary sum in substitution. Causation, foreseeability and remoteness are irrelevant to this enquiry. On the other hand, breach of the conflicts rule addresses the clash of interests that has occurred. The fiduciary trustee has been in a position where personal interest or duties owed to others have conflicted with the interests of the trust. Such conflict sounds in equitable compensation when this has caused

¹¹⁷ Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484, 501.
¹¹⁸ This can be by an account of profits, or by a constructive trust: Keech v Sandford (1726) Sel Cas T King 61; 25 ER 223; Green v Folgam (1823) 1 Sim & St 398; 57 ER 159.
loss. This is akin to specific performance of the trustee’s duty not to permit a conflict. Once the effect of the conflict is removed, the trustee’s duty is performed. Causation is relevant to this enquiry. Only losses caused by the conflict are recoverable. Losses that would still have been suffered in the absence of the conflict are beyond equity’s reach.

For example, a trustee holds intellectual property in a vaccine against equine disease on trust for beneficiaries. He is also the director of a company that sells equine vaccines. If the company develops a similar vaccine, the director may be in a position of conflict of duties; perhaps there is only room in the market for one such vaccine. If his preference for the interests of the company over the interests of the trust causes the value of the trust’s intellectual property to fall, he can be called upon to compensate the trust. The question is: what causative effect did the trustee’s conflict have on the drop in value of the intellectual property? Equity acts as if the trustee had performed his duty without conflict, and the economic effect of the conflict must be removed. However, if the value of the intellectual property would have fallen in any event, because a new competitor developed a better vaccine, the director is not responsible for that loss. Causation is relevant, and this drop in value that would have occurred in any event is not causally linked to the trustee’s conflict.

It is not enough that a plaintiff can identify a conflict. The conflict must be causally linked to the loss. For this reason, it was not sufficient for the plaintiff in Target to merely point to the undoubted conflict between the interests of the purchaser/s and its own interests. The plaintiff needed to be able to establish that ‘the use of Target’s money to pay for the purchase from Mirage and the other intermediate transactions were a vital feature of the transaction and therefore causative of the loss. The House of Lords could not make that assumption on the stated case.

119 If no loss has been suffered, the beneficiaries may still have grounds for complaint. For example, trustees can be removed from their office if they are in a position of conflict with the interests of the trust: Titterton v Oates (1998) 143 FLR 467; Monty Financial Services Pty Ltd v Delmo (1996) 1 VR 65.
120 Target Holdings Ltd v Redfearn [1996] 1 AC 421.
121 Ibid, 440 (Lord Browne-Wilkinson).
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Compensation subsequent to conflict will often coincidentally result in reconstitution of the trust estate. So, for example, if the trustee purchases trust property at an undervalue, compensation for the conflict of interest and reconstitution of the trust are identical. In both cases the amount required to either compensate or reconstitute is the difference between market value and sale price. It is usually easier for the beneficiary to seek reconstitution of the trust fund in cases where the two sums coincide. These cases of coincidence have added to the confusion as to causation in the area. Causation is effectively irrelevant in cases of reconstitution. Coincidence cases create the illusion that causation is also irrelevant in conflict cases. But that is not so. Once the effect of the conflict is removed, the beneficiary has no further complaint. Absence of the conflict may or may not account fully for the loss. The mortgage fraud cases involving drops in property prices are typical of this difficulty. Even when the effect of the conflict was removed, loss would still have been suffered because the value of property had fallen.

Occasionally, it may be arguable that the whole transactional loss is caused by the conflict. This may have been the case in Target. It is arguable that the non-resolution of the conflicting duties the solicitors owed to two parties enabled the entire loss to be incurred. Had that been so, the whole loss should have been recoverable. Target may well have been able to recover compensation for the loss caused by the conflicting duties owed by Redferns (assuming there were any such losses). But that loss needed to have been causally established. Target needed to show that, but for the conflict, it would not have completed the transaction at all. If that could not be shown, and the losses were really due to a market collapse, it is assumed that the causal link would not be made out.

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122 The transaction would also be susceptible to an order for rescission, which would also coincidentally reconstitute the trust fund.
124 Target Holdings Ltd v Redferns [1996] 1 AC 421.
125 Unfortunately, it is not possible to say what happened in Target subsequent to the House of Lords decision. The defendants were given unconditional leave to defend, but the plaintiffs may well have decided to pursue claims for negligence or breach of fiduciary duty. It is assumed the parties settled out of court.
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The enquiry as to loss following conflict resembles reconstitution of the fund, often (but not always) coinciding completely with it. It performs the same function in that it puts the trust in the same position as if the trust had been properly performed. But the focus is different. It looks to conflict in the facts and removes the effect of the conflict; therefore causation is relevant. Only losses caused by the conflict are recoverable.

3.6 NEGLIGENT BREACH OF TRUST – A FIDUCIARY BREACH?

Failure to act in the beneficiary's best interests according to an objective standard of care is not a breach of fiduciary duty. It is best seen as an emanation of the primary duty to perform the trust. Although there may be no overall failure to perform the trust, negligent breaches of trust are truly failures to perform the trust properly. The policy objectives dictated by the trustee's holding of the trust property indicate that the trustee must account for the trust fund, and reconstitute it if necessary.

However, the trustee is not the insurer of the trust fund. The trustee is not liable for events beyond control. Even prior to legislative intervention, the courts accepted the limited liability of the trustee. The classic statement is contained in Speight v Gaunt:

A trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee.

Most statutory definitions of the trustee's duty of care are variations on this theme.

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126 Re Bulmer [1937] 1 Ch 499. See also Ford and Lee, above, n 2, [17135]; P Birks, above, n 19, 36: 'The trustee's central obligation is to preserve and promote the interests of the beneficiaries. This obligation does not extend so far as to make him liable for every loss.'

127 Speight v Gaunt (1882) 22 Ch D 727, 729 (Sir George Jessel, MR).

128 Some make distinctions between the professional and amateur trustee, requiring a higher standard for the professional: See Trustee Act, 1958 (Vic) s 6. Others drop the reference to the ‘business’ person, and instead focus more on the requirement that the trustee act morally. See s 52, Superannuation Industry (Supervision) Act 1993 (Cth).
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A series of English cases in recent years has stressed the tortious nature of this trustee duty. Their effect is that the duty to take care in the management of the trust fund is not part of the ‘irreducible core of obligations owed by trustees’ enforced by the courts of Equity. The duty to manage trust property is a core duty, but a duty of care in that management is a supervening tortious concept. In *Armitage v Nurse*, Millett LJ specifically excluded the duty of care, saying:

I do not accept... that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.  

So, while it is a breach of a trustee's duty to fall below the requisite standard of care, it is said that this is a negligent breach and not a breach of the fiduciary obligations owed by a trustee. 

This dissection of trustee's duties into duties that are trust duties and duties better seen as common law duties is relatively new, and reflects a similar development in fiduciary law. It has for some time been argued that all duties owed by fiduciaries are not necessarily fiduciary duties. By extension, the recent English cases argue that not all breaches of trust should be remedied as fiduciary breaches, but should be assessed according to common law concepts where appropriate. The split between contractual, tortious and fiduciary duties is conceived as involving a closer examination of fiduciary duties. Instead of assuming that all duties owed by a fiduciary are therefore fiduciary duties, the content of the fiduciary obligation is closely considered. This consideration reveals that true fiduciary duties are prescriptive in nature, rather than prescriptive. Thus visualised,

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129 *Armitage v Nurse* [1998] Ch 241, 253-4. Millett LJ's opinion has been generally well received. See Birks, above, n 19, 49: ‘Is a breach of the principal prescriptive obligation of skill and care in promoting the interests of a beneficiary a distinct wrong? In particular, is it distinct from contractual or tortious negligence? Some encouragement had been given to the view that it was and that different rules could therefore be justified. In a powerful judgment Millett LJ, with the full backing of the other members of the Court of Appeal, scotched that notion. He was quite right.’  
130 This is discussed in Chapter 4.
there are only two true fiduciary duties; expressed negatively they are the duty not to make an unauthorised profit, and the duty not to suffer a conflict of interest. Any other duties a fiduciary may owe are prescriptive. Thus the duty to act in a non-negligent manner is prescriptive, a positive duty to take care. It does not stem from the prescriptive profits and conflicts rules.

Birks has examined whether the duty of care owed by a trustee is any different from the duty of care owed in negligence. He comments:

It cannot be said that the standard set by the prudent person from the world of business is different from that of the passenger on the Clapham bus. Reasonableness is always fine-tuned to context. No more is involved here. If that is right, contentually there is no relevant difference at all between the two duties. In the case of the disinterestedness limb the content is indisputably different. Pursuit of an interdicted interest is thus a distinct wrong. Contentually, however, default in the promotion and preservation of the interests of the beneficiary is not.

Other writers also take this position. Recently, the New Zealand Court of Appeal added its support to this approach. However, the idea that negligent breaches of trust should be dealt with according to tortious principles is not necessarily accepted. Getzler criticizes this view as radical judicial creativity that strikes at the heart of the fiduciary tenet that innocent breaches are regarded as seriously as dishonest breaches:

The new dualistic theory of trust obligations - some fiduciary, some not - invites the questions: 'How can a fiduciary trustee be said to be loyal to his beneficiary if

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131 Birks, above, n 19, 50.
132 For example, Nugee, above, n 94; Chambers, above, n 52; Elliott and Edelman, above, n 8.
he takes no care for the running of the trust?’ and ‘What use is a trust obligation if the obligee is protected from liability for lack of diligence?’

This criticism has some resonance. Fiduciary obligations have long been thought to emanate from the trust paradigm. If there is greater room for saying that all breaches by those who are fiduciaries but not trustees are not necessarily fiduciary breaches, it is because the relationship between a fiduciary and principal is essentially a lesser thing than the relationship between a trustee and a beneficiary. The distinguishing feature between trust and all other legal relationships is that trust involves full legal ownership being vested in the trustee entirely for the benefit of someone else. To allow a valid recognition that all those who owe fiduciary obligations are not necessarily breaching them by their wrong to become a theory that not all trustee obligations concerning trust property are fiduciary may be confused thought.

Trust is more than the mere depositing of an asset with a trustee. Trust has for several centuries at least involved active management. As this is so, it may not be sufficient that a trustee fulfil his or her duty by merely being honest. It can be argued that trust may contain as a ‘core’ duty the obligation to manage the assets in a non-negligent fashion. Traditionally, the standard of care expected of a trustee has not been particularly high, and this generosity is on the whole continued in the statutory standards applied to trustees. There may be no need to further lower expectations concerning trustee’s behaviour, and indeed further lowering may obliterate trustee’s special duties in relation to property. Even if it is accepted that the ‘core’ trust duties do not include a duty of care, the questions Getzler poses must still be asked: can a careless trustee be said to be loyal; does the institution of trust retain any meaning if a trustee can act pretty much as he pleases?

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134 Getzler, above, n 2, 255.
135 This is not to deny that a non-custodial fiduciary is capable of inflicting great economic loss upon the beneficiary. However, because the trustee is the holder of property, it is argued that a non-custodial fiduciary cannot owe a greater level of duty than a trustee.
136 Although the earliest uses and trusts did not require active management of the property, a duty to manage carefully gradually evolved until its clearest expression in Speight v Gaunt (1882) 22 Ch D 727.
137 Austin, above, n 31, 169-70.
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Getzler's views may have received some important Australian support recently. In *Youyang* a unanimous High Court bench cast some doubt on the English authority mentioned above. Their Honours commented that 'there must be a real question whether...any assimilation even in this limited way with the measure of compensatory damages in tort' is warranted. Their Honours noted that:

It might be thought strange to decide that the precept that trustees are to be kept by court of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.

Although *dicta*, this may indicate reluctance to follow the English and New Zealand courts in this matter. The High Court position has already attracted some criticism, Elliott and Edelman offering the opinion that '(t)his is an unfortunate suggestion which we hope Australian courts will not take up'.

All this questioning reflects the basic confusion in the law concerning breach of trust, namely, the complete equation of trust and fiduciary law. The response to questioning whether a negligent trustee has been disloyal (in the fiduciary sense) because of a lack of care, is that the trustee's duty of care is not peculiarly fiduciary, and not distinguishable from common law duties of care. This response indicates that these concerns are misplaced because they fail to distinguish between failure to perform and failure to be loyal. This is especially so if it is remembered that the trustee must still account for the trust fund. It is generally accepted that the trustee remains liable while a breach of trust has not been remedied. For example, in *Re Dawson* the trustee's estate was still liable to repair the misappropriation of funds many years later after the death of the trustee. Even if it is

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138 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484.
139 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).
140 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 500.
141 Ibid.
142 Elliott and Edelman, above, n 8, 550.
143 Birks, above, n 19, 52.
accepted that a duty of care is not an integral incident of trust, the beneficiary is still entitled to see the trust performed. Once the trust is performed, there remains no room for allegations of disloyalty. Disloyalty and poor performance are different things, and poor performance can be cured by proper performance. Equity’s restoration interests are satisfied by performance of the trust. If the trust is performed, the trust fund is necessarily restored.

It is not clear that the concerns expressed by the High Court and by Getzler have much practical application. Unauthorised payment away of trust funds, whether negligent or not, will always be a breach of trust, and the beneficiary will always be able to insist that the trust is performed. Negligence does not really enter the question, because what is being considered is performance of the trust. It is true that the court has the discretion to excuse a trustee who has acted honestly, reasonably and ought fairly to be excused from the consequences of the breach. But it is highly unlikely that a trustee who has paid away the trust fund in breach of trust can be so excused. If the trustee has been negligent in performance of the trust, the court still requires that the trust be performed to the standard that would have been achieved by a reasonable trustee.

If the trustee has paid away the trust fund improperly, then it must be accounted for. If the trustee has paid the trust fund away properly, but negligently, he must account for the trust fund as if he were a reasonable trustee. And if he has paid away the fund properly, and not negligently, but a loss has occurred, he should not be liable. This may be illustrated with the following table:

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144 [1966] 2 NSWR 211.

145 Trustee Act 1958 (Vic) s 67; Trustee Act 1925 (NSW) s 85; Trusts Act 1973 (Qld) s 76; Trustees Act 1936 (SA) s 56; Trustees Act 1962 (WA) s 75; Trustees Act 1898 (Tas) s 50; Trustee Act 1980 (NT) s 49A. Prior to enactment of these sections, it was thought that courts of equity could not excuse trustees from personal liability, however arising. This appears to be the system being now advocated by Getzler.

146 Speight v Gaunt (1882) 22 Ch D 727.

147 For example, see Crook v Smart (1872) 11 SCR (NSW) Eq 121, where trustees had invested trust money in unauthorised investments; Fouche v The Superannuation Fund Board (1952) 88 CLR 609, where the trustee had invested money in a speculative investment.

148 For example, in Smith v Hassall (1899) 20 LR (NSW) Eq 165, a trustee was liable for relying upon a valuation given by a non-independent valuer, although the investment itself was of an unobjectionable
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<tr>
<td>Unauthorised payment, with fault.</td>
<td>To account for trust fund.</td>
<td>No. The trustee will not have been honest or reasonable.</td>
<td>Fund reconstituted.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unauthorised payment, negligent.</td>
<td>To account for trust fund.</td>
<td>No. The trustee is not likely to have been reasonable.</td>
<td>Fund reconstituted.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authorised payment, negligent.</td>
<td>To account for the trust fund as a reasonable trustee.</td>
<td>Possibly, if honest, reasonable, etc. But query whether a negligent trustee is 'reasonable'.</td>
<td>Fund reconstituted, to level achievable by reasonable trustee, (but trustee might be excused from personal liability).</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authorised payment, made without negligence.</td>
<td>None, because the trust will have been properly performed.</td>
<td>Not applicable.</td>
<td>Trust carries loss, because the loss not 'caused' by the trustee.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Breach of the conflicts rule (eg, conflict of interest and duty).</td>
<td>To repair loss.</td>
<td>Unlikely, Possibly not honest, reasonable in an equitable sense; and unlikely that breach ought fairly be excused.</td>
<td>Effect of the conflict is removed when loss is compensated.</td>
</tr>
</tbody>
</table>

Accordingly, it follows that where there is a breach of the duty of care causing loss to the trust estate, there is no fiduciary breach. 'Mere negligence, even by a trustee, does not attract a fiduciary approach to remedies, because the policy reasons for deterring abuse

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 type. In *Pateman v Heyen* (1993) 33 NSWLR 188, a trustee was liable for failure to insure the trust property.
of a duty of loyalty then have no application'. Negligence in management does transform into disloyalty for the purposes of the profits and conflicts rule merely because a trustee is a fiduciary. As the trustee's breach of the duty of care is simply another emanation of the tortious duty of care (with reasonableness as appropriate to the trust circumstance) quantum falls to be assessed along tortious lines. The beneficiary is not denied a remedy. Any beneficiary can insist the trust is performed, and the trust fund reconstituted to the state in which it should have been had the trustee exercised the appropriate level of care. This situation is illustrated in the third example in the table above. Once that is done, there is no room for complaint about disloyalty. There is no need for a different standard of calculation of remedy. It is not, as the High Court fears, that the trustee is not being kept up to his duties. Rather, it is that he is not being made the insurer of the trust against all losses, however they occur. If he is negligent, he still has to account for the trust fund, but he is not made accountable for losses beyond control. The trustee's negligence must amount to making an unauthorised profit, or the preferring of his own interests (or another's) over the interests of the trust before it can be called 'disloyal'.

Despite the recent High Court observations, the balance of opinion tends to the view that negligent breaches of trust that do not involve disloyalty should be remedied through compensation calculated as for negligence, rather than treated as a breach of fiduciary duty. But contextually relevant factors must be borne in mind. The negligence standard considered is that of a reasonable trustee, who must reconstitute the fund to the level that would have been achieved by a reasonable trustee. More importantly, the proprietary aspects of trust ensure that the beneficiary is not denied a remedy. The trustee must still account for the trust property.

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150 'Rhetorical appeals to the sanctity of the trusting relationship are misplaced where the breach consists in carelessness rather than disloyalty': Elliott and Edelman, above, n 8, 550.
151 This may include concepts such as remoteness, novus actus interveniens, contributory negligence and the like: Millett, above, n 57, 226 suggests 'it must be right to adopt the common law rules of causation and remoteness of damage to their fullest extent'. Realistically however, contributory negligence is unlikely to play a large part, as it is very difficult to imagine a situation in which a beneficiary can be said to have contributed to the loss, given that the trustee has full legal control of the trust estate. Contributory fault is discussed in Chapter 7.
3.7 BREACHES UNRELATED TO THE TRUST FUND OR FIDUCIARY DUTY

The trustee owes duties as a trustee only in respect of the trust property. The trustee owes the beneficiary no other trust duties. If the trustee owes separate duties to the beneficiary, their source lies elsewhere; perhaps in contract or tort. The beneficiary's status is irrelevant. Breaches of these duties are not breaches of trust or fiduciary obligation. This type of case is rare, and is best demonstrated by the recent New Zealand decision Bank of New Zealand v New Zealand Guardian Trust Co Ltd.\(^{152}\)

New Zealand Guardian Trust Co Ltd (NZGT) was appointed trustee under a debenture deed securing advances by a syndicate of banks to an investment company, Comsec. NZGT failed in a duty imposed by the trust deed to detect certain breaches of the loan by Comsec. Upon discovery, the banks all waived the breach, and all but one bank (NAB) in fact increased advances to Comsec. Comsec failed when the property market crashed. The Bank of New Zealand took over NAB's interests in the loan syndicate, and sued NZGT in its own account and as successor to NAB, alleging negligence by the trustee in fulfilling its duties under the trust deed. NZGT admitted the breach of the trust deed duty, but argued causation, remoteness and contributory negligence on the part of the banks. The plaintiff claimed NZGT was in breach of a fiduciary duty, and that therefore common law limitation concepts did not apply.\(^{153}\)

Fisher J at first instance said that NAB would have altered its position had it known of the Comsec breach of loan conditions in a timely fashion, however, his Honour confined fiduciary duty to the duty of loyalty.\(^{154}\) Loss to the trust fund occurred when there was a diminution in the value of the property held on trust,\(^{155}\) but trust loss cases, involving the right to have the trust fund reconstituted, had no direct equivalent in fiduciary duty.\(^{156}\)


\(^{153}\) This appears to be an example of another variant on the confusion between breach of fiduciary duty and breach of trust.

\(^{154}\) [1999] 1 NZLR 213, 240.

\(^{155}\) Ibid, 244.

\(^{156}\) Ibid, 243.
Chapter Three: Breach of Trust

Further, not every breach of trust is automatically a breach of fiduciary duty. ‘Mere negligence, even by a trustee, does not attract a fiduciary approach to remedies because the policy reasons for deterring abuse of a duty of loyalty then have no application.\(^\text{157}\) In this case, NZGT’s breach did not damage or diminish the trust property\(^\text{158}\) and it could not be said that the breach was a breach of the fiduciary duty of loyalty.\(^\text{159}\) All that was left was a contractual duty of care. If the plaintiff was to recover compensation on that basis, it was necessary to satisfy common law principles, without the benefit of the forensic advantages of equity.\(^\text{160}\)

On appeal to the Court of Appeal, Gault J\(^\text{161}\) identified the plaintiff’s claim as one of loss of opportunity to depart the loan facility.\(^\text{162}\) This opportunity was not trust property and therefore the claim was not one for reconstitution of the trust estate.\(^\text{163}\) Trust principles did not apply. Tipping J agreed there was no loss to the trust estate, or breach of fiduciary duty.\(^\text{164}\) In short, the breach under discussion was not truly a breach of trust. It was a breach of contractual duty owed to the beneficiary by the trustee, but because it was not a duty relating to performance of the trust or a breach of fiduciary duty, equity had no special interest. It fell to be dealt with according to the law which was the source of the duty.

\(^{157}\) Ibid, 246.
\(^{158}\) Ibid, 252. The trust property was said to be the inchoate choses in action which formed part of the security.
\(^{159}\) Ibid, 253.
\(^{160}\) Ibid.
\(^{162}\) Ibid, 679.
\(^{163}\) Ibid, 680.
\(^{164}\) Ibid, 688.
Chapter Three: Breach of Trust

3.8 QUANTIFICATION OF EQUITABLE COMPENSATION FOR BREACH OF TRUST

(i) Introduction

The common law makes certain adjustments when quantifying damages for loss. Concepts such as causation, mitigation, remoteness, contributory negligence, aggravated damages and exemplary damages are employed. Causation questions whether the defendant’s behaviour led to the loss; remoteness addresses whether the defendant can be held responsible for the loss. Limiting issues are also considered; whether the plaintiff should have taken steps to mitigate against the loss, and, in the case of negligence, whether the plaintiff’s own actions contributed relevantly to the loss. Further, in the case of tort (and contract in Canada), the plaintiff may recover more than proven losses by way of aggravated and exemplary damages. Not all quantification concepts apply to each and every common law cause of action. Contract differs from tort; some torts are treated differently from others.

These differences are driven by the causes of action themselves. The cause of action dictates both the appropriate remedial response, and the necessary method of quantification, consistent with the overall aim of making the defendant responsible for his or her actions, but not for any more than justice requires. For breach of contract, the court must assess what monetary sum is required to place the plaintiff in position as if the contract had been performed, as this is the only way the plaintiff can be restored to his or her rightful position. On the other hand, when a tort has been committed, the court must address the

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165 Clearly there is significant overlap between the concepts, and it has been suggested there is no real sense in treating them as distinct concepts: Bank of New Zealand v New Zealand Guardian Trust Co Ltd [1991] 1 NZLR 213, 240.


167 For example, contributory negligence and exemplary damages are irrelevant to contract in Australia while mitigation is still required.

168 Intentional torts and negligence attract different remoteness rules. Some torts support nominal damages, which entitle the plaintiff to an award even in the absence of loss.

169 Hadley v Baxendale (1854) 9 Exch. 341; [1843-60] All ER Rep 461. Specific performance will not be considered in this thesis.
question of the level of compensation required to return the plaintiff to a pre-breach state. It may be that, in addition to obvious economic loss, the plaintiff has suffered injury to feelings, or the defendant has acted with a cavalier attitude that warrants the court’s attention. The differences in approach here are largely referrable to the juxtaposition of the consensual nature of contract (and the subsequent focus on rights _inter partes_) on the one hand, and the reduction of the requirement of relationship between parties (and the greater focus on public law issues) in tort.

Where, then, does equity sit? Equitable causes of action can encompass facts that extend across the spectrum, from paradigmatic relationships of trust, through ad hoc relationships as may arise in cases of unconscionable conduct, to relationships that can only be described as accidental as may occur in breach of confidence. One end of this spectrum can closely resemble contract, but the other looks much more like tort. This alone might suggest that different methods of quantification may be appropriate for different causes of action in equity too.

This thesis suggests that this is, in fact, the case. Where equitable compensation is available, it falls to be calculated along different lines, depending on which cause of action is alleged. This is appropriate and correct. Causation rules may differ for separate equitable causes of action, just as they lack uniformity for common law causes of action. It is too much to expect that, just because a remedy is administered in equity, it must therefore be exercised in one limited way.

(ii) Causation and breach of trust

Unsurprisingly, questions of causation subsequent to breach of trust very much depend upon what type of breach of trust is being considered. It is not enough to allege a breach of trust. Breaches of trust may involve non-loss situations. If so, they are

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remediable, but equitable compensation is not appropriate. Breaches of the primary duty to perform the trust do not rely upon causation. The obligation to perform the trust is an absolute one, and causation is not relevant to failures in performance. Either the trust is performed in accordance with the terms of the trust itself and the relevant law, or it is not.

Breaches of fiduciary duty, however, do rely on causation. Breaches of fiduciary duty can involve breaches of the profits rule or the conflicts rule. However, equitable compensation is not a remedial response to breach of the profits rule. Breaches of the conflicts rule attract equity's causation standard, the 'but for' test. If a plaintiff seeks compensation for a breach of trust that cannot be said to involve diminution of the trust fund, or involve lack of loyalty, causation is determined according to common law standards. These three separate situations will now be addressed.

(a) Causation after breach of trustee's obligation to perform the trust

Not all losses incurred by the trust can be recovered. The trustee is not the insurer of the trust. But the trustee is required to account for the trust fund at any time, whether or not there has been a breach of trust. To this extent, causation is irrelevant. If the trust fund cannot be accounted for, it must be reinstated to the extent of the shortfall. In circumstances where account is not made, causation, as Street J put it in Re Dawson, does not 'readily enter into the matter'. Causation of loss is irrelevant because that question is not being addressed.

When the trust fund remains unreconstituted, remoteness is also irrelevant. Again, this is because that is not the question being asked. We do not ask what losses are too remote from the breach to be recovered; we ask at what level the trust fund should have

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171 For example, removal of the trustee might be appropriate: Monty Financial Services Pty Ltd v Delmo [1996] 1 VR 65.

172 It would appear that causation is largely irrelevant to gains of illicit profits: Gray v New Augarita Porcupine Mines Ltd [1952] 3 DLR 1, 15 (Lord Radcliffe); Gwembe Valley Development Co Ltd v Kothy [2003] EWCA Civ 1048, (unreported, Mummery, Hale and Carnwath LLJ, 28 July 2003) [144]. Once the gain is made in the context of a fiduciary duty no further causation questions arise.

173 This is discussed in the next chapter.

stood. This is dictated by the fact that all the trustee’s obligations emanate from the
trustee’s holding of trust property on behalf of the beneficiary. Exactly the same can be said
about the irrelevance of foreseeability. Foresight is not relevant to the state of the trust
fund. This is what is meant when courts say that equitable compensation in such cases is
assessed with the full benefit of hindsight.\(^{175}\) The only relevant question is, what would the
trust fund have comprised, but for the failure to perform the trust?

\(b\) \textbf{Causation following breach of trustee’s fiduciary obligations.}

Causation for breach of fiduciary duty is far more controversial, and will be covered
in the next chapter. However, this thesis takes the position that fiduciary obligations are a
constant and limited duty. It will be argued in the following chapter that fiduciary
obligations are comprised of the two proscriptive obligations; not to make an illicit profit
and not to suffer a conflict of interest to continue. There are no prescriptive fiduciary
duties, no positive duty to disclose, no positive duty to act, that are fiduciary duties. Any
positive duties imposed upon one who owes fiduciary duties find their source in other areas
of law.

Moreover, the proscriptive fiduciary obligations are uniform. They apply to all
fiduciaries equally, whether the fiduciary can also be characterised as a trustee, a senior
employee, or more controversially, a doctor vis-à-vis a patient. There is no \textit{extra} dimension
of fiduciary responsibility just because the fiduciary is a trustee. Trust law gives trustees an
extra dimension of responsibility through the liability to account for the trust property.
There is no basis for collapsing the trustee’s two responsibilities into one. The confusion in
this area of the law has arisen from the failure to distinguish between these two concepts.
Causation following a trustee’s breach of fiduciary obligation is therefore no different from
causation following any fiduciary’s breach of the two proscriptive obligations. This will be
discussed in the following chapter.

\(^{175}\) \textit{Canson Enterprises Ltd v Boughton & Co} (1991) 85 DLR (4\textsuperscript{th}) 129, 162 (McLachlin J); \textit{Target Holdings
Chapter Three: Breach of Trust

(c) Causation following a negligent breach of trust

Causation for negligent breaches of trust needs separate consideration. It has been argued above that negligent breaches of trust are best seen as failures to properly perform the trust, and therefore as a subset of failure to perform the trust. These then also call for reconstitution of the trust fund. But where negligence in performance is alleged against the trustee, tortious calculation principles apply to the reconstitution of the trust fund. This is not to imply that the duty to perform is reduced down to a general tortious level. Instead of acting as a reasonable person, the trustee must act as a reasonable trustee. Acts or omissions that might be forgiven in a lesser person are not necessarily forgiven in a trustee. For example, it is not generally regarded as negligent if a person carries no insurance against accidental damage to property she legally owns. This may or may not be true of a trustee—it will depend upon what a reasonable trustee would have done.\(^{176}\) What is required is that the trust be performed in accordance with its own terms and the applicable law. Negligent breaches of trust are not disloyal breaches. There is no public policy imperative in insisting on savage recovery rules. The trustee holds the trust property and must account for it, but must only account for it as a reasonable trustee. If despite the trustee’s best efforts the trust property deteriorates, the trustee does not have to make up the loss, because the trust has been performed.

For example, if strict ‘but for’ analysis is applied when trust property deteriorates, the trustee is arguably responsible for the damage by not preventing the deterioration. Absent that, the damage would not have occurred. If this were so, a trustee would be liable for every drop in share prices for failing to sell the shares and invest in something else. However, if the trustee has performed the trust to the level achievable by a reasonable trustee, no more is required. Once it is admitted that liability is not absolute, it must be accepted that tortious concepts like causation, remoteness and foreseeability are appropriate

\(^{176}\) Pateman v Heyen (1993) 33 NSWLR 188.
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for consideration. When the trustee has cured her negligence by accounting as if she were a reasonable trustee, the trust fund has been accounted for properly.

3.9 CONCLUSION

If the allegation of breach of trust stems from mere trustee negligence, rather than from fiduciary disloyalty by the trustee, then compensation should be calculated as any other breach of the duty of care would be once the appropriate standard of care is applied to the facts. Compensation for these breaches is subject to the same limitations as any other damages in negligence, such as foreseeability and remoteness. The only difference is that the standard of care applied is that appropriate to trustees. This is not to deny a remedy for negligent breach of trust, it is merely to ensure that the trustee is not held to an impossibly high duty. Once the careless aspect of the performance of the trust has been remedied, the trust has been performed. If compensation following a negligent breach of trust is regarded as ‘equitable compensation’, that term is only being used as a label. Its use should not imply a special compensatory system, and should not imply a strict liability to reconstitute the trust fund. However, as mentioned, the Australian High Court has shown some resistance to this approach. It may be that the High Court will continue to apply a strict ‘but for’ test in these cases, tempered where appropriate by application of legislative amelioration provisions.

In all other cases of breach of trust not concerning fiduciary disloyalty, the primary obligation on the trustee is to account, returning the trust property to the state in which it should have been. This is not an inquiry into loss, it is an inquiry as to the state of the trust fund. Foreseeability, remoteness and other common law limitations play no part here. Causation is exactly as described in Re Dawson. This is because the unique nature of trust requires that the trust fund be restored. The calculation of the remedy is limited to the amount required to repair the breach, but it is unlimited by common law considerations. A

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177 This is not to suggest that all tortious concepts automatically apply. There is great doubt whether contributory fault or exemplary damages, for instance, are available in cases of breach of trust. This is discussed in Chapter 7.
178 [1966] 2NSWR 211.
Chapter Three: Breach of Trust

claim for account is essentially a claim ‘for performance of a duty rather than reparation of a loss’. There is no normative meaning for foreseeability or remoteness in the context of performance of a duty. Either the duty is performed or it is not.

Recovery following breach of the fiduciary obligations of loyalty requires a causal link between the fiduciary breach and the loss. Where the trustee breaches the conflicts rule, and but for that conflict no loss would have occurred, the loss is recoverable. Once the effect of the conflict is removed though, the trust is performed. If the loss would have occurred even if no conflict was present, there is insufficient causal link between the breach and the loss. In this situation the loss will not be recoverable. Equity has no interest in restoration beyond removing the conflict. Trustee’s breaches of fiduciary duty are dealt with in the same manner as all duties of loyalty applying to all fiduciaries. Fiduciary obligations and recovery for their breach are discussed in the next chapter.

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179 Elliott, above, n 8, 590.
CHAPTER FOUR

EQUITABLE COMPENSATION FOR BREACH OF FIDUCIARY DUTY

PART A: THE AVAILABILITY OF EQUITABLE COMPENSATION FOR BREACH OF FIDUCIARY DUTY

4.1 INTRODUCTION

Of these equitable wrongs, the most wide-ranging and important—and the most difficult to pin down—is the breach of fiduciary duty.¹

Fiduciary law was equity's major growth area in the second half of the twentieth century. Finn's famous work on fiduciary obligations must in part be credited with this expansion. 'Even as recently as 1976, when Finn wrote his preface, the subject of fiduciary obligations had escaped sustained attention by legal commentators'.² Fiduciary obligations are now, however, the subject of extensive judicial opinion³ and searching legal research.⁴

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¹ A Burrows, 'We Do This At Common Law, But That In Equity' (2002) 22 Oxford Journal of Legal Studies 1, 8.
² P Finn, Fiduciary Obligations, (Sydney, Law Book Co, 1977).
³ Frankel identifies such factors as a long-term, gradual increase in the importance of fiduciary relations in the change from a feudal to a modern society, changes in perception of power and the emergence of new forms of power: T Frankel, 'Fiduciary Law' [1983] 71 California Law Review 795. Others identify other economic factors, such as the increase in modern investment products and rise in superannuation: P Russell and T Ali, 'Investor remedies and fiduciaries in rising and falling markets' (2000) 18 Company and Securities Law Journal 326.
⁵ For example, see Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41; Breen v Williams (1986) 186 CLR 71; Pilmer v Duke Group Limited (in liq) (2001) 207 CLR 165.
Nevertheless, the fiduciary obligation remains hard to pin down. Unfortunately too, in that time frame, the common law world has split in its attitudes to fiduciary obligations and remedies.\(^7\) Fiduciary law administered in Canada and New Zealand now shares little more than history with fiduciary law as understood in Australia and the United Kingdom. One writer has pithily referred to comparisons between Australian and Canadian fiduciary law as between apples and oranges.\(^8\) It should not surprise then, that given the lack of general agreement on fiduciary law, the principles concerning equitable compensation for breach of fiduciary duty have also remained elusive. It is in relation to fiduciary law that equitable compensation faces its most testing examination; its greatest challenge is with respect to causation.

The previous chapter shows that the greatest part of recovery for breach of trust is driven by reconstitution of the trust fund. The same is not true of equitable compensation for breach of fiduciary duty. To state the obvious, equitable compensation for breach of fiduciary duty does not restore a trust fund, and therefore must be performing some other task. It will be argued that the task performed in these cases is curing the damage caused by breach of the conflicts rule. This is akin to specific performance of the duty not to allow a conflict to continue.\(^9\) The principal is restored to the position as if the fiduciary duty had

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\(^8\) Sealy, above, n 4, 40.


'Equity, with its 'good man' philosophy, prevents a defendant subjected to the fiduciary duty of loyalty from denying that he was a good man': D Hayton, 'Fiduciaries in Context: An Overview' in P Birks (ed) Privacy and Loyalty (Oxford, Clarendon Press, 1997), 306.
Chapter Four: Breach of Fiduciary Duty

been performed. This shares a broadly similar objective with reconstitution of the trust fund; in that case, the trust is restored to the position as if the trust had been performed. But the twin objectives address different duties: the primary obligation to perform the trust required of trustees; and the obligation not to permit a continuing conflict, which is required of trustees and all others who owe fiduciary obligations.

These objectives answer the call of different policy imperatives. The primary obligation to perform the trust is imposed because the trustee has been invested with legal ownership of the trust property and is therefore armed with the indicia of full ownership. In this situation of risk, beneficial ownership is protected at all costs. Fiduciary obligations are similar in that the fiduciary is in a position of strength that might allow misfeasance to occur. Fiduciary obligations discourage misfeasance, but not through an insistence on the proprietary interests of the beneficiary. Rather, they describe a minimum acceptable standard of behaviour that the fiduciary must achieve. While equity insists that a trust be performed properly, its demands upon mere fiduciaries are different. First, equity insists that a fiduciary not make a secret profit, by stripping any such profit from the fiduciary. Secondly, equity will not tolerate a conflict to continue. If the principal suffers a loss as a result of such a conflict, equity sees that the principal is compensated for the damage caused by that conflict. By describing these minimum acceptable standards, and applying sanctions when those standards are not achieved, equity approximates loyal performance by the fiduciary.

This point deserves amplification. Equity does not seek to reconstitute property when a fiduciary duty has been breached. When equitable compensation is sought for breach of fiduciary duty, equity’s concern is whether or not a fiduciary duty (in particular, the conflicts rule) is breached. This thesis argues that the profits rule and the conflicts rule together describe fiduciary obligations, but are separate and distinct even though their operation can overlap. Equitable compensation is not an appropriate remedy for breach of the profits rule. Its only application is in respect of the conflicts rule because this is the only fiduciary breach that requires compensation.
Confusion has arisen because of a tendency to globally allege a 'breach of fiduciary duty'. At the level of remedy greater specification is needed. Breaches of the conflicts rule and breaches of the profits rule require different remedial responses to approximate loyal performance by the fiduciary. Profit-stripping approximately achieves a loyal outcome where the profits rule has been infringed; a situation is constructed as if the fiduciary had made the profit loyally for the principal. Equitable compensation approximately achieves loyal performance where a conflict has resulted in a loss; the outcome is as if the transaction is unaffected by the fiduciary's conflict. A secondary confusion appears to have set in at the level of causation. When equitable compensation is sought for breach of the conflicts rule, the nature and scope of the obligation breached has been overlooked. That obligation is not to allow a conflict to continue.\(^\text{11}\) Compensation is not unlimited. Compensation is limited to removal of the effect of the conflict. Once that is done, the fiduciary duty is fulfilled. Part A of this chapter examines the availability of equitable compensation for breach of fiduciary duty. Causation in cases of such breach is discussed in Part B.

4.2 THE NATURE AND SCOPE OF FIDUCIARY DUTY

(i) What are fiduciary obligations?

Fiduciary obligations famously defy definition, partly because of the nearly infinite number of situations in which they can arise.\(^\text{12}\) Greater sophistication in analysis has revealed that it is more correct to speak of 'fiduciary obligations' than of 'fiduciary

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\(^\text{10}\) See Chapter 3. 3 (i).

\(^\text{11}\) This is necessarily in respect of the transaction under inspection.

\(^\text{12}\) Perhaps the best-recognised statement of this truism came in 1911, when Fletcher Moulton LJ said, '(f)iduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations': *Re Coomber* [1911] 1 Ch 723, 728.
relations. However, certain relationships are effectively assumed to be fiduciary relationships. The trustee/beneficiary relationship is the paradigm, but emanating from that many relationships are taken as being fiduciary without much more. The solicitor/client relationship and the relationship between partners serve as the best examples. According to Smillie, the traditional categories of fiduciary relationships:

identify common contexts in which pursuit of socially valuable ends leaves a person with little choice but to entrust his property or financial affairs to another, and the loss-based common law remedies provide insufficient deterrence against self-serving conduct.

The courts have always maintained that the categories of relationships in which fiduciary obligations can arise are not closed. As Glover puts it, the recognised technique is to proceed to extension by analogy. Thus, fiduciary obligations have been held to exist in Australia in a financial advisor/client relationship, a solicitor/client relationship, a relationship between an aboriginal artist and his tribe and a relationship between parties negotiating a joint venture agreement. In more radical jurisdictions, fiduciary obligations

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13 See Austin, above, n 6, 155; Paramasivam v Flynn (1998) 160 ALR 203, 218. In 1977, Finn suggested it was ‘meaningless to talk of fiduciary relationships as such’: P D Finn, above, n 2, 1.

14 See Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41, 96-7 (Mason J).


16 For a recent example of a claim of fiduciary relationship outside the traditional categories, see Gray v Morris [2004] QCA 5 (unreported, McPherson JA, Chesterman and McMurdo JJ, 5 February 2004), where a solicitor argued that a barrister owed him fiduciary obligations. Upon appeal against dismissal of the claim, the Queensland Court of Appeal held that this was arguable.

17 Glover, above, n 6, 36.


21 United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1.
have been held to exist in a much broader range of relationships, such as doctor/patient,\(^{22}\) parent/child,\(^{23}\) and government/native tribe,\(^{24}\) but this approach has been rejected in Australia.\(^{25}\) This wide spread of situations in which fiduciary obligations can arise has made finding a rational, logical underpinning of fiduciary law notably difficult. One writer lists the various theories that have been put forward to explain the fiduciary phenomenon as:

- the property theory,
- the reliance theory,
- the unequal relationship theory,
- the contractual theory,
- the unjust enrichment theory,
- the power and discretion theory
- and the commercial utility theory... (together with an) 'unencumbered power' theory that makes use of property notions.\(^{26}\)

No doubt there are more. It is not proposed to critique all possible explanations; still less to propose another possibility. However, some aspects of fiduciary obligations impact upon remedy, and to this extent require attention. These are the interrelationship between fiduciary law and trust, loyalty and the content of fiduciary obligations, the limitation of fiduciary obligations to the profits and conflicts rule, and the possible existence of positive fiduciary obligations.

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\(^{22}\) Norberg \textit{v} Wynrib (1992) 92 DLR (4th) 449. The Australian High Court held that a doctor did not owe fiduciary duties to a patient such as would require him to hand over her medical records: Breen \textit{v} Williams (1986) 186 CLR 71.

\(^{23}\) M (K) \textit{v} M (H) (1992) 96 DLR (4th) 289.

\(^{24}\) Guerin \textit{v} R [1984] 2 SCR 335.


(ii) Fiduciary obligations and trust

Fiduciary obligations are said to emanate from the concepts of the trust institution, with the trustee said to be the archetype of a fiduciary.

The word (fiduciary) is thus the vehicle for the extension of incidents of the express trust to trust-like situations. A fiduciary relationship is a relationship analogous to that between express trustee and beneficiary, and a fiduciary obligation is a trustee-like obligation exported by analogy.

The obligations of the trust are not able to be imported directly to all fiduciary obligations (thus making it necessary to extend by analogy) because there is an essential difference between trust and other fiduciary situations. Unlike the trust, it is not necessary for those who owe fiduciary obligations to hold title to property. They may in fact be given control of assets belonging to the beneficiary, such as in the case of a board of directors controlling the company's assets. But it is not necessary that the fiduciary be given legal title, nor is there any necessity for a split in the title between legal and equitable title. Both these are essential to an express trust. There is no necessity for property to be involved in the performance of fiduciary obligations at all. Hence, the positive obligational aspects of trust, which all relate to property, are not necessarily appropriate to fiduciary duty.

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27 Comments here concern the institution of the trust, in particular, the express trust. There is a distinction between the abstract concept of trust, and the institution of 'the trust'. The concept of trust, at least in one sense, is probably present in every fiduciary relationship. This sense is the 'sort of case where you place yours if in the hands of another...to the extent of making yourself vulnerable to them, voluntarily or under the force of circumstance': P Pettit, 'The Cunning of Trust' (1995) 24 Philosophy and Public Affairs 202, 203.


29 Birks, above, n 6, 36.

30 Gatreau, above, n 6, 7.

31 See 3.3 (i); and see Mr Justice Gummow, 'Compensation for Breach of Fiduciary Duty' in T G Youdan (ed) Equity, Fiduciaries and Trusts (Toronto, Carswell, 1989), 64.
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Although fiduciary duties need not involve property, they must relate to economic interests for the purposes of Anglo-Australian law.\(^\text{32}\) The development of fiduciary duty to protect only economic interests can be followed from an examination of the traditional status-based relationships readily accepted as being fiduciary. For example, the trustee/beneficiary relationship is characterised by the trustee being invested with legal title to the trust property. The company director/company relationship is similar: although the company director does not hold title to the company's property, the company can only deal with that property through the board of directors. The agent/principal relationship differs in that neither ownership nor possession of assets must be given to an agent, but the agent has power to contractually bind his principal, thus putting the principal's economic interests at risk.\(^\text{33}\) In none of these cases does the fiduciary owe duties to the principal concerning the principal's non-economic interests. However, Canadian courts now disagree with the Anglo-Australian approach, extending fiduciary duties to personal interests, such as health and well-being.\(^\text{34}\) This is essentially a public policy decision: Canadian courts see no discernible difference in the public policy imperatives that dictate the regulation of fiduciaries in relation to economic interests, and those that dictate regulation of behaviour.

\(^{32}\) It has been conclusively held in Australia that fiduciary obligations apply to economic interests only, and cannot protect integrity of the person: Breen v Williams (1996) 186 CLR 71; Paramasivam v Flynn (1998) 160 ALR 203; Woodhead v Elbourne [2001] 1 Qd R 220. See also Sidaway v Board of Governors of Bethlem Royal Hospital and the Maudsley Hospital [1984] 1 QB 493, 518 (Lord Browne-Wilkinson). It is thought that these interests are properly protected by the common law and criminal law. However, O'Loughlin J felt it was arguable that a case of fiduciary obligation could be made out in Cubillo v The Commissioner (1999) 163 ALR 395, 440, where compensation was sought with respect to non-economic interests. See also Mr Justice R P Meagher and A Maroya 'Crypto-Fiduciary Duties' (2003) University of New South Wales Law Journal 348, 353; R Joyce, 'Fiduciary Law and Non-economic Interests' (2002) 28 Monash University Law Review 239, 242; n 36 below.

\(^{33}\) This does not fully explain why the solicitor/client relationship is accepted as fiduciary. A solicitor may act for a client in matters unconnected with economic interests, such as a custody dispute. The ready acceptance of the solicitor/client relationship as fiduciary probably relates to its status as part of the justice system: See Mallesons Stephen Jaques v KPMG Peat Marwick (1991) 4 WAR 357, 361; Re Van Laun; Ex Parte Chatterton [1907] 2 KB 23, 29; Law Society (NSW) v Harvey [1976] 2 NSWLR 154, 169-70.

causing personal harm. Australian courts, however, remain firm that such other interests are best protected by criminal law or by tort.

Fiduciary obligations must relate to an assumption of responsibility by one party for the interests of another. The reverse of this coin is an abdication of control or power over its own interests by the second party.

The critical feature...is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person.

35 M(K) v M(H) (1992) 96 DLR (4th) 289, 323-30 (La Forest J).
36 Woodhead v Elbourne [2001] 1 Qd R 220. There are at least three explanations for equity's inability to employ fiduciary obligations to preserve interests in bodily integrity. The first lies in equity's restoration goal. While equity can restore a plaintiff to the appropriate position where the harm is economic, it cannot restore a plaintiff to an appropriate position where the harm is to the person. This is because equity can relieve the defendant's conscience from sharp economic practices, but cannot relieve the defendant's conscience of the consequences of crime. Equity does not punish. Secondly, fiduciary law as currently understood allows the fiduciary to avoid liability by making full disclosure and gaining the principal's agreement to what would otherwise be a breach. It is clearly inappropriate for a principal to agree to bodily harm. A third explanation is offered by Penner, who says that fiduciary obligations 'are intended to ensure that a fiduciary takes decisions which he is otherwise legally or obliged to undertake ... in a manner which best serves the interests of his principal.' Obviously, no-one is legally empowered or obliged to commit assault or child abuse. There is no way in which a decision to act in such a manner can be taken legitimately. Acting self-interestedly alone does not constitute a fiduciary obligation; otherwise most wrongs would also be fiduciary breaches. There must be a pre-existing fiduciary obligation before self-interested behaviour becomes a fiduciary breach: J Penner, 'Exemptions' in P Birks and A Pretto (eds) Breach of Trust (Oxford, Hart Publishing, 2002) 241 at note 14 (245-7).

37 Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41, 96-7 (Jessup J). This statement of the law has been cited with approval in the High Court: Concut Pty Ltd v Norrell (2000) 176 ALR 693, 697-8 (Gleeson CJ, Gaudron and Gummow JJ); Pilmer v Duke Group Ltd (In Liq) (2001) 207 CLR 165, 196 (McHugh, Gummow, Hayne and Callinan JJ). See also Meagher and Moyano, above, n 32, 350. However, this view is not universally accepted. 'A fiduciary responsibility, ultimately, is an imposed not an accepted one. ...The factors which lead to that imposition doubtless involve recognition of what the alleged fiduciary has agreed to do. But equally, public policy considerations can ordain what he must do, whether this be agreed or not': Finn, 'The Fiduciary Principle', above, n 6, 54.
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Fiduciary duties arise from the relationship rather than from the holding of property. Therefore, not all of the trustee’s obligations can be taken as applying directly to all fiduciaries. Obligations concerning property and reconstitution of the trust fund are inappropriate for direct application.

(iii) The content of fiduciary obligation and the concept of loyalty

Difficulties arise in cases where the alleged fiduciary owes numerous duties to the principal. It becomes important to separate out those that are truly fiduciary obligations, from those that are contractual, or actionable in tort. It is no longer sufficient to assume:

that a relationship... was either fiduciary (as a matter of law) or was not, that once it was characterised as fiduciary a wide range of fiduciary obligations automatically came into play, and that for any 'breach' of a fiduciary 'duty' a whole panoply of remedies might be indiscriminately invoked.

In recent years, considerable effort has been put into defining what it is that makes an obligation fiduciary. 'Writers vie with one another to find the elusive common feature of human interaction by which the 'fiduciary relation' can be defined.' Possibly the most we can accomplish here is to admit it is not possible to define a situation in which a fiduciary obligation will arise. They are infinitely various, and perhaps no relationship should ever be excluded from contemplation. Finn says that it is not possible to do more than describe a fiduciary, which description is:

no more precise than a description of the tort of negligence. It is as follows:

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38 This explains why the trustee/beneficiary relationship is itself fiduciary. The trustee has undertaken to act, the settlor (on behalf of the beneficiary) has given over control of its interest, and there is therefore a relationship between the parties.


40 Sealy, above, n 4, 38.

41 Gliver, above, n 6, 17.
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A person will be a fiduciary in his relationship with another when and in so far as that other is entitled to expect that he will act in that other's interests or (as in a partnership) in their joint interests, to the exclusion of his own several interest.\(^{42}\)

Whether or not a defendant is a fiduciary is a question of fact. There should be no surprise in the observation that judicial opinion as to the existence of fiduciary obligations is often divided. What to one judge is a commercial relationship, regulated by no more than contract, is to another judge a relationship that also contains fiduciary obligations.\(^{43}\)

Even if definition must be satisfied by description, one must be able to say what a fiduciary obligation is, or what responsibilities the fiduciary obligation contains. If liability follows from breach, content of the duty is crucial. Finn defines the content of fiduciary obligation succinctly, basing his definition on Deane J's formulation in *Chan v Zacharia*.\(^{44}\)

(T)he central idea is service of another's interests. And the consequential obligation a fiduciary finding attracts is itself one designed essentially to procure loyalty in service. It can be cast compendiously in the following terms:

A fiduciary

(a) cannot misuse his position, or knowledge or opportunity resulting from it, to his own or to a third party's possible advantage; or

(b) cannot, in any matter falling within the scope of his service, have a personal interest or an inconsistent engagement with a third party -

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\(^{42}\) Finn, "Fiduciary Law and the Modern Commercial World", above, n 6, 9; Hayton, above, n 9, 296.

\(^{43}\) For example, *Hospital Products Limited v United State Surgical Corporation* (1986) 186 CLR 71; *Pilmer v Duke Group Limited (in liq)* (2001) 207 CLR 165. Bean suggests that there is greater analysis needed here. It is not enough to merely categorise a relationship as commercial; courts too readily assume these cannot be fiduciary without considering other aspects of the obligations: Bean, above, n 6, xiii-xiv.

\(^{44}\) (1984) 154 CLR 179, 198.
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unless this is freely and informedly consented to by the beneficiary or is authorized by law. 45

Austin adopts this assessment, and lauds it as supplying a more limited and precise use of fiduciary duties. 46 These two obligations are usually referred to as the profits and conflicts rules. Most writers agree the twin fiduciary obligations described above can compendiously be described as a duty of loyalty, 47 although that concept itself is remarkably slippery. An expectation (either subjective or objective) that the fiduciary will act in the principal’s interest, to the exclusion of the fiduciary’s solely personal interests, is required to found a fiduciary obligation. This expectation permits the principal to relax. The principal does not supervise the fiduciary’s performance, which allows opportunities for fiduciary misbehaviour to arise. 48 Fiduciary law recognises that such a level of trust is valid. Remedies for breach of fiduciary duty ensure that the principal’s expectation of proper, selfless performance by the fiduciary are met. The best available shorthand for this duty seems to be that it is an obligation of loyalty. 49

This brief survey has highlighted some of the pertinent aspects of fiduciary relations. In summary these are:

(a) Although fiduciary obligations emanate from the institution of the trust, not all trust obligations are relevant to them. In particular, because fiduciaries are not necessarily

45 Finn, ‘Fiduciary Law and the Modern Commercial World’, above, n 6, 9.
46 Austin, above, n 6, 156. However, he also identifies seven problem areas with this classification, including possible positive duties of loyalty, exercise of fiduciary discretion, business opportunity doctrine, differences between conflicts of duties and conflicts of duty and interest, duty of disclosure, and strict compliance and care. Many of these issues are discussed in the following text. See also Thomas, above, n 6, 406.
49 Birks disagrees with use of the term ‘loyalty’ to describe fiduciary expectations. He prefers ‘altruism’; Birks, above, n 6, 37. But De Mott proves altruism is not a complete analogy: De Mott, ‘Fiduciary Obligations under Intellectual Siege’, above, n 6, 477 et seq.
property holders, fiduciary obligations do not carry with them a responsibility to reconstitute a trust fund.

(b) Fiduciary obligations are more than simply contractual responsibilities; they involve assumption of responsibility to act in another’s interests to the exclusion of the fiduciary’s personal interest.

(c) The assumption of responsibility by the fiduciary to act in another’s interests justifies the principal taking less care for his own interests than he otherwise might.

(d) Fiduciary obligations require loyalty to the principal. But loyalty is all that is required. The fiduciary is man, not superman. Fiduciary obligations are those that require loyalty in performance.

(iv) The duty of loyalty: profits and conflicts rules

In Australia and elsewhere, the identification of obligations requiring loyalty in performance has involved separating out proscriptive duties from prescriptive duties. It is now generally accepted for Australian purposes that only those duties that are proscriptive are truly fiduciary. Fiduciary duties are thus characterised by spelling out what a fiduciary cannot do. If there are prescriptive duties incumbent upon a fiduciary, those duties fall to be enforced by other branches of law, such as contract, trust and tort. What the fiduciary cannot do amounts to the two rules mentioned above, the profits and conflicts rules. This view has extensive academic support and has been endorsed by the courts.

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50 Uncertainty has attached to the question whether the conflicts and profits rule are one rule or two. Despite dicta of the highest standing (see Boardman v Phipps [1967] 2 AC 46, 123 (Lord Upjohn)) the better view appears to be that there are two rules having separate operation: Warman International Ltd v Dwyer (1995) 69 ALJR 362, 372. See also A J McClean, ‘The Theoretical Basis of the Trustee’s Duty of Loyalty’ (1968-69) 7 Alberta Law Review 218; J Glover, Equity, Restitution and Fraud, (Sydney, LexisNexis Butterworths, 2004), 179. Clearly there is a high degree of overlap in the application of both rules.

51 Birks, above, above, n 6, 37; Hayton, above, n 9, 286-292. Cf. Teele, above, n 6, 112.

These two obligations run contrary to the natural human preference for one’s own interests. This counter-intuitive dimension of fiduciary obligations explains the severity of equitable remedies. None of the remedies available for breach of fiduciary duty can perform adequately in individual cases as deterrents because all act after the fact. No *ex post facto* remedy can insulate against human frailty and natural self-interest. Therefore there is need for the singular strength of the remedial response to breach of fiduciary duty. The deterrent is of general, not individual, effect. The profits and conflicts rules are discussed in greater detail later in this chapter.

(v) Positive fiduciary duties?

The concept of loyalty could have been interpreted so as to include prescriptive duties. Despite what is said above, is there any positive duty, any prescriptive duty which is a fiduciary duty? Nolan notes the inherent irony in the prescriptive/proscriptive divide that determines fiduciary duties:

Though it is the nature of his activity, or potential activity, that leads to the identification of a person as a fiduciary, fiduciary duties are proscriptive in nature: though a fiduciary exists to act, if at all, for the benefit of another, fiduciary duties do not tell any fiduciary how he should act, but rather they define acts from which a particular fiduciary must abstain.

Finn says that the purpose of fiduciary law is to encourage disclosure. Rickett has recently argued for a revisioning of the fiduciary obligation to an acceptance of some

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53 As is the case in other jurisdictions such as Canada.
55 ‘The fiduciary law’s object is not to ban actions as such, it is to compel disclosure of certain types of actions so that consent can be given to it, notwithstanding there is a conflict of interest or a conflict of duty or whatever. It operates savagely, particularly in its remedies, by and large simply to coerce disclosure.’ – Evidence to *Senate Standing Committee on Legal and Constitutional Affairs*, Parliament of Australia, Canberra, 10 March, 1989, 172 (Prof. Paul Finn). This position is supported by N. P Beveridge Jr, ‘The Corporate Director’s Fiduciary Duty of Loyalty: Understanding the Self-Interested Director Transaction’ (1992) 41 *De Paul Law Review* 655, 659.
positive duties. If there are any positive duties, the most likely candidate is the possible duty to disclose. Many already feel there is such a duty.

The fiduciary’s responsibility to disclose is often expressed as a positive duty, and has been ‘for well over 100 years’, even where the writer concerned accepts the hegemony of the prescriptive duties. Justice Gummow is typical: ‘The breach of duty in these cases essentially will be failure to make full disclosure of conflict’. This language clearly implies the existence of a positive duty, but there is no fiduciary duty to disclose. If a fiduciary is positively required to make disclosure on any given facts, it is because he is otherwise in breach of contract or in breach of a duty of care.

The misconception arises because prevention of conflicts of interest is factually usually entwined with the duty of disclosure. It is possible to characterise virtually every conflicts case as exhibiting failure by the fiduciary to disclose information of some kind. But a duty to disclose does not per se cover the same field as the disloyal duties. If a solicitor fails to disclose an important matter to a client, (such as the fact that the property the client is purchasing is about to be resumed for a freeway) she is in breach of contractual or a tortious duty of care, but she is not disloyal. The solicitor is only disloyal if she allows her interests and those of the client to clash, or she makes an undisclosed profit from her fiduciary responsibilities. That lack of loyalty attracts equity’s supervision. Failure to

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59 Gummow, above, n 31, 89. However, see Breon v Williams (1996) 186 CLR 71, 137-8 (Gummow J).
60 See Hayton, abov., n 9, 291.
61 Hoyano, above, n 6, 212.
62 Thus, Nocton v Lord Ashburton [1914] AC 932 can be described as a case where the solicitor failed to disclose his personal interest; Stewart v Layton (1992) 111 ALR 687 as the solicitor failing to disclose his second client’s true financial position; McKenzie v McDonald [1927] VLR 134 as the agent failing to disclose the true value of the two properties, etc.
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disclose, without more, is not a fiduciary breach merely because it is generally accepted that she (as a solicitor acting for a client) is a fiduciary. This particular duty is not a fiduciary duty.

In Anglo-Australian law, disclosure is seen as a form of protection. A fiduciary must take action to avoid being caught by the conflicts rule. If a fiduciary makes full disclosure of the conflicting interest and obtains the principal’s informed consent, he cannot be said to be acting disloyally.

The conclusion that equity will impose a positive duty requiring a fiduciary to act in the interests of another by disclosing information to that other person, appears to be at odds with principle. It is widely accepted that fiduciary obligations are only prescriptive...So, that which is often regarded as a fiduciary obligation of disclosure should not be seen as a positive duty resting on the fiduciary, but a means by which the fiduciary obtains the release or forgiveness of a negative duty; such as the duty to avoid a conflict of interest or the duty not to make a secret profit.

Nevertheless, the fact that there is probing at the proscriptive/prescriptive boundary of fiduciary law may indicate a growing disquiet with this situation and could herald a movement away from solely proscriptive fiduciary duty orthodoxy. For the present, failure to disclose is indicative of the continuance of a conflict. Mere existence of a possible conflict does not breach the conflicts rule, but at a point in time, failure to resolve a

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63 Nolan, above, n 54, 223.
64 Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq) (2001) 188 ALR 566, 576 (Finkelstein J).
65 Rickett, ‘Blueprint’, above, n 56; Conaglen, above, n 57; Recently, the English Court of Appeal declined to decide whether non-disclosure of an interest by a director is a breach of fiduciary dealing rules for which equitable compensation is available: Gwembe Valley Development Co Ltd v Koshy (2003) EWCA Civ 1048 (unreported, Mummery, Hale and Carnwath LJJ, 28 July 2003) [143].
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conflict counts as pursuit of a conflicting interest, and thus, a breach of the conflicts rule. If a fiduciary is in a position where he fails to disclose what he must, he is not liable because he has failed in a positive duty to disclose; he is liable because he has breached the negative obligation not to permit a conflict to go unresolved. Disclosure is the basis of the exception to the profits and conflicts rule, informed consent. A ‘duty to disclose’ conflates exception with rule. There is no need for any restatement ‘of the duty of loyalty and fidelity as constitutive of positive requirements’ here. Equity can compensate the principal for the effect of the conflict, and leave the positive requirements to other areas of law. Equitable intervention is simply not needed.

(vi) Conclusion: the nature of fiduciary duty

Breaches of fiduciary duty differ from breach of trust strictu sensu. It is not essential for them to entail diminution of a fund, because frequently there is no fund. Therefore, the focus is not on reconstitution of the fund. However, what is necessary is that there is a disloyal breach, a breach of the profits or the conflicts rule. These are the only breaches that are breaches of a fiduciary obligation. The duty to disclose is not a fiduciary obligation.

These matters impact upon the appropriate remedy. Breaches of the profits rule are properly remedied by removal of the illicit gain. Breaches of the conflicts rule causing loss require removal of the conflict. Once the effects of the conflict are removed, the fiduciary duty is effectively performed. In both cases, the principal is returned or restored to the position that ought to have been occupied, fulfilling equity’s restoration interest. Equitable compensation should be available for breach of fiduciary duty caused by conflicts of interest, resulting in loss. Whether or not equitable compensation is available for all breaches of fiduciary obligation is discussed below.

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68 Rickett, 'Understanding Breach of Trust', above, n 56, 228.
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4.3 IS EQUITABLE COMPENSATION AVAILABLE FOR ALL BREACHES OF FIDUCIARY OBLIGATIONS?

It will be argued that equitable compensation is not available for all breaches of duty by a fiduciary. Three issues will be discussed. The first matter to consider is the 'peculiarly' fiduciary obligations, the obligation not to make an unauthorised profit, and the obligation not to suffer a conflict. It will be argued that equitable compensation is only available for breaches of the conflict rule. Secondly, it will be considered whether equitable compensation is available for negligent breach of fiduciary duty. Finally, the claim that equitable compensation should not be available for breach of fiduciary duty at all will be addressed.

(i) The availability of equitable compensation for breach of the profits rule and conflicts rule

(a) The profits rule: its rationale

When applying a remedy to a given fact situation, a court must consider the rationale behind the cause of action and the remedy.\(^{69}\) There must be a purpose for the cause of action, and logically, the remedy should address that purpose. The profits rule forbids a fiduciary making an unauthorised profit through his or her fiduciary position. Loyalty is demanded, and approximately exacted by stripping the fiduciary of any profits made in breach.\(^{70}\) The purpose behind the profits rule is social policy. One old case actually claims the fiduciary institution is necessary 'for the preservation of mankind'.\(^{71}\) This seems excessive, but more modern commentators have regarded fiduciary obligations as an incident of relatively civilised society.\(^{72}\) Finn expresses this view more moderately. Fiduciary law, he says:

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\(^{69}\) See generally Chapter 1.

\(^{70}\) This may be subject to allowances made in the fiduciary's favour for skill and effort, etc: Boardman v Phipps [1967] 2 AC 46.

\(^{71}\) Welles v Middleton (1784) 1 Cox 112, 124-5.

\(^{72}\) Pettit, above, n 27, 216. See also, P J Zak and S Knack, 'Trust and Growth' (2001) 111 The Economic Journal 295, who have shown that economic growth depends upon the level of trust present in a society; Frankel, above, n 6, 802.
is informed in some measure by considerations of public policy aimed at preserving the integrity and utility of these relationships, given the expectation that the community is considered to have of behaviour in them, and given the purpose they serve in society.\textsuperscript{73}

That said, the exact reason for the profits rule is not entirely clear. Bishop and Prentice point out that the profits rule is not necessarily economically efficient; because a complete prohibition is placed on profit-making, the fiduciary has no incentive to seek out profit-making opportunities for the principal.\textsuperscript{74} Equity has chosen to balance interests here. This relatively inefficient result is accepted because the absolute anti-profit rule has the lowest monitoring cost, meaning the principal need never check to see if the fiduciary is seeking gain-making opportunities which may be contrary to the best interest of the principal.\textsuperscript{75} Thus, the utility of the fiduciary relationship and its integrity are guaranteed, even if there is associated inefficiency. The risk equity perceives and responds to with the profits rule, is that the fiduciary will give in to the baser human element, greed. The cure equity prescribes is that all fiduciaries are stripped of their unauthorised profits, however innocently made, with virtually no questions asked.\textsuperscript{76} This encourages confidence in the fiduciary institution - in effect, it allows principals to be untroubled by the concerns they would otherwise have about those whom they trusted as their fiduciaries.

\textsuperscript{73} Finn, 'Fiduciary Law and the Modern Commercial World', above, n 6, 10.

\textsuperscript{74} W Bishop and D D Prentice, 'Some Legal and Economic Aspects of Fiduciary Remuneration' [1982] 46 Modern Law Review 289, 295-6; 'Some Legal and Economic Aspects of Fiduciary Remuneration: A Postscript' [1986] 49 Modern Law Review 118. See also Pettit, above, n 27, 215, who notes that intrusive levels of regulation can, in fact, be counterproductive; Zak and Knack, above, n 72, whose research indicates that levels of trust tend to increase where the trusted party receives recompense; E Talley, ‘Taking the “I” out of Team: Intra-Firm Monitoring and the Content of Fiduciary Duties’ (1999) Journal of Corporation Law 1001, 1022. All these may suggest that the profits rule is, in fact, inefficient. But see R P Austin, ‘Fiduciary Accountability for Business Opportunity’ in P D Finn (ed) Equity and Commercial Relationships (Sydney, Law Book Company, 1987) 141, 163, who suggests that ‘(t)he law of fiduciary duties as a whole is efficient in economic terms’.

\textsuperscript{75} Bishop and Prentice, 'Some legal and Economic Aspects of Fiduciary Remuneration', Ibid, 296.

\textsuperscript{76} Even with respect to causation, it would seem that the plaintiff does not have to satisfy a ‘but for’ test, i.e. he does not have to show that but for the breach, the fiduciary would not have made the profit. See McCamus, above, n 47, 335; Gwembe Valley Development Co Ltd v Koshy [2003] ECWA Civ 1048 (unreported, Mummery, Hale and Carnwath LJJ, 28 July 2003). However, in Maguire v Makaronis
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It seems that equity makes no moral judgments here, at least in the modern understanding. Confidence in societal institutions is more important than individual morality. Equity assumes the fiduciary will give in to greed. Thus, equity is disinterested, at least in theory, as to whether the fiduciary was devious and deliberate in making the gain, or merely inadvertent and perhaps fortunate. On the other hand, all that the principal is able to insist upon is that the fiduciary account for the illicit profit. This is no case for a windfall for the principal. 'The remedy is justified simply as the most effective means of supporting the underlying obligation.' The remedy is limited to profit-stripping. Clearly there does not have to be any quantifiable loss to the plaintiff before a profit-stripping remedy is ordered, nor is it relevant that the principal could not personally have made the gain. The gain in the hands of the fiduciary establishes disloyalty and dictates the remedy. Equity acts as if the fiduciary had loyally made the profit and directs the gain to the principal.

(b) Remedy for breach of the profits rule

It is clear that an account of profits, or disgorgement, is available for breach of the profits rule; the question is whether absolutely any remedy at all is available for such a breach. More particularly, is equitable compensation available for breach of the profits rule? There should be a logical link between cause of action and remedy, even if only in a functional sense. Weight must be given to the cause of action itself; it should indicate what remedy or remedies are available for breach.

(1997) 188 CLR 449, 468 the majority suggest that there should be a causal link between the fiduciary breach and the claimed profit.

78 Equity was once, of course, only making moral judgements. Greater secularisation of society over the last few centuries has greatly reduced the moral content of equity.
79 See Keech v Sandford (1726) Sel Cas T King 61; 25 ER 223; Boardman v Phipps [1967] 2 AC 46. However, it must be noted that a devious fiduciary is less likely to be the recipient of a generous allowance for care and skill.
80 Warman International Limited v Dwyer (1995) 69 ALJR 362. There is an element of windfall in those cases where the beneficiary could not possibly have gained the benefit him or herself.
82 See generally, Chapter 1.
A breach of the profits rules is shown by proving that (a) the defendant owes a relevant fiduciary obligation, and (b) the defendant (or a party through them) has made an unauthorised profit. Whether or not the plaintiff has made a loss is irrelevant. The cause of action only requires proof of a gain to the defendant. This suggests that disgorgement is the appropriate remedy and compensation should not be available. On a normative view, the proper remedy must be disgorgement of the profits. As Rickett and Gardner put it,

it is unclear why compensation is required to relieve a defendant of his or her gain derived from the breach of an equitable duty. One would have thought that calling the defendant to account would provide an adequate personal monetary remedy, so that equitable compensation could then properly be reserved for those cases where the plaintiff has actually sustained loss from the relevant breach.

For example, it seems ridiculous to speak of equitable compensation as an available remedy to strip the profit made in *Boardman v Phipps*. The plaintiff in that case could not possibly have pointed to any loss. It will be remembered that, not only did the defendants profit, but so did the trust, to which they owed their fiduciary duties. There was nothing that required ‘compensating’; quite the opposite.

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83 *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223; *Attorney-General (Hong Kong) v Reid* [1994] AC 324; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Boardman v Phipps* [1967] 2 AC 46.

84 See generally, M McInnes, ‘Disgorgement for Wrongs: An Experiment in Alignment’ [2000] *Restitution Law Review* 516; and see also *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048 (unreported, Mummery, Hale and Carnwath LJJ, 28 July 2003), where it was held that the trial judge had been entitled to refuse to award equitable compensation on the basis no loss was suffered. As the wrongdoing was a breach of the profits rule, it was not appropriate to allow the plaintiff to elect equitable compensation as a remedy.


86 [1967] 2 AC 46.

Nevertheless, some cases are apparently decided on the basis that the measure of equitable compensation is the amount of profit made by the defendant. Commentators note this phenomenon almost uncritically. But these decisions are misleading at best. If the monetary sum awarded is being calculated by reference to the defendant's gain, it is profit-stripping. If it is calculated by reference to the plaintiff's loss, it is compensation, and in this case, equitable compensation. The two remedies are alternate. It is widely thought that they cannot be had together. They address entirely different questions. Equity's restoration interest following loss incurred as a result of the breach of the conflicts rule cannot be satisfied by stripping the defendant of a profit made. Profit-stripping is equity's response to breach of the profits rule, however:

 equitable compensation is solely concerned with quantifying the plaintiff's actual losses. As in the common law assessment of compensatory damages, these are not related to any gains made by the defendant, although that information may be helpful in quantification.

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These cases probably stem in part from earlier uncertainty as to whether an account of profits is an available remedy where an accurate account cannot be produced. It is now accepted that accounts of profits need not be absolutely accurate, and sometimes will not be able to be so accurate. Necessary estimation is permitted. It would be ridiculous if the plaintiff lost a potential remedy merely because the defendant was incapable of keeping decent records, and this is why courts have quantified equitable compensation by reference to an estimated profits figure. Further, sometimes the only way of quantifying a principal’s loss is by reference to the fiduciary’s gain.

This is particularly true of cases concerning diverted opportunities where assessment of what the plaintiff has lost is highly speculative, and the only tangible guide to assessment is provided by the gain which the defendant has made by exploiting the opportunity.

Most of the reported cases where equitable compensation is calculated according to gain can be classified as ‘loss of opportunity’ cases. If the quantification of an account of profits, and the quantification of equitable compensation in a particular case are the same, that is merely fortuitous. It is not because the awards cure the same wrongs. As Berryman says, the information concerning the gain ‘may be helpful in quantification’; but it is

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92 Markwell Bros Pty Ltd v C P N Diesels Queensland Pty Ltd [1983] 2 Qd R 508; Fraser Edmiston Pty Ltd v A G T (Qld) Pty Ltd [1988] 2 Qd R 1.
96 Berryman, above, n 91.
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'only a justifiable option in the absence of better options'.

Equitable compensation is not per se available for breach of the profits rule.

(c) Compensation for breach of the conflicts rule

Breach of the conflicts rule is an essential ingredient in a successful claim for equitable compensation for breach of fiduciary duty. The conflicts rule forbids the fiduciary allowing a conflict of interest and duty, or duty and duty, to exist. Although there is a clear overlap with the profits rule (for there is almost invariably a conflict of interest when the fiduciary breaches the profits rule) the conflicts rule has an independent operation. With the conflicts rule it is irrelevant that the fiduciary has not made, or even sought to make, a profit. What is being protected is the beneficiary's right to expect loyalty from the fiduciary. This right can be protected in a number of ways. For example, in the case of a trustee/beneficiary relationship, a court might order replacement of the trustee where the trustee's interests conflict with those of the beneficiaries. A solicitor acting for one client who proposed to act for another in the same matter could be restrained from so doing by injunction. These other remedies also put the plaintiff in the position he ought to occupy.

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97 A Phang and P Lee, 'Restitutionary and Exemplary Damages Revisited' (2003) 19 Journal of Contract Law 1, 10. Some writers see this as 'disgorgement damages'. J Edelman, Gains-Based Damages: Contract, Tort, Equity and Intellectual Property (Oxford, Hart Publishing, 2002) proves that disgorgement and damages are not necessarily strangers. However, this may be unnecessarily confusing in relation to equitable wrongs. Equity already provides separate methods for disgorgement (account of profits) and compensation (equitable compensation), where common law traditionally only had one label, damages. Equitable compensation is not available for breach of the profits rule, because an account of profits responds adequately to equity's concern by not allowing the fiduciary to retain an illicit profit.

98 There is no substantive difference between a conflict of interest and duty, and a conflict of duty and duty. Both are manifestations of the overriding duty of undivided loyalty: Beach Petroleum NL v Kennedy (1999) 48 NSWLR 1, 47; Moody v Cox [1917] 2 Ch 71, 81-2, 84-5; Haywood v Roadknight [1927] VLR 512, 516-7, 521. However, in Maguire v Makaronis (1997) 188 CLR 449, 474 the majority of the High Court said there was a heightened concern where loss arises from a conflict of duty and interest. See also White v Illawarra Mutual Building Society Limited [2002] NSWCA 164 (unreported, Powell, Hodgson JJA and Hamilton J, 19 July 2002).


101 Prince Bolkiah v KPMG (a firm) [1999] 2 WLR 215.
Suffering of loss differentiates those cases where equitable compensation is available from these others. In cases where a conflict remains unresolved and the beneficiary suffers loss as a result, equity will award a personal monetary award; equitable compensation. *Nocton v Lord Ashburton* perhaps remains the best example of this principle. Breach of the conflicts rule is the only peculiarly fiduciary breach for which equity will award equitable compensation. An account of profits is the appropriate remedy for a breach of the profits rule. Although it resembles a fiduciary breach, a breach of confidence is not a peculiarly fiduciary breach. In principle, equitable compensation is available for breaches of the conflicts rule that result in loss to the plaintiff. In some situations, it may be the only method by which equity can look after its restoration interests. However, this position has its detractors, whose views are discussed later in this chapter.

The more confronting question is whether the principal should be entitled to a remedy if it seems the breach of the conflicts rule results in a gain to the fiduciary, but no loss to the principal. In most cases, such a situation is also covered by the profits rule and the principal would be clearly entitled to the gain. This is a stringent rule. However, in rare cases like *Re Cape Breton Company* and *Peninsular & Oriental Steam Navigation*...
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Co v Johnson,¹⁰⁹ there may be a gain to the fiduciary in circumstances where the profits rule is not breached. Peninsular concerned a defendant who was a director of two companies, one a coal mining company, and the other involved in selling mining equipment. The defendant arranged for the equipment company to sell goods at a profit to the mining company. There was a clear conflict of interest, and arguably also a breach of the profits rule. However, the High Court rejected a claim for an account of profits.¹¹⁰

The facts disclosed that the fiduciary had made a profit, but did not show that the principal had suffered a loss; there was no evidence the mining company had paid more than market value for the goods. From a modern perspective, the decision in Peninsular appears incorrect, because it seems that the fiduciary was allowed to retain the profit made in circumstances of breach of duty. Nevertheless, on its findings, the case was correctly decided. First, it was held that the circumstances did not involve a breach of the profits rule.¹¹¹ The breach of the conflicts rule allowed the principal to rescind the transaction, had it been willing or able. If loss could be proved, equitable compensation should have been available.¹¹² There was, however, no evidence of any loss. Therefore, equity had no restoration interest to satisfy. There is nothing to ‘restore’ to the plaintiff who is already in the position he or she would have occupied but for the breach. The fiduciary’s conflict has not affected the principal’s position in relation to the transaction.

¹⁰⁹ Co v Johnson [1938] 60 CLR 189 (‘Peninsular’).
¹¹⁰ Ibid, 249. This was on the basis that no trust property was involved. The High Court appeared to accept that the director had been able to purchase the equipment on behalf of the equipment company without offering the equipment to the coal mining company. It is unlikely such a finding would be made today. See W S Martin, ‘Principles of Equitable Compensation’ in R Carroll (ed) Civil Remedies: Issues and Developments (Sydney, The Federation Press, 1996)114, 126.
¹¹¹ Ibid.
¹¹² If rescission is unavailable because restituto in integrum is not possible, it is clearly unjust to deny the principal some remedy. The principal should be able to recover pecuniary rescission. This is arguably one of the explanations of McKenzie v McDonald [1927] VLR 134.
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The principal should only be entitled to a remedy if the gain can be said to have been made disloyally. If the application of the profits rule is negated by the particular facts, then there is no disloyalty in the making of the profit and no justification in equity for stripping the gain from the fiduciary for breach of the profits rule. Any disloyalty must then be attributed to a breach of the conflicts rule. But there is no effect of the fiduciary’s disloyal conflict to be removed if he has sold his property at the market price, even though the principal is entitled to rescind the contract. If the principal is only compensated for what ‘ought’ to have happened, then there can be no personal liability in the fiduciary. What ‘ought’ to have happened has happened. The plaintiff can still rescind if it wishes. There is nothing to restore and no other result of the conflict requiring removal. The conclusion is then, that had evidence been adduced in *Peninsular*\(^ {113}\) that the price paid for the fiduciary’s property exceeded its market value at the time of purchase, then a loss would have been established, and could have been compensated for in equity.

The conclusion above can be challenged by reference to some authorities. However, these cases, where the compensation awarded is calculated according to the defendant's gain, \(^ {114}\) can be misleading. The appropriate remedy where the fiduciary has made a gain is an account of profits. If there has been no breach of the profits rule, but rather a breach of the conflicts rule, it may be convenient for the court to calculate the plaintiff’s loss by reference to the defendant's gain, but this is a matter of ease rather than of doctrine. \(^ {115}\) It is still essential for the plaintiff to prove a loss. This may or may not have any correlation to the defendant’s gain. \(^ {116}\) Even if gain is referred to in calculation of quantum, we should not lose sight of the fact that the court is quantifying the plaintiff’s loss. The enquiry must be as to the damage the plaintiff suffered as a result of conflict of interest faced by the fiduciary.

\(^{113}\) *Peninsular & Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189.

\(^{114}\) For example, see *Ferrari Investments (Townsville) Pty Ltd (in liq) v Ferrari* [2000] 2 Qd R 359; *Markwell Bros Pty Ltd v C P N Diesels Queensland Pty Ltd* [1983] 2 Qd R 508; *Fraser Edmiston Pty Ltd v A G T (Qld) Pty Ltd* [1988] 2 Qd R 1.

\(^{115}\) ‘(E)quitable compensation is solely concerned with quantifying the plaintiff’s actual losses. As in the common law assessment of compensatory damages, these are not related to any gains made by the defendant, although that information may be helpful in quantification’. Berryman, above, n 91, 322.
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In *Peninsular*,\(^{117}\) this would have been the difference between the price paid for the property and its market value at the time of the sale. If there is no difference, the plaintiff has suffered no loss, and should not be compensated; otherwise the defendant is being punished. This exceeds equity’s corrective interest in restoration of the status quo.

(ii) Negligent breaches and fiduciary duty

Allegations of breach of fiduciary duty become intertwined with the law of negligence in three possible ways. First, a defendant who is a fiduciary may have breached a tortious duty of care owed to a principal. Secondly, a defendant who is a fiduciary may have breached an equitable duty of care; it is often then argued that equitable jurisdiction delivers a more generous remedial response than would be available at common law. Thirdly, a defendant who is a fiduciary may have breached a fiduciary duty negligently. This thesis argues that, first, negligent breaches of common law duties owed by a fiduciary fall to be remedied at common law. This follows from the recognition that the fiduciary obligations require loyalty in performance. A careless breach of a general law duty by a fiduciary does not involve disloyalty. Secondly, the equitable duty of care is in substance the same as the common law duty of care. There is no compelling reason why remedial regimes should differ here. Thirdly, although there is authority for the view that positive intention is required to establish the disloyalty needed for a breach of fiduciary duty, the better view is that any negligence in such a situation should be treated with deep suspicion. Negligence coupled with breach of a fiduciary duty justifies the drawing of adverse inferences, and possibly adverse conclusions, against a fiduciary. Negligence coupled with breach of the conflicts rule should justify a conclusion that the fiduciary has acted deliberately and disloyally.

(a) Negligent breaches of non-fiduciary duties

Fiduciaries often owe contractual duties and duties of care, in addition to their fiduciary obligations, to their principal. A fiduciary who is negligent in performing one of

\(^{116}\) Sometimes reference to a supposed gain is the ‘best estimate’ of quantification of the plaintiff’s loss: E Boros, above, n 94, 275.

\(^{117}\) *Peninsular & Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189.
these other duties owed to a principal does not thereby breach fiduciary duty. The fiduciary’s role does not alter the content of the particular duty owed. This position is not self-evident, or necessarily universally accepted. Academic opinion varies widely here. For example, Flannigan says that ‘conduct that is uncaring is...objectionable’. Getzler questions whether a fiduciary who pays no attention can be said to be loyal. But Justice Gummow criticises the application of fiduciary principles to cases involving the duty of care, and Harpum states that mere incompetence does not suffice as evidence of a fiduciary breach.

Nevertheless, precisely because the methodology of calculation of equitable compensation has not been obvious, and because it is believed that recovery in equity is more generous, plaintiffs have attempted to have all breaches of duty by a fiduciary dealt with on an equitable basis. This has led to an understandable reluctance in the courts to label every breach by a fiduciary as a fiduciary breach. This dissection of duties appeared in the Australian context in *Permanent Building Society (in liq) v Wheeler*, where Ipp J noted:

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118 *Breen v Williams* (1996) 186 CLR 71, 82 (Brennan CJ); *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598.


121 Gummow, above, n 31, 66.


123 McCamus, above, n 47, 326; and see Hon Justice Gummow, ‘Equity: too successful?’ (2003) 77 *Australian Law Journal* 30, 38. This view has its genesis in Viscount Haldane’s dicta that calculation of equitable compensation may differ from calculation of damages for deceit. This is usually interpreted as meaning that equitable compensation is more generous. The possibility that recovery for deceit might exceed recovery for equitable compensation is rarely considered, although Elliott hints at the possibility: S Elliott, ‘Fiduciary Liability for Client Mortgage Frauds’ (1999) 13 *Trust Law International* 74, 83.

124 Arguably, it has also led to a findings that a professional is not a fiduciary at all; compare the majority judgment and the minority judgment in *Pilmer v Duke Group Limited (in liq)* (2001) 207 CLR 165.

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(i)t is essential to bear in mind that the existence of a fiduciary relationship does not mean that every duty owed by a fiduciary to a beneficiary is a fiduciary duty. In particular, a trustee's duty to exercise reasonable care, though equitable, is not specifically a fiduciary duty. 126

Disloyalty and lack of care are independent concepts. There is a basic difference between tortious and fiduciary duties that should make complete overlap impossible. Fiduciary duties are prescriptive, the negative duties not to profit and not to allow a conflict to continue. Common law duties such as the duty to take care, or the duty to perform the contract, are positive and prescriptive. Although the same set of facts might give rise to two types of breaches, they are distinct breaches and address different considerations. Fiduciary obligations address disloyalty. This position has much support in academic works, 127 and is confirmed in the cases. 128 For example, in British Mutual Investment Society v Cobbald 129 it was held that a solicitor who was negligent in investigating title to property had not breached any equitable duties. There was no suggestion of any breach of the conflicts or profits rule.

In negligence, there is no betrayal of one interest for the sake of another. Instead, there is a failure to properly look after one interest. Something more is required to attract the operation of the conflicts rule and that is disloyalty, namely, apparently preferring one interest or duty over another. 130 In Nocton, 131 Lord Ashburton was betrayed when Nocton did not resolve the conflict between their interests. Coincidentally, Nocton may have

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129 (1875) LR 19 Eq 627.
131 Nocton v Lord Ashburton [1914] AC 932.
committed the tort of negligence, but negligence and breach of fiduciary duty are separate wrongs. The duty to avoid conflict is not a duty of care. It is another manifestation of the duty of loyalty. This is why equity’s jurisdiction cannot be excluded from conflict cases. But conversely, if there is no disloyalty, that is, no illicit profit or conflict, there is no reason to resort to equity. As Viscount Haldane said in *Nocton*, a suit that only alleged negligence against a fiduciary would have been susceptible to demurrer, prior to the Judicature reforms.

Often the distinction between fiduciary duties and duties of care owed by a fiduciary is remedially irrelevant. Usually, the failure of the fiduciary to resolve conflict will also be able to be described factually as a failed duty of care, and in most incidences, the quantum in both cases will be the same. However, in rare cases, of which *Nocton* is the best example, it can still be important or necessary to rely upon equity’s jurisdiction. The plaintiff is able to resort to equitable jurisdiction because its interest has been presumptively betrayed. There is nothing special about the duty of care owed by a fiduciary; it is just the duty owed to any neighbour, with reasonableness assessed in the full context of the facts of the case (and particularly noting the defendant owes fiduciary duties). Therefore there can be no justification for imposing any different, higher level of recovery upon the fiduciary.

Further confusion arises if there is insufficient differentiation between the profits and the conflicts rule. Negligence is irrelevant to illicit profits. If an illicit profit is made

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132 See Meagher and Maroya, above, n 32, 350.
133 *Nocton v Lord Ashburton* [1914] AC 932, 956.
134 Davidson, above, n 90, 375.
135 For example, *Stewart v Layton* (1992) 111 ALR 687.
136 [1914] AC 932.
137 Birks, ‘The Content of Fiduciary Obligation’, above, n 6, 50.
negligently, that profit will still be stripped from the fiduciary. This is because the profit represents an objective manifestation of disloyalty. What matters is that there was a disloyal outcome. But the same is not true of losses incurred in the course of a fiduciary undertaking. The loss may or may not be a manifestation of disloyalty. In loss cases, it is appropriate to look more closely at the loss and question whether it is due to mere negligence in performance of the obligations, or whether it stems from a disloyal conflict of interests. Equity could have chosen to regard all negligence as disloyal, along the lines of 'a negligent fiduciary cannot be said to be acting loyally'. But this would have gone beyond what policy required. A principal is not entitled to demand that the fiduciary insure him against all losses, acting constantly in his interests; this would have been a positive duty. A principal is only entitled to demand that the fiduciary (as a fiduciary) serve his interests ahead of the fiduciary's interests or those of a third party.

The apparent difference between the profits and conflicts rules in this regard is justified by reference to equity's interest in restoration. If the fiduciary negligently breaches the profits rule, he must still restore the principal to the position as if the profits rule had not been breached, because a disloyal outcome has eventuated. This can only be done by profit-stripping. But if the fiduciary has merely breached a duty of care and there is no disloyalty, equity is satisfied by a common law remedy. There is no extra restoration dimension requiring equity's attention.

(b) Breach of an equitable duty of care

Equity also recognised a duty of care, which pre-dated the tort of negligence. It is questionable, however, whether a separate equitable duty still survives. This thesis takes the view that it does survive, but its survival does not necessitate a different method of calculation of remedy to common law damages.

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139 'But it is one thing to strip a fiduciary of profit without much inquiry; it is another to hold him accountable for all losses without inquiry into relative causes': J D Heydon, 'Causal Relationships Between a Fiduciary's Default and the Principal's Loss' (1994) 110 Law Quarterly Review 328, 332.

140 De Mott, 'Fiduciary Obligations under Intellectual Siege', above, n 6, 489.
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The equitable duty of care came under close consideration following *Henderson v Merrett Syndicates Ltd.* The famous insurer, Lloyds of London, operated their risks business through syndicates of underwriters put together by agents. A spate of large, unforeseen payouts caused Lloyds to call upon the syndicates for reimbursement. It was argued by the syndicates that the agents owed them a fiduciary duty of reasonable care in choosing which insurance contracts to underwrite. In dicta, Lord Browne-Wilkinson said that this was not a separate head of liability, but part of the general tortious duty owed to the plaintiffs. Heydon notes that, if this is correct, it appears the equitable duty of care (which predates the tort of negligence) has been subsumed by the general law duty. He argues against that outcome, in favour of the continued existence of the equitable rule.

There is precedent, though, for the gradual withering of an equitable duty, where a concurrent tortious duty has come into existence. Davidson notes in the context of the tort of deceit that:

(1) there are no examples of compensatory relief in the concurrent jurisdiction where deceit could be established since *Derry v Peek.* The explanation for cessation of this concurrent jurisdiction probably is the adequacy of the common law remedy of damages for deceit. There is now no advantage in seeking equitable relief ‘in the nature of damages’.

Something similar may have happened to the equitable duty of care. The content of the two duties is the same, and ‘can be regarded juristically as the same duty’. In *Permanent

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141 [1994] 3 WLR 761.
142 Ibid, 799.
143 J D Heydon, ‘The Negligent Fiduciary’ (1995) 111 Law Quarterly Review 1. Interestingly, Heydon JA suggested in *Proprietors of Strata Plan 17226 v Drakulic* (2002) 55 NSWLR 659, 684 that the fiduciary relationship may eventually be considered as a possible special relationship for the purposes of tort law, though creation of new categories was a matter for the High Court. His Honour has since been elevated to the High Court.
144 Davidson, above, n 90, 357.
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Building Society (in liq) v Wheeler, 146 Ipp J held that a company director could have a duty to exercise care in both tort and equity. The fact that the duty existed in equity did not convert its breach into a fiduciary breach. 147 If the duty is exactly the same in equity and tort, outcomes should be the same, unless there are clear reasons to the contrary. 148 Treating the breach as an equitable breach may result in a variety of plaintiff-centred advantages, 149 but these do not involve a different standard of causation or remoteness. The fact that no single case can be cited where a different primary monetary result was reached, whether the breach is described as a breach of a tortious or an equitable duty of care, suggests that there are no good reasons for insisting on a different quantification scheme. 150 This, however, does not lessen other advantages that might be available to the plaintiff in equity. For example, in Wheeler it was held that the plaintiff was entitled to have compensation assessed as at the date of trial, rather than the date of breach. This is justifiable if the fiduciary’s breach continued until date of trial, because otherwise equity cannot restore the plaintiff to the position as if the duty had been performed.

Resort to equitable compensation in addition to damages for negligence is unnecessary in many cases of breach of fiduciary duty, especially where professional services are involved. 151 In cases such as Stewart v Layton 152 no different result is achieved by seeking equitable compensation for breach of fiduciary duty in addition to damages for tort. Stewart v Layton involved a solicitor who acted for two parties in a conveyance. He eventually had to discontinue acting for the purchaser, but had discovered information prejudicial to the vendor through acting for the purchaser. He was not able to disclose this information to the vendor. These facts satisfied both a claim in negligence and a claim for

147 Glover, above, n 50, 172
148 See also Boros, above, n 94, 289.
149 Such as limitation periods.
151 See Wan v McDonald (1992) 105 ALR 473; Commonwealth Bank of Australia v Smith (1991) 102 ALR 453; Martin, above, n 110, 133.
152 Stewart v Layton (1992) 111 ALR 687.
breach of the conflicts rule. The amounts recoverable by way of damages for tort and equitable compensation for breach of fiduciary duty were the same. Cases like Nocton\(^\text{153}\) and Canson\(^\text{154}\) provide examples of where the common law action is flawed in some respect, necessitating the appeal to equity. Breach of fiduciary duty is often then argued by plaintiffs through over-abundance of caution, or perhaps due to fears that limitation devices such as contributory negligence will impact on recovery at common law,\(^\text{155}\) or due to equity’s procedural advantages.\(^\text{156}\) Whether equitable duties of care are regarded as independent or subsumed by the tort of negligence should not impact on the primary calculation of monetary awards for breach, although it may impact on the action in other ways, such as limitation periods, contributory negligence and so forth.

\((c)\) \textit{Negligence in the context of breach of the conflicts rule}

Once there is both a breach of the conflicts rule and negligence in performance of duties, matters become more complicated. Sheridan, for example, described Nocton\(^\text{157}\) as an example of the equation: breach of fiduciary duty plus negligent misstatement equals equitable fraud. This kind of situation arose in Bristol and West Building Society v Mothew,\(^\text{158}\) which concerned a solicitor who acted for both the borrower and lender in one transaction. Both parties knew of the double employment. The solicitor neglected to pass on to the lender certain information it required to know concerning the security it was taking. The solicitor admitted his negligence. Crucially, the lender did not allege in its pleadings a breach of the conflicts rule, although that argument appears to have been

\(^{153}\) Nocton v Lord Ashburton [1914] AC 932.

\(^{154}\) Canson Enterprises Ltd v Boughton & Co (1991) 85 DLR (4th) 129.

\(^{155}\) There may be signs that courts are tiring of this over-pleading of cases. See Australian Breeders Co-operative Society Ltd v Jones (1997) 150 ALR 488, 517, (Wilcox and Lindgren J); Opening Address by the Hon Justice K M Hayne AC, Centre for Commercial Law Conference 2002, ‘Commercial Law - Private Business/Public Concern’, 30 September 2002, 5. \text{http://law.anu.edu.au/CCL/upcom.PDF (14/10/03).}

\(^{156}\) In Permanent Building Society (in liq) v Wheeler (1994) 11 WAR 187 the defendant owed both tortious and equitable duties of care. Recovery in equity meant that the award was computed at the date of the trial rather than date of the wrong. It is not clear that this advantage is warranted outside of reconstitution or breach of conflicts rules cases.

\(^{157}\) Nocton v Lord Ashburton [1914] AC 932.
allowed before the Court of Appeal. Millett LJ said that although the remedy for breach of the equitable duty of care was called equitable compensation rather than damages, this was 'a distinction without a difference'. Common law principles of causation, remoteness and measure of damages applied in such a case. This, he said, left 'those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary and restorative rather than compensatory' to be remedied in equity.

Mothew acted for both parties in the transaction, with their knowledge and consent. Nevertheless, his negligence meant that one party may have been potentially disadvantaged. This might suggest that, even though both clients knew of the double employment, he should have been liable for breach of the conflicts rule. He was in a position where the duties he owed to both clients conflicted, i.e., the duty to inform the lender versus his duty of confidentiality to the borrower. Further, one party appeared to have not been properly served. Elliott has argued that negligence in performance in this context should be interpreted against the solicitor. In short, in such a case, it should be presumed that the solicitor has acted disloyally. However, in Mothew Millet LJ specifically held that inadvertence would not be enough to trigger fiduciary liability, saying:

He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.

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158 Bristol and West Building Society v Mothew [1988] Ch 1 ("Mothew").
159 The pleadings alleged breach of contract, negligence, and breach of trust (similar to Target Holdings Ltd v Redferns [1996] 1 AC 421).
161 Ibid.
162 Ibid.
163 See also Macedone v Collins (unreported, 40351/94, NSWCA, 18 December 1996).
164 Elliott, above, n 123, 85.
Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care.165

Arguably, Mothew166 is highly dependent upon its facts; this solicitor was in an unusual position in that the clients had agreed to his double employment. Millet LJ said the solicitor's position was not one of conflict, because by agreeing to the double employment, the borrower had impliedly agreed to allow the solicitor to make a full and accurate report to the lender (therefore acting against the borrower's interests).167 This implication may not have been warranted.168 Unless that implication can be made, the solicitor's case appears hopeless.

Elliott suggests that negligence by a solicitor coupled with any suggestion of conflict or profit should be treated seriously by equity, and should perhaps deserve the epithet 'breach of fiduciary duty', with all that entails.169 On the Mothew facts, the admittedly negligent solicitor should have been liable for breach of the conflicts rule, as his mistake had the effect of preferring another client's interests (even though that outcome was unintentional). This suggestion has immense attraction. Once there is a suggestion of conflict or illicit profit, the spectre of disloyalty has been raised. However, if it can be

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165 **Bristol and West Building Society v Mothew** [1988] Ch 1, 19.
166 Ibid.
168 Some jurisdictions require that the client understand fully the implications of agreeing to double employment. For example, see **Legal Practice Act 1996 (Vic) s 64 (d)** in conjunction with the Professional Conduct Practice Rules 2003 r. 8.3. There is no indication in the report of any evidence that the solicitor explained the implications of double employment to the client.
169 Elliott, ab've, n 123, 83-84, believes Millett LJ adopted the solution of denying the solicitor had breached fiduciary duty in part to avoid unfair recovery against the solicitor. He suggests that this was unnecessary, because equity is capable of greater flexibility than this. This thesis also suggests that the solution may have been unnecessary because, in any event, the breach would not have caused the loss unless the building society entered the transaction on the basis of the breach (and there was no such allegation). However, Elliott has since apparently accepted that in the case of an inadvertent breach by a fiduciary 'it is reasonable to expect that the court would not apply the same wide remoteness criteria that it would in a case of intentional disloyalty': Elliott, above, n 150, 595.
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shown that the solicitor has not been in a position of conflict or made a secret profit, there is no real justification for saddling the sloppy solicitor with another remedial regime. An irrebuttable presumption would seem to go beyond equity’s requirement of restoration.

Mothew\(^{170}\) directly raises the question whether the conflicts and profits rule can be breached by inadvertence, or whether disloyalty requires a conscious decision to be disloyal. The arguments run both ways. The normative response is that a conscious decision is required. In *Bank of New Zealand v New Zealand Guardian Trust Co.*,\(^{171}\) Fisher J commented that the fact that defendants were controlled by ‘obligations impacting upon conscience or intentional conduct’ justified equity’s more generous causation and remoteness rules, because those defendants ‘are thought to have a special opportunity and responsibility to weigh possible consequences.’\(^{172}\) This implies conscious thought. On the other hand, as disloyal outcomes can result from inadvertent actions or omissions, it may be instructive that the profits rule does not appear to require a conscious decision to be made. This suggests that a consistent result between the two rules would be achieved by indifference to the degree of mental involvement by the fiduciary in the breach of the conflicts rule.\(^{173}\) This clearly does not accord with Mothew. The risk in the Mothew decision lies in the difficulty faced by the principal in proving the state of the fiduciary’s mind. It is notably difficult for a principal to prove that a fiduciary approached any given decision with a particular degree of mental involvement. Elliott’s solution is then preferred. Negligence coupled with a breach of the conflicts rule should justify a finding that the fiduciary has been disloyal. However, negligence without disloyalty is only negligence, and should not attract a harsher remedy.

\(^{170}\) *Bristol and West Building Society v Mothew* [1988] Ch 1.

\(^{171}\) [1999] 1 NZLR 213.

\(^{172}\) Ibid, 243 (emphasis added).

\(^{173}\) Glover, above, n 50, 177 says that a guilty mind is not required for either rule.
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Here, perhaps, a distinction should be drawn between a conflict of duty and duty on the one hand, and a conflict of duty and interest on the other. In the first case, Mothew appears as authority for the proposition that mere inadvertence is not enough to establish a breach of the conflicts rule. On the other hand, the solicitor in Nocton was only negligent; it was not shown that his poor advice was morally reprehensible. Yet that poor advice coupled with a conflict of duty and personal interest was enough to push his wrong into the range of fiduciary breach. If Nocton is correct, it is difficult, as Elliott puts it, ‘to sustain the idea that negligence never amounts to a breach of fiduciary duty’. There may be, as Pollock said long ago, ‘an underlying note of judicial incredulity as to the honesty of people who make blunders likely to operate in their own favour.’ The solution is to regard negligence in the context of conflict of duty and personal interest as establishing disloyalty, but only to regard negligence in the context of conflicting duties as raising an inference of disloyalty, which the fiduciary can then answer.

The concept of disloyalty logically encompasses intention: ‘Loyalty influences behaviour; it impels one to do what, in the absence of loyalty, one would not do’. If loyalty is a matter of an ‘obligation or preference that one assumes towards a living object

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176 Nocton v Lord Ashburton [1914] AC 932.

177 Elliott, above, n 123, 80.

178 F Pollock, ‘Nocton v Lord Ashburton’ (1915) 31 Law Quarterly Review 93, 94.


or cause, then disloyalty must involve a choice to ignore that obligation or preference. Fiduciary loyalty is enforced by disallowing the fiduciary from acting in her interests or those of another. It is contrary to the human experience to expect the fiduciary to act against her own self-interest in cases where her interest and that of the principal conflict, and yet that is what fiduciary law requires. If the fiduciary’s ‘negligent’ act has the effect of advancing the fiduciary’s own interests, then a disloyal outcome has eventuated. Equity treats strictly that other disloyal outcome, the making of illicit profits, and is disinterested as to whether the profit was made accidentally or deliberately. Consistency suggests an equally clear finding should follow where negligence causes the fiduciary to breach the conflicts rule. The difficulty is that if equitable remedies are more generous than common law damages, this may have the effect of punishing the fiduciary. There is no punishment in stripping the fiduciary of profits she could not properly have made, but there may be punishment in holding the fiduciary to a more exacting remedial standard where the only wrong is inadvertence. Thus, the suggestion is that there is more room for leniency in a case of clashing duties, than in clashes of duty and interest. A rebuttable inference that the fiduciary has breached the conflicts rule serves equity’s restoration principles sufficiently in the case of conflicting duties. If the fiduciary cannot remove the court’s doubt, it is appropriate he restore the principal to the same condition as if no conflict rule breach had occurred. But if the fiduciary can satisfy the court there is no disloyalty (as apparently would have been the case in Motew) it is sufficient that the fiduciary compensate the principal according to common law principles. The fiduciary is not absolved of blame; it is only that no punitive award is extracted.

(iii) No equitable compensation at all for fiduciary breaches?

Some commentators argue that equitable compensation should not be available for any fiduciary breach, and that instead, the plaintiff should be restricted to a

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181 Bargiac and Haigh, above, n 127, 2.
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disgorgement remedy. Worthington argues that fiduciary law should operate ‘only’ to exact loyalty; it does not concern itself with matters of contract, tort, unjust enrichment and other equitable obligations (such as breach of confidence).\(^{184}\) Because the purpose of fiduciary law is to provide ultimate protection in those relationships society has deemed deserving of that protection, disgorgement is the appropriate remedy. Compensation, she says, is not appropriate because that is directed at obligations other than the obligation of loyalty.\(^{185}\)

There are real difficulties with Worthington’s argument. If the purpose of fiduciary law is to provide ultimate protection in certain relationships, it is unclear why that protection does not include keeping the beneficiary from economic harm. It is not obvious why disgorgement is the only appropriate remedy. To elaborate, saying that society accepts that some relationships require protection can just as easily be stated in the negative – society requires that some relationships be insulated from harm.\(^{186}\) Why should the vulnerable party not be protected from harm arising from disloyalty? Either disloyalty is an important part in the equation, or it is not. The profits rule only addresses one clear manifestation of disloyalty. If the disloyalty is manifested in another way, as conflict resulting in loss to the beneficiary, there should still be a remedy in equity because the guiding principle here is protection from disloyalty.\(^{187}\)

Worthington tends to overlook the dualist nature of the profits and conflicts rules by reducing the fiduciary obligation down to what she sees as a single obligation of loyalty.

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\(^{184}\) Worthington, above, n 183, 503.

\(^{185}\) Ibid, 507. Such as preservation from harm. Jackman presents a similar argument, though somewhat differently. He explains the rationale for restitution for wrongs as being protective of facilitative institutions, which he catalogues as property, relationships of trust and confidence, and some contracts. Further, he says that ‘the characteristic pecuniary remedy for institutional harm is restitutionary, while the remedial counterpart to personal harm lies in compensation’: I M Jackman, ‘Restitution for Wrongs’ [1989] Cambridge Law Journal 302, 302-5.


\(^{187}\) Or, as Rickett puts it, ‘If wrongdoing is the event, why is compensation not a perfectly legitimate response? If the plaintiff has suffered a loss, why should that not be compensable, even if the breach causing loss is of an equitable duty?’: Rickett, above, n 39, 175. See also Rickett, ‘Blueprint’, above, n 56, 33.
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Fiduciary obligations certainly require loyalty, but the loyalty requirement is not satisfied merely by the fiduciary not seeking an unauthorised profit. It is equally disloyal to allow a situation to continue where the fiduciary cannot discharge his obligations because of a conflict. The purpose behind the fiduciary obligation contained in the conflicts rule is to ensure proper, selfless performance. If the fiduciary acts selfishly, that conduct can still cause a loss, even though he or she may not have sought a profit.

Worthington's argument is an adequate explanation of some of the cases in the area, such as Nocton and Brickenden, where the fiduciaries arguably achieved betterment of their own positions. However, different considerations apply in cases where the fiduciary stands to gain nothing, on any reading of the facts. Examples of these types of factual situations include Canson and Target. In neither case was there any evidence that the fiduciary/solicitor was profiting from the chain of contracts of sales. Yet the solicitors were arguably disloyal in allowing their client to proceed to settlement, in deference to the duties owed to other parties. The Worthington argument apparently regards any losses suffered by the client/principal as irrecoverable (unless under some other head of liability). Alternatively, it is possible that the Worthington approach could explain the situation of disloyalty as one where the solicitor allowed another party to profit. As the profits rule forbids the fiduciary to seek an unauthorised profit personally or for others, perhaps the profits rule could be utilised to recover some of the loss. The amount recoverable would be limited to the profit; in both Target and Canson the amount finally paid for the property less the true value of the property.

This approach has the attraction of simplicity, as it would remove entirely any difficulties about causation and quantification of compensation. But it would also strip the conflicts rule of any independent meaning. The only conflicts prohibited would be conflicts

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188 For example, Stewart v Layton (1992) 111 ALR 687.
189 Nocton v Lord Ashburton [1914] AC 932.
192 Target Holdings Ltd v Redfem [1996] 1 AC 421.
by which either the fiduciary or some other party to whom the fiduciary owed duties had sought to make a profit. There would be little need for a separate conflicts rule because forbidden conflicts would be resolved by application of the profits rule. This is unorthodox, and the explanation will not solve some reported cases.

One example is *Stewart v Layton*, a clear demonstration of a solicitor with conflicting duties. A solicitor acting for both the vendor and purchaser of a property received information about the extent of the purchaser’s financial problems before discontinuing acting for the purchaser. He did not pass the information on to the vendor, or inform her that he no longer acted for the purchaser, or suggest she get another solicitor. The day before settlement, the purchaser’s new solicitor informed the first solicitor that the purchaser could not settle unless the vendor provided vendor finance of about $195,000. The vendor was faced with a choice of agreeing to the vendor finance, or obtaining a bridging loan for her next purchase then due to settle. The vendor agreed to provide finance on security of a second mortgage. The purchaser soon defaulted, and the vendor ultimately lost about $173,000. The solicitor did not profit from the transaction (apart from his fees). It is difficult to describe the purchaser in the above situation as having profited from the fiduciary breach caused by the unresolved conflict. This loss could not have been recovered via an application of the profits rule. Not all cases of conflict of duty and duty can be covered by the profits rule. Nevertheless, a conflict of duty and duty effectively shifts risks from one of the fiduciary’s principals to another. If that risk manifests in loss, the principal should be entitled to a remedy.

Another example confronting the Worthington suggestion is *Permanent Building Society (In liq) v Wheeler*. Allegations were made against five directors of the building society, two of whom gained from the alleged breach. The amount the building society lost exceeded the amount by which two directors profited. Application of Worthington’s argument to *Wheeler* would mean that the plaintiff is restricted to stripping the defendant of the illicit gain, even in situations where the losses surpass any gain made. There is no

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deterrent effect in such a rule. Instead, the fiduciary would be encouraged to take risks with the principal’s interests, and yet suffer no personal risk beyond confiscation of any gain made. If the purpose of fiduciary law is to encourage social cohesion, through protecting certain relationships deemed worthy of fiduciary law’s supervision, protection should be extended to losses caused by disloyalty. Faith in the system can also be damaged by losses made, not just by unauthorised gains. Worthington’s proposal provides too much protection to defaulting fiduciaries.

Brock says that equitable compensation is not an appropriate remedy for breach of fiduciary duty because it focuses on loss, and argues that the profits rule is the appropriate rule to remedy fiduciary breach. He reaches his conclusion through a different route from Worthington, although their arguments may amount to much the same thing. Brock’s approach is through restitutionary analysis. Brock argues that the infringement of a right should be viewed as a loss, not necessarily an economic loss, but a ‘normative’ loss. He describes normative loss as the ‘moral imbalance that affects the holder of the right when the duty correlative to the right is breached’.

It seems that Brock would compensate the beneficiary for loss, but via the law of torts rather than equity. For him, obligations are aligned with the remedies to which they give rise.

In other words, where there is a restitutionary remedy, liability is in unjust enrichment; where there is a compensatory remedy, liability is in tort; where there

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195 Brock, above n 183, argues that there is no category of restitution for wrongs and that all restitution cases can be explained as restitution for unjust enrichment. The kernel of this argument is that normatively, every infringement of a right results in a wrong. Normatively, every plaintiff in such a position has lost something, that is, the right of non-infringement, though that may not result in a monetary loss. This satisfies the usual restitutionary requirement that the defendant be enriched at the expense of the plaintiff. Thus, all cases of breach of fiduciary duty can be explained in normative terms as the defendant being unjustly enriched at the expense of the plaintiff.

196 Ibid, 190.

197 Ibid, 191.
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is an expectation remedy, liability is in contract. In each case, the remedies rectify a normative imbalance between the plaintiff and defendant. 198

Although it is conclusionary, there may be some validity in this. Cases of breach of fiduciary duty involving loss almost invariably involve breaches of tortious duties, suggesting that there is a substantial overlap. Nocton arguably involved non-fraudulent negligent advice that would now be considered a negligent misstatement. In Stewart v Layton the same amounts were ordered as recoverable for breach of fiduciary duty and breach of the duty of care. It seems that the key for Brock is that a breach of the profits rule is the only duty which can be said to be ‘solely of the fiduciary duty of loyalty owed to the fiduciary's principal’, rather than also a breach of a duty of care. In this, it is clear he would agree with Worthington.

The question, then, is whether the overlap between the duty of care and the duty to avoid conflict of interest is complete. If there is a complete coincidence, Brock and Worthington's approach seems compelling - loss should be compensated in tort. For Worthington and Brock, the loyalty a fiduciary owes is only betrayed by the seeking of an unauthorised gain, the gain being the clear manifestation of disloyalty. But, as already argued, disloyalty can be manifested in less obvious, but equally damaging, ways. Betrayal also occurs where a fiduciary prefers one of his duties over another to the cost of the former because he shifts the risk of harm from one principal to another. Alternatively, it occurs when the fiduciary prefers his or her own interests over that of the principal, as occurred in Nocton. This shifts the risks from the fiduciary to the beneficiary. Despite arguments like those proposed by Brock and Worthington, these actions are forbidden by the conflicts rule. They are so forbidden because they are disloyal. The rule against making illicit profits is

198 Ibid, 200.
199 McKenzie v McDonald [1927] VR 134 provides a rare example.
200 [1914] AC 932.
201 (1992) 111 ALR 687.
202 Brock, above n 183, 203.
not the only duty of loyalty owed to the principal; the duty to avoid conflicts also confronts disloyalty.

But concluding that the conflicts rule is designed to overcome disloyalty does not fully answer the question of whether there is complete coincidence between it and a duty of care. It shows that the obligations are of different substance. It shows that a breach can be negligent without being disloyal, but it does not necessarily show whether a breach can be careful (or at least not careless) and yet still disloyal. If an act can satisfy the duty of care, but still be a breach of the duty of loyalty, there is no complete coincidence. Usually this scenario will not arise. If a fiduciary prefers his or her own interests, factually this commonly involves not taking care of the principal’s interests. Even though it is extremely rare, it is possible to act carefully and still be disloyal. McKenzie v McDonald\(^2^0^4\) illustrates this. A real estate agent who owed fiduciary duties to the vendor sold his own property to the vendor at an overvalue, and purchased her property at an undervalue. Rescission had become impossible. The plaintiff pleaded deceit, negligence and breach of fiduciary duty against the agent. Only the fiduciary claim succeeded. The plaintiff could not show that any relevant negligence had led to her loss, but the fiduciary’s disloyalty had. The fiduciary responsibility is to act in the interests of the principal to the exclusion of the fiduciary’s own interests; therefore while the fiduciary’s acts may satisfy the standard of care required by tort, they may still be disloyal.\(^2^0^5\) For this reason alone, there can be no blanket rule that the only remedy for breach of fiduciary duty is profit-stripping. Arguments which suggest recovery against fiduciaries should be limited to situations where the fiduciary may benefit rest on ‘a misguided sense of orderliness.’\(^2^0^6\)

The work done by Worthington and Brock may point the way to a far more limited future for equitable compensation for breach of fiduciary duty. There may come a time when it is recognised that the only uniquely fiduciary duty is the duty not to make an illicit

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\(^2^0^4\) [1927] VLR 134.
\(^2^0^5\) For example, as in Hodgkinson v Simms [1994] 3 SCR 377. Further, Boardman v Phipps [1967] 2 AC 46, establishes that it is possible to act carefully and yet still make an illicit profit in breach of the profits rule.
profit. This would increase the scope of cases left to be solved solely according to the law of tort. However, at the current time, these views cannot be said to represent the law in Australia. Recent High Court dicta in *Maguire v Makaronis* \(^{207}\) and *Pilmer v Duke Group Limited (in liq)* \(^{208}\) give no support whatever for an imminent recognition of truncated operation for the remedy of equitable compensation. This thesis asserts that, in any event, the conflicts rule is a fiduciary obligation and another manifestation of the duty of loyalty. In appropriate cases, equitable compensation should be available to remove the fiduciary’s conflict in the subject transaction. Equity’s interests can be served here by the remedy of equitable compensation. An award of equitable compensation will allow the principal to be returned to the position he would have occupied. The principal is thus restored, and the fiduciary’s conflict is removed from the matrix. If equitable compensation is not available to remove the effect of the fiduciary’s conflict, equity’s restoration interests will be disappointed. Disgorgement of any gains may not achieve equity’s aim of providing restoration to the principal.

4.4 CONCLUSION: AVAILABILITY OF EQUITABLE COMPENSATION FOR BREACH OF FIDUCIARY DUTY

Equitable compensation is available to remedy some breaches of fiduciary duty. The nature of fiduciary obligations means that they cannot be regarded merely as an extension of trust, and therefore cannot be remedied in the same manner. Fiduciary obligations are limited to two requirements, that the fiduciary not make an illicit profit, and that the fiduciary not allow a conflict of interest to continue. Fiduciary obligations do not encompass a positive obligation to make disclosure.

However, equitable compensation is not available to remedy all breaches by fiduciaries. In particular, the fact that the defendant is a fiduciary will not convert every


\(^{207}\) (1997) 188 CLR 449.

\(^{208}\) (2001) 207 CLR 165.
duty owed by the defendant to the plaintiff into a fiduciary duty. It may be that the subject breach can only be remedied by the common law. Fiduciary law only reaches obligations which require loyalty in performance. The requirement for disloyalty excludes many breaches that might otherwise fall foul of fiduciary law; thus common law duties are excluded. Equitable duties of care are not excluded, but because the content of the tortious duty of care and the equitable duty of care is the same, little turns on the distinction. It is uncertain whether equity’s jurisdiction is enlivened by conscious disloyalty or mere inadvertence. Negligence in the context of conflict of duty and personal interest should be regarded as irrefutably disloyal, but it may be acceptable to regard negligence in the context of conflicting duties as merely presumptively disloyal.

Equitable compensation is not needed as a remedy for breach of the profits rule, because compensation can only remedy loss.\textsuperscript{209} The disloyal outcome represented by an illicit profit is cured by profit-stripping. Therefore, the only fiduciary duty that attracts the remedy of equitable compensation is the conflicts rule. Arguments that the only remedy that should be available for breach of fiduciary duty is a disgorgement remedy are dismissed; equity’s interest in restoring the plaintiff to the position deserved cannot be satisfied in all cases by disgorgement alone. Equitable compensation must be utilised to achieve justice in these cases.

Nevertheless, it is obvious that the range of cases in which equitable compensation is the only remedy that can fully address restoration of the principal remains small indeed. Its exclusive operation is in fact limited to cases where the fiduciary experiences a conflict of duty and duty or duty and interest which is for some reason not reached by the common law. McCamus says this is because the nature of fiduciary duty:

\begin{quote}

is not such as to give rise to the kinds of injury for which compensation would be an appropriate remedy. In cases where fiduciaries have injured their principal
\end{quote}

\textsuperscript{209} In cases where, on the facts, (a) both equitable compensation and an account of profits are available, and (b) the principal’s loss exceeds the fiduciary’s gain, equitable compensation may be the preferred remedy.
through misconduct of some kind...the victim will typically be entitled to compensation in the form of damages either in contract or in tort.\textsuperscript{210}

This is not to deny equitable jurisdiction in relation to fiduciary breaches. It is merely to assert that, in most cases, equitable compensation need not be sought and offers no advantages over the common law.

\textsuperscript{210} McCanus, above, n 47, 300-01. See also Davidson, above, n 90, 375.
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PART B: CAUSATION IN AWARDS OF COMPENSATION FOR BREACH OF FIDUCIARY DUTY

4.5 INTRODUCTION

It has been shown above that the defining requirements that indicate the availability of the remedy of equitable compensation for breach of fiduciary duty are a breach of the conflicts rule, but not a breach of the profits rule or a tortious duty of care, that causes a loss to the principal. There is little to link the availability of equitable compensation for breach of fiduciary duty to the availability of equitable compensation for breach of trust. Breach of the conflicts rule is not the same thing as a breach of the obligation to perform the trust which results in liability to reconstitute the trust. The positive obligations of a fiduciary who is a trustee revolve around the trust property. The fiduciary who controls no property cannot be asked to reconstitute a trust fund but can be asked to abide by the negative fiduciary obligations.

Restoration of the principal to the situation that should have existed is broadly comparable to restoration of the trust estate. But because there is no pre-existing trust fund, equity is restoring the principal’s economic position. The principal is entitled to the approximation of performance of the fiduciary duty. This is achieved by making good whatever losses the principal suffers due to the fiduciary’s conflicted position. The focus then shifts to the principal’s loss, though the issue of loss is not open-ended. It is limited to the loss that is caused by a breach of the conflicts rule. The plaintiff is restored only to the extent the fiduciary’s conflict has impacted upon the transaction in question. There is a necessary causal link in this. There must be a link between the fiduciary’s conflict and the damage suffered. Other losses are not referrable to breach of fiduciary duty. The fiduciary’s conflict is cured when the effect of the conflict is removed from the transaction. The

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[211] However, it is possible for a trustee to incur liability in equitable compensation for a breach of the conflicts rule resulting in a loss to the trust fund. The trustee is, of course, a fiduciary. See generally, Chapter 3.
principal is approximately placed in position as if the duty has been properly performed, and this satisfies equity’s interests in restoration.

Causation in respect of breaches of the conflicts rule has caused unique and difficult problems. There has been an ongoing assumption in the case law and in academic writing that losses incurred subsequent to breach of fiduciary duty are in some way unlimited. This misconception can be blamed on a number of factors, including:

1) an assumption that because all gains can be stripped from a defaulting fiduciary, it must follow that all losses are also recoverable;

2) An unjustified equation of breach of the conflicts rule with reconstitution of a trust fund;

3) The effect of Brickenden; and

4) The important factual differences between the decided cases that has caused ‘doctrinal fragmentation in the sense that the many different tests proposed are really addressing different combinations of factors’.

These factors have all been exacerbated by the fashion for pleading breach of fiduciary duty in addition to all other possible claims at common law and statute, in the hope of obtaining a wider remedial menu.

This misconception is unsustainable. The fact that all gains can be stripped from a fiduciary is of little significance in discussions of loss. Compensation for breach of the

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212 Causation issues rarely arise in respect of the profits rule. Defendants are rarely successful in showing the profit made is not subject to the profits rule. However, Re Cape Breton Company (1885) 29 Ch D 795, Peninsular and Oriental Steam Navigation Company v Johnson (1938) 60 CLR 189, and Re Leeds and Handley Theatres of Varieties Ltd [1902] 2 Ch 809 appear to be examples where the fiduciary succeeded in denying the causal link between the gain and the breach of duty.

213 Alternatively, it is said that ‘no rule to govern consequential loss has emerged’: J D Davies, ‘Equitable Compensation: “Causation, Foreseeability and Remoteness”’ in D W M Waters (ed) Equity, Fiduciaries and Trusts, (Ontario, Carswell, 1993) 297.


215 Getzler, above, n 120, 238
Chapter Four: Breach of Fiduciary Duty

conflicts rule cannot necessarily be equated to reconstitution of the trust fund. It is understandable that early scholarship suggested such a link, but this has now been eclipsed by the high level of analysis fiduciary obligations have received in recent decades. *Brickenden* must be limited in its application, and should be restricted to its facts. This is discussed below.

A further dimension of the problem is the wide variety of situations in which allegations of both the existence of fiduciary duties and allegations of their breach can arise. The most obvious distinction is between custodial and non-custodial situations. It has become common to analogise custodial situations with cases calling for reconstitution of the trust fund. Non-custodial cases are often compared to tort. Two schools of thought have directly developed as a result; the first suggests causation rules must be the same as for trust, the second argues for adoption of tortious causation rules. A third variant is also discernable; this calls for a blend of trust and tort as appropriate to the facts. The difficulty with all this is, although a just result is often reached, it is hard to discern any consistent principle and therefore problematic to attempt to predict likely outcomes of litigated matters. The case law does not reveal one entirely satisfactory method of dealing with causation for breach of the conflicts rule. Instead, a number of causation tests have been applied.

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216 Gummow, above, n 122; Hayne, above, n 153.
218 As, for example, with company directors who have control of company property.
219 As, for example, with solicitors acting for clients in transactions.
221 For example, *Stewart v Layton* (1992) 111 ALR 687; *Wan v McDonald* (1992) 105 ALR 472.
222 For example, Davidson, above, n 90, 352.
223 For example, J Berryman, ‘Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals’ (1999) 37 *Alberta Law Review* 113; Burrows, above, n 1, 9; Davies, above, n 213, 303.
224 For example, Elliott, above n 150.
225 Getzler, above, n 120.
Nevertheless, it is essential to be able to specify exactly why equity is intervening and what equity’s remedial interests are. Equity sees to it that the fiduciary obligations are properly performed.

A primary inquiry to be made by each court of equity faced with a fraud is not, How much will roughly compensate the plaintiff for the harm he has suffered? It is, what exactly would have happened between the parties had the defendant not been fraudulent? When the answer is settled, the consequences of that are made to follow anyway. Equitable frauds which come to light are never consummated with success.226

This observation holds good for both fiduciary duties. The fiduciary who makes an illicit profit does not succeed after detection. She is stripped of the profit. Equity acts as if the fiduciary acted properly at the outset and acquired the profit for the principal.227 Equity intervenes in cases of breach of the conflicts rule, not to strip the defendant of any gain, nor to reconstitute a trust fund, but to remove the effect of the defendant’s conflict. When the effect of the conflict is removed, it is as if the defendant’s fiduciary duty has been performed properly. The fiduciary’s conscience is made clear. No further restoration is required. The principal can insist the fiduciary perform his duty, but no more.

Equitable compensation for breach of the conflicts rule is therefore necessarily limited to an amount required to remove the effect of the defendant’s conflict. This determines causation. Only the loss caused by the fiduciary’s conflict is recoverable. This is frequently said to be determined according to ‘but for’ causation: the question is whether the loss would have occurred but for the defendant’s breach. This thesis will argue that the term ‘but for’ is misleading, unless coupled with words indicating the nature of the duty breached. ‘But for the fiduciary’s breach’ is better expressed as ‘but for the fiduciary’s unresolved conflict of interest’. Once this is cured, the situation obtained is ‘as if’ the duty not to suffer a conflict to continue has been performed.

227 Attorney-General (Hong Kong) v Reid [1994] 1 AC 324.
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The quagmire that is the law on causation for breach of fiduciary duty can be cleared. The regular failure in the case law and earlier academic writings to separate out breaches of trust from breaches of fiduciary duty, and the subsequent failure to consider the scope of the obligation allegedly breached, can be corrected.\(^{228}\) Despite the paucity of references, this solution has been long suggested, and its importance cannot be overemphasised.

The rubric 'breach of fiduciary duty' has come to encompass so many different types of liability that it is not now possible to determine the appropriate remedy by defining the wrong simply as a 'breach of fiduciary duty'. It is necessary, instead, to look through the categorisation of the wrong as a 'breach of fiduciary duty' to the true nature of the wrong, and to move from there to determination of the remedy.\(^{229}\)

Multiple causation tests have been proposed simply because the cases are inconsistent.\(^{230}\) Focus must be on the breach of the conflicts rule. Seen in this light, causation causes few difficulties.\(^{231}\) Only the effect of the conflict should attract equitable remedies. If there are any further losses outstanding, they cannot be remedied by equity, but must be remedied via other arms of the law, if at all. The loss that is referable to the

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\(^{228}\) These failures have never been universal. For example, Davies, above, n 213, 307-8 made a similar comment in 1993. Its significance may have been overlooked because his conclusion tended to the adoption of tortious principles for the calculation of equitable compensation.

\(^{229}\) *Canson Enterprises Ltd v Boughton & Co.* (1989) 61 DLR (4th) 732, 737 (Lambert JA).

\(^{230}\) Getzler, above, n 120.

\(^{231}\) In this respect, the conflicts rule may mirror the profits rule, where causation is unimportant: *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048 (unreported, Mummery, Hale and Carnwath LJJ, 28 July 2003). It is irrelevant that a gain made in breach of the profits rule is due in part to events outside the fiduciary's control, such as a general increase in the stockmarket. (It is possible that the fiduciary will be allowed an amount for skill and care, in order to avoid a windfall to the plaintiff). If the illicit profit is made by reason of or by use of the fiduciary position, that is the end of the debate; no further element of causation is called for. As Glover points out, these elements provide a necessary link between the fiduciary office and the illicit profit. This can usefully be likened to a 'but for' standard of causation: Glover, above, n 50, 201-3.
effect of the conflict should be remedied strictly; the fiduciary can be said to be liable upon a 'but for' basis. But that is the only loss to which strict liability applies. 232

4.6 CAUSATION TESTS

'What are the tests? Judges have been known to despair in their quest for the answer.' 233

Equitable compensation cases have not yielded one, single, satisfactory explanation of causation for breach of the conflicts rule. Because there are relatively few cases, inevitable cross-fertilisation with other areas of the law has occurred. Nocton v Lord Ashburton 234 is of little assistance in discussion of causation. Causation was not crucial there because there was no dispute about the quantum of relief. Nevertheless, it is telling that Viscount Haldane expressed the view that the appropriate remedy might have been to order the solicitor to restore to the mortgage security the amount taken out as a result of his breach. This would have removed the effect of the solicitor’s conflict from the transaction between Lord Ashburton and the mortgagor. It would have restored Lord Ashburton to the position he would have occupied ‘but for’ Nocton’s breach.

Factual differences in the relatively few cases on equitable compensation have made them of little precedential value, but that has been scarcely noticed in the authorities; witness the constant references to Re Dawson 235 when breach of fiduciary duty is under discussion. Instead of a single causation test emerging, various have been applied. These

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232 For this reason, Brickenden causation is highly important. If it applies in its widest sense, more losses may be included under the label ‘effect of the conflict’ than might otherwise be the case. This is discussed further below.
234 [1914] AC 932.
are strict Brickenden\textsuperscript{236} causation, causation derived from trust cases, common sense causation, causation derived from torts cases, and scope of duty causation. It is clear that there is significant overlap between these various tests. This thesis suggests that the most effective causation test is a combination of two of these: in effect, ‘but for’ causation within a consideration of scope of the duty.

Types of Compensation

In a series of recently published articles, Steven Elliott has argued that there are two different types of compensation under discussion when equitable remedies are sought.\textsuperscript{237} He distinguishes between claims for performance of a duty (as in performance of a trust) and claims for reparative compensation to repair a wrong (as in breach of the conflicts rule or breach of a duty of care). Elliott (in this case with Mitchell) says that:

(i) in its dominant sense compensation consists in a money equivalent to the injury or loss that a person has suffered. This may be called reparative compensation because it is calculated to repair the loss. The measure of reparative compensation is the difference between the claimant’s present position and the position he would have occupied if he had not sustained the wrong. This hypothetical comparison is drawn pursuant to a causal inquiry linking the defendant’s misconduct with deterioration in the claimant’s position. Reparative compensation matches injury caused by the defendant’s misconduct.

In its second sense compensation consists in a monetary equivalent to property of which a person has been deprived or denied. This may be called substitutive compensation because it is calculated to provide a substitute for the property. ….Causal connection between the claimant’s injury and the defendant’s act is not to the point where compensation is used in the substitutive sense because

\textsuperscript{236} Brickenden v London Loan & Savings Co [1934] 3 DLR 465.

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the compensation is an equivalent to the property and not to whatever injury there may be.  

This distinction may go a long way towards reconciling the contradictory cases in this area of law.

(i) Brickenden causation

The most extreme causation test for breach of fiduciary duty is derived from Brickenden v London Loan & Savings Co. At its widest, it may mean that in cases of breach of fiduciary duty, causation is entirely irrelevant. In the Privy Council, Lord Thankerton made the following delphic comment:

When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property. Once the court has determined that the non-disclosed facts are material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.

In this decision, the fiduciary who had failed to disclose his interest in the matter was held liable for the entire amount advanced by his client to a borrower.

Although Lord Thankerton's remarks appear limited to non-disclosure of material facts, it is obvious that most breaches of the conflicts rule can be cast in that light. In all of the cases mentioned in this chapter, breaches of the conflicts rule arose when the fiduciary

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238 Elliott and Mitchell, ibid, 24.
239 Brickenden v London Loan & Savings Co [1934] 3 DLR 465 ('Brickenden').
240 Ibid.
failed to make disclosure to the principal. Read this way, the test suggests that equity treats non-disclosure as a bypass of the need to show a causal link between the breach of the conflicts rule and the loss. The non-disclosure is then performing double-duty, both attracting the wrong and proving its breach.

In *Maguire v Makaronis*, Kirby J interpreted the ‘but for’ test as applied in *Re Dawson* as a less stringent test than the *Brickenden* test. This is a valid distinction given that *Brickenden* appears to assume causation, but *Re Dawson* requires at least ‘but for’ causation. Others see the two tests in a similar light. This raises an interesting prospect: if the *Brickenden* standard is more exacting than the trust-derived ‘but for’ test, fiduciary law may have eclipsed trust law as the sphere for equity’s paramount concerns. *Brickenden* is not universally accepted, however. Though it is frequently applied, it is regularly distinguished and criticised.

(a) *Brickenden in context*

Put plainly, the difficulties concerning the Privy Council opinion in *Brickenden* have occurred because the case has been divorced from its context. Heydon criticises Lord Thankerton’s pronouncement as being ‘*obiter dicta,* unrelated to any arguments put to the

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243 [1966] 2 NSWLR 211.

244 See *Swindle v Harrison* [1997] 4 All ER 705, 716-7 (Evans LJ); L Ho, ‘Breach of Fiduciary Duty and Causal Responsibility’ (1997) 11 Trust Law International 72, 74; Getzler, above, n 120, 238-9.

245 *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465.


248 Heydon, above, n 139, 328.

249 *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465.
Board or factual controversy which would make them determinative, unsupported by authority, and offering no explanation of why the plaintiff should recover for loss not caused by the defendant. These criticisms reveal the crux of the matter. The case should never have been taken as authority for the proposition it is claimed it supports. Quite simply, it cannot support the wide interpretation it is given. The genesis of the problem lies in the relative lack of detail in the reported advice of the Privy Council. Lord Thankerton’s statement of facts is adequate, but it does not deliver the full flavour of the evidence heard below. Brickenden’s behaviour appears to have been in a different league altogether to that of Nocton. Crocket J’s judgment in the report of the appeal to the Supreme Court of Canada provides the most complete history of the transaction.

Biggs and his wife were serial borrowers, and had previously borrowed three sums from Brickenden, namely $2,000, $1,200 and $5,000. A total of $1,993.33 was outstanding in respect of the first two loans, and all of the $5,000 remained unpaid. Mr and Mrs Biggs had also previously borrowed $18,000 and $12,000 from the loan company, and were in arrears of interest in the sum of $1,636.14. Brickenden arranged for Biggs to borrow a further $13,500 from the loan company. The facts showed this was more than a mere failure to disclose a conflicting interest. Brickenden actively sought the loan for Biggs for the purpose of recovering the debt owed to him. Crocket J commented:

It is perfectly obvious that the intention from the beginning was that Brickenden was not only to unload his $5,000 mortgage upon the Loan Company, but that he was to be paid the balances of principal and interest due on his two subsequent mortgages out of the proceeds of the proposed loan, as well as his exorbitant commission money.

250 Heydon, above n 139, 331.
251 Ibid, 332.
252 London Loan & Savings Co v Brickenden [1933] 3 DLR 161, 162.
253 Berryman directs us to the findings of the trial judge: Berryman, above, n 223, 101.
Brickenden, he noted, 'refrained on the trial from even so much as attempting to vindicate his conduct.' Later, his Honour concluded that Brickenden's breach induced the loan company's entry into the loan transaction. Thus, Brickenden can be distinguished from Nocton in several important ways. There were no allegations of fraud against Nocton. The same is not true of Brickenden, although the appeal did not concern such allegations. In Nocton, it was not clear whether Nocton's breach caused the client's entry into the transaction; that point was clearly established in Brickenden.

Brickenden should have been seen as authority for the much more limited proposition that a fiduciary is liable for all losses that would have occurred but for his breach of the conflicts rule. Clearly the loan company would not have entered into the agreement but for Brickenden's active inducement. Equity's restoration goal requires that subsequent losses be restored to the principal. Prima facie, Brickenden should have been liable for all losses the loan company suffered by advancing the sum of $13,500 to Biggs. It is regrettable that this does not appear from the Privy Council report. Unfortunately, there is a further aspect of the decision that is still questionable. The loan company withheld $1,636.14 of the $13,500 advanced to Biggs to pay itself interest arrears accrued on Biggs' earlier loans. The minority in the lower court, the Supreme Court of Canada, felt that this should not be recoverable as it could not 'fairly be said to have been lost to the company as a result of the [new] loan.' The majority did not allude to this aspect at all. Nor did Lord Thankerton directly deal with the point, possibly because that aspect of the assessment of damages was not disputed on appeal to the Privy Council. His Lordship noted the

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255 Ibid, 165.
256 Ibid, 170. Cannon J agreed with Crocket J. The majority, Smith, Rinfret and Lamont JJ, concurred on this point, but disagreed as to remedy.
258 Nocton v Lord Ashburton [1914] AC 932.
261 It might have been contemplated in their order that the matter be referred back for recalculation of the amount owing under the mortgage.
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retention of the arrears, but followed the trial judge’s finding that the security offered for the $13,500 loan was worthless.

To the extent that recovery included the arrears of interest the Biggs already owed, it would seem to have been over-inclusive. This made Brickenden the insurer of the Loan Company’s earlier advance, even though there was nothing to suggest he was responsible for the earlier borrowings. Recovery against Brickenden should have been restricted to the loss that resulted from his conflict of interest. In this case, that was not limited to the amount by which he himself profited but included the losses the loan company incurred from entry into the transaction. This is because the loan company would not have entered into the loan transaction but for Brickenden’s instigation of the loan. However, his conflict of interest was not causative of a loss that would have occurred in any event. This can be easily tested by considering what would have happened if Brickenden had acted properly. The answer is that the loan company would not have made the $13,500 advance to Biggs, but Biggs would still have been in arrears of interest on the earlier loans. Brickenden’s decision not to contest the issue that the loss of previous arrears would have occurred in any event is to be regretted.

(b) Interpretations of Brickenden

The commentary above discusses the widest possible interpretation of Brickenden. There are many examples of this interpretation being adopted, at least ostensibly. Equally, there are numerous examples of attempts to limit the scope of its

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262 Brickenden v London Loan and Savings Co [1934] 3 DLR 465, 468.
263 Other aspects of the decision are curious. Lord Thankerton said the breach entitled the plaintiff to 'at least nominal damages': Brickenden v London Loan & Savings Co [1934] 3 DLR 465, 469. Nominal damages are a tortious concept, applied to vindicate a right. It was never open to the court to award nominal damages for breach of fiduciary duty. It is uncertain whether Lord Thankerton thought he was dealing with a tort, or merely analogizing to tort law for the purpose of assessing damages. It is also notable that Lord Thankerton made no reference at all to Nocton v Lord Ashburton [1914] AC 932 though brief reference had been made to it by the Supreme Court of Canada.
265 Hill v Rose [1990] VR 129; Stewart v Layton (1992) 111 ALR 687; Swindle v Harrison [1997] 4 All ER 705. The three members of the Court of Appeal in Swindle v Harrison appeared to understand Brickenden as having this meaning.
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application. These were conveniently catalogued by Kirby J in *Maguire v Makaronis*. It will become obvious that there is a significant degree of overlap in the various limitation devices employed.

(i) As a rule of evidence

As Kirby J noted, the Canadian cure for the breadth of *Brickenden* is to read it down to the status of 'no more than an evidentiary principle'. Elliott calls this interpretation 'questionable but perhaps practical'. Once a breach of fiduciary duty is established, a presumption arises that all following effects are causally linked to the fiduciary’s breach. The presumption is, however, rebuttable upon proof by the fiduciary that the loss is not causally related to the breach. 'Even if a court may not speculate on the effect of the material non-disclosure, it can reach its own conclusion based on reasonable inferences from the evidence.' This seems to be the most common method of cutting back the scope of *Brickenden*.

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267 *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465.
268 *Maguire v Makaronis* (1997) 188 CLR 449, 490; see Davies, above, n 213, 304-5.
269 Elliott, above, n 123, 74, at n 78.
270 This differs from the usual position, where the principal is required to prove breach of fiduciary duty and causation of loss: *Papadopoulos v Hristoforidis* [2001] NSWCA 368 (unreported, Spigelman CJ, Sheller and Hodgson JJA, 12 October 2001). A variation on this interpretation is that *Brickenden* is limited to the effect of non-disclosure. If non-disclosure is relevant, the principal’s reliance on the state of affairs as disclosed is presumed: see Martin, above, n 110, 134.
271 This is in substance what Ho calls a ‘weak reading of the test’, containing two limbs; the first requires the plaintiff to prove that the breach was material to the transaction, the second allows the defendant to lead evidence that the loss would have occurred despite the breach. Ho, above, n 244, 74. *Brickenden* was applied this way in *Haira Burberry Mortgage Finance & Savings (in rec)* [1995] 3 NZLR 396 and *Everist v McEvedy* [1996] 3 NZLR 348.
273 For example, see *Witten-Hannah v Davis* [1995] 2 NZLR 141.
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(ii) Fraud versus non-fraud

In *Permanent Building Society (in liq) v Wheeler*\(^{274}\) Ipp J\(^{275}\) drew a distinction between breaches of fiduciary duty and breaches of the duty of care. Lord Thankerton’s wide *Brickenden* formulation applies to the first, because they are at least equitable fraud, but does not apply to the second.\(^{276}\) The shortcoming of this approach is pointed out by Tijo and Yeo, who warn that:

this would create two levels of liability for defaulting fiduciaries. Yet all losses consequent on breaches of fiduciary duty which fall to be compensated under *Nocton v Lord Ashburton* would seem to be governed by the same principles.\(^{277}\)

But perhaps it was not intended by Viscount Haldane that the degree of the fiduciary’s culpability could not be taken into account. Viscount Haldane commented that the measure of equitable compensation would not always be the same as in action for deceit or negligence.\(^{278}\) Plaintiffs and their lawyers invariably interpret this as meaning that more generous compensation is available in equity. But the Lord Chancellor’s words are sufficiently vague to bear the negative meaning, that is, in an appropriate case the plaintiff might recover *less* than might have been available in tort.\(^{279}\) Perhaps a fiduciary’s honest, superficial breach might trigger such a situation.

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\(^{275}\) (Malcolm CJ and Seaman J concurring)

\(^{276}\) See also *Swindle v Harrison* [1997] 4 All ER 705, 717 (Evans J); *Hodgkinson v Simms* (1997) 117 DLR (4th) 161, 202.

\(^{277}\) Tijo & Yeo, above, n 272,183.

\(^{278}\) *Nocton v Lord Ashburton* [1914] AC 932, 958.

\(^{279}\) Elliott hints that this might be possible: Elliott, above, n 123, 83.
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(iii) As going to contributory fault

Finn sees the *Brickenden* principle as negating the ability of a defendant to raise contributory negligence as a defence to a claim, in order to reduce equitable compensation payable. Getzler says that Australian and New Zealand decisions can be seen this way:

applying a *Dawson*-style but-for test to exclude a contributory negligence defence but using a common-sense notion of significant causation to establish basic liability in the first place.

This certainly seems to have been the understanding of the New South Wales Court of Appeal in *Beach Petroleum NL v Kennedy*. The Court thought *Brickenden* had to be understood in light of *Target*, and drew attention to the oft-forgotten fourth party in the *Brickenden* scenario. There seems little doubt that Brickenden was assisted in his dubious plans by one or more officers of the plaintiff company, who may well have been liable for their own breaches of duty. Their behaviour, though, was not the subject of the appeal before the Privy Council. The Court of Appeal preferred to see the *Brickenden* prohibition against speculation as questioning what course the principal would have taken given that others were also potentially liable for separate breaches of duty that caused the loss. *Brickenden* thus read is not to be taken as authority ‘for the general proposition that, in no case involving breach of fiduciary duty, may the Court consider what would have happened if the duty had been performed.’ Other limiting explanations have also been proposed.

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281 Getzler, above, n 120, 240-1.
283 *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465.
284 *Target Holdings Ltd v Redferns* [1996] 1 AC 421.
286 Several other limitations or exclusions of *Brickenden* have been suggested, including an interpretation by Kirby J, which is discussed in the text below. A more recent suggestion was provided by Hodgson JA (Hamilton J agreeing) in *White v Illawarra Mutual Building Society Limited* [2002] NSWCA 164, (unreported, Powell, Hodgson JJA and Hamilton J, 19 July 2002) [144] where it was suggested that the *Brickenden* principle clearly applied to cases where the fiduciary obtained an undisclosed benefit from
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(c) English position on Brickenden

Brickenden holds a curious position in England. It has not been explicitly overruled, but is perhaps under even greater threat there than in Australia. It is extremely hard to align with the important House of Lords decision, Target Holdings Ltd v Redferns. Its status is, as Matthews puts it,

in a peculiarly delicate state. We have a decision of the Privy Council (in any event not technically binding on the English courts) dating from 1934, which has since been followed by other Commonwealth courts of high repute.

Brickenden and Target are distinguishable in that the latter involves a breach of trust and the former a breach of fiduciary duty only. However, complications arise because Lord Browne-Wilkinson endorsed the minority view expressed by McLachlin J in Canson (another breach of fiduciary duty case) of the ultimate limitation upon equitable compensation, namely that the right was not unlimited and must result from breach of the relevant duty. The Target court made no reference to Brickenden. The outcome of application of Lord Browne-Wilkinson’s endorsement is that the two cases must be seen as inconsistent. Applying hindsight and common sense to the Brickenden facts, it cannot really be said that the whole loss was caused by Brickenden’s conflict of interest.

the transaction, and thus probably applied in all cases where the principal sought not damages but recovery of the benefit received. A similar comment was made in Gwembe Valley Development Co Ltd v Koshy [2003] EWCA Civ 1048 (unreported, Mummery, Hale and Carnwath LJJ, 28 July 2003) [144]. With respect, Brickenden is not necessary to establish that point.


Target Holdings Ltd v Redferns [1996] 1 AC 421.


An attempt was made to reconcile the cases in Bristol and West Building Society v May, May & Merrimans [1996] 2 All ER 801. Solicitors had acted for both the lender and borrowers in a number of transactions. The retainer from the lender had specified that the solicitors were required to communicate matters that might prejudice the lender’s security, immediately such matters became known to the solicitors. A strict interpretation of Brickenden suggests that these prejudicial matters were ‘material’ and that non-disclosure would result in liability for the solicitors. But applying Target, it would seem the lender would have to establish a causal link between the breach and the loss. In fact, most of the loss was due to a property market crash. Chadwick J resolved the apparent disparity by distinguishing

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Brickenden\textsuperscript{292} came under scrutiny in the English decision, Swindle v Harrison.\textsuperscript{293} Mrs Harrison contracted to purchase a property to be run as a restaurant by her son. Believing finance to be available she instructed her solicitor, the unfortunately named Swindle, to exchange contracts, thereby making the contract unconditional. The firm of solicitors knew that the expected loan would not be forthcoming, but did not tell their client. The day before settlement was due, the solicitors offered Mrs Harrison a bridging loan, not disclosing that the firm would be making a hidden profit on the loan. The business was not successful, and in due course, Mrs Harrison defaulted. The solicitors issued proceedings for possession of the property and Mrs Harrison counterclaimed alleging a breach of fiduciary duty.

The Court of Appeal held that Mrs Harrison could not recover equitable compensation for the breach of fiduciary duty, because she could not show that her loss was caused by the fiduciary’s breach. The three members of the court, Evans, Hobhouse and Mummery LJJ all considered the Brickenden principle. All three judges preferred the ‘but for’ test of causation to the wide Brickenden formulation. They agreed that the general ‘but for’ test could be inferred from the requirement in the Target decision that the loss flow from the breach.\textsuperscript{294} Unfortunately, in most other respects, the three members of the Court of Appeal reached their conclusions in Swindle v Harrison\textsuperscript{295} via markedly different routes.

Evans LJ rejected the argument that the Brickenden principle could apply because, in his opinion, the authorities showed that its strict test of causation did not apply unless the breach of equitable duty could properly be regarded as the equivalent of fraud. This presents difficulties, because breach of fiduciary duty is regularly referred to as ‘equitable

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\item between the classes of cases before him. Factually, they could be divided into cases where the solicitors received the information prior to warranting to the lender that all matters were in order and those where the solicitors received information after having given the warranty. In the first class, Brickenden applied, and the solicitors could not argue that the lender would still have entered into the transaction. In the second class, Target applied.
\item Brickenden v London Loan & Savings Co [1934] 3 DLR 465.
\item Swindle v Harrison [1997] 4 All ER 705.
\item The difficulty here though is that Brickenden was not cited in Target, making assumptions that its precedential value was affected by Target problematic at best.
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fraud’. Indeed, in Nocton, Viscount Haldane identified as fraudulent ‘the solicitor who makes a bargain with his client that cannot stand’. For Evans LJ, a principal cannot recover compensation:

except on proof either that the (fiduciary) acted fraudulently or in a manner equivalent to fraud or that she would not have completed the purchase if full disclosure had been made i.e. if the breach of duty had not occurred.

This leaves the Brickenden principle as a rebuttable presumption, at most, unless fraud is present.

Hobhouse LJ thought that Swindle’s breach of fiduciary duty was ‘marginal’. His Lordship distinguished the loan transaction (through which Swindle was in a position of conflict) and the purchase transaction (in respect of which Swindle had not breached any fiduciary duty). This resulted in the solicitor not being liable for losses associated with the purchase. This thesis argues that fiduciary duties arise within transactions, and that the scope of the relevant duty must be closely scrutinised in order to avoid injustice to the fiduciary. Nevertheless, this may be taken too far. Hobhouse LJ’s analysis appears to involve an oversimplification of the facts. The purchase and the loan are inextricably tied. It may represent too great a limit on the remedy of equitable compensation if a claimant is not able to rely on the entirety of the facts, but must instead find a breach in respect of each single part of the transaction. While the right result was reached, the transactional split may have been expressed too strongly. With respect, it would have been better to accept that Swindle owed Mrs Harrison fiduciary obligations in respect of the whole transaction, and then to consider which duties he had allegedly breached. He made a secret profit and should have been liable to account for it. He entered into a transaction with his client that was

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295 Swindle v Harrison [1997] 4 All ER 705.
296 For example, Sheridan, above, n 226. For criticism of this aspect of the decision, see Ho, above, n 244, 72.
297 [1914] AC 932, 954.
298 Swindle v Harrison [1997] 4 All ER 705, 718.
299 Ibid, 720.
voidable at her request. He allowed a conflict of interest to occur, and is responsible for losses caused by that conflict. But the losses caused by that conflict only include the losses eventually made on the business if the conflict caused entry into the transaction.

The most helpful judgment in *Swindle v Harrison* is that of Mummery LJ. His Lordship thought there was no way around the need to establish causation. The starting point for identifying the relevant cause is the relevant wrong, which for Mummery LJ was the failure to make full disclosure. The loss did not flow from this breach. Instead, the loss flowed from Mrs Harrison’s decision to complete the purchase. All that the fiduciary is required to do to restore the plaintiff to the pre-breach position is to remove the effect of the conflict. The conflict here had no effect on the performance of the business, and therefore losses were not recoverable by way of equitable compensation. This conforms to both *Target* and *Maguire v Makaronis*, but only conforms to *Brickenden* if the latter is a case of the transaction only proceeding because of the solicitor’s breach.

**(d) Brickenden’s Status in Australia**

**(i) Maguire v Makaronis**

In 1997, the High Court gave leave to appeal from the Victorian Court of Appeal decision in the case of *Maguire v Makaronis* for the purpose of reconsidering the *Brickenden* principle. In *Maguire*, purchasers under an unconditional contract for the sale of a poultry farm were unable to raise the money to settle, and their solicitors made the advance to them. However, the solicitors did not disclose that they were the lenders, or that they would be making a profit on the transaction. The poultry business failed, the

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300 [1997] 4 All ER 705, 729 et seq.
301 Ibid, 733.
302 Ibid, 735. This thesis asserts that there is no fiduciary duty to make disclosure; failure to disclose indicates a non-resolved conflict, and therefore a breach of the conflicts rule.
303 *Target Holdings Ltd v Redfern* [1996] 1 AC 421.
304 (1997) 188 CLR 449.
305 *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465.
Makaronises were unable to repay the loan, and the solicitors sought to enforce their security. Applying Brickenden at its widest, the solicitors had failed to disclose a material fact and could not be heard to say there was any other cause of their client's loss. The Makaronises sought to rely on the Brickenden presumption because, if only rescission was ordered, they were not in a position to make restitution to the solicitors of the sum advanced.

The majority of the High Court said that once a breach of fiduciary duty has occurred, there is an immediate right to a decree of rescission; however, other considerations arise where a plaintiff seeks equitable compensation. In particular, a sufficient connection is needed between the breach of duty and the loss sustained. Their Honours distinguished Brickenden on the basis that the loss here could not have been said to have been sustained 'by' the solicitor acting in breach of duty. This interpretation of Brickenden implies that it cannot be applied blindly. Proof of breach of fiduciary duty plus proof of loss do not necessarily equal liability for the fiduciary. A causal link is needed between the breach of duty and the loss. In this, the majority judgment goes closer to overruling Brickenden as it has been previously applied, than to maintaining it. Given the majority's view that a causal link is necessary between breach of duty and incurred loss, it is unclear why they were at pains to maintain the possible continued authority of the wide interpretation of Brickenden causation. The majority drew a distinction between cases of breach of trust and breach of fiduciary duty, nevertheless noting the similarity at a policy

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308 (Brennan CJ, Gaudron, McHugh and Gummow JJ.)
310 Ibid, 468.
312 (1997) 188 CLR 449, 472. (The trial judge had indicated he was satisfied that the clients would have entered the mortgage if the true identity of the mortgagee had been revealed.)
313 Ibid, 473-4. This included that trust involved the holding of trust property, and therefore an objective to reconstitute the trust fund in cases of breach. Further, it was noted that trustees had available to them statutory exculpatory protection denied to other fiduciaries.
level. This similarity influenced the majority's refusal to overrule Brickenden, even though they expressed concerns about maintaining its principles in light of a 'tendency apparent in some recent decisions too readily to classify as fiduciary in nature relationships which might better be seen as purely contractual or giving rise to tortious liability.'

Kirby J delivered a separate judgment. His Honour differed markedly from the majority in his approach to the Brickenden principle. He regarded it as a 'rule which helps to fulfil the purposes of equity...(which include)...the ready restitution and reinstatement of the beneficiary to the fullest extent possible'. For Kirby J, the Brickenden principle carries within it a ready-built test for causation. It requires that material facts be disclosed: 'facts will not be "material" if the relevant loss would have happened if there had been no breach.' If an inconsequential breach occurs, the facts will not have been 'material', but once facts are classified as 'material' the court is not initially concerned with causation, although that may become relevant to the exercise of discretion to provide relief. As this applied to the case at hand, Kirby J felt that Brickenden had been properly applied in the lower courts. The non-disclosure was material, resulting in the execution of a flawed mortgage. The borrowers were entitled to rescind the mortgage, but because equity does not punish, practical justice between the parties was required. This required that the plaintiffs make restitution to the solicitors.

It is hard to marry Kirby J's view of Brickenden with the previous interpretations. If the non-disclosed facts were 'material' in Maguire, why was it not the case that full

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314 Ibid.
318 Ibid.
319 Ibid, 494.
321 Ibid.
322 Maguire v Makaronis (1997) 188 CLR 449.
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liability followed? Kirby J’s judgment has more logical appeal if, instead, the non-disclosed facts are said to be ‘inmaterial’ to the loss suffered. Factually, this may have been so. The poultry business may not have succeeded regardless of the identity of the lender. However, Kirby J appears to have interpreted materiality as indicative of grounds upon which equity will intervene. Possibly his Honour was attempting to establish one single causation test for all remedial responses to breach of fiduciary duty, or at least one that will cover both rescission and equitable compensation. This aspect of Kirby J’s judgment was criticised by Rolfe J in Beach Petroleum NL v Abbott Tout Russell Kennedy, who said:

If I may say so with respect, it may equally have been said that the material non-disclosure of personal interest of the solicitor entitled the clients to have the transaction set aside even if it was favourable to them, such that there was no loss. No resort to Brickenden would then have been necessary.323

This thesis suggests that attempts to establish single causation tests for all cases where equitable compensation can be ordered must fail. The fact that equity is prepared to order rescission is not logically linked to its preparedness to order equitable compensation. Different remedial responses call for different causation tests.

(ii) Since Maguire v Makaronis

Although Priestley JA in O’Halloran v R T Thomas Pty Ltd324 said Brickenden325 was ‘an authority this Court should follow, unless and until the High Court says otherwise’,326 the general impression post-Maguire is that ‘it is to be doubted whether, in Australia, the apparently absolute principle indicated in (the decision) would be recognised.’327 Even though majority in Maguire v Makaronis328 were not prepared to


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overrule the case entirely, they indicated that some degree of connection between breach and loss is necessary; therefore the absolutism of Brickenden at its widest is inappropriate.

In Beach Petroleum NL v Kennedy\(^{329}\) the New South Wales Court of Appeal effectively equated Brickenden causation with an exclusion of the fiduciary’s ability to argue that contributory fault limits his responsibility. Other recent decisions\(^{330}\) show the policy appears to be to read Brickenden causation down as much as possible.\(^{331}\) The Brickenden principle can no longer be regarded as a sure-fire shortcut to the establishment of fiduciary liability. The onus of proof remains on the plaintiff to prove a loss connected with the breach.\(^{332}\)

Brickenden\(^{333}\) is a difficult decision which may not survive long, at least in its most extreme form. It has been demonstrated that the case should not be seen as authority for the wide interpretation often given. To the extent that the plaintiff recovered in respect of risks it had already incurred, the outcome cannot be justified in equity. However, in all other respects, the decision can be seen as correct when considered in the context of its facts. The defendant’s breach was the main, if not the sole, cause of the plaintiff’s entry into the loss making venture. But the interpretation of Brickenden causation which implies strict liability following non-disclosure of a material fact is untenable, and in any event, usually avoided by the Courts. It is to be regretted that the wide interpretation of Brickenden has not been expunged already.

\(^{326}\) (1997) 188 CLR 449.

\(^{329}\) (1999) 48 NSWLR 1, 93.


\(^{331}\) See also Aequitas Limited v AEFC Leasing Pty Ltd (2001) 19 ACLC 1006; Re H1H Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler (2002) 41 ACSR 72, 235-6.


\(^{333}\) Brickenden v London Loan & Savings Co [1934] 3 DLR 465.
(ii) Causation derived from trust cases – the ‘but-for’ test

Street J in Re Dawson\(^{334}\) held th... a defaulting trustee was liable to place the fund in the same position as it would have been in if no breach had been committed.\(^ {335}\) He took this test for reconstitution of the trust estate\(^ {336}\) from the old case, Caffrey v Darby.\(^ {337}\) There, trustees failed to get in the trust property and it was lost. The trustees were held liable to reconstitute the trust fund, because their negligence had allowed the loss to occur. Lord Eldon specifically referred to ‘negligence’\(^ {338}\) in performance of the trust. However, this is not ‘negligence’ in the tortious sense, but a failure to perform the trust.\(^ {339}\) Therefore, the fund required reconstitution. Reconstitution can be seen to rest on ‘but for’ causation – but for the breach of trust, the loss would not have occurred.

It has been argued in Chapter 3 that this is the correct analysis for cases of breach of trust involving performance of the trust. Nevertheless, the decision of the House of Lords in Target Holdings Ltd v Redfern\(^ {340}\) draws a curtain of doubt over the validity of the ‘but for’ test in context of breach of trust.\(^ {341}\) The majority of the High Court in Maguire v Makaronis\(^ {342}\) appeared to accept the general tenor of Lord Browne-Wilkinson’s Target opinion, and drew a distinction themselves between fiduciaries and trustees; one implication being that the ‘but for’ test might only apply to trustees.\(^ {343}\) In any event, the suggestion that ‘but for’ causation may not be appropriate for all breaches of trust enables

\(^{334}\) [1966] 2 NSW 211.
\(^{335}\) Re Dawson [1966] 2 NSW 211, 214.
\(^{336}\) Getzler, above, n 120, 240 suggests that this may have been ‘the fatal initial category mistake’.
\(^{337}\) (1801) 6 Ves Jn 488; 31 ER 1159.
\(^{338}\) Ibid, 1162.
\(^{339}\) See generally, Chapter 3.
\(^{340}\) [1996] 1 AC 421.
\(^{341}\) Lord Browne-Wilkinson appeared to endorse the ‘but for’ test, but then tied a complicated gloss distinguishing bare trusts from traditional trusts: [1996] 1 AC 421, 435-6. This distinction is unhelpful, and the explanation that the trust fund has been reconstituted already when the transaction was completed in terms of the solicitor’s retainer is preferred. This explanation attracted support from the High Court recently in Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484.
\(^{342}\) (1997) 188 CLR 449.
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us to question whether it is appropriate for breaches of fiduciary duty. The ‘but for’ test is seen as relatively strict. If the loss would not have occurred but for the fiduciary’s breach the fiduciary is thought liable, notwithstanding other causal factors.

One of the limitations of ‘but for’ causation are revealed in *Canson*. On its own, the test can return unfair results. ‘But for’ causation, as from the old trust cases, would suggest that the solicitor *should* have been liable for subsequent negligence of the contractors, on the basis that ‘but for’ the solicitor’s breach, all that followed would not have occurred. This would have allowed the tortfeasors to escape liability entirely. Common law theorists would find such a result absurd. The common law understand that the ‘but for’ test is inadequate in cases where there are multiple sufficient causes of the loss.

The common law regards the ‘but for’ test as a negative indicator. It can establish that a breach *did not* cause a loss, but is not sufficiently accurate to establish that a particular breach *did* cause the loss for the purposes of common law. A breach might satisfy the ‘but for’ test without being the relevant cause at common law. The ‘but for’ test is acceptable in cases of breach of trust requiring reconstitution of the trust fund, precisely because the trustee must account for the trust property. It may even be acceptable to extend the ‘but for’ test to cases of custodial fiduciaries who misappropriate their principal’s property. But the ‘but for’ test seems over-inclusive in cases like *Hodgkinson v Simms* where at least part (or all) of the loss is in fact referable to another cause, in that case, the collapse of the property market. ‘(D)ivorced from questions of policy, the but-for test of causation in its various guises simply cannot carry the entire burden of allocating risks in

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343 Ibid, 473.
344 One of the reasons for questioning the ‘but for’ test is its venerability: The ‘but for’ test was adopted for breach of trust before the common law had fully developed tortious recovery tests; Getzler, above, n 120, 240. See also L Ho, ‘Attributing losses to a breach of fiduciary duty’ (1998) 12 *Trust Law International* 66, 67.
345 *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129. See generally Ho, above, n 243, 73.
346 As, for example, in the case of third party intervention.
347 Davies, above, n 213, 314.
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equity. This is the key issue; if ‘but for’ causation always suffices in cases of breach of fiduciary duty, the principal effectively escapes all the risks of the transaction. This was what the plaintiffs sought in Canson. Allowing the plaintiff to escape risks otherwise incurred exceeds equity’s interest in restoration.

In the past, it has been common for courts to fail to differentiate between claims of breach of trust requiring reconstitution of the trust fund and claims of breach of fiduciary duty when applying the remedy of equitable compensation. It is simply assumed that the test for causation for breach of trust applies in toto to fiduciary breaches, whether or not property is involved. However, in the wake of Target, this approach is being questioned. It is now more common to attempt to explain applications of strict trust remedies to fiduciary cases by way of analogy. In short, the difference between trust and fiduciary duty is realised, but the strict ‘but for’ test is applied because of the similarity of the particular fiduciary breach with breach of trust. O’Halloran v R T Thomas & Family Pty Ltd provides a good example. This case involved a misappropriation of company property by the managing director, by way of a sale of shares for which no consideration was received. When this was discovered, the company affirmed the sale contract and sought payment. Before the company could either obtain payment or recover the property, the value of the property dropped. The defendant argued that intervening causes had caused the loss, but was held liable on a ‘but for’ basis. This was because of the close policy analogy between a company director holding company assets and a trustee holding trust property. Spigelman CJ, (the rest of the court agreeing), said:

(t)he strict standard applicable to a trustee of a traditional trust with respect to improper application of trust property is based on the vulnerability of beneficiaries

140 Tjio and Yeo, above, n 272, 184.
150 Target Holdings Ltd v Redfearn [1996] 1 AC 42.
351 There have been earlier suggestions that Re Dawson is apt for use where a custodial fiduciary’s breach leads to a loss requiring reconstitution of an asset: Canson Enterprises Ltd v Boughton & Co (1991) 85 DLR (4th) 129, 146 (La Forest J); Davies, above, n 213, 314.
with respect to the disposition of trust property by a trustee who has control over such disposition. This policy applies equally to the case of a director of a company. \(^353\)

Interestingly though, his Honour continued:

Such a director ...is...subject to the same stringent test with respect to the exercise of the fiduciary power to dispose of property, as is the trustee of a traditional trust. It is not necessary to consider the appropriate test for breach by a director of other fiduciary duties.

This suggests that, although on the facts the analogy with reconstitution of the trust fund was complete because the defendant was disposing of company property, Spigelman CJ was not attempting to propose a general test of causation applicable for breach of fiduciary duties. In fact, his Honour contemplated the possibility that different tests might apply. But this seems unnecessary. There is no fiduciary duty per se not to dispose of the principal’s property. The disposition of the property is a breach of fiduciary duty because it transgresses either or both of the profits and conflicts rules. As the defendant remained in a position of conflict while the property was not restored to the company, the defendant was liable for all the losses the company incurred. In short, the same result would have been achieved without resort to the trusts analogy. \(^354\) Elliott would describe this as a case where substitutive compensation was required. \(^355\)

It remains to be seen whether it is acceptable to completely analogise fiduciary breaches where the fiduciary holds property to cases of breach of trust. The danger is that, over time, the coincidence may appear complete with the result that other positive trustee’s

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\(^353\) Ibid, 277. Reverse reasoning is sometimes used to rule out the ‘but for’ test. Thus in Canson, La Forest J of the majority distinguished the earlier trust cases on the basis that the conveyancing solicitor was not a custodial fiduciary: Canson Enterprises Ltd v Boughton & Co (1991) 85 DLR (4th) 129, 152.

\(^354\) Spigelman CJ did comment that he would have been satisfied on a lesser causation test too: Ibid, 279.

\(^355\) Elliott, above, n 150, 590; Elliott and Mitchell, above, n 237, 27-8.
duties are extended to property-holding fiduciaries; quasi-trust. The majority of the High Court in Maguire v Makaronis appeared to limit recovery on the basis of reconstruction of a trust fund to fiduciaries who were also trustees which indicates that the technique of complete analogy to breach of trust for property-holding fiduciaries may be discouraged. The approach of assimilating breach of trust with breach of fiduciary duty seems logical enough where the custodial fiduciary misappropriates the principal’s property, but it is unnecessary. It is possible to find a causation rule that holds good for all breaches of the fiduciary conflicts rule, whether or not the fiduciary holds property.

The fiduciary does not always misappropriate existing property. Frequently, the cases concern misrepresentations or poor advice. Hill v Rose is an example of a case where ‘but for’ causation was applied, even though the fiduciary was not a trustee and was not holding the principal’s property. A fiduciary selling his business to an ‘amazingly naïve’ man failed to disclose various pertinent matters, thereby falling foul of the proscription against conflicts of duty and interest. Tadgell J applied ‘but for’ causation; but for the breach, the principal would not have suffered the loss. This is akin to the strict trust causation cases like Caffrey v Darby.

Similar approaches were taken in Stewart v Layton, Farrington v Rowe McBride & Partners and Hodgkinson v Simms, where there was no misappropriation, but rather,

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357 (1997) 188 CLR 449, 473.
360 Ibid, 132.
361 (1801) 6 Ves Jun 488; 31 ER 1159.
poor advice. For example, in *Hodgkinson v Simms*,365 the principal engaged the fiduciary to give advice about tax-effective investment. The fiduciary advised investment in residential units, not disclosing that he was receiving a secret profit from the developers.366 The value of the principal’s investment was lost when the real estate market crashed. The majority held that there was sufficient connection between the fiduciary’s breach of duty and the principal’s loss. Applying ‘but for’ causation, the solicitor was clearly liable for the loss. This seems harsh, where the real cause of the loss was a fall in real estate prices. The decision can be justified on the basis that, factually, it was arguable that the fiduciary selected the investments the principal made, thereby causing the principal’s entry into the transaction. Therefore, the fiduciary’s conflict was causally linked to the whole of the risk the principal took. In such a case, the effect of the fiduciary’s conflict is not removed until the principal is safely out of the transaction. This thesis suggests that trust-derived ‘but for’ causation alone may be unnecessarily harsh, and not sufficiently fine-tuned to deal with anything other than cases of fiduciary misappropriation or where the conflict led to the incurring of the risk. Cases where these factors are absent are not obviously susceptible to ‘but for’ causation rules.367 More sophisticated analysis is needed to exclude over-recovery by the plaintiff.368

(iii) Common sense causation

The shortcomings of ‘but for’ causation often cause courts to adopt ‘common sense’ causation instead. Some see this as possibly a separate test to traditional ‘but for’ causation.369 Others regard it as a tempering of the ‘but for’ test.370 A famous passage from McLachlin J’s judgment in *Canson* is usually referred to here:

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365 Ibid.

366 This was therefore a case where both the profits and conflicts rules were breached; as the eventual loss was greater than the gain, the principal sought equitable compensation.


368 ‘The adoption of assessment principles drawn from trust cases where the main remedial goal is either restitution or restoration does not sit comfortably with the pursuit of compensation’: Berryman, above, n 223, 97.

369 Io, above, n 344.
Compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, i.e., the plaintiff’s lost opportunity. 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. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach. Where the trustee’s breach permits the wrongful acts or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss will be recoverable. Where there is no such link, the loss must be recovered from third parties.

In *Canson*, strict ‘but for’ causation would have resulted in the solicitor bearing responsibility for the ultimate loss, even though it was caused by the negligence of third parties. Her Ladyship applied the ‘but for’ test, but limited the principal’s recovery to losses that ‘on a common sense view of causation were caused by the breach’. In this sense, common sense causation appears as a limitation on ‘but for’ causation. The losses resulted ‘not of the solicitor’s breach of duty, but of decisions made by the plaintiffs and those they chose to hire.’ This view appears to have received support from Lord Browne-Wilkinson in *Target*. The ‘common sense’ test has also been applied in Australia.

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372 Ibid.
373 Ibid.
374 Ibid, 164.
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Common sense tests are easily criticised, however. Judges are not universally known for their ‘common’ sense, and such loose concepts are open to allegations of ex post facto reasoning, unpredictability and the often invoked spectre of palm-tree justice.\(^{377}\) Davies calls the common sense view of causation ‘a circular way of putting it’.\(^{378}\) Ho points out that the meaning of common sense causation is uncertain; it is not clear ‘what more it requires apart from satisfaction of the ‘but for’ test of causation’.\(^{379}\) However, one judge has said that differences between ‘but for’ and common sense causation exist for the purposes of achieving justice:

In my view, the choice of a ‘common sense’ test in some cases and a ‘but for’ test in others does not mean that the authorities are inconsistent. Rather, it demonstrates that the principles governing the availability of equitable compensation have about them a measure of flexibility, which enables the Court to choose the most appropriate means to redress unconscionable behaviour in the circumstances of the case. In some cases, a ‘but for’ approach is the common sense approach. In other cases, a strict ‘but for’ approach may produce a distorted outcome.\(^{380}\)

This implies that the primary causation test is ‘but for’ causation, which is modified where it would be contrary to common sense to apply it. It is sometimes said that the common sense causation test combines both causation and remoteness; it is probably fair to conclude that ‘common sense’ causation provides a limit to ‘but for’ causation, and in that sense, can be seen as combining causation and remoteness principles. However, whatever


\(^{378}\) Davies, above, n 213, 306.

\(^{379}\) Ho, above, n 344, 69.

\(^{380}\) Gray v National Crime Authority [2003] NSWSC 111, [255] (unreported, Austin J, 28 February 2003). See also Lowry and Edmonds, above, n 370, 528, who say that ‘any resulting uncertainty does not render the test unworkable or devoid of theoretical justification.'
its exact meaning or status as a stand-alone causation test, it is frequently the test ostensibly applied in Australia.

(iv) Causation derived from torts

Torts present an attractive source of analogy in cases of equitable compensation for breach of fiduciary duty, because of the close resemblance to damages for loss in case of wrongs. It can be argued that this first emerged in the earliest cases. In *Nocton itself*, the House of Lords was content to let the remedy of damages for deceit remain.

The majority in *Canson* (through La Forest J) justified limiting the solicitor’s liability by reference to tort. A distinction was drawn between trust cases involving trust property, and this case, where the solicitor had no control over property. There was no difference for the majority between the policy objectives pursued by tort law (especially as to misrepresentation) and the kind of fiduciary breach disclosed by this case. Common law remoteness principles would deny the client relief from the solicitor for the contractor’s faults, and these were adopted as appropriate. Damages were to be calculated as for deceit. As Davies says:

(t)he analogy to deceit is more helpful, and is frequently made, since deceit law employs a ‘but for’ principle, the plaintiff is put back into the position he was before the false representation was made, and both deceit and fiduciary law involve what is termed ‘fraud’.

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381 Robinson v Abbott (1894) 20 VLR 346, 384 (A’Beckett J); *Re Leeds and Hanley Theatres of Varieties Ltd* (1902) 2 Ch 809, 825 (Vaughan Williams LJ).

382 [1914] AC 932, 958 (Viscount Haldane LC, Lord Atkinson concurring), 965 (Lord Dunedin), 978 (Lord Parmoor).


384 Similar has occurred in numerous cases in Australia and England. See, for example, *Kinhult-Ng v Tay* [1998] WASC 125 (unreported, Wheeler J, 30 April 1998); *Collins v Brehmer* [2000] Lloyd’s Rep PN 587.

385 Davies, above, n 213, 308.
Elliott also supports the deceit analogy in cases of intentional breach of fiduciary duty,\textsuperscript{386} pointing out that:

The reason these concepts have been refined to a greater level of sophistication at law than in equity is that most claims for reparation of loss complain of wrongs that before Judicature were only actionable in the common law courts and so common law judges have had greater exposure to remoteness problems.\textsuperscript{387}

Nevertheless, it is not clear from the \textit{Canson} majority judgment exactly which common law remoteness test was being applied. La Forest J confirmed the lower court’s damages award based on deceit, but in \textit{Hodgkinson v Simms} other comments his Lordship made tend to indicate an intention that negligence remoteness principles be applied.\textsuperscript{388} In particular, these differ as to foreseeability;\textsuperscript{389} in negligence, a defendant is only responsible for losses that were a foreseeable consequence of the negligent behaviour. In deceit though, the defendant is liable for losses that were not foreseeable, the only limitation being that the loss must be factually caused by the breach of duty. The close relationship between remedy for deceit and breach of fiduciary duty is obvious in the exclusion of foreseeability of loss as a limiting factor.

Analogising from tort is problematic, because in truth neither deceit nor negligence is a full cousin to breach of fiduciary duty. Deceit is not a complete analogy because fiduciary breaches can be innocent, whereas deceit is based on falsehood.\textsuperscript{390} Negligence does not suffice because it focuses on lack of care, as opposed to breach of fiduciary duty where what must be shown is disloyalty.\textsuperscript{391} And, importantly, McLachlin J’s objection to

\begin{footnotes}
\item[386] Elliott, above, n 150, 588.
\item[387] Ibid, 594.
\item[388] [1994] 3 SCR 377, 444 (referring to \textit{Canson}). See also Boros, above, n 94, 283.
\item[390] This difference was specifically noted in \textit{Canson Enterprises Ltd v Boughton} (1991) 85 DLR (4th) 129, 155 (McLachlin J). See generally, Davies, above, n 213, 308-9.
\item[391] See Chapter 4.3 (b).
\end{footnotes}
the assimilation of tort law to breach of fiduciary duty remains. In Canson, her Ladyship was unable to agree that in cases where the fiduciary did not control property, damages for breach of fiduciary duty could be measured by analogy with contract or tort. Her primary concern was that, proceeding by analogy with tort 'overlooks the unique foundation and goals of equity'. The underlying rationales differ. Common law sees the parties as independent, self-interested actors, whereas fiduciary law 'has trust, not self-interest, at its core. ...In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.' Her Ladyship's views have received endorsement from the House of Lords, and from Kirby J of the Australian High Court. McLachlin J's secondary concern was with the distinction the majority drew between cases where the fiduciary held property, and non-custodial cases. She saw the distinction as 'artificial' and not representative of the trust that was the common element in both cases, favouring instead a common approach reflective of trust.

Competing views on the assimilation of tortious principles or alignment with trust principles lead into suggestions of a blended system, with causation based on trust for cases of misappropriation, and upon torts for non-misappropriation cases. Elliott would describe this as the difference between reparative and compensatory remedies. Indeed, Elliott proposes adoption of tortious principles for non-misappropriation cases. The overwhelming sense in this approach points to its eventual adoption, unless equity adopts a causation scheme that holds good in both misappropriation and non-misappropriation cases. This thesis suggests that such a causation test can be supplied by causation based on scope of the duty breached.

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393 Ibid.
394 Ibid.
396 Maguire v Makaronis (1997) 188 CLR 449, 492.
397 Canson Enterprises Ltd v Boughton (1991) 85 DLR (4th) 129, 156.
398 Elliott, above, n 150, 596-7.
(v) Causation based on scope of the duty

It is regularly argued that causation of loss should be based on identification of the scope of the duty breached and the purpose of the rule imposing the duty. For example, Davies says that 'guidance on when it is proper to limit recovery should be sought in the scope and ambit of his fiduciary obligations and the character of his breaches of them.' Once the scope and ambit of the fiduciary obligation and the circumstances of its breach are considered,

in equity an errant fiduciary would be prima facie liable for all losses arising within the scope of his duty, there being clear consensus that foreseeability is irrelevant as a criterion for attribution of responsibility.

It is argued that this is the best analysis to adopt for equitable compensation for breach of fiduciary duty. It has the greatest potential for providing a single causation test for breach of fiduciary duty that will satisfy equity’s restoration aim. The difficulty is that, frequently in these cases, breach is spoken of in blanket terms of ‘breach of fiduciary duty’. This does not provide sufficient detail. Exact results will not be achieved with vague formulae. To properly determine causal responsibility for breach of fiduciary duty, it is necessary to go a step further and ask which fiduciary duty was breached. This thesis argues that breach of the conflicts rule must be specified to obtain a true picture of the limit of recovery. As Rickett puts it, ‘the type and content of the duty allegedly breached must be carefully articulated.’

This can be illustrated by reference to Canson. Labelling the solicitor’s breach, ‘breach of fiduciary duty’ or ‘breach of the conflicts rule’ creates different impressions. If
the breach is described as a 'breach of fiduciary duty' the profits and conflicts rules tend to conflate and the basis of liability becomes opaque. The obligation is best explained in the following terms. The defendant solicitor was engaged to handle the conveyance of the land. The scope of his fiduciary duty was (a) not to illicitly profit from that transaction, and (b) not to suffer a conflict of duty and duty (in this case) in relation to that transaction to continue. He preferred his duty to the vendors, arguably breaching the conflicts rule. His conflict caused a loss to the purchasers of the amount by which the purchase price was secretly inflated. His conflict did not cause the subsequent negligence of third parties. The principal must be returned to the position as if the duty had been performed without conflict. The presence of an illicit profit confuses if the purpose of the conflicts rule is not kept in mind. This is the reason why there can be no extended recovery in the case. The solicitor knew the vendors were making an undisclosed profit on the sale, but the losses were caused by negligence of third parties. Even when the effect of the conflict is removed, further losses would still have occurred in Canson.

This explanation can be used to explain all other recent cases of breach of fiduciary duty. Thus, in Stewart v Layton\(^{404}\), also a conveyancing case, the solicitor was responsible for the loss caused by his conflict, namely, that his client entered into a vendor finance arrangement, but he was not liable for the fact that the purchaser could not settle.\(^{405}\) In Swindle v Harrison\(^{406}\) the solicitors were liable for the effects of their conflict on Mrs Harrison's loan, but not for the fact that the business was not a viable proposition. A similar outcome occurred in Maguire v Makaronis.\(^{407}\) However, in O'Halloran\(^{408}\) all losses flowed (even though there had been a drop in the share market) because all of the losses were caused by the fiduciary's conflict. Had he not been in a position of conflict, no damage would have occurred. The drop in the share market happened while his position of conflict

\(^{401}\) (1992) 111 ALR 687.
\(^{405}\) The court should not be 'blind to the reality of the situation and take notice of the fact the vendor still had to deal with a defaulting purchaser': Ibid, 710,714 (Foster J).
\(^{406}\) [1997] 4 All ER 705.
\(^{407}\) (1997) 188 CLR 449.
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continued unresolved. In the New Zealand decision, *Gilbert v Shanahan*, the solicitor’s breach arose out of acting for both a corporate lessee and an individual guarantor. The solicitor failed to advise the guarantor to take independent advice. The plaintiff would not have taken any independent advice. (He was in fact a director and shareholder of the lessee company, and also the guarantor.) Thus, when the guarantee was called up, there was no loss caused by the solicitor’s breach of the conflicts rule.

This is ‘but for’ causation, but looked for inside the scope of the particular duty, namely the duty not to suffer a conflict to continue. The dangers of not drawing the distinction between a ‘breach of fiduciary duty’ and a ‘breach of the conflicts rule’ are demonstrated when it is considered how breach of fiduciary duty can be alleged when the fiduciary has made a profit. For example, say the fiduciary sells his own property to the principal without disclosing its true source. The fiduciary makes a profit of $100 on the transaction. This is likely to be a breach of the profits rule, and would entitle the principal to an account of profits, *prima facie* also $100. Causation is irrelevant to this calculation. If, on the same facts, the principal argues that ‘but for the breach of fiduciary duty’ he would not have suffered a loss, and is therefore entitled to equitable compensation, misleading results can arise. The first formulation (but for the breach of fiduciary duty), tends to suggest that the principal’s loss will be $100, because of the temptation to equate the fiduciary’s gain with the principal’s loss. This may or may not be so; there is risk to the fiduciary of unfairness unless the second formulation (but for the breach of the conflicts rule) is applied. For example, it may be that the principal in fact paid correct market price for the property. In this case, there is no loss, though the principal is entitled to have the transaction rescinded. Or, the principal may have paid over market rates, say to the extent of $50. In that case, breach of the conflicts rule has caused a loss of $50. Alternatively, the principal might be able to prove that, but for the conflict, the principal would not have

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Indeed, it can be argued that there was no relevant conflict at all. The guarantor must have known of the solicitor’s double employment.
Chapter Four: Breach of Fiduciary Duty

entered into the transaction at all. In this case, the breach has caused the full loss of $100, and may have caused further losses in terms of lost opportunity to buy elsewhere.\footnote{This example also demonstrates the nature of election between the alternate remedies of account of profits and equitable compensation. In scenarios where loss to the principal is less than $100, the principal is advised to elect an account of profits. If the loss equals $100, either option may be selected. If opportunity losses exceed $100, the principal is advised to seek equitable compensation.}

It is essential that this second step, description of the duty, be taken within scope of duty analysis. Too often, discussion of scope of duty entails an examination of scope of the fiduciary relationship only. This question tends to be answered by describing the extent of the transactional retainer between the fiduciary and the principal.\footnote{For example, \textit{Beach Petroleum NL v Abbott Tour Russell Kennedy} (1998) 48 NSWLR 1.} This is not enough. The court must also consider which of the fiduciary duties has been breached, the profits rule or the conflicts rule; the court must consider under which category the plaintiff is seeking a remedy. Often both rules will have been breached and at least two kinds of remedies will be available, namely disgorgement and compensation. But this is not an invariable rule,\footnote{See \textit{Re Cape Breton Company} (1885) 29 Ch D 795; \textit{Peninsular and Oriental Steam Navigation Company v Johnson} (1938) 60 CLR 189.} and supposing that it is so can lead to unfair outcomes.

Ho proposes adoption of 'scope of duty' analysis, but suggests that recovery should be modified if the fiduciary has been dishonest, or if the loss has arisen in circumstances where the fiduciary cannot be said to be responsible, such as through the intervention of third parties.\footnote{Ho, above, n 344, 71-3.} But these modifications are unnecessary if the question is asked, what would have happened but for the fiduciary's conflict? If the principal is returned to the position as if the duty has been properly performed, it is irrelevant whether the fiduciary was honest or dishonest in breaching. Equity does not aim to punish,\footnote{\textit{Harris v Digital Pulse Pty Ltd} (2003) 56 NSWLR 298.} and is neutral as to the fiduciary's motivation if no punishment will result. The manner in which the loss eventuated is not relevant to causation within scope of the duty analysis strictly described. The plaintiff must be restored to the position as if the duty owed had been performed...
without conflict. Courts are able to consider what would have happened in any event.\textsuperscript{416} Losses due to new intervening acts or natural causes are not the responsibility of the fiduciary. Thus:

The fiduciary must argue that the loss should be measured as if the fiduciary duty had been carried out, and that that duty cannot be re-assessed with the benefit of hindsight to involve escaping all market losses. To insist on restoring the account to how it was at the moment before the breach overlooks the significant new information available to the court.\textsuperscript{417}

Consideration of the scope of the specific duty breached (that is, the duty to avoid conflict) disposes of the need to distinguish between claims for reparation and claims for substitutive performance. If it is alleged that as a result of the fiduciary’s conflict property belonging in equity to the principal has been misappropriated, this causation test returns to the principal the value of the misappropriated property in full.\textsuperscript{418} The effect of the fiduciary’s conflict and the value of the misappropriated property are co-extensive. If on the other hand, it is shown that the fiduciary’s conflict has caused a diminution in the principal’s position, that diminution is recovered as compensation, because the principal’s placed in the position that would have eventuated had there been no conflict. Thus, in a case like \textit{Nocton},\textsuperscript{419} the principal would be compensated for the reduction in his economic position because that loss would not have eventuated had Nocton properly performed his duty. But in a case like \textit{Canson},\textsuperscript{420} the principal cannot recover for the unforeseeable negligence of third parties, because that loss would have occurred even if the solicitor had performed his duties correctly. Calculation of equitable compensation then depends on an

\begin{itemize}
\item \textsuperscript{416} \textit{Gwembe Valley Development Co Ltd v Koshy} [2003] EWCA Civ 1048,( unreported, Mummery, Hale and Carnwath LJJ, 28 July 2003) [144].
\item \textsuperscript{417} Ali and Russell, above, n 3, 336.
\item \textsuperscript{418} ‘Thus, \textit{Re Dawson} ... should continue to be applied when a fiduciary’s breach has led to a loss which calls for restitution of an asset’s worth to be made. But that should now be seen as related to the nature of the obligation broken and the character of the breach, rather than through the more general association of fiduciary law with trust law’: Davies, above, n 213, 314.
\item \textsuperscript{419} \textit{Nocton v Lord Ashburton} [1914] AC 932.
\end{itemize}
assessment of what the position would have been if the fiduciary had not allowed conflict to affect performance of the duty. Recovery of all transactional losses is only possible if the fiduciary’s conflict caused the principal’s entry into the transaction, if ‘but for’ the fiduciary’s conflict, the principal would have attracted none of the risk. This necessarily involves some estimation by the court, but no more than is called for when assessing damages at common law. Estimation of what would have occurred had the fiduciary performed without conflict carries with it no limitation based on foreseeability.

4.7 CONCLUSION: CAUSATION

The ‘but for’ test as applied in breach of trust cases is clearly not a complete explanation of causation in cases of breach of the conflicts rule. As a result of the unsuitability of the ‘but for’ test, and the even stricter Brickenden test, Australian courts have largely adopted ‘common sense’ causation. But there is still little guidance as to when ‘common sense’ should be preferred, or what exactly is encompassed in the ‘common sense’ formulation. Common sense causation may only take ‘but for’ causation into less predictable territory. Tortious causation tests applicable to negligence are probably not apposite to fiduciary breach cases because of the policy variants between negligence and fiduciary duty. However, there is little to distinguish causation applied in deceit cases, or intentional torts, to outcomes in equity. The only real justification for maintaining separation in approach is that the distinction brings to the forefront the differences between the common law and equity. Some believe those differences are worth maintaining; others advocate change. The course of recent Australian jurisprudence suggests Australia will probably opt for maintenance.

If the essential difference between equity and tort is to be asserted, equity must present its own coherent version of causation of loss. The scope of duty analysis, incorporating a ‘but for’ standard of causation, offers the potential to unify compensation for breach of fiduciary duty. It must be remembered that the loss must be caused by the

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conflict. All of the losses caused by the conflict are recoverable; there is no real scope for limitations on this principle, such as having regard to the honesty or dishonesty of the fiduciary. This is because there is no real need for them. If equity succeeds in removing the effect of the conflict, there are no other losses that require equity’s attention. The limit of equitable compensation in cases of breach of fiduciary duty is an amount to restore the plaintiff to the position that would have been occupied, had the fiduciary duty been performed without conflict.

If it is recalled that Brickenden caused his client to enter the disastrous transaction, the result in Brickenden\textsuperscript{421} sits comfortably with the causation principles endorsed in this chapter. The fiduciary is liable for all losses attributable to the fiduciary’s conflict of interest. But the limitation is that the fiduciary is relieved of liability when the principal is placed in the position as if the fiduciary duty had not been breached, i.e., as if there had been no conflict of interest.\textsuperscript{422} Therefore, there is scope for the Brickenden principle to survive within a scheme calling for strict description of the duty breached, if it can be shown that the effects of the conflict include the entering of the subject transaction. That is, if it can be shown that the plaintiff would not have entered into the transaction at all, but for the effect of the fiduciary’s conflict, there is no reasonable ground for denying the principal full recovery. Hodgkinson v Simms\textsuperscript{423} can be explained on this basis.

It is sufficient that equitable compensation for breach of fiduciary duty be awarded whenever loss is caused by a fiduciary’s conflict of interest. Equity sees the principal is restored by approximating proper performance of the fiduciary obligation. If the principal has suffered losses unrelated to the clash of interest or duty, those losses must be remedied by some other branch of the law.

\textsuperscript{421} Brickenden v London Loan & Savings Co [1934] 3 DLR 465, (apart from the over-recovery attributable to the earlier debt to London Loan & Savings Co).

\textsuperscript{422} Therefore, the extra recovery in the case is unsupportable.

\textsuperscript{423} [1994] 3 SCR 377.
CHAPTER FIVE

EQUITABLE COMPENSATION FOR BREACH OF CONFIDENCE

5.1 INTRODUCTION

A monetary remedy sometimes described as equitable compensation is widely accepted as available for breach of confidence. This chapter will consider whether either of the bases of the remedy already studied, reconstitution of the trust fund in the case of breach of trust, and removal of the effect of conflict of interest in case of the fiduciary conflicts rule, can be said to be the basis of the remedy here. Equitable compensation is only justified as a remedy for breach of the obligation of confidence if, and to the extent, it performs the task of satisfying equity’s restoration interest.

Lord Ashburton and Mr. Nocton again

Lord Ashburton had little luck with his solicitors. It is surprising he persevered with Nocton’s firm as long as he apparently did. As a result of his solicitor’s behaviour, his Lordship had the distinction of litigating one of the seminal cases in the area of breach of confidence too. Lord Ashburton was owed money by Pape, a bankrupt seeking a discharge from bankruptcy. Lord Ashburton opposed the discharge and in the course of proceedings Pape surreptitiously managed to obtain privileged letters written by Lord Ashburton to Nocton, his solicitor. Pape served a subpoena ducus tecum on Nocton’s clerk, Brooks, requiring him to produce the letters at the Bankruptcy Court. Brooks complied with the subpoena, but complained of feeling ill while at the Court. He left the letters with Pape, who promptly arranged for copies to be made. Cozens-Hardy MR suggested there was collusion between Brooks and Pape, though the judgment of Swinfen Eady LJ seems to indicate the handing over of the documents may have been negligent, though of course ‘a

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1 Lord Ashburton v Pape [1913] 2 Ch 469, 471.


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gross breach of his duty”. Negligent or fraudulent, Lord Ashburton cannot have been much impressed with his solicitors. Pape was restrained by injunction from use of the copies that had been made.

In terms of doctrinal matters, the timing of the decision is to be regretted. It would have been more instructive had Pape managed to use the letters and for the case to have been heard after the House of Lords decided Nocton v Lord Ashburton, rather than before. This might have answered two questions that have plagued this area of law. The first concerns the basis of the jurisdiction, more particularly, whether or not the action of breach of confidence stems from equity’s exclusive jurisdiction. The second matter it might have addressed was the basis of the award of ‘damages’ for breach, and whether the award was governed by principles such as with Nocton v Lord Ashburton, as is sometimes suggested, or whether other principles apply. These two matters are discussed below.

5.2 JURISDICTIONAL ISSUES

The roots of the action of breach of confidence are unclear and the jurisdictional basis is ‘a source of lingering uncertainty and controversy’. At various times, it has been regarded as having its origin in contract, property or equity, but it is generally now regarded as being based in equity and subject to equitable remedies. Nevertheless, early doubt about

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2 Ibid, 475.
3 [1914] AC 932.

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the origins of the action led to breach of confidence being called ‘plurijurisdictional’ and ‘sui generis’, and this historical aspect of the action may have bearing on the remedies available for its breach. It may be that, because breach of confidence cases have traditionally drawn on remedies from the common law as well as equity, the cause of action should be treated as a special case.

The primary remedy for breach of confidence is the injunction to stop its occurrence. Nevertheless, the full range of equitable remedies is available. In particular cases courts have ordered account of profits, constructive trust, and compensation. These remedies are all available for breaches of fiduciary duty; therefore it is arguable that compensation for breach of fiduciary duty and for breach of confidence should be applied in a like manner. But on closer examination of the remedy in confidence cases, we are entitled to ask whether this is so (except in the most general terms) and whether the remedy is necessarily calculated in the same way. This thesis will suggest that equitable compensation for the two wrongs is not calculated similarly, and that therefore equitable compensation as demonstrated in fiduciary cases resembles compensation for breach of confidence only in the sense that both cases attract that attention of equity.

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7 Gurry, above, n 6, 113.
8 Gurry, above, n 5, 26; Gurry, above, n 6, 115; Cadbury Schweppes Inc v FBI Foods Ltd [1999] 1 SCR 142, 158.
9 It has been noted that prior to 1948 no case was decided solely upon a cause of action of breach of confidence: see D Bayliss, ‘Breach of Confidence as a Breach of Fiduciary Obligations: A Theory’ (2003) Auckland University Law Review 702, 703. This would account for the remedial responses apparently coming from different sources.
10 McDermott says there is an overlap between Lord Cairns’ Act damages and equitable compensation here. If an injunction is available, Lord Cairns’ Act ‘would provide an obvious source of jurisdiction to award damages’: McDermott, above, n 5, 158.
13 Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203; Seager v Copydex Ltd (No 2) (1969) 2 All ER 718.
Chapter Five: Breach of Confidence

In this discussion, only equitable obligations of confidence are examined. Obligations of confidence frequently arise from contract, either expressly or by implication. Fiduciaries are also bound to keep confidences. However, independent of any contract or fiduciary obligation, equity recognises an obligation of confidence if certain prerequisites are satisfied. It is generally accepted that an obligation of confidence will arise in equity to protect specific information confidential to the plaintiff, imparted to the defendant in circumstances implying confidence, from unauthorised misuse. This chapter only concerns that equitable obligation.

5.3 IS A BREACH OF CONFIDENCE A BREACH OF FIDUCIARY DUTY?

(i) A difference of opinion

This is a controversial question. If breach of confidence is automatically a breach of fiduciary duty, it follows that available remedies include equitable compensation. Fiduciary relationships include obligations of confidence, but it is not necessarily true that a person who owes an obligation of confidence automatically owes fiduciary obligations to the confider. There does not need to be a pre-existing fiduciary relationship for an obligation of confidence to arise, but this does not address the issue whether the two duties are the same in content. There is clearly some overlap in that 'confidence' is often found in the relationships giving rise to both obligations, however many older works deny that the two concepts completely coincide. Modern works often take a similar line: ‘Duties

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14 Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health (1990) 22 FCR 73, 86.
16 Coco v A N Clark (Engineers) Ltd [1969] RPC 41.
17 Bean comments that in regard to this question ‘it is unwise to be categorical’: G M D Bean, Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship (Oxford, Clarendon Press, 1995) 275 (n 76).
of confidence and fiduciary duties are not mutually exclusive nor are they synonymous.\textsuperscript{20} Millet,\textsuperscript{21} Brock\textsuperscript{22} and Worthington\textsuperscript{23} all say breach of confidence is not a fiduciary breach because it is not a breach of the duty of loyalty. Edelman says that the idea that an obligation of confidence is a fiduciary duty 'should be rejected'.\textsuperscript{24} These views are echoed in some case law: 'The equitable doctrines relating to confidential information and fiduciary relationships are conceptually distinct, though overlapping in their factual applications.'\textsuperscript{25}

On the other hand, some courts\textsuperscript{26} and other writers are prepared to classify the obligation of confidence as fiduciary. Virgo refers to confidentiality as a 'category of fiduciary relationship'.\textsuperscript{27} Kearney J, writing extracurially, clearly sees the breach of confidence in \textit{Seager v Copydex (No. 1)}\textsuperscript{28} as a breach of fiduciary duty.\textsuperscript{29} Klink suggests a fiduciary duty does arise out of the finding that there is an obligation of confidence, precisely because it is a breach of the duty of loyalty. He argues that:

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because of the limitations placed upon the information imparted, the confidant never receives it exclusively for his own interests. Thus the confidant is fixed with an obligation to act on that information in an unselfish way - that is, to be loyal.\(^{30}\)

Klinck argues that when the confidant is given confidential information, the confider effectively gives the confidant power, and thus becomes vulnerable to the confidant's misuse of the information.\(^{31}\) ‘One implication of this analysis’, he says, is that ‘almost inevitably, any breach of confidence will entail a breach of fiduciary obligation’.\(^{32}\)

Klinck suggests ‘breach of confidence might be isolated as an essentially equitable concept (which) should facilitate relating it to the fiduciary principle’,\(^{33}\) but it is not clear that accepting the obligation of confidence as equitable necessitates its alignment with fiduciary law. It is necessary to understand what Klinck means by ‘fiduciary obligations’. Like many others, he is thrown back to Finn's analysis that the fiduciary should act selflessly with undivided loyalty.\(^{34}\) This stresses the obligation of the fiduciary to act against self-interest. Klinck argues that the obligation of confidence also involves this level of loyalty, that ‘if the fiduciary obligation is essentially defined by loyalty, the obligation of ‘secrecy’ involved in the imparting of confidential information is difficult to distinguish from it.’\(^{35}\) This reasoning seems compelling, yet it is disquieting because of the differences between the two concepts.

(ii) Comparing the fiduciary and confidential obligations

Clearly there are both similarities and differences between the obligation of confidence and fiduciary duty. Both obligations serve similar policy objectives. It is often

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\(^{32}\) Ibid.

\(^{33}\) Klinck, above, n 30, 86.

\(^{34}\) Ibid, 92.

\(^{35}\) Ibid, 94.
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said that the obligation of confidence and fiduciary obligations exist to serve social purposes. Fiduciary law enables the development of societal trust, which in turn encourages economic development. The protection of information also has underpinnings in economic policy and in encouraging good faith in business dealings.

On the similarities side of the ledger, several obvious doctrinal likenesses appear. First, breach of both obligations can be unintentional. There is no element of conscious behaviour required to establish a breach. Nor is any 'bad' motive required. An honest confidant and an honest fiduciary can still be held liable for breach of their relevant duties. Secondly, neither duty is a duty of care. A careful confidant is not protected from liability for unauthorised disclosure, nor is a careful fiduciary absolved from breaches of the profits and conflicts rules. This is because duties of care and duties of a fiduciary or confidential nature address different responsibilities. Thirdly, like fiduciary duty (but unlike trust), the obligation of confidence does not depend on property being involved. This may suggest that there is more correlation between the obligation of confidence and fiduciary duty than there is between confidential obligations and trust. Fourthly, as Klinck argues, a similar degree of disinterestedness is reflected in both obligations. The fiduciary must not be disloyal by making a secret profit or preferring another interest. If he acts at all,

37 Glover notes that there are different policy considerations applicable depending upon the kind of information under consideration. Personal confidences are protected as 'part of the inviolate core of liberties that citizens possess in a liberal democracy': J Glover, Equity, Restitution and Fraud (Sydney, LexisNexis Butterworths, 2004) 310-12.
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Seager v Copydex Ltd [1967] 1 WLR 923; Attorney- General v Guardian Newspapers (No.2) [1990] 1 AC 149, 179.

However, it may be that the conflicts rule requires bad behaviour: Bristol and West Building Society v Motheuw [1988] Ch 1, and see Chapter 4.3 (b) (iii).

Gurry, above, n 6, 124; and see generally, Chapter 4.3 (b).

Information is not regarded as property, though many cases treat the information as analogous with property. See for example Detal Nominees Pty Ltd v Viscount Plastic Products Pty Ltd [1979] VR 167, 190-1 (Fullagar J).

Morgan has recently commented that, in relation to breach of confidence, there is no difficulty imposing an obligation on complete strangers, but it then becomes impossible to use trust-based rhetoric and reasoning: J Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62 Cambridge Law Journal 444, 456.

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he must act in the beneficiary's interest. These obligations are prescriptive, not prescriptive. Likewise, a confidant must not use the information involved to further his own interests or act against the confidant's interests.

A fifth similarity is that the fiduciary obligation and the confidential obligation can, in certain circumstances, survive the termination of the underlying relationship.\(^{43}\) Thus, employees may find their fiduciary duties continue even after the contract of employment ends.\(^{44}\) Equally, an obligation of confidence can continue after the termination of a contract of employment,\(^ {45}\) and may be perpetual in effect.\(^ {46}\) Finally, another similarity is that third parties are treated in much the same manner.\(^ {47}\) The innocent third party receiver of information is not liable, neither is the innocent assistant to a breach of fiduciary duty, nor the innocent receiver of the proceeds of a fiduciary breach. However, in all three cases, once the requisite degree of knowledge is shown, the third party becomes liable just as if he was the original confidant, or the fiduciary.\(^ {48}\)

There are important differences, however. First, for the purposes of Australian law, the two obligations can protect different interests. Fiduciary law only protects economic interests.\(^ {49}\) The obligation of confidence can protect economic interests, such as trade

\(^{43}\) Glover, above, n 37, 323; \textit{Prince Jefri Bolkiah v KPMG} [1999] 2 AC 222, 235.


\(^{45}\) \textit{Europe Strength Food Co Pty Ltd v A B Consolidated Ltd} (1978) 2 NZLR 515, 520; \textit{X v Attorney-General} [1997] 2 NZLR 623, 629.

\(^{46}\) \textit{X v Attorney General} [1977] 2 NZLR 623.

\(^{47}\) Though possibly not in all cases of breach of confidence: 'While dishonesty is a natural word to use in relation to misappropriation of trust property or misuse of confidential information of a commercially valuable kind, it is not an appropriate word to use in relation to the publication of information about someone's private life in circumstances which would make the publication offensive to any fair-minded person.' \textit{Campbell v MGN Ltd} [2003] 1 All ER 224, 240 (Lord Phillips), citing Toulson & Phipps, above, n 4, 7-03.

\(^{48}\) The requisite degree of knowledge, however, is not necessarily the same in all three cases. For breach of confidence, the relevant test appears to be whether the reasonable person in the position of the defendant would have realised that the information was confidential: \textit{Coco v A N Clark (Engineers) Ltd} [1969] RPC 41, 48 (Megarry J); \textit{Franklin v Giddins} [1978] Qd R 72, 80 (Dunn J).

\(^{49}\) See generally Chapter 4.2 (b).
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secrets and information having an obvious market value, but it can also protect interests more easily described as personal, such as the interest in not having marital secrets published or private, embarrassing video footage broadcast. This reflects the fact that, at a deeper level, different abstract concepts are being protected. Obligations of confidence protect confidentiality of information, but fiduciary obligations protect the integrity of the relationship itself. Related to this point is the observation that while breaches of fiduciary duty are invariably transactional, the same is not true of breaches of confidence. With breach of fiduciary duty, damage arises either because there is a direct transactional relationship between the fiduciary and the principal, or because the fiduciary experiences conflict in respect of a transaction between the principal and a third party. However, damage in breach of confidence cases does not depend on transactional factors and may be related to issues like market share loss, or in personal information cases, general humiliation.

Further, fiduciary obligations and confidential obligations are breached in different ways. Fiduciary obligations are breached by making an illicit profit or by suffering a conflict to continue unresolved. Obligations of confidence are breached by unauthorised use of confidential information. That might include the making of a profit, or arise from a conflict, but those elements are not essential to a successful action for breach of confidence. Instead, those outcomes are the result of the unauthorised use of the confidential information. The obligation of confidence is silent on the topics of profit and conflict. It forbids unauthorised use of confidential information only. For example, if a solicitor acts for two clients in one matter without disclosing the fact to one client, he is in breach of the conflicts rule in respect of that client. But he is not thereby in breach of an obligation of confidence. The solicitor will only breach an obligation of confidence if he discloses to one

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51 Donnelly v Amalgamated Television Services Pty Ltd (1998) 45 NSWLR 570 (discussed by Gleson CJ in Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, 230). This might, however, be an indication that the action for breach of confidence is being used to 'gap-fill' in the absence of an enforceable right to privacy. The unsuitability of the obligation of confidence as a means of protecting privacy in discussed below.
52 Nakajima, above, n 20, 37.
client information which is confidential to the other, or otherwise makes unauthorised use of that information.

Another indication that the content of the obligation of confidence differs from fiduciary obligation lies in applicable defences. The action for breach of confidence can be successfully defended in the United Kingdom by showing an overriding public interest in the disclosure of the information. Australian courts have taken a more restrictive view of the possibility of the defence. Gummow J has been particularly damning, saying:

examination of the recent English decisions shows that the so-called 'public interest' defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis..., and (ii) equitable principles are best developed by reference to what conscionable behaviour demands of the defendant not by 'balancing' and then overriding those demands by reference to matters of social or political opinion.

Information concerning matters of 'iniquity in the sense of a crime, civil wrong or serious misdeed of public importance' will instead usually be treated in Australia as lacking the quality of confidence required for protection. Thus, the question of breach will not usually arise. However, the current Chief Justice of the High Court indicated recently that a public interest defence would be available for breach of confidence. Conversely, it is extremely difficult to imagine circumstances in which a fiduciary could argue overriding public interest in acting self-interestedly. Public interest is unlikely to be served by secret profits or loss-causing conflicts.

53 For an extensive review of authority on the question, see A G Australia Holdings Ltd v Burton (2002) 58 NSWLR 464, 513-26. See also M Richardson, ‘Whither Breach of Confidence: A Right of Privacy for Australia?’ (2002) 26 Melbourne University Law Review 381, 392. Richardson says that the defence is probably also available in Australia, ‘notwithstanding some pronouncements to the contrary’.
54 Smith, Klein & French Laboratories (Australia) Ltd v Department of Community Services (1990) 22 FCR 73, 110-111.
Chapter Five: Breach of Confidence

The possibility of a public interest defence reveals another aspect of the obligation of confidence at variance with fiduciary obligations. The obligation of confidence is a more truncated concept. It is more limited than fiduciary duty, and more ad hoc, being in a sense more circumstantial. The competing public interests in preserving confidentiality on the one hand, and allowing the dissemination of knowledge on the other, are more finely balanced, than the social institutions protected by the fiduciary concept and any countervailing public interest.

Thirdly, the obligation of confidence is more fragile than the fiduciary obligation. The obligation to keep confidences ceases when the information loses its confidentiality, regardless of the intentions of the parties or the state of their relationship, if any. The fiduciary obligation can only really be disposed of by action between the parties. Even if the information is protected, the protection may only be short-lived. Thus, in the ‘springboard’ cases, the plaintiff is protected against the defendant’s unauthorised use only to the extent that the defendant has gained an undeserved advantage. After that advantage has expired, the defendant is free to use the information at will.

Perhaps the greatest point of distinction between the obligation of confidence and fiduciary duty lies in the consequences of breach. Remedies are approached differently. It is noticeable that remedies awarded for breach of confidence are not in fact as draconian in approach as those given for breach of fiduciary duty. Gurry observes that ‘if the confidant can establish that a misuse was not deliberate and that he acted in good faith, the remedies

58 It is not possible for a fiduciary to discharge a fiduciary obligation by unilaterally ending the relationship: Green & Clara Pty Ltd v Bestobell Industries Pty Ltd [1982] WAR 1; Frazer Edmiston Pty Ltd v A G T (Qld) Pty Ltd [1988] 2 Qd R 1; Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41. For a rare exception see Authorson v Canada (Attorney-General) [2003] 2 SCR 40, where parliament legislatively disposed of a fiduciary obligation to pay interest on war veterans’ pension benefits.
consequent on the breach ... may be adjusted accordingly'.\(^{60}\) The same is clearly not true of breach of fiduciary duty, where liability approaches the absolute.\(^{61}\) Courts often comment on the inability to mollify the harshness of the award of remedy for breach of fiduciary duty.\(^{62}\) Further, some writers suggest that there are differences in the way remedies are awarded for breach of confidence, depending whether the confidant already owes fiduciary obligations to the confider.\(^{63}\) This indicates that fiduciary breaches and breaches of confidence are treated differently. Possibly, this allows for the fact that it is more difficult for a plaintiff to prove a fiduciary breach, given the inherent difficulty in monitoring fiduciary performance. Almost by definition the fiduciary is information-rich and the principal information-poor. The plaintiff suing for breach of confidence is not necessarily at the same degree of risk as the plaintiff in a fiduciary case. A confider-plaintiff is more likely to be on equal terms with the discloser, and is more likely to be able to protect its own interests at a general level. Therefore it may not be necessary to take as strict an approach to remedy with breaches of confidence.

There is also some resistance to making available all of the remedies that would be open following a breach of fiduciary duty to a breach of confidence. Thus in *Lac Minerals Ltd v International Corona Resources Ltd*,\(^{64}\) where the plaintiff was awarded a constructive trust over the ultimate product of the misused information (a working mine that resulted from information concerning possible mineral deposits), the minority thought that a constructive trust was not justified in the absence of a pre-existing property right or

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\(^{60}\) Gurry, above, n 6, 124. For a clear example of this principle, see *X v Attorney-General* [1997] 2 NZLR 623, 639 where Williams J took into account when fixing a monetary award that the party who released the information had committed no more than an error of judgment.

\(^{61}\) However, see *Boardman v Phipps* [1967] 2 AC 46, where a 'generous' allowance was made.


\(^{63}\) A Abdullah and T Hang, ‘To Make the Remedy Fit the Wrong’ (1999) 115 Law Quarterly Review 376, 379-80. Abdullah and Hang suggest that where there is a fiduciary relationship, the plaintiff is in a stronger position to insist on an account of profits as a matter of right, and therefore the court has less discretion to craft a remedy, than in a simple breach of confidence action. See also Millett, above, n 21, 222.

\(^{64}\) 61 DLR (4th) 14.
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fiduciary relationship. Notably, there have been no English or Australian cases where a
constructive trust was granted for a breach of confidence.

Klink’s observations concerning loyalty in an obligation of confidence may be
unable to be taken too far. Where there is a pre-existing relationship between the parties it
is relatively easy to characterise the confidential obligation as an obligation of loyalty.
However, it is much harder to suggest that a complete stranger owes an obligation of
loyalty to another stranger, merely because information concerning the second stranger has
come into his possession. It is much easier to conceptualise this obligation (if it exists) as a
duty owed to a neighbour, as in tort. The obligation of confidence appears to share
similarities with fiduciary duty. Nevertheless, the better view appears to be that the two
concepts are distinct and form different heads of jurisdiction.

(iii) Remedial Implications

Even if a breach of confidence is not automatically a breach of fiduciary duty, the
question arises whether or not the two breaches should be remedied in the same manner,
although they are separate doctrines. This middle ground is well occupied. Finn, for
example, thinks that compensation for breach of confidence could be regarded as a modern
development of the jurisdiction exemplified by Nocton v Lord Ashburton. 65 Stuckey-Clarke
says the obligation of confidence is enforced as a fiduciary duty in order to encourage and
protect the exchange of information. 66 She suggests that it is desirable that the equitable
duties of the trustee, the fiduciary and the receiver of the confidence be dealt with similarly
as regards remedy, all being duties which protect facilitative institutions. 67 Toulson and
Phipps say:

66 J Stuckey-Clarke, “‘Damages’ for Breaches of Purely Equitable Rights: The Breach of Confidence
67 Ibid, 77.
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there seems no good reason in principle why a person should not be required to provide compensation in equity...for breach of an obligation of confidence as in a case of breach of fiduciary obligation.\(^{68}\)

The similarities between the two duties tend to suggest that communality between remedies for the two doctrines might be justified. However, this is not to say that that the rules concerning breach of fiduciary duty can always be extended to breach of confidence. Nor is it necessarily accurate to suggest breaches of trust and breaches of confidence should automatically be regarded in the same manner. Closer examination is needed before such conclusions can be drawn.

5.4 DETERMINING REMEDY BY ANALOGY

The rhetoric used when equitable compensation for breach of fiduciary duty is discussed frequently recites the *Re Dawson*\(^{69}\) formulation of no limitations. But a different view is perhaps taken of monetary awards for breach of confidence. Some commentators seem to accept that matters such as foreseeability and remoteness are relevant. Glover, for example, states that '(r)ecovery of loss beyond market value of the information depends on the principles of remoteness of damages'.\(^{70}\) Capper also cautions that we cannot extrapolate directly from fiduciary cases to breach of confidence. Discussing *Canson*, he comments:

It is also important to recognise that McLachlin J was speaking only of compensation for breach of fiduciary duty. It should not be assumed that she believed remoteness, foreseeability and causation to be irrelevant to other equitable duties such as the duty of confidence.\(^{71}\)

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\(^{68}\) Toulson and Phipps, above, n 4, 32.

\(^{69}\) \[1966\] 2 NSW R 211.

\(^{70}\) J Glover, *Commercial Equity: Fiduciary Relationships*, (Sydney, Butterworths, 1995), 341; Glover, above, n 37, 346.

\(^{71}\) D Capper, 'Damages for breach of the equitable duty of confidence' (1994) 14 *Legal Studies* 313, 325.
On the other hand, Stuckey-Clarke regards the question of whether remoteness principles can be used to limit compensation as ‘highly controversial’. She prefers to apply Re Dawson, saying

(t)he analogy with the liability of the defaulting trustee is apt. The same justification for the protection of facilitative institutions underpins the obligations of a confidant. If a plaintiff could truly prove that the full commercial value of its confidential information was destroyed, then such full compensation should flow.  

When considering equitable compensation for breach of confidence there are two possible equitable bases upon which comparisons can be made. The first analogy is to breach of trust, requiring reconstitution, and the second is to fiduciary law, to removing the effect of conflict from a transaction. Drawing analogies with removal of conflict has little attraction in confidence cases. Frequently, the facts do not reveal transactional conflict. It is common in breach of confidence to adopt a common law approach to quantification, often analogising to tortious cases involving destruction of a chattel. This analogy seems apt because similar interests are often being protected, namely, the value of the asset, be it a chattel or information. But it is arguable that an analogy could just as easily be drawn to breach of trust, where what is required is reconstitution of the trust fund. Restoring to the plaintiff the value of the information as an asset performs a similar task as reconstituting the trust fund. Equity’s restorative interest is being satisfied. Traditional cases like Coco v A N Clark (Engineers) Ltd, where the market value of the royalty was restored to the

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72 Stuckey-Clarke, above, n 66, 84-5. A similar view is adopted by R P Meagher, J D Heydon and M J Leeming, Meagher, Gummow and Lehane’s Equity Doctrines and Remedies (4th ed, Sydney, Butterworths LexisNexis, 2002) [41-135] but earlier in the same edition, (at [23-010]) they indicate they regard ‘the proper basis for a pecuniary remedy for breach of an equitable duty of confidence and for breach of fiduciary duty’ as the same. This no doubt reflects their view that breaches of fiduciary duty and breaches of trust should be remedied in the same manner. Stuckey-Clarke may have modified her position. Writing with Richardson, she later suggests a system of analogy with the torts of conversion or detinue where the information has commercial value: M Richardson and J Stuckey-Clarke, ‘Breach of Confidence’ in P Parkinson (ed) The Principles of Equity (Sydney, LBC Information Services, 1996) 420, 471.

plaintiff, and the 'springboard' cases where the value of the head start is returned to the plaintiff, can be explained in this way.

In tort, if the chattel is totally destroyed, the plaintiff is entitled to its full value. In trust law, if a trust asset cannot be accounted for, reconstitution of the trust fund must be made. The same principles should apply to breach of confidence whether the analogy is drawn with tortious destruction of a chattel, or reconstitution of a trust estate. The calculation may be more difficult where the value of *information* has been destroyed, but it is suggested that the process of calculation remains the same. In other words, in neither case would full recovery be too remote. No real differences emerge whether the trust model or the torts model is adopted.

The above discussion assumes that the information under consideration has a market value; that is, the value that a willing buyer is prepared to pay a willing seller. More difficulties arise when the issue of personal information is considered. The analogy with breach of trust is relatively easy to maintain when information has a clear commercial value, because it is closer to the concept of ‘trust property’. But purely personal information having no trade value *per se* is hard to equate to ‘trust property’. Richardson and Stuckey-Clarke comment that ‘it is unclear whether compensation in such cases could be based on analogies drawn with tortious damages’.

Difficulties of this kind arose in *X v Attorney-General*. At issue was the damage suffered by a former undercover police officer when a serving police officer disclosed to a reporter sufficient details about the plaintiff to make him identifiable. Williams J surveyed

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75 Cf. Stuckey-Clarke, above, n 66.
76 Evans, above, n 20, 177, (at n 51).
77 Richardson and Stuckey-Clarke, above, n 72, 471-2. Evans also notes that '(t)he property analogy stands up when applied to commercially valuable information but falls down badly when applied to personal confidences.' Evans, above, n 20, 176.
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the plethora of authority and academic opinion touching the situation before concluding that, in addition to a continuing injunction, the plaintiff was entitled to:

an award of equitable compensation or damages...to an amount which will reflect the effect on both parties in a just and equitable way and which will endeavour to compensate him for the value to him of the information disclosed.79

His Honour then took into account a smorgasbord of factors, including: the nature of the continuing obligation; that some information about the plaintiff was already in the public domain and the rest was easily discoverable; the likelihood of physical risk to the plaintiff; the time elapsed; that the plaintiff was protected by continuing injunction; that the plaintiff did not suggest he had suffered any monetary loss; and that the defendant had not been ‘guilty’ of deliberate exposure of the plaintiff.80 While this list appears eminently sensible and just, it must be noted that it bears little or no resemblance to the factors taken into account in breach of trust or breach of the conflicts rule by a fiduciary. The analogy of reconstitution of the trust estate does not translate to scenarios like these, and it is extremely difficult to describe recovery in X v Attorney-General81 as ‘removing the effect of the conflicted party’s conflict’. Particularly, it must be highlighted that the plaintiff was able to recover without being able to show a monetary loss.82 Inability to show monetary loss in breach of trust or breach of fiduciary duty cases is undoubtedly fatal to claims for equitable compensation. Breach of confidence seems to be sui generis in this regard as well.

This may indicate we are dealing with three separate equitable wrongs, namely breach of trust, breach of fiduciary duty and breach of confidence. The essential differences between breach of trust and breach of fiduciary duty have already been discussed. It is not necessarily the case that equitable compensation for each can be calculated in a single manner. Although there are parallels between breach of confidence and breach of fiduciary

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79 Ibid, 637.
81 Ibid.
duty they are separate causes of action, and cannot necessarily be remedied in a single manner either. Nevertheless, the three have in common the one goal, that is, to put the plaintiff in the position she would have been but for the breach.

Further, it suggests that breach of confidence as currently conceived does not admit of one method of remedial calculation only. Instead, there are at least two methods currently in use. The first is in relation to marketable information. Here, use of either a tortious or a trust based analogy to value the information will deliver similar results. The second is in relation to information which has no true market value (usually because the plaintiff would never be a 'willing seller') such as information of a private, personal or governmental nature. This kind of information cannot be valued as if for reconstitution of the trust fund because it may be priceless. As a result it is usually dealt with by analogy with tort and most commonly with the torts relating to reputation such as defamation.83

Compensation for breach of confidence then is not currently uniformly provided upon the same basis as either breach of trust or breach of the conflicts rule. Absent clear equitable guidance, the line of least resistance is to adopt common law quantification principles and this is what has happened. Indeed, instead of reference to equity for breaches of confidence, the technique seems to be that damages in the common law sense are presumed to apply, whether or not the jurisdictional source is the common law.84 As Glover comments, 'a substantial body of the cases now fails to distinguish between the sources of "damages" for breach of confidence.'85 Stuckey-Clarke observes that:

(t)he action for breach of confidence, though a purely personal action in equity, is conceived as more readily analogous to a tortious action in relation to the misappropriation of property or, alternatively, since the duty...is often undertaken consensually, akin to a contractual duty. ...It has similarities to the torts of

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83 As in X v Attorney-General [1997] 2 NZLR 623.
84 For example, in X v Attorney-General [1997] 2 NZLR 623 the plaintiff sought special, general and punitive damages for breach of confidence.
85 Glover, above, n 70, 339.
conversion, detinue and trover and, when it is invoked to protect privacy interests, is closely analogous to torts remedying injury to reputation.86

The remedy awarded is equitable compensation for loss, even if it is calculated by reference to common law equations. No wonder litigants and courts find this confusing, and fall into the abhorred ‘fusion fallacy’.87 This degree of doctrinal confusion is not ideal. Changes, however, may be imminent. The law of breach of confidence may soon be forced to reform, with the impetus being provided by the growing concerns for privacy in society.

5.5 RATIONALISING THE ACTION OF BREACH OF CONFIDENCE

There are two options open for the equitable obligation of confidence. The first is to recognise its *sui generis* nature, and accept what has become the norm: the action equitable, but remediable in cases of loss by primary analogy with torts such as detinue, trover, conversion or defamation. The second is to elect to subdivide breach of confidence into two distinct actions. One, a purely equitable obligation, would protect confidential information with a marketable value. The other, a tort of invasion of privacy, would cover private information88 and other privacy issues. This thesis argues that the second option presents the best way forward, for reasons of doctrinal transparency and coherence, and in order to provide more extensive privacy protection than is currently provided by the obligation of confidence.

The first alternative cannot be supported, and not merely for reasons of doctrinal purity. Stuckey-Clarke argues that resort to a tortious damages regime denies ‘the essential nature of the action for breach of confidence, namely...the sort of rights the action is there to enforce and the sort of interests the equitable action protects.’89 Further, she argues that

86 Stuckey-Clarke, above, n 66, 73.
87 Meagher, Heydon and Leeming, above, n 72 [2-100 - 2-110].
88 There may therefore be some overlap. Some information will be both ‘private’ and ‘confidential’.
Obviously, there could be no double recovery.
89 Stuckey-Clarke, above, n 66, 74.
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tort law presents a less flexible remedial regime to that achieved by equity. A third argument against continuing with this cross-fertilised amalgam of equitable action and tortious remedy currently used is that in most cases there is no reason to resort to tort in the first place. Analogy with breach of trust will serve as well, allowing the cause of action to remain truly equitable. However, the trust analogy does not translate to the privacy cases. There is no essentially equitable dimension to the protection of privacy. Privacy duties look like torts, are duties owed to society at large (if at all), and are remedied like torts. Privacy cases should be treated as tort, or alternatively be dealt with legislatively.

(i) Removing privacy interests from the action for breach of confidence

Although the obligation of confidence is appropriate for the protection of commercially valuable information imparted in confidential circumstances, it is not an appropriate vehicle for the protection of privacy. Its shortcomings in this regard are highlighted when considered in light of the remedial response of equitable compensation. Equitable compensation is available as a remedy for the misuse of commercially valuable information because the remedy requires proof of loss; it is a sufficient remedy in those cases because it performs equity’s regulatory role in respect of restoration. The value of the misused information is returned to the plaintiff.

The obligation of confidence is not appropriate to protect privacy because (except in the limited application to private confidential information) equitable remedies including equitable compensation cannot properly perform the task of restoration. There are three reasons for this. First, equity rarely acts in non-economic spheres; equity deals in tangibles and its concerns are with a plaintiff’s economic wellbeing. The interest that we all have in maintaining privacy stems from the desire for intrinsic human dignity. There is no economic interest here. Secondly, because privacy interests are concerned with ‘quality of

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90 Ibid.
91 Giller v Procopets [2004] VSC 113 (unreported, Gillard J, 7 April 2004). Occasionally, a plaintiff will have an economic interest in their own privacy. This occurred in Douglas v Heilo Ltd [2001] QB 967, where the plaintiffs were in part protecting their own commercial interests in selling their wedding photographs to a magazine. This interest was arguably devalued by a rival magazine publishing unauthorised photographs.
life' and do not have an economic dimension (at least in Anglo-Australian law), there is no way equity can effect restoration. The restoration rationale does not apply to privacy cases. Invasion of privacy is an unconscionable outcome that cannot be undone; equity cannot restore a plaintiff's privacy once it has been invaded. Nor, of course, can the law of tort, any more than it can restore good health to the victim of a personal injury, but tortious damages are better suited to that task. Thirdly, equity acts at a personal level. Trustees, fiduciaries, those who are estopped from enforcing legal rights and those who have exerted undue influence for example, owe their obligations to specific persons with whom they interact. If there is an obligation not to invade another's privacy, it is a duty owed at large to all members of society, as an incident of citizenship. In short, it is not individualised justice but generalised justice being sought when a right to privacy is asserted. Equity prefers the sphere of individualised justice.

(ii) Should privacy be protected by the obligation of confidence?

Certain aspects of privacy have always qualified for protection under the doctrine of breach of confidence. Some private information can be protected as confidential information. Thus in Duchess of Argyll v Duke of Argyll, one spouse was able to prevent the other disclosing information concerning their married life. X v Attorney-General is another clear example. However, these may be the exception rather than the norm. The requirement that the obligation of confidence be founded upon information that has the necessary quality of confidence about it can be difficult for a plaintiff to satisfy. Much otherwise private information will not qualify as confidential information, as the plaintiff in Australian Broadcasting Corporation v Lenah Game Meats rightly conceded. There, a

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92 Gurry, above n 6, 117 says, 'a standard which determines confidentiality by reference to economic effort is hardly appropriate to personal confidences.'

93 In Prince Albert v Strange (1849) 1 H. & Tw 1; 47 ER 1302, private etchings were protected from unauthorised publication.


97 Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199 ('Lenah').
video of commercial possum slaughtering performed on private premises taken by a trespasser could not be protected by the obligation of confidence, because the information contained in the video did not qualify as 'confidential'. As Morgan comments, 'private' and 'confidential' 'are radically different qualities'.\(^9^9\) Fundamentally, confidence is about disclosure of secrets reposed in trust, and privacy is about sensibilities and feelings.\(^1^0^0\) Privacy is 'a personal shield'\(^1^0^1\) which has its genesis in 'the fundamental value of personal autonomy'.\(^1^0^2\)

Even though the action of breach of confidence may have sufficient strength to counter some cases of unauthorised use of 'private' information, the doctrine is being stretched beyond its natural boundaries when attempts are made to utilise it to give greater protection to privacy. Nor does the body of traditional tort law completely cover the field.\(^1^0^3\) This may suggest a gap, requiring filling. One of equity's historical applications has been to correct the gaps left by the common law and the legislature. But there may be some serious policy contradictions in treating privacy as able to be remedied by equity in Australia. The duty of confidence, where it applies in relation to private information, is a very different creature from fiduciary duty. Fiduciary obligations in Australia cannot protect bodily integrity or access to medical records,\(^1^0^4\) for example. Protection is only extended to economic interests. Yet if the doctrine of breach of confidence is applied in

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\(^{98}\) However, Richardson, above, n 53, 386 regards this concession as 'curious' and 'unfortunate'. See also J Horton, 'Towards a Real Right of Privacy' (2003) 29 Monash University Law Review 401, 403-5.


\(^{100}\) Morgan, above, n 42, 451.


\(^{102}\) Douglas v Hello! Ltd [2001] QB 967, 1001 (Sedley LJ).

\(^{103}\) See for example, Giller v Procopets [2004] VSC 113 (unreported, Gillard J, 7 April 2004, where the plaintiff could not recover damages because she could not establish loss.

\(^{104}\) Breen v Williams (1996) 186 CLR 71.
privacy cases, it may be possible to protect against ‘hurt feelings’.  

Further, the obligation of confidence is a duty that can be owed by a complete stranger, whether or not they have sought out the information or undertaken any duties in relation to the confidant; what matters are the circumstances in which the defendant became aware of the information. It will be enough that the defendant ought to have known the information was confidential. Contrast this with the fiduciary, who is rarely a stranger to the principal, and may have explicitly undertaken obligations with respect to economic interests. This effectively elevates an obligation of confidence to the position that it is more exacting than a fiduciary obligation. Significant consideration of the relative values of those societal interests being protected is called for, before the obligation of confidence is elevated in such a way via the auspices of equity. If the obligation is one that each member of society can incur (in appropriate circumstances) no matter what relationship exists between the two parties, then it is a duty owed to other members of society at large. This is beyond equity’s concern with conscience on an individualised basis.

In Australia, as in New Zealand and the United Kingdom, the movement appears to be towards recognition of an action of invasion of privacy, for use in ‘human dignity’ cases. This move is to be applauded, though the route being followed by these jurisdictions is markedly different. In England, the breakthrough appears to have come in Douglas v Hello! Ltd, a decision of the Court of Appeal. However, the English development is said to be referrable to the action for breach of confidence, rather than a free-standing cause of action. A lone Australian District Court judge (relying heavily on High Court obiter dicta


Usually, a fiduciary relationship is predicated upon a pre-existing relationship: P D Finn, ‘Contract and the Fiduciary Principle’ (1989) 12 University of New South Wales Law Journal 76, 85. The best known exception is the trustee, who may not be known to the beneficiary.

[2001] QB 967 (‘Douglas’).

Grosse v Purvis (2003) Aust Torts Reports 81-706; but see Giller v Procopets [2004] VSC 113 (unreported, Gillard J, 7 April 2004, where Gillard J held there was no tort of invasion of privacy. His
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discussed below) has been rather more adventurous, and has recognised a free-standing tort for invasion of a right to privacy. In this, he follows in the footsteps of trans-Tasman courts.

(iii) Privacy in the United Kingdom

Douglas is well known for its celebrity plaintiffs, actors Douglas and Zeta-Jones. They sold the right to publish photographs of their wedding to a magazine, taking elaborate (but unsuccessful) steps to avoid unauthorised photography. An injunction was sought when rival magazine attempted to publish ill-gotten photographs. The injunction was discharged in the Court of Appeal because, on the facts, a monetary award would be a sufficient remedy. Breach of confidence was initially contentious because it appeared that the information might not be confidential, or imparted in circumstances of confidence. The Court of Appeal accepted that a right to privacy existed, coming out of the action for breach of confidence. One writer comments that reliance on breach of confidence was ‘so the

Honour does not appear to have been referred to Grosse v Purvis (which in any event would not have been binding).

In a recent important decision, Hosking v Ruting [2004] NZCA 34 (unreported, Gault P, Keith, Blanchard, Tipping and Henderson JJ, 25 March 2004), the New Zealand Court of Appeal held 3:2 that a tort of privacy exists in New Zealand. This built upon a series of cases supporting recognition of a tort. See Tucker v New Media Ownership Ltd [1986] 2 NZLR 716; Bradley v Wingnut Films Ltd [1993] 1 NZLR 415; P v D [2000] 2 NZLR 591; L v G [2002] DCR 234. In Hosking v Ruting a magazine photographer photographed the infant twins of a minor celebrity being pushed in their stroller by their mother (who had separated from her celebrity husband) in a public street. Gault P, Blanchard and Tipping JJ held there was an action in tort for the publication of information or material where the plaintiff has a reasonable expectation of privacy, unless there is legitimate public concern justifying publication. Reasonable expectation of privacy is linked to whether publication of the material would cause offence to a reasonable person. All five members of the court agreed that, on the facts, the incident did not amount to a breach of privacy.

[2001] QB 967.

[111] English courts had previously held that there was no action to protect privacy: Kaye v Robertson [1991] FSR 62. However, since the passing of the Human Rights Act 1998 (UK) (implementing the European Convention for the Protection of Human Rights and Fundamental Freedoms), both a right to privacy and a right to freedom of expression have required integration into law. English courts appear to have chosen the action of breach of confidence as the vehicle for this integration.
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court could avoid frightening the horses, by appearing not to be doing anything new (or noteworthy) at all.113

On one level, Douglas114 is unremarkable. Photographs have often previously been held to contain confidential information.115 In Douglas, unauthorised misuse was plain to see. The Court of Appeal was prepared to lighten the requirement that information be imparted in confidential circumstances, to be inclusive of information obtained in breach of privacy, or fortuitously obtained without actually being ‘imparted’. This doctrinal extension was proposed in the Spycatcher litigation, where Lord Goff suggested liability could attach to a complete bystander, as long as the bystander ought reasonably to have known the information was confidential.116 This was confirmed in Douglas, where it was held that a pre-existing relationship between the parties was not essential. Sedley LJ said:

I would conclude...that [the plaintiffs have] a powerfully arguable case to advance at trial that [th:] have a right to privacy which English law will today recognise and, where appropriate, protect. To say this is in my belief to say little, save by way of a label, that our courts have not said already over the years. It is to say, among other things, that the right, grounded as it is in the equitable doctrine of breach of confidence, is not unqualified. ...What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused by those who simply find themselves subjected to unwarranted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim.117


115 For example, Pollard v Photographic Co (1888) 40 Ch D 345; Shelley Films Ltd v Rex Features Ltd [1994] 2 EMLR 134.


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Douglas\textsuperscript{118} works quite well as a traditional breach of confidence case because the plaintiffs were really protecting the right to profit from the sale of their ‘information’ themselves.\textsuperscript{119} But if the facts are changed very slightly cracks appear and limitations in the use of breach of confidence to protect privacy become obvious. For example, the plaintiffs could not have protected themselves against paparazzi camping outside the wedding venue, because there would have been no way ‘information’ could have been said to be at risk. Or, had the official magazine published sanctioned photographs first, it may have been difficult to see how the information could have been said to remain so ‘confidential’ as to stop publication of unauthorised photographs.\textsuperscript{120} Nevertheless, these examples might be regarded by the plaintiffs as invasions of their privacy. And, as Morgan says:

breach of confidence can never protect publication of images taken of an individual in a public place, however distressing, since such information cannot have ‘the necessary quality of confidence about it’.\textsuperscript{121}

Hence, newspapers and television reports regularly include photographs of grieving relatives at funerals, or victims of accidents receiving treatment. Very much more indeed is available via the Internet. The right to privacy envisaged in Douglas\textsuperscript{122} only protects against public disclosure of private information. It cannot protect against other invasions of privacy.

Doctrinal limitations are illustrated by the English decision A v B.\textsuperscript{123} A, a well-known footballer, had adulterous affairs with C and D. Both women sold their stories to a newspaper, the defendant B. A sought an injunction to restrain publication on the basis of

\begin{flushleft}
\textsuperscript{118} Ibid.
\textsuperscript{119} In the substantive trial, the photographs were treated like trade secrets: Douglas v Hello! Ltd [2003] 3 All ER 996.
\textsuperscript{120} In fact, because the plaintiffs had already sold photographs of their wedding for publication, they were not granted an injunction preventing publication. It was judged that damages would provide an adequate remedy.
\textsuperscript{121} Morgan, above n 42, 457.
\textsuperscript{122} De Jas v Hello! Ltd [2001] 1 QB 967.
\end{flushleft}
breach of confidence, which was granted at first instance. The newspaper sought discharge of the injunction. One of the shortcomings of a breach of confidence action in circumstances such as these is clearly visible. A could not successfully assert that the stories the women had told the newspaper were confidential to him. On one view, the newspaper was publishing C and D’s information rather than his. There is a market in the sort of tale C and D were able to recount. Their stories had a realisable monetary value to them, but little or no such value to A. If it was anyone’s confidential information, it was C and D’s as much as it was A’s. This aspect of the case appears to have influenced the Court of Appeal, where it was noted that A’s right to have such information protected was undermined by the women’s right to freedom of expression.

The Court of Appeal was bound to consider the action for breach of confidence in the context of statutory rights of freedom of expression. But difficulties with attempting to construct this situation as a breach of confidence go further than that. It is not possible to regard the fact that A, C and D participated in brief adulterous affairs as information of A’s, having the necessary quality of confidence, imparted in circumstances of confidence, such as to impose an obligation on C and D to only use such information in the interests of A, unless there was very clear evidence of such an agreement. A on the one hand, and C and D respectively on the other, are independent actors entitled to pursue their own self-interest unless there is a clear assumption of responsibility to act disinterestedly or a societal expectation that participants such as C and D will keep their peace. At this time, it is suggested the opposite is the case. A must have known that the women owed him no such obligation, and if anything, might be expected to sell their stories. Equity cannot change human nature, and should not impose obligations upon persons in situations where no assumption of responsibility can possibly have been intended. Even if the ‘nature of the

124 [2002] 2 All ER 545.
124 Ibid, 563.
125 The right to freedom of expression is protected in England through Human Rights legislation.
subject matter or circumstances of the defendant’s activities suffice in some instances to give rise to liability\(^{120}\) it is argued that this should not be one of those circumstances.\(^{127}\)

Woolf LJ (for the Court) dismissed the possibility of a new tort in England, saying that in most cases, breach of confidence will protect privacy interests.\(^{128}\) However, he then proposed a new test for breach of confidence in the privacy context, similar in philosophy to the elements of the new torts seen emerging in New Zealand and Australia, saying:

(i) if there is an intrusion in a situation where a person can reasonably expect his privacy to be respected then that intrusion will be capable of giving rise to liability in an action for breach of confidence unless that intrusion can be justified.\(^{129}\)

There are various shortcomings of the English approach of incorporating privacy into the action of breach of confidence.

1. The action for breach of confidence only covers unauthorised use of information confidential to the plaintiff. It is unlikely to cover cases like \(A v B\),\(^{130}\) where one of the participants has opted against maintaining privacy. Once the information is released by another participant the confidentiality of the information may be destroyed, and protection permanently lost.


\(^{127}\) This is not to say that an obligation of confidence can never arise inside a sexual relationship. \(T\) Court of Appeal in \(A v B\) [2002] 2 All ER 545, 554, 562 drew a distinction between permanent and transient relationships, there being no expectation that casual partners will respect the privacy of the relationship. This underscores the observation that the obligation of confidence is best suited to existing relationships, and is often not an appropriate obligation to be imposed upon (relative) strangers. See also Hosking v Runting [2004] NZCA 34 (unreported, Gault P, Keith, Blanchard, Tipping and Henderson JJ, 25 March 2004), [245] (Tipping J). In Giller v Procopets [2004] VSC 113 (unreported, Gillard J, 7 April 2004), the female plaintiff was able to establish confidentiality concerning sexual activities with a long-term friend that occurred in a private home.

\(^{128}\) \(A v B\) [2002] 2 All ER 545, 552-2. However, earlier in the judgment it was hinted that without the provisions of the Human Rights legislation, the action of breach of confidence could not protect privacy. Woolf LJ said (at 549) that the conventions imported by the legislation were absorbed into the action of breach of confidence which involved ‘giving a new strength and breadth to the action’.

\(^{129}\) Ibid, 554.

\(^{130}\) \(A v B\) [2002] 2 All ER 545.
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2. The action may not cover release of information where the defendant came into it without the constraint of confidential circumstances attaching to its receipt, where the plaintiff is not in the position where he or she can reasonably expect their privacy will be protected. For example, if a newspaper discovers an unsavoury fact about a newsworthy plaintiff through research, the plaintiff’s privacy will not be protected.

3. The formulation of the action for breach of confidence can only cover use of information. It does not protect against invasive behaviour of any kind such as hounding by paparazzi.

4. In theory, only equitable remedies should be available to address a breach of an equitable duty. Equity is unable to restore the plaintiff’s privacy.

5. Incorporation of privacy into breach of confidence has resulted in doctrinal confusion. In England there are now ‘two quite distinct versions’ of the action.

(iv) Privacy in Australia

Australian law has traditionally denied the existence of a right to privacy. This view is exemplified in the venerable High Court decision, *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*. However, recent High Court dicta have been seized upon in a Queensland District Court decision as permitting development of a tort of breach of

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131 This should exclude damages, yet Lindsay J assumed that exemplary damages would be available: *Douglas v Hello! Ltd* [2003] 3 All ER 996, 1073. In *Giller v Procopets* [2004] VSC 113 (unreported, Gillard J, 7 April 2004), Gillard J held that aggravated and exemplary damages are unavailable for breaches of confidence. Even though the defendant had distributed video footage of himself and the plaintiff involved in sexual acts, in breach of an obligation of confidence, the plaintiff could not recover damages, as she was unable to show a loss.

132 ‘One is the long standing cause of action applicable to companies and private individuals alike under which remedies are available in respect of use or disclosure where the information has been communicated in confidence. ...those remedies are available irrespective of the “offensiveness” of the disclosure. The second gives a right of action in respect of the publication of personal information of which the subject has a reasonable expectation of privacy irrespective of any burden of confidence, but only where that publication is likely to be highly offensive to a reasonable person.’: *Hosking v Ruting* [2004] NZCA 34 (unreported, Gault P, Keith, Blanchard, Tipping and Henderson J J, 25 March 2004), [42] (Gault P and Blanchard J).

133 (1937) 58 CLR 479 ("Victoria Park").
privacy. In the Lenah decision, several members of the High Court discussed the status of Victoria Park. Gummow and Hayne JJ (with whose reasons Gaudron J agreed) denied the authority as conclusive of absence of a tort of invasion of privacy, stating, 'Victoria Park does not stand in the path of development of such a cause of action.' Callinan J indicated that he thought Victoria Park would have been decided differently today than it was in 1937.

These comments were sufficiently encouraging for Skoien SJ of the Queensland District Court to recognise a tort of invasion of privacy, in Grosse v Purvis. The facts of the case were severe; there were approximately 70 alleged incidents of stalking. The defendant's behaviour included loitering near the plaintiff's home and workplace, spying on her private life, trespass, physical contact, offensive phone calls, and the use of offensive and insulting language to the plaintiff, her friends and relatives. Some of these matters are covered by existing torts such as trespass, nuisance, assault and battery. Others may have given no cause of action to the plaintiff. Nevertheless, the plaintiff argued for the existence of two new torts: harassment and invasion of privacy.

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135 Ibid, 231.
138 In Grosse v Purvis (2003) Aust Torts Reports 81-706, Skoien SJ also drew support for recognition of a tort from the fact that Kirby J 'did not reject the possibility of its existence'(at [426]), and from his view there was 'nothing in the reasons for judgment of Gleeson CJ to suggest that he in any way differed from the view of the other members of the Court that the decision in Victoria Park presented no bar to the existence of a common law right to privacy in Australia'( at [428]).
139 Ibid.
140 Ibid, [18].
141 The defendant made various untrue allegations about the plaintiff's husband and daughter. Even though those actions were arguably aimed at the plaintiff, they were probably only actionable by the husband and the daughter.
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The comments of the members of the High Court in *Lenah* are clearly *obiter dicta*, and might be thought of as rather thin authority for the recognition of a new cause of action of breach of privacy. In fact, signs of lack of enthusiasm for a new tort can also be seen in the High Court judgments. G'eeson CJ, who thought that the action of breach of confidence would have protected the plaintiff had its possum slaughtering activities been private, called for caution in recognising a new tort:

The lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind for which the respondent contends. Another reason is the tension that exists between interests in privacy and interests in free speech.

Gummow and Hayne JJ (and therefore Gaudron J) were not entirely sure a new tort was necessary, but were happy for debate to continue. Their Honours commented:

It may be that development is best achieved by looking across the range of already established legal and equitable wrongs... (but) Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome.

Kirby J preferred to ‘postpone an answer to the question’ whether the Court should declare a new tort.

Skoien SJ nevertheless took the ‘bold step’ of recognising a civil action for damages based on a right to privacy, and specified the elements of the action as:

(a) a willed act by the defendant;

(b) which intrudes upon the privacy or seclusion of the plaintiff;

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*Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 208 CLR 199.

143 Ibid, 225.
144 Ibid, 225-6.
145 Ibid, 258.
146 Ibid, 278.
147 Ibid, 278.
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(c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and

(d) which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.\(^{148}\)

Skoien SJ indicated it was not necessary to consider whether a defendant could be liable for negligent acts as opposed to willed acts, or whether a defence of actual intention to protect or benefit the plaintiff should be a defence, or whether a separate tort of harassment might be developing,\(^ {149}\) but he thought a defence of public interest should be available.\(^ {150}\)

According to *Grosse v Purvis*,\(^ {151}\) compensatory damages are available for this new tort, including for the ‘range of unpleasant emotions such as upset, worry, anger, embarrassment and annoyance’.\(^ {152}\) Damages include a component for vindication of the right to privacy, similar to the tort of defamation where damages are also awarded for the purposes of vindication.\(^ {153}\) And, because the new cause of action is a tort, aggravated

\(^{148}\) *Grosse v Purvis* (2003) Aust Torts Reporter 81-706 [444]. Skoien SJ does not appear to have been referred to *P v D* [2000] 2 NZLR 591 or *L v G* [2002] DCR 234, although reference was made to a much earlier New Zealand authority, *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716. Since *Grosse v Purvis*, the New Zealand Court of Appeal has examined the issue in depth and defined the elements of the tort in New Zealand as including publication that would be considered offensive to a reasonable person of material in respect of which there is a reasonable expectation of privacy. This is subject to a defence of legitimate public concern, but does not appear to require willed damage: *Hosking v Runting* [2004] NZCA 34 (unreported, Gault P, Keith, Blanchard, Tipping and Henderson JJ, 25 March 2004).

\(^{149}\) Traditionally, there is no tort of harassment. The conduct is only actionable if it amounts to intentional infliction of harm: *Wong v Parkside NHS Trust* [2003] 3 All ER 932, 942.

\(^{150}\) *Grosse v Purvis* (2003) Aust Torts Reporter 81-706 [446-451]. The possibility of this defence should allay the fears of media organisations concerning the new tort. Impact of such a tort on the media may not have been considered by Skoien SJ, given that the dispute involved two private individuals.

\(^{151}\) Ibid.

\(^{152}\) Ibid, [473].

\(^{153}\) Ibid, [474].
damages are available (and were appropriate in this case), as were exemplary damages, due to the nature of the defendant’s conduct.

=Grosse v Purvis^156 is open to criticism on three fronts. First, Skoien SJ overly relied on inconsistent dicta from the High Court’s Lenah^157 decision. Consideration by a higher court will be needed before the emergence of a new tort can be conclusively suggested. Secondly, Grosse v Purvis might not have been an appropriate case for the attempted establishment of a new tort. The litany of wrongs could probably have been adequately remedied through application of existing tort law, as is revealed in the numerous torts for which damages were awarded. 158 Although it may be more convenient to deal with the myriad allegations under the heading of one tort, Grosse v Purvis may not properly demonstrate a gap in the law needing attention. 159 And finally, as with all judge-made changes in the law, a new tort is open to the criticism that the issue of the privacy of citizens should be attended to by the Parliament.

Nevertheless, the approach taken in Grosse v Purvis^160 and by the New Zealand courts^161 is more successful than the English approach to privacy. For the reasons discussed, the obligation of confidence has severe limitations in relation to privacy. The tort approach is preferred because it allows a degree of protection to cases where there might otherwise be none, such as where the information is not confidential for example, because

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154 Ibid, [476].  
155 Ibid, [481-2].  
156 Ibid.  
158 The exception is the defamatory comments made about the plaintiff’s husband and daughter.  
159 Factualy, the New Zealand cases P v D [2000] NZLR 591 (where non-defamatory information was discovered independently of an obligation of confidence) and Hosking v Ruting [2004] NZCA 34 (unreported, Gault P, Keith, Blanchard, Tipping and Henderson JJ, 25 March 2004), (where the children of a celebrity were photographed in a public place) are more attractive scenarios for discovery of a new tort, because of the obvious limitations of both existing tort and the equitable action of breach of confidence.  
the event took place in a public forum, or cannot be said to be ‘information’ at all. The new tort would also cover cases where it is difficult to discuss the information as having been imparted in circumstances of confidence.

The great difference between the English and the antipodean position is division over which arm of the law, torts or equity, should perform the task of extension to cover a gap in protection of privacy. The question as to which solution is preferable may, in part, be answered by reference to the remedial consequences of the choice. The tort model is far more appropriate for compensatory awards for breach of privacy than is equitable compensation. Tortious damages allow the court to vindicate the right to privacy (even in the absence of assessable damage) via nominal damages and allow the court to make appropriate allowance for malicious behaviour, via aggravated and exemplary damages, which probably cannot be done in equity due to its restoration focus. Further, tort allows the court to protect more than mere economic interests. Even in those rare cases like X v Attorney-General, where personal confidential information has been protected by the obligation of confidence, the torts model has been utilised, largely because of the obvious unsuitability of applying the equitable models; pragmatism has ruled the day. Equity’s restoration model cannot satisfy plaintiffs whose privacy has been invaded. This suggests that if expansion is to occur, it is preferable that the law of torts take the initiative in the absence of legislative action.

If a right to privacy can be protected via a new tort, this allows the obligation of confidence to occupy territory more familiar to equity, namely, the field of economic interests. Once personal privacy rights are removed from the obligation of confidence, that

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165 Contra, Richardson, above n 53, 393-5, who prefers the breach of confidence approach.
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obligation focuses its concern upon commercially valuable information. Equitable compensation for breaches concerning commercially valuable information is already largely calculated by analogy with torts concerning property. This has more normative sense than comparisons with breach of fiduciary duty. Confidants who are not already fiduciaries cannot be expected to show the same degree of loyalty, but they can be expected to restore what they have ‘taken’. Equity’s restoration interests are satisfied in these cases if the defendant compensates the plaintiff for unauthorised use of the information. Analogy to reconstitution of the trust fund works well here too, and is preferred as a matter of doctrine.

All the indications in Australia and internationally are that distinctions are being drawn between private information and privacy interests on the one hand, and commercially valuable information on the other. In a competition concerning which branch of law should protect privacy, it is best to acknowledge that the equitable action for breach of confidence is inappropriate. Therefore, the balance of this chapter will consider only commercially valuable information. These cases can arise in a commercial, contractual or employment setting, as well as other less obvious ways. What they have in common is that the plaintiff claims interference with its economic interests.

5.6 CAUSATION IN THE CONTEXT OF BREACH OF CONFIDENCE

Breach of confidence decisions reveal a remarkable range of methods of calculation of remedy, in part due to the historical doubts about the jurisdiction being exercised. Early courts often felt that the jurisdictional basis in equity could be explained by damages in lieu of injunction under Lord Cairns’ Act. This view has now been doubted, but still finds

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166 Some confidential ‘private’ information may still be covered under this heading.
167 For example, Franklin v Giddins [1978] Qd R 72, where an orchardist stole part of the grafted tree of a competitor in order to grow the grafted variety of fruit on his own trees.
168 For example, Nicrotherm Electrical Ltd v Percy [1957] RPC 207, 213 (Lord Evershed MR).
169 For example, see Meagher, Heydon and Leeming, above, n 72, 2320; Stuckey-Clarke, above, n 66, 72-3. Cf McDermott, above, n 5, 165, who argues that both Lord Cairns’ Act jurisdiction and the inherent equitable jurisdiction exist in cases where an injunction is available.

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expression. Similarly, much early debate concerned whether or not confidential information could be regarded as property. Always a controversial theory, it should be regarded as beyond doubt that property is not the basis of equity's jurisdiction. Restitution theory in the unjust enrichment sense is also used to explain recovery for breach of confidence. The wrongdoer is made to pay over the value of the benefit obtained in breach of the obligation of confidence because the defendant is unjustly enriched. This is unnecessary. While unjust enrichment can be a sufficient explanation of breach of confidence, it is not an essential explanation. Confidential information is protected whether or not the defendant made any profit, or whether the information had any real worth to either the plaintiff or defendant.

Competing explanations of remedial responses to breach of confidence create the impression of arbitrariness, confusion as to the appropriate rules of causation, and lack of predictability in outcome. Equitable remedies for breach of confidence must be able to be justified in terms of causation. Equity does not punish, therefore the remedy granted must reflect only the restoration of the plaintiff to the position to have been occupied but for the breach. In the case of equitable compensation, the remedy must undo the damage that the defendant has caused to the plaintiff's interests. This will satisfy equity's restorative concerns, but these concerns will be disappointed if the plaintiff is over or under

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170 See for example, Attorney-General v Guardian Newspapers No 2) [1990] 1 AC 109, 286 (Lord Goff); McDermott, above, n 5, 165.

171 For example, see differing opinions as to whether information can be property in Phipps v Boardman [1967] 2 AC 46, 89-90 (Lord Dilhorne), 102 (Lord Cohen), 107 (Lord Hodson), 115 (Lord Guest), 127 (Lord Upjohn).

172 ‘A general equitable jurisdiction to grant such relief has long been asserted and should, in my view, now be accepted: see The Commonwealth v John Fairfax & Sons Ltd. (1980) 147 CLR 39, 50-52. Like most heads of equitable jurisdiction its rational basis does not lie in proprietary rights. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained’: Moorgate Tobacco Co. Ltd v Phillip Morris Ltd (No.2) (1984) 156 CLR 414, 437-S (Deane J).


174 In Nicrotherm Electrical Co Ltd v Percy [1956] RPC 272, confidential information (comprised of drawings of a pig-rearing machine) was protected even though the defendant would suffer no harm and the defendant make no profit from its misuse.
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compensated. What the defendant must do is restore the plaintiff to the position that would have obtained had the defendant not made unauthorised use of the confidential information.

While the restorative goal is the same, it is a far cry from applying analogies with *Nocton v Lord Ashburton*, which concerned restoration of loss following a conflict, in order to fashion a remedy. If compensation for breach of confidence is upon the same basis as compensation in *Nocton*, then *Nocton* is being given its widest possible interpretation, that is, one of establishing an equitable jurisdiction to compensate in order to make restoration. It has been suggested that both breach of trust and breach of fiduciary duty demonstrate the proper method of compensating the plaintiff for breach of confidence. But as has been demonstrated in Chapters 2 and 3 these are in fact different methods, applying different concepts. Additionally, the cases show that breach of confidence jurisprudence often purports to apply neither test, borrowing freely from the common law when assessing compensation. Common law technique is adopted with the general justification being the *sui generis* nature of breach of confidence. The question then arises whether any one of these three methods, causation as for breach of trust, breach of the conflicts rule, or some tortious test, better suits equitable compensation for breach of confidence.

This thesis argues that the scope of duty analysis adopted in the last chapter applies here too. Equitable compensation is specific to the duty allegedly breached. Once the scope of the duty has been determined, causation in cases of breach of confidence becomes less contentious. The duty involved in the obligation of confidence can be 'crisply stated'. The duty is not to make unauthorised use of confidential information. 'Unauthorised' use causes few difficulties. Because the plaintiff is required to detail with a high degree of

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175 [1914] AC 932.
176 For example, Meagher, Heydon and Leeming, above, n 72, [41-135] suggests analogy with trust. Toulson and Phipps, above, n 4, 32, prefer analogy with breach of fiduciary duty.
177 Glover, above, n 37, 315.
178 Unauthorised use is usually obvious on the facts. However, in *Fractionated Cane Technology Ltd v Ruiz-Avila* [1986] 1 Qd R 51, the plaintiff placed no restriction on the defendant's use of the information
specificity what that information is, the court will have already ascertained the scope of the defendant’s duty before the question of whether the breach caused the loss requires determination. The scope of the defendant’s duty is not to make unauthorised use of information that has been demonstrated to be confidential to the plaintiff, and has been communicated in circumstances regarded as confidential. Once the latter two matters are established, what is unauthorised misuse usually follows. Proof of unauthorised use of confidential information coupled with loss is generally conclusive.

The causation question is then answered by the assertion that but for the defendant’s misuse, the plaintiff’s alleged loss would not have occurred. Factually, this is usually quite straightforward. Generally, loss would not have occurred for any other reason than the defendant’s unauthorised use of the information. If, however, the loss (or some of it) would have occurred in any event, this is beyond the scope of the duty. For example, imagine the defendant misuses the plaintiff’s secret formula for a novel medical treatment. Simultaneously, a third party independently develops the same medical treatment. The plaintiff is entitled to recover for loss of market share from the defendant, but not for the loss of the entire market in that treatment. Part of that would have been lost anyway when the independent competitor appeared.

The question is whether this test can be said to be closely analogous with the causal test for breach of trust, the causal test for breach of the conflicts rule or the tortious causal tests. There is really no causal question to be addressed in cases of reconstitution of the trust fund; the fund must be reconstituted simply because it is the trustee’s prima facie duty to perform the trust. In this respect, causation for breach of trust and causation for breach of confidence are similar. Breach and loss are two sides of the one equation. There are rarely the factual disputes that arise in cases of breach of the conflicts rule. The causation test for

\[ \text{when disclosing it (in this case, demonstrating a cane-drying machine). The plaintiff was then unable to establish that the defendant’s use was ‘unauthorised’.} \]

\[ O’Brien v Komesaroff (1982) 150 CLR 310. \]

\[ Gurry, above, n 5, 123. \]

\[ However, in Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd [2002] QSC 222 (unreported, Philippides J, 12 August 2002) (‘Ithaca Ice Works’) [16], a common sense test was used. \]
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breach of the conflicts rule by a fiduciary is that but for the breach of the conflicts rule, the principal would not have suffered the harm. The harm is cured when the effect of the conflict is removed. Removal of conflict, though, is not helpful in discussing misuse of information.

Because of the widespread use of tortious concepts for calculation of damages, compensation for breach of confidence gives the impression that a tortious nexus between causation and loss may be required. But this appearance can be misleading. The causal tests for breach of trust and the torts concerning destruction of chattels are uniform. This thesis argues that the causation test for breach of confidence should be determined according to equity’s restoration aim. This requires that all losses incurred by reason of the breach must be restored to the plaintiff. Equity can complete its restorative task by returning to the plaintiff the value of the confidential information. There is no real need to resort to tortious concepts.

Information, though, can be valued in a number of ways. The value of the information might be the sum that the defendant saved through not having to expend the energy himself to produce the information. Or it might be fair recompense to the plaintiff for the use of the information, assuming the plaintiff was prepared to negotiate a figure for its use. Or alternatively, it might be represented by market share lost by the plaintiff through the defendant’s misuse, or even the amount of profits made by the defendant through the misuse. Breach of confidence case law can provide examples of all of these valuations. This gives the impression that no single causation test has appeared.

In fact, there is only one causation test here, though it is rarely articulated. Equity’s restoration interests can only be satisfied if the value restored is the value that the information had for the plaintiff. The value that the information had for the defendant should be irrelevant. Equity is not punishing the defendant by insisting the defendant reinstate the plaintiff’s interest to the extent of the value it had to the plaintiff. It is merely achieving restoration of the status quo ante. If equity allows the defendant a cheaper exit,
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the plaintiff is left under-compensated. It is often said that the plaintiff is entitled to the market value of the confidential information which is misused. This can be an inappropriate allusion. In some cases, the market value (what a willing buyer is prepared to pay a willing vendor) is apt, but in other cases market value should be regarded as a distraction. What is relevant is the value to the plaintiff of the confidential information. This is the explanation of the remedial outcomes in a range of cases. Three are taken as examples, Seager v Copydex,184 Cadbury Schweppes Inc v FBI Foods Ltd,185 and Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd.186

In Seager v Copydex Ltd (No 1),187 the Court of Appeal ordered an inquiry by a Master for damages to be assessed on the basis of reasonable compensation for use of the plaintiff's information. The plaintiff was an inventor of a carpet grip. During negotiations with a potential manufacturer, the inventor disclosed his ideas for the carpet grip. After negotiations broke down, the manufacturer produced a carpet grip using the information disclosed to it by the inventor. The plaintiff/inventor suggested two bases of assessment to the Master, namely (a) a sum representing capitalised royalties, and (b) the value of the business lost while the competing carpet grip had been on the market. The defendant put forward a third basis, namely (c) the cost it would have incurred in producing the carpet grip itself. Assessments (a) and (b) are both plaintiff-based and look to the amount the plaintiff lost through the defendant's actions. The first assumes the plaintiff would have been prepared to sell the information, negotiating a royalty for its use. The second assumes

182 All of these methods were canvassed in the Seager v Copydex litigation: Seager v Copydex Ltd (No 1) [1967] 1 WLR 923; (No 2) [1969] 2 All ER 718.
183 For example, Interfirm Comparison (Aust) Pty Ltd v Law Society of New South Wales [1975] 2 NSWLR 104.
184 Seager v Copydex Ltd (No 1) [1967] 1 WLR 923; (No 2) [1969] 2 All ER 718.
186 Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd [2002] QSC 222 (unreported, Philippides J, 12 August 2002).
188 It is clear that the Court of Appeal based its "damages" on a belief that fusion between common law and equity had occurred following the Judicature Acts, and that the remedy was available for breach of an
the plaintiff would have marketed the carpet grip and therefore been in competition with the defendant. Assessment (c) is defendant-based, and asks by what amount the defendant has profited from the breach in terms of costs saved. The Master sent the matter back to the Court of Appeal to determine the correct approach, in *Seager v Copydex Ltd (No 2)*.\(^{189}\)

On return to the Court of Appeal, Lord Denning MR thought the correct approach was via analogy with the tort of conversion,\(^{190}\) which effectively gave the plaintiff reasonable compensation for the use of the information. He saw recovery as if on a sliding scale. The value of the information would depend upon its nature.\(^{191}\) The Master of the Rolls drew a distinction between information that was ‘nothing very special’ and information that ‘involved an inventive step or something so unusual that it could not be obtained by just going to a consultant’.\(^{192}\) In the first case, a consultant’s fee would adequately compensate the plaintiff, but in the second, more would be needed. The appropriate figure would be the value as between a willing buyer and a willing seller.\(^{193}\) Stuckey-Clarke has commented that this analogy with a property tort ‘is inadequate and incomplete’\(^{194}\) because it fails to take into account the election the plaintiff would have had at common law to sue for either detinue or trover. Stuckey-Clarke suggests:

\[(t)he\ analogy\ with\ common\ law\ remedies\ for\ stolen\ chattels\ should\ be\ followed\ through\ with\ completeness: by\ analogy\ with\ the\ action\ in\ trover,\ if\ the\ information\ is\ no\ longer\ of\ any\ value\ to\ the\ plaintiff\ after\ the\ confidant’s\ breach\ of\ duty,\ the\ plaintiff\ should\ be\ able\ to\ elect\ to\ have\ monetary\ compensation\ assessed....By\ analogy\ with\ specific\ delivery\ in\ the\ action\ in\ detinue,\ if\ the\ information\ still\ has\ potential\ commercial\ value\ to\ the\ discloser...then\ the\ equitable\ obligation.\ This\ fusion\ confusion\ does\ not\ affect\ the\ use\ of\ the\ case\ as\ authority\ for\ calculation\ of\ the\ remedy.\]

\(^{189}\ [1969]\ 2\ All\ ER\ 718.

\(^{190}\ Ibid,\ 719.\ Meagher,\ Heydon\ and\ Leeming,\ above,\ n\ 72,\ [41-085]\ refer\ to\ this\ dictum\ as\ ‘extravagant’.

\(^{191}\ Seager v Copydex Ltd (No 2) [1969] 2 All ER 718.

\(^{192}\ Ibid,\ 719-20.

\(^{193}\ Ibid.

\(^{194}\ Stuckey-Clarke,\ above,\ n\ 66,\ 79;\ see\ also\ Gurry,\ above,\ n\ 5,\ 444-6.
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plaintiff should be able to profit from the information himself if he wishes, after the grant of injunctive relief against the confidant. In this situation, the plaintiff should be also entitled to an account of profits made by the defendant. 195

Logic suggests that equitable compensation should approach the question of restoration of the plaintiff from the plaintiff's point of view. Compensation depends upon loss; therefore the fact the defendant may have profited from misuse of the information is irrelevant. 196 This approach leaves two possible bases for compensation of the plaintiff, either an amount for fair value for use of the plaintiff's information, or an amount calculated for the losses the plaintiff has actually suffered. The Seager v Copydex litigation confuses because it is arguably an example of both possibilities. The plaintiff received a fair value for the use of his idea; coincidentally this was also the value to the plaintiff of the information. He was not in a position to distribute himself; therefore the value to him always lay in selling the idea to someone else. Lord Denning's analogy to fair value for use and full market value is therefore flawed because it fails to present the alternatives from the plaintiff's point of view. 197 If breach of confidence is truly an equitable action then the aim is to restore the plaintiff to the position that should have obtained and the appropriate focus is the value of the information in the hands of the plaintiff. 198

Cadbury Schweppes 199 concerned a clam-juice based drink, originally made by the defendants 200 in Canada under licence from the plaintiff. After Cadbury terminated the defendant's licence, the defendant produced its own version of the drink making wrongful

195 Stuckey-Clarke, above, n 66, 84.
196 It is clearly relevant to a claim of an account of profits.
197 Gurry, above, n 5, 445 says, if instead of considering the plaintiff's position as a 'willing seller', the plaintiff is regarded as a willing seller endowed with the characteristics of the plaintiff, the assessment' comes closer to compensation for loss'.
198 This plaintiff-centered approach does not impact upon the availability or calculation of an account of profits. If the plaintiff seeks an account of profits from the defendant, the plaintiff is effectively adopting the breach, and claiming all the profits flowing from it. This is irrelevant to compensation calculated according to the plaintiff's loss.
200 In fact, the clam drink had been made by the defendant's predecessors.
use of information it had obtained during the period of the licence. The defendant was able to enter the market to compete against Cadbury 12 months earlier than would have been possible if it had developed another drink itself ‘from scratch’. The possible bases of awards included either the development costs (what it would have cost to develop the recipe over 12 months) or the loss of the clam juice drink market by the plaintiff to the defendant for 12 months. Binnie J (for a unanimous court) held that Cadbury was not entitled to be permanently protected against competition from its former licensee, but it was entitled to be free of the competition that resulted from the misused information. Because the plaintiff was a drink manufacturer, the value of the information to it included the market share it could have expected to hold over the 12 month period; had Cadbury not been a drink manufacturer, the ‘consultancy fee’ basis of recovery would have sufficed.\footnote{Cadbury Schweppes Inc v FBI Foods Ltd (1999) 167 DLR (4th) 577, 605-6.} The court said, ‘the assessment of compensation has ...to address the value of the lost market opportunity... and not be diverted to a valuation of the confidential information itself.’\footnote{Ibid.} This is reflective of the value to Cadbury of the information, rather than any value it might have had for the defendant. This is the correct focus – the remedy must restore to the plaintiff what has been taken from it. The amount ordered by way of compensation was loss of profit Cadbury would have made if it sold the amount of product the defendant sold in the 12 month period.\footnote{Ibid, 616-18.} This reflects equity’s restoration basis. The amount of profits the defendant actually made is not in question (as compensation rather than an account of profits is sought). What is relevant is how much profit the plaintiff could have expected to make, because that is the value the misused information had for it.

*Ithaca Ice Works*\footnote{Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd [2002] QSC 222 (unreported, Philippides J, 12 August 2002).} provides a recent Australian illustration of the principle. The defendants were employees of the plaintiff, who set up business in opposition to their employer. They stole the plaintiff’s customer list and pricing information, and used these to approach customers, undercutting the plaintiff’s price. Philippides J ordered equitable
compensation, but her Honour did not calculate this by reference to the profit made by the defendant, or on the basis of the savings flowing to the defendant from use of the plaintiff’s information. Instead, her Honour adopted calculations of the lost profits the plaintiff would have made by supplying the customers taken over by the defendant. This is the correct basis of calculation because it values the information from the plaintiff’s perspective. On the other hand, it can be seen in *Ithaca Ice Works* that this method of calculation does no more than restore the plaintiff. Phillipides J assessed the loss as the loss of the profit the plaintiff could have expected to make; but her Honour took into account the likelihood that the plaintiff would have lost some of the accounts anyway. Thus, the plaintiff had restored to it the correct value of its information, namely, its value to the plaintiff. Equity’s restoration concerns were addressed because restoration was made to the plaintiff without the defendant being overly penalised.

Therefore, equitable compensation for breach of confidence is limited to recovery for the loss suffered by the plaintiff of the value to it of its confidential information. This aspect of remedy is rarely articulated. Perhaps the regular reference in the cases to market value can be blamed for this relative silence. Nevertheless, equity must overlook market value of the information, and focus upon the value that the information had for the plaintiff, so that restoration can be effected. Losses are sufficiently causally linked to a breach of confidence when, but for the misuse of the information, the loss would not have occurred. References to market value of the information or analogies to torts concerning property do not fully coincide with the concept of ‘value to the plaintiff’.

An extreme case provides the best example. In *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* the defendant’s misuse of the information had the possibly unforeseen effect of destroying the plaintiff’s market completely. The plaintiff’s information concerned a method for using freeze-dried mussels as a possible treatment for arthritis. The defendant misused the information to manufacture itself a mussel-based food supplement that was advertised as an arthritis cure. The United States Food and Drug Administration banned the product, amid widespread negative publicity about ‘quack’
cures. The plaintiff argued that the ban effectively destroyed the lucrative US market for its product. The case is widely criticised as being an example of 'fusion fallacy' because the New Zealand Court of Appeal accepted that compensatory and exemplary damages were theoretically available. Nevertheless, the judge at first instance, Pritchard J, would have awarded NZ$1.5 million as compensation. Some call the loss of the plaintiff’s market consequential loss. But the value of the information to the plaintiff included the continued existence of the market. Therefore the damage was sufficiently linked to the defendant’s breach to allow full recovery. It should be irrelevant that the defendant was merely seeking to make a (much smaller) profit, or that the defendant could have paid less if the ‘market value’ of the information was calculated. What matters is the value of the information in the hands of the plaintiff.

This concept of restoration to the plaintiff of the value of the information to the plaintiff is clearly closely analogous to cases concerning reconstitution of the trust fund. Let us say the confidential information is analogous to trust property. If the trustee cannot account for the trust property in specie, she must pay equitable compensation. If the trust property was originally a pair of Ming vases, and one is misappropriated, she must reconstitute the trust fund for the loss of the pair, (the trust giving allowance for the remaining vase) as that is the value of the loss to the trust. It may be that the value of the pair is more than twice the value of one single vase. If that is so, it is not sufficient to compensate for the loss of one vase only. That does not cover the value that the vase had for the trust. Compensation for breach of confidence operates in the same way. It is not necessarily enough for the defendant to restore to the plaintiff the market value of the information. The defendant must restore the value the information had to the plaintiff. This

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205 [1990] 3 NZLR 299 (‘Aquaculture’).
206 It is generally thought in Australia that exemplary awards are not available in equity. See Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298 and the discussion in Chapter 7.
207 Pritchard J was uncertain whether he could order a compensatory award in equity at all.
is largely unrelated to equitable compensation for breach of fiduciary duty,\(^{208}\) where the concern is removal of the effect of the conflict.

### 5.7 FORESEEABILITY AND REMOTENESS

The status of the concepts of foreseeability and remoteness in the area of breach of confidence is uncertain. When the case law so freely employs other tortious concepts in assessing loss, it is tempting to suppose that foreseeability and remoteness may have some part to play. However, it should be remembered that when analogies are made between torts and breaches of confidence, the torts tend to be the older wrongs, such as trover and detinue, rather than the action for negligence. Foreseeability has very little role to play with these torts. Even if parallels are drawn with negligence, in most breach of confidence cases the loss suffered would have been foreseeable. Negligence does not require that the defendant foresee exactly the loss ultimately suffered; it is sufficient if the general type of damage is foreseen. Most losses following upon misuse of confidential information will be foreseeable on any test. Nevertheless, Capper expresses the view that foreseeability should not automatically be presumed to be irrelevant here.\(^{209}\)

There is little guidance in the authorities. However, one decision may indicate that foreseeability is irrelevant to breach of confidence. This is the *Aquaculture*\(^{210}\) decision discussed above. The defendant’s misuse of the plaintiff’s confidential information had the effect of destroying the plaintiff’s market for the sale of its product. It is highly unlikely that the defendant foresaw this kind of damage – after all, its market suffered the same fate. Indications in *Aquaculture* were that the plaintiff was entitled to recover for the loss of the market. It has been argued earlier that this is because equity was restoring to the plaintiff what the plaintiff had lost; the full value of the information to the plaintiff. But it can also

\(^{208}\) Except in those cases where the principal successfully argues that entry into the transaction is referable to the fiduciary’s conflict. See Chapter 4.

\(^{209}\) See Capper, above, n 71, 325.

\(^{210}\) *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299.
be argued that this case may demonstrate the irrelevance of foreseeability to equitable compensation for breach of confidence. If this is so, it is consistent with the principles applicable to reconstitution of the trust fund. There is doctrinal cohesion in this.

Remoteness is always a difficult question, and hard to separate from causation. Glover and Capper have both expressed the view that remoteness can become an issue concerning recovery, while Stuckey-Clarke regards the question as highly controversial.²¹¹ Again, Aquaculture²¹² can be called into service. Recovery for destruction of the market was not regarded as too remote. However, the conceptual overlap between causation and remoteness may obscure matters. For example, in Ithaca Ice Works,²¹³ the plaintiff did not recover for the complete loss of profits on all of the ‘stolen’ contracts. Philippides J took into account the fact that several clients were unhappy with the plaintiff’s service and would have ceased dealing with them in any event. This may indicate that some losses are too remote, but it is more readily seen as a causation issue. The truth is that the overlaps tend to cloud the issue, making final statements brave. Factually, the vast majority of cases will be uncontroversial as to causation and remoteness. Causation follows directly from unauthorised misuse; remoteness usually follows causation. Cases like Aquaculture²¹⁴ are exceptional. On the whole, it can be concluded that issues of foreseeability and remoteness will rarely arise in the context of breach of confidence.

5.8 CONCLUSION

Breach of trust concerns reconstitution of the trust fund. Although information is not property, there are some clear resemblances between reconstitution of the trust fund where misappropriation is the basis of the claim, and compensation for breach of confidence where confidential information has been misused. This suggests that decisions

²¹¹ See 5.4 above.
²¹³ Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd [2002] QSC 222 (unreported, Philippides J, 12 August 2002).
where principles analogous with tortious recovery for unauthorised use of chattels have been used achieved appropriate remedial outcomes. In such cases, tortious principles performed a parallel task to reconstitution; in effect ‘putting back’ the value of the information wrongly removed from the plaintiff. Tort law is frequently adopted because it has ready-made patterns that can be applied. While the result satisfies equity’s remedial goal of restoration, it is doctrinally unacceptable. It is more coherent with equitable principles generally to acknowledge that restoration to the plaintiff of the subjective value of the information is what is sought. This can be accomplished in equity without resort to tort.

The principle in *Norton v Lord Ashburton*,215 establishing equitable compensation for breach of the conflicts rule through removal of the effect of the fiduciary’s conflict from the transaction, has little application here. It is not often a useful correlation to draw in cases of breach of confidence, because frequently no transactional relationship exists. This is particularly so in the cases where only the equitable obligation of confidence can be called upon for protection. Cases involving a transactional relationship between the plaintiff and the defendant, or even the plaintiff and a third party, usually involve liability for breach of confidence under other regimes such as contract.216 It is not possible to satisfy equity’s restoration interests by removing transactional conflict in all breach of confidence cases. To do so would invariably limit the plaintiff’s recovery to the amount the defendant has made in breach of confidence, that being the only transactional conflict to which the plaintiff could point. More is required, particularly in cases where the defendant does not profit from the breach. Employing Lord Goff’s example of the confidential document found lying in the street,217 it is obvious that there is no transactional relationship between either the plaintiff and defendant, or the plaintiff and a third party discloser of the information. The only ‘transactional conflict’ identifiable is the profit the finder of the document makes by

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216 For example, trade secrets, client lists, and pricing information will often come into the possession of the defendant as a direct result of contractual dealings with the plaintiff.
selling the information to a discloser. Recovery of the profit is available to the plaintiff via an account of profits, but if the damage to the plaintiff is greater than the amount made by the defendant, equity’s restoration principles require that the plaintiff be restored in full.

Causation is not usually in any doubt. Proof of unauthorised use of the information coupled with loss is generally conclusive. Nevertheless, the general principle is that all of the plaintiff’s loss must be restored, analogous to reconstitution of a trust fund. The only question then concerns valuation of the loss to the plaintiff. Case law answers this question by the adoption of common law technique, but without articulating any rational explanation for such adoption. It is generally said that this indicates the jurisdiction is *sui generis*; a stand alone duty found in equity but remedied by tort. This thesis argues that the better explanation is that value to the plaintiff is wholly subjective, and therefore completely case-specific. Three broad valuation bases appear from the cases, namely, ‘savings’ made by the defendant, market value of reasonable use of the information, and loss of profits by the plaintiff. These all bear resemblance to other remedial responses, such as recompense for destruction of chattels. But these are only resemblances. In all cases, equity is restoring to the plaintiff the value that the information had for the plaintiff. There is no need to resort to common law technique.

Cases concerning ‘private information’ can occasionally qualify as breaches of confidence; regularly though, the action of breach of confidence cannot properly protect privacy interests. Whether invasions of privacy are regarded as tortious wrongs, a varietal of breach of confidence, or best dealt with by legislation, the type of interest protected suggest that tortious analogies should also be used for calculation of compensation. However, it would be preferable that privacy concerns be divorced from the obligation of confidence. On the whole, equity is not equipped to restore privacy interests.

It would thus appear that in the three wrongs for which equitable compensation is currently available, namely breach of trust, breach of fiduciary duty and breach of confidence, different considerations apply to its quantification. There is no one single
method of calculating equitable compensation, the remedy being specific to the duty breached. What the causes of action share is a general remedial aim of returning the plaintiff to the position that should have pertained in the absence of the breach. We are inevitably left with the position that equitable compensation is duty-specific, and entirely dependent upon the action under consideration. In each case, the duty breached must be specified exactly. In each case, the remedy must address the alleged wrong. Otherwise, injustice to one or other of the defendant or the plaintiff is likely. In the following chapter it will be suggested that equitable compensation is duty-specific for other equitable wrongs too. Three causes of action, undue influence, unconscionable conduct and equitable estoppel, will be examined.

218 The fourth possible award for breach of confidence, an account of profits made by the defendant, is directed at disgorgement rather than compensation. Accordingly, it is beyond the scope of this thesis.
CHAPTER SIX

THE AVAILABILITY OF EQUITABLE COMPENSATION FOR OTHER CAUSES OF ACTION

6.1 INTRODUCTION

Equitable compensation is available as a remedy for a breach of trust. It is also available for a breach of fiduciary duty and breach of confidence. However, it is uncertain whether equitable compensation can be claimed in all other cases where equity traditionally intervenes and, if so, whether the same doctrinal principles apply. Three other causes of action, undue influence, unconscionable conduct and equitable estoppel, will be examined to assess the availability of equitable compensation in those cases. Equitable compensation is particularly problematic under these three doctrines. Undue influence and unconscionable conduct have traditionally been seen as giving a claim to rescission rather than a right to compensation. Equitable estoppel has only recently been recognised as an independent cause of action, and that status is not without its difficulties. The expansion of the action of equitable estoppel may depend upon the development of a coherent, well-understood, compensatory jurisdiction.

1 See Chapter 3.
2 See Chapter 4.
3 See Chapter 5.
4 This does not mean that these are the only cases in which equity will intervene. These actions have been chosen as examples. Equitable compensation has been held available to remedy other equitable actions such as fraud on a power: Houghton v Immer (No 155) Pty Ltd (1997) 44 NSWLR 46.
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6.2 UNDUE INFLUENCE

Traditionally, the remedy for undue influence is rescission, and at present it is unclear whether equitable compensation is available as an alternative. One English case, Mahoney v Purnell, is commonly referred to in this context; claims have been made that the decision establishes a jurisdiction to award equitable compensation for the exertion of undue influence. However, Mahoney v Purnell does not clearly justify this conclusion; there May J also found the existence of a fiduciary relationship between the plaintiff and the defendant, which was then used to base an award of equitable compensation. One writer calls this using "the device of "equitable compensation" to award, in effect, the monetary equivalent of rescission where precise restitution was not possible."

At this point, there does not appear to be English or Australian authority awarding equitable compensation, in the sense of restoration for economic loss rather than pecuniary rescission, where undue influence has been alleged in the absence of a fiduciary

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9 [1996] 3 All ER 61.
relationship. Pecuniary rescission is the monetary equivalent of specific asset rescission where, for some reason, the specific asset cannot be restored to the plaintiff. Nevertheless, there is considerable opinion that equitable compensation should be available for undue influence and the jurisdiction may be emerging.

(i) The nature of undue influence

The doctrine of undue influence has assumed a less prominent role in Australian jurisprudence since the reinvigoration of the doctrine of unconscientious conduct, though it retains its paramount position in English law. As a result, much of the recent case law concerning undue influence emanates from the latter jurisdiction. Undue influence is alleged where the plaintiff wishes to have a transaction set aside, or alternatively, to establish it as a defence against a claim for specific performance of a contract. It is not traditionally a cause of action that allows a suit for a compensatory remedy.

Undue influence can arise from the actual coercion or domination of the plaintiff by the defendant (actual undue influence), or can be presumed against the defendant because of the pre-existing relationship of influence between the parties (presumed undue influence). Some relationships are automatically presumed to be subject to the risk of undue influence, such as parent/child and religious leader/follower; other individual relationships can be proved to contain sufficient factors to establish them as relationships of influence. Undue influence is purely economic. There is no action in undue influence for personal

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12 But see Hartigan v International Society for Hare Krishna Consciousness Incorporated [2002] NSWSC 810 (unreported, Bryson J, 6 September 2002); See also Wood v Laverty [2003] QSC 405 (unreported, Muir J, 27 October 2003), where Muir J refused the defendant’s application to strike out a statement of claim on the ground that equitable compensation is not an available remedy for undue influence or unconscientious conduct.

13 See Chapter 2.4.


injury or emotional harm. The doctrine is only directed to transactions entered into as a result of undue influence.\footnote{16}

The nature of undue influence is controversial. The way in which the action is viewed determines the way in which its remedy is understood. The first view sees the essence of the allegation of undue influence as that the will of the plaintiff has been in some manner overborne and no longer truly represents a free exercise of the plaintiff's independent will.\footnote{17} The second view is that in these cases, equity seeks to protect the plaintiff from exploitation by the party who is in a position to overbear the plaintiff.\footnote{18} Thus it is seen as either undermining the transaction due to the absence of consent, or as warranting the setting aside of the transaction because of the defendant's wrongful exploitation.

Whether it is explained by the absence of will on the plaintiff's part or by the possible exploitation by the defendant, the focus of undue influence is on \textit{setting aside} a transaction. The purpose of the action is to protect those at risk from being pressured into entering into transactions. Lord Millett has commented that English law does not generally regard undue influence as giving rise to an independent cause of action, treating it instead as vitiating consent, and allowing the party influenced to avoid the transaction.\footnote{19} This impacts on remedy; in most if not all cases, equity's interests in restoration will be satisfied.

\footnote{16} For the purposes of this thesis, only the doctrine of undue influence applicable to \textit{inter vivos} transactions will be considered.

\footnote{17} Short of common law duress.


\footnote{20} \textit{Agnew v Ljusingfors\r{a}rkingsbolagens AB} [2001] 1 AC 223, 264-5. Until the plaintiff has exercised equitable rescission, the plaintiff has a mere equity to have the transaction set aside: S Worthington, ‘The Proprietary Consequences of Rescission’ (2002) \textit{Restitution Law Review} 28.
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by rescission. The transaction is seen as flawed from its inception and thus it is necessary for a court exercising equitable jurisdiction to set the transaction aside.

Rescission restores the plaintiff to the position he would have occupied had the undue influence not been applied by the defendant. Occasionally, the monetary equivalent of rescission has been acceptable in lieu of specific asset restitution, but this is not necessarily equitable compensation. This is pecuniary rescission which is better regarded as a subset of rescission than a subset of equitable compensation. However, the growing usage of the label ‘equitable compensation’ in case law shows that pecuniary rescission is frequently regarded as a subset of equitable compensation. Pecuniary rescission may come in time to be regarded in the same way in relation to non-fiduciary breaches as well. Nevertheless, availability should be approached independently. Whether or not pecuniary rescission should be available in the three causes of action now under consideration is a separate issue from whether equitable compensation should be available in those instances.

(ii) Should pecuniary rescission be available for undue influence?

Traditionally, it has been thought that the right to a remedy of rescission could be lost unless the plaintiff could make *restitutio in integrum*. Failure to make restitution was certainly a bar to the remedy at common law, though equity has always been more flexible. In certain fiduciary cases where *restitutio in integrum* is no longer available, the


22 See Chapter 2.4. The author takes the view that such orders are in substitution for an ordinary order for rescission, as opposed to an order for equitable compensation, which involves consideration of loss. Restitution scholars argue that this substitutionary order in place of rescission is gains-based, rather than assessed by reference to loss. See also Birks, above, n 9 and R Nolan, ‘Conflicts of Interest, Unjust Enrichment and Wrongdoing’ in W R Cornish et als (eds) *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford, Hart Publishing, 1998) 87, 114-116.

23 See Chapter 2.

24 Proksch, above, n 5, 914.

25 Ridge, above, n 18, 78. For a historical explanation of why the equitable standard and common law standard developed differently, see Worthington, above, n 19, 32-3.
courts have been prepared to order the monetary equivalent of rescission,\(^{26}\) if necessary accounting for profits on the one hand, and inputs and improvements on the other. But there have been very few examples of complete adjustment in cases of undue influence, where restitution was not possible.\(^{27}\) Many commentators argue in favour of allowing pecuniary rescission in cases of undue influence, upon the basis that to deny a remedy simply because specific asset rescission is no longer possible in unjust.\(^{28}\) The strongest argument here comes from Nahan. As she pithily puts it:

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\text{(s)trict restitutio in integrum is sterile logic for two reasons. The first is that it is never truly impossible if we consider that it can always be done in money. Even more importantly, there is no interest worth protecting in the notion of impossibility of restitutio in integrum that cannot be protected by allowing pecuniary counter-restitution.}\]^{29}
\]

Monetary adjustments to the extent of full pecuniary rescission should be available to achieve justice between the parties where *restitutio in integrum* is not possible. There can be few real objections to extending pecuniary rescission to cases of undue influence. Most objections concern protection that would then be lost by the defendant\(^{30}\) but the defendant

\(^{26}\) *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218.

\(^{27}\) The clearest example is *Hartigan v International Society for Hare Krishna Consciousness Incorporated* [2002] NSWSC 810 (unreported, Bryson J, 6 September 2003).


\(^{29}\) Nahan, above n 9, 77. See also Chen-Wishart, above, n 26, 567-8: ‘If the law can make small money adjustments to supplant a plaintiff’s counter-restitution of substantially subsisting property, then it can make larger adjustments, even to the extent of wholly substituting for the benefit which is unreturnable in kind. The same reasoning applies to the mode of effecting restitution from the defendant. Impossibility of precise return in kind by either party should not defeat restitutionary claims.’

\(^{30}\) Worthington, above, n 19, 66-67.
can always be sufficiently protected 'by allowing pecuniary counter-restitution'. The word 'extending' has been used deliberately in relation to pecuniary awards for undue influence, because it is clear that pecuniary rescission orders are made in cases of breach of fiduciary duty, albeit sometimes *sub nom* equitable compensation. For this extension to be accomplished, it is necessary to be able to say whether the jurisdiction to make a monetary award in lieu of rescission is attracted by the breach of fiduciary duty (the conflicts rule) or by the fact that the transaction is flawed from the outset. If the jurisdiction is enlivened by a flawed transaction, it can be argued that pecuniary rescission should automatically be available for all transactions flawed by undue influence and other invalidating factors.

One counter argument is that there is something special about a breach of a fiduciary obligation that attracts a pecuniary rescission remedy. Lack of this special ingredient would deny a pecuniary rescission remedy to a case where no fiduciary duty existed. However, cases where pecuniary rescission has followed a fiduciary breach suggest that the correct explanation is that the jurisdiction is attracted because the transaction is flawed from the outset. The fact that quantum is assessed as at the date of the transaction rather than the date of judgment, and no other assessment of loss is attempted, point to this conclusion. This suggests that the underlying policy imperative in cases of pecuniary rescission for fiduciary breach is the undoing of the flawed transaction, rather than some particular application of the profits and conflicts rule. There is no obvious policy difference

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31 Nahan, above, n 9, 77. However, see also Bryan, who cautions, 'the circumstances in which personal restitution will be available as an alternative to rescission need to be carefully defined. This is because the equitable considerations barring proprietary rescission may in some cases be equally able to defeat the pecuniary remedy. For example, a claim to rescind barred by 'laches' should not be revived under the guise of a claim for personal restitution': Bryan, above, n 27, 76.

32 For example, *McKenzie v McDonald* [1927] VLR 134.

33 Some support for this position can be drawn from the other great equitable remedy, the account of profits. In equity this is apparently only available for breach of trust, breach of fiduciary duty, knowing assistance, and breach of confidence. The same may be true of equitable compensation. Perhaps account and equitable compensation hunt in a pair. If the same considerations could be seen flowing through those causes of action, this might suggest that equitable compensation should not be available for any other causes of action. However, as Chapters 3, 4, and 5 have shown, this conclusion cannot be drawn.

34 For example, *McKenzie v McDonald* [1927] VLR 134.
between the two causes of action, at least inter partes.\textsuperscript{35} Viscount Haldane’s dictum that a contract between a fiduciary and his principal ‘cannot stand’\textsuperscript{36} expresses the same policy goals as a recent Privy Council comment: ‘(w)here a transaction is obtained by undue influence, it must be set aside \textit{ab initio}.\textsuperscript{37}

This conclusion is borne out in a recent case where a monetary award was made for undue influence, rescission being impossible. In \textit{Hartigan v International Society for Here Krishna Consciousness Incorporated},\textsuperscript{38} a convert gave her real estate to a religious group.\textsuperscript{39} \textit{Restitutio in integrum} became impossible following the sale of the property. The former devotee recovered the value of her property at the time of the gift. Thus, the transaction was set aside \textit{ab initio} (at least in pecuniary terms) even though no allegation of breach of fiduciary duty was made. Pecuniary rescission is the logical solution in cases like these. A denial of remedy would defeat policy aims. Pecuniary rescission should be available as an alternate remedy when specific asset restitution cannot be made in cases of undue influence.\textsuperscript{40} Recent Australian experience is that such a remedy is already available.

(iii) \textit{Should equitable compensation be available for undue influence?}

If ‘equitable compensation’ includes the subset ‘pecuniary rescission’, then it should clearly be available for undue influence. The same is not necessarily true if pecuniary rescission and equitable compensation are separate remedies. The purpose of the action is to avoid transactional exploitation and this is fulfilled by a remedy which negates the transaction. Specific asset restitution and pecuniary rescission perform that task. These

\begin{itemize}
\item It is arguable that different policy considerations might apply to the two causes of action where third parties acquire rights.
\item \textit{Nocton v Lord Ashburton} [1914] AC 932, 945.
\item [2002] NSWSC 810 (unreported, Bryson J, 6 September 2003).
\item This is one of the relationships long recognised as a presumptive relationship of influence: \textit{Allcard v Skinner} (1887) 36 Ch D 145. See generally, Ridge, above, n 19.
\item Subject to the restrictions noted by Bryan: see n 31 above.
\end{itemize}
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are both also available for breach of fiduciary duty. The next question is whether the second step can be taken as it was in *Nocton*; is it possible to award equitable compensation, as distinct from pecuniary rescission, for undue influence? This thesis takes the position that equitable compensation is unnecessary for undue influence.

*Mahoney v Purnell* encouraged extensive debate on this issue. Heydon clearly believes the decision to mean that such compensation *is* available. This view is shared by Getzler. Heydon notes that equitable compensation is available for breach of fiduciary duty where the breach consists of the exercise of undue influence by the fiduciary over the principal. This is undoubtedly so; a fiduciary who exercises undue influence over a principal concerning a transaction must surely fall foul of the conflicts and profits rules, but it does not follow that equitable compensation should be available in every case of undue influence.

(a) *A 'wrong'?*

Birks (writing shortly after Heydon) takes exception to the suggestion that equitable compensation might sound from an allegation of undue influence in the absence of 'the less doubtful wrong of breach of fiduciary duty.' For Birks, the question turns on whether undue influence can be viewed as a 'wrong':

If and only if undue influence is conceived to be a wrong, damages can in principle be awarded. However, if and so far as undue influence is not a wrong,

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41 *Nocton v Lord Ashburton* [1914] AC 932.
43 'Is the remedy of equitable compensation available to the victim of undue influence? May J answered this question affirmatively in *Mahoney v Purnell*': Heydon, above n 8, 8.
44 Getzler, above, n 8, 247.
45 Heydon, above, n 8, 9.
47 Birks, above, n 9. Birks and Chin have argued that relief for undue influence 'is given simply on the ground of the impairment itself': Birks and Chin, above n 18, 63.
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...damages (as that term is usually understood) cannot be awarded, but pecuniary rescission still remains in principle available in respect of the defendant's unjust enrichment.

The right to rescission arises because of an unjust factor present at the formation of the transaction, but '(a)n unjust factor is not necessarily a wrong.'

Chin agrees with Birks that undue influence should not be regarded as a wrong. They ask what a defendant must do to rebut the presumption of undue influence. The answer is:

(h)e rebuts it by evidence that the plaintiff was able to think for himself. Typically this means showing that he had been emancipated from his dependence by independent information and advice. The defendant cannot rebut the presumption by showing that he had no unconscientious intention to take advantage of the other's weakness.

This tends to suggest the focus of the action is on the plaintiff's weaknesses, rather than on any wrongdoing by the defendant. It makes no difference whether the defendant was acting 'wrongly' or 'rightly'. Thus, undue influence looks less like a 'wrong' and more

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48 Birks, above n 9, 73. See also Burrows, above, n 45, 8.
49 Birks, above, n 10, 74. See also W Swadling, 'Limitation' in P Birks and A Pretto (eds) Breach of Trust (Oxford, Hart Publishing, 2002) 319, 341. But see J Edelman, 'Gain-Based Remedies for Wrongdoing' (2000) 74 Australian Law Journal 231, 243. Edelman suggests that undue influence, duress and unconscionability may come to be regarded as wrongs, and notes that in Barclays Bank plc v O'Brien [1994] 1 AC 180, Lord Browne-Wilkinson referred to undue influence as a wrong on seven occasions. However, Edelman's views appear to have modified. In 2002 he commented, 'because of the necessity of characterising undue influence as an unjust enrichment action in three party cases, and the fact that the same logic applies in two party cases, undue influence is an action in unjust enrichment and not a wrong. However, ...it is possible that the approach originally suggested by Lord Millett might also be accepted in the two party case. This would introduce a new wrong which, in two party cases, would exist concurrently with the unjust enrichment action for undue influence': J Edelman, Gain-Based Damages: Contract, Tort, Equity and Intellectual Property (Oxford, Hart Publishing, 2002) 47.
50 See also Burrows, above, n 46, 9.
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like a ‘vitiating factor’. Edelman comments that whether or not any given cause of action is a wrong is an ‘intensely difficult question’, but concludes ‘undue influence is an action in unjust enrichment and not a wrong’. Rickett and Myburgh also subscribe to the view that it is ‘quite misleading to regard (cases of undue influence) as cases of fraud or wrongdoing by the presumptively influencing party.’

This analysis is confirmed by a consideration of the doctrinal elements of undue influence. In Australia, it is not necessary to show the unduly influenced transaction placed the plaintiff in a position of material disadvantage. Theoretically, the plaintiff is entitled to have the transaction set aside upon proof of undue influence (or no rebuttal of the presumption, if applicable) and proof the undue influence caused entry into the transaction (which is presumed in relationships of influence). This focuses squarely on the quality of the plaintiff’s consent; it is irrelevant that the plaintiff was not economically exploited. Equity is not concerned with the rightfulness or wrongfulness of the defendant’s behaviour. All equity is concerned with is disallowing the contract that would have been enforceable at common law.

However, other commentators are less disturbed about classifying undue influence as a wrong. Because of its doctrinal aim to prevent exploitative practices, Bigwood sees undue influence as involving ‘a wrongful, or at least an unacceptable, exercise of influence

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52 Edelman comments further: ‘One important indicator is whether the cause of action in question can give rise to a right to...compensatory damages. But that test, while usually sufficient, cannot be necessary, for it is not impossible for a wrong to give rise only to other remedies’: Edelman, Gain-Based Damages, above, n 49, 25. Needless to say, the test on its own is circular. To state that a wrong gives rise to compensation; therefore if compensation is available, the cause of action is a wrong provides no explanation of wrongs or compensation and is misleading. Applying the test of whether or not exemplary or compensatory damages are available, Edelman concludes that the equitable actions of breach of confidence, breach of fiduciary duty, breach of trust, actual fraud and knowing participation in a fiduciary breach are wrongs. He also believes estoppel to be a wrong, but classifies it as a species of contract: Edelman, Gain-Based Damages, above, n 49, 44.

53 Ibid, 25.

(power) by one contracting party over the other.\textsuperscript{56} For Bigwood, exploitation can be either passive or active. Passive exploitation may look "less "wicked", but it is no less wrong and no less "exploitation".\textsuperscript{57} Glover is also blunt: '(u)ndue influence is the wrongful exercise of influence.'\textsuperscript{58} This view has highly respectable support in authority.\textsuperscript{59}

Ho answers Professor Birks' arguments that undue influence is not necessarily a wrong and therefore should not result in an award of damages, by asking another question. Ho distinguishes 'the question as to whether undue influence is a wrong from the question as to whether loss-based awards can be granted as an alternative to rescission.'\textsuperscript{60} This is indeed the pertinent question. Ho argues that a loss-based award could be granted in lieu of rescission, as this is consistent with equity's remedial aims in this area, undoing the consequences of undue influence. Part of her justification for this view is that the separation from the law of tort is maintained; equitable compensation in lieu of rescission is a loss-based monetary restoration of property, rather than a consideration of the plaintiff's overall financial position (as would be expected, say, in a case of personal injury).\textsuperscript{61} However, this thesis argues that a monetary restoration of property is not loss-based.\textsuperscript{62} It only appears to be loss based because in this case restoration and loss are equivalent. In short, what Ho is arguing for is pecuniary rescission.

\textsuperscript{55} Worthington, above, n 19, 65.
\textsuperscript{56} Bigwood, above, n 18, 511. Ho has recently backed both horses, suggesting that 'where undue influence is concerned, the relevant transaction is set aside as a result of the combination of both the impaired consent of the complainant, and the passive exploitation of his trust and dependence by the respondent'. L Ho, 'Undue Influence: When and How It Matters To Banks and Solicitors' [2002] Singapore Journal of Legal Studies 617, 624.
\textsuperscript{57} Bigwood, above, n 18, 512.
\textsuperscript{58} Glover, above, n 54, 291; and see Akkouh, above, n 26, 163.
\textsuperscript{60} Ho, above, n 8, 198. Edelman suggests that 'the key to identifying a given cause of action as a wrong is proof that remedial consequences flow from its characterisation as a breach of duty': Edelman, Gain-Based Damages, above, n 49, 25.
\textsuperscript{61} Ho, above, n 8, 198-9.
\textsuperscript{62} See discussion in Chapter 2, and material at note 14 in this Chapter.
Nevertheless, Ho goes further, and argues that certain instances of undue influence should be regarded as wrongs giving rise to compensatory damages. Ho is prepared to analyse undue influence in terms of breach of a duty:

The relationship of influence generates a range of positive duties on the defendant, to act in the interests of the plaintiff rather than those of his own, to make full disclosure and to take care.\[63\]

This description is remarkably close to a description of those duties frequently regarded as fiduciary and there is certainly authority of some pedigree for this view.\[64\] From an Australian perspective, it must be wondered whether courts would be prepared to make this doctrinal leap. There are three reasons for doubt:

(1) Recently, claims of undue influence have become less popular in Australian litigation. Instead, the claim of unconscionable conduct is ascendant.\[65\] It seems unlikely that an Australian court would seek to revive undue influence by allowing it to encroach into a field more properly described as fiduciary.

(2) At the same time, Australian courts have adopted a more stringent approach to finding that a particular duty owed in the circumstances of the case is fiduciary. There is substantial overlap between relationships of influence and fiduciary relationships. However, there will be some reluctance in Australia to impugn a transaction by reference to fiduciary characteristics where there is undue influence but no fiduciary duty owed. This is elevating the case of undue influence to the position of quasi-fiduciary law. The transaction

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\[63\] Ho, above, n 8, 201.

\[64\] Johnson v Buttress (1936) 56 CLR 113, 134-5 (Dixon CJ); L A Sheridan, Fraud in Equity, (London, Sir Isaac Pitman & Son Ltd, 1957) Chapter 6; Duggan has suggested that in time, presumed undue influence will be absorbed by fiduciary law: A Duggan, 'Undue Influence' in P Parkinson (ed) The Principles of Equity, (Sydney, LBC Information Services, 1996), 379, 417. Such a development would negate any need to regard undue influence as a discrete wrong, and would allow provision of compensatory relief to a wronged plaintiff.

\[65\] Garcia v National Australia Bank (1998) 194 CLR 395, 410-11 (Gaudron, McHugh, Gummow and Hayne JJ); Bridgewater v Leahy (1998) 194 CLR 475, 485 (Gaudron, Gummow and Kirby JJ). Unconscionable conduct will be discussed later in this chapter.
would still be impugned because of undue influence, but it is questionable whether a remedy more usually granted for a fiduciary breach would be obtained.66

(3) The obligations imposed upon a fiduciary are of a higher standard than those which apply between parties involved in a transaction that may be infected with undue influence. In relationships of influence there is no fiduciary undertaking to act loyally and selflessly as with fiduciary duty and thus no obligation to account for profits made, or to avoid conflicts.67 At most, equity’s protection extends to removing the benefits of exploitative behaviour in relationships of influence; a much lower standard.68 We should question whether it is really necessary to give more assistance to the claimant in a case of undue influence than is already provided. It is relevant that equity regards some relationships as fiduciary for the purposes of the prescriptive rules, but excludes others, such as doctor/patient and religious leader/follower. Equity will set aside transactions entered in those relationships, but will not necessarily apply the conflicts and profits rules to those relationships. This is because no more is required to avoid transactional exploitation.

There are stronger grounds for arguing that undue influence be regarded as an actionable wrong, within the requirement that the influence be ‘undue’. Influence is morally

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66 For another argument questioning Ho’s conclusions, see R Chambers, ‘Resulting Trusts and Equitable Compensation’ (2001) 15 Trust Law International 2, 12. Ho in part argues in favour of extending compensation to some cases of undue influence by analogy with misrepresentation. Compensation is available for fraudulent or negligent misrepresentation, but not for innocent misrepresentation, where the plaintiff is restricted to seeking rescission. Chambers doubts the misrepresentation analogy, because while misrepresentation is never desirable, ‘(g)enerally speaking, influence is a good thing’. As undoing the transaction removes the temptation to misuse influence, Chambers questions whether compensation should also be available.

67 See Chapter 4. See also Hayton, above, n 16, 286.

68 ‘At first sight there is much to be said for regarding the doctrine of undue influence as one aspect of the broader doctrine of breach of fiduciary duty, being applied to a type of situation where in the course of a relationship an event occurs which amounts to a breach of the prescriptive ‘no profit’ and ‘no conflict’ rules. This is fine where a relationship has developed where B is entitled to expect F to act in B’s interest, and so subordinate his interest to that of B, but it is possible for B’s will actually to be overborne by F’s will in circumstances where B is not entitled to have such expectation but where B needs the protection of Equity. Thus the core part of the doctrine of undue influence, concerned solely to ensure that dispositions by a person under the influence of another are voluntarily made by a truly competent person, has to be independent of the law on breach of fiduciary duty’: Hayton, above, n 16, 286.
neutral, and ‘may be used wisely, judiciously and helpfully’\textsuperscript{69} but ‘undue’ may imply some moral blame on the part of the defendant.\textsuperscript{70} Some see the doctrine of undue influence as acting ‘to police the conduct or “conscience” of the recipient of a beneficial transaction’.\textsuperscript{71} In cases where there is, in fact, moral blame on the defendant, Ho sees no difficulty in regarding undue influence as a wrong. The difficulty lies with the innocent defendant identified by Birks. This is especially so in the case of presumed undue influence, where the factual matrix of the relationship gives rise to a presumption against the defendant, rather than an actual finding of wrongdoing by the defendant. A typical example is the older case, \textit{Allcard v Skinner}.\textsuperscript{72} A nun had surrendered her property to the Mother Superior at her convent, in accordance with the practice of the religious Order. Years later she left the Order and sought to regain her surrendered property. This was a case of presumed undue influence and there was no suggestion of any wrongdoing on the part of the Mother Superior. Had it not been for long delay, the Mother Superior would have been held liable, despite her lack of wrongdoing. The observation that there need be no actual wrongdoing by the defendant applies equally in cases where the plaintiff proves she is in such a relationship that a presumption arises against the defendant. As Ho points out, the presumption raised against the defendant is already ‘very plaintiff-friendly’\textsuperscript{73} and she questions whether it is appropriate in such circumstances to extend compensatory liability to the defendant.

It is interesting to note the United Kingdom Law Commission did not consider undue influence to be an equitable wrong. It restricted equitable wrongs to breach of fiduciary duty, including breach of trust, breach of confidence, and knowing assistance in a

\textsuperscript{69} Harris \textit{v} Jenkins (1922) 31 CLR 341, 367-8 (Starke J), citing Poosaihurdi \textit{v} Kanappa Chettiar (1919) LR 47 Ind Ap 1, (Lord Shaw).

\textsuperscript{70} Birks and Chin comment that the term ‘undue’ is ‘fundamentally unstable’. They believe ‘the word “undue” cannot mean “improper” or “unconscionable” but only “excessive”: Birks and Chin, above, n 71, 57-8, 78.

\textsuperscript{71} Bigwood, above, n 19, 512.

\textsuperscript{72} (1887) 36 Ch D 145. Similarly, see Harrigan \textit{v} Society for Krishna Consciousness [2002] NSWSC 810 (unreported, Bryson J, 6 September 2003).

\textsuperscript{73} Ho, above, n 8, 201.
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fiduciary breach.\(^{74}\) Recent authority in the House of Lords is inconclusive as to whether or not undue influence is a wrong.\(^{75}\)

**(b) Other approaches**

Getzler offers a more prosaic argument in support of the extension of equitable compensation to the field of undue influence, a movement he ‘cautiously welcomes’.\(^{76}\) He notes that the statutory damages available pursuant to the *Trade Practices Act 1974* (Cth) have acted as a ‘useful surrogate for equitable compensation awards’\(^{77}\) and have indeed become dominant. It could be argued that the very fact that the legislature needed to create a statutory right to damages suggests that no such right is available in equity. Getzler sees the development of compensatory power as providing ‘lateral evidence that the accession of an inherent equitable compensation remedy for vitiated bargains, sounding in money damages, is a strongly felt need within the common law system’.\(^{78}\) This may be true, and there is some attractive logic here. Given the opportunity to design afresh a remedial system, released from the historical shackles of the common law-equity divide, the legislature chose a more flexible remedial scheme, which may have been a reflection of community need. But need for a remedy does not demonstrate the availability of a remedy. Nor is need for a remedy necessarily proved by plaintiffs apparently opting for *Trade Practices Act* relief. There may be many other reasons why plaintiffs would prefer to approach their unsatisfactory transactions through the statutory system than to seek a remedy in equity. Glover has recently suggested there is some forum-shopping involved in this choice.\(^{79}\)

\(^{74}\) Law Commission *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247 1997) Appendix A, Draft Bill.

\(^{75}\) *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 3 WLR 1021; See also Ho, above, n 56, 623.


\(^{77}\) Getzler, above, n 9, 247.

\(^{78}\) Ibid.

\(^{79}\) Glover, n 54, 436.
Another approach which can perhaps be utilised with respect to equitable causes of action is that offered by Mitchell McInnes. McInnes argues there is a basic alignment between causes of action and remedies, and that remedies available in given cases must reflect the constituent elements of proof required in those cases. Causes of action that require proof of loss irrespective of any gain to the defendant should sound in compensation. Causes of action that require proof of gain irrespective of any loss to the plaintiff should result in disgorgement. Causes of action that do not require proof of either loss or gain can support both compensation and disgorgement. McInnes sees restitution as distinguishable from both compensation and disgorgement. For him, the remedy of restitution is available where a cause of action requires proof of a gain to the defendant resulting from a loss to the plaintiff. That restitution would be measured by the gain in so far as it results from the loss.

Applying McInnes' basic alignment thesis to undue influence, it will be remembered that the aim of the claim is to have the impugned transaction set aside. In summary, proof is required that: 1) either actual undue influence took place, or that the parties were in a relationship of influence; and 2) that the undue influence resulted in the impugned transaction. Into which of McInnes's categories would undue influence fall?

In Australia, it is not necessary that the plaintiff show the transaction was disadvantageous; the presence of full value is of some assistance in showing that no undue influence took place. Therefore, the plaintiff does not per se need to show a loss.
Nevertheless, it must be shown that the influence resulted in entry into the transaction. This must be affirmatively shown in cases of actual undue influence. In cases of presumptive undue influence, causation is presumed against the defendant. As the focus appears to be on the resulting benefit the transaction delivers to the defendant, this can be described as proof of a gain to the defendant. Undue influence would be a case calling for proof of a gain to the defendant irrespective of a loss to the plaintiff in the McInnes scheme. Thus the appropriate remedy would be disgorgement. It can be argued that the remedial scheme currently pertaining largely corresponds with disgorgement. If undue influence is successfully established, the defendant must give up the benefit of the transaction, either because the transaction is rescinded, or because the defendant is unable to enforce the transaction. Thus the benefit is disgorged by way of rescission. The suggestion is that in the McInnes scheme, compensation for loss would not be an appropriate remedial response to undue influence.

Support for this conclusion can be found in the application of the doctrine of undue influence to third parties, that is, where third parties reap the benefit of undue influence applied by the stronger party over the weaker party. The cause of action is available in both the two party situation, where the defendant is accused of exerting undue influence, and in three party situations, where the third party does not exert the influence but is the recipient of the benefit. Bullock v Lloyds Bank Ltd and Bester v Perpetual Trustee Co Ltd are examples of this principle. If the third party (against whom no wrongdoing is alleged) must give up the benefit of the transaction, it must be because the cause of action calls for proof of a gain to the defendant third party. The appropriate remedy is disgorgement.

disadvantage may be required. If the plaintiff must show manifest disadvantage, it could perhaps be argued that this was showing loss.

Ho suggests that, following the decision of Royal Bank of Scotland plc v Etridge (No. 2) [2001] 3 WLR 1021, the plaintiff carries the burden of proving entry into the transaction as a result of undue influence in all undue influence claims: Ho, above, n 56, 620.

Meagher, Heydon and Leeming, above, n 8, [15-150].


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Compensation is not an appropriate remedy, because the cause of action does not rely on proof of a loss to the plaintiff.

A further reason can be proposed as to why equitable compensation calculated for loss is not appropriate to undue influence. It has been shown in Chapter 2 that equitable compensation only becomes an essential remedy for breach of fiduciary duty when the transaction in question is not between the fiduciary and the principal, but between the principal and a third party. In those cases (like Nocton\textsuperscript{89}) equitable compensation is the only remedy that can cure the loss, because neither rescission nor pecuniary rescission is of any use. Equitable compensation is largely unnecessary in fiduciary-principal dealing scenarios, and is likewise unnecessary in two-party undue influence cases. Rescission satisfactorily achieves equity's restorative aims. Because rescission is also an available remedy in three-party undue influence cases, there is no need for a separate remedy (such as equitable compensation) to recover losses from the party exerting the undue influence. Where undue influence is concerned, equity's restoration interests are completely fulfilled by the remedy of rescission (including pecuniary rescission).

(iv) Conclusion: the nature of undue influence

Undue influence is probably not a wrong. It is best described as a vitiating factor allowing the claimant an exit from the subject transaction. Exit is usually by way of specific asset restitution, but can (and should) also be by pecuniary rescission. Compensation is not an appropriate remedy for undue influence because the cause of action in no way depends on proof of a loss. Most importantly, however, equitable compensation is largely unnecessary for undue influence. The cause of action is adequately remedied by rescission, including pecuniary rescission. Rescission fulfils equity's restoration interests here because the plaintiff's lack of real consent to the transaction requires the transaction be set aside. However, even if undue influence comes in time to be regarded as a wrong entitling the claimant to equitable compensation (which is discussed in the next section), the method of

\textsuperscript{89} \textit{Nocton v Lord Ashburton} [1914] AC 932.
calculation of compensation will differ from that applicable to the breaches of equitable duties discussed in the previous chapters.

6.3 CALCULATION OF EQUITABLE COMPENSATION FOR UNDUE INFLUENCE

If equitable compensation were hypothetically available for undue influence, a method of calculation would be necessary. It has been shown in the previous three chapters that calculation of equitable compensation is duty-specific; however, in each case the remedy can be understood as fulfilling equity's interest in restoration. Equity's interest in undue influence also concerns restoration. Equity aims to restore the plaintiff to the position he would have occupied if no transaction had been entered. Because the requisite quality of consent is lacking, restoration must be to a position as if the transaction had not occurred.

It is notable that the object of the exercise is not to restore the plaintiff to the position as if the transaction had been concluded without undue influence. If this were equity's aim, equity would have to be satisfied with a result that placed the plaintiff in the economic position that would have obtained had the transaction taken place freely. This is clearly not the case, because the plaintiff is entitled to relief whether or not there is any manifest disadvantage. Therefore, in hypothetically calculating equitable compensation, equity would be seeking to undo the transaction that has taken place.

Entry into the transaction is the only element of undue influence that must be causally established. Any test for equitable compensation would have to reflect this. Causation is determined by the 'but for' test, tailored for the particular cause of action. The question equity must ask is: what position would the plaintiff have occupied but for the undue influence? The answer is that the plaintiff would not have entered the transaction. If equitable compensation is available for undue influence, it must then be limited to the amount required to achieve undoing of the transaction, in short, pecuniary rescission. Compensation could only be in lieu of rescission, or there would be a risk of double recovery. This is the upper compensatory limit; the only question then is whether it also
represents equitable compensation’s lower limit here. It is possible that equitable compensation for undue influence could cover a range of awards spanning complete pecuniary rescission and partial pecuniary rescission. The potential of partial rescission is discussed below.

Several writers have argued that equitable compensation for undue influence should be calculated on a tortious basis. Ho suggests that equitable compensation for those cases of undue influence that can properly be regarded as wrongs should be available upon principles similar to common law torts. 90 But this adds little. By which tortious measures should compensation be measured? Akkouh appears to suggest that negligence is the appropriate template. 91 However negligence is not the only tort. Compensation could also be calculated on the basis of deceit or the intentional torts.

Actual undue influence cases may have more in common with the intentional torts than with negligence, because the defendant can be taken to have intended the consequences of that influence. This would make the defendant liable for all the direct consequences of the influence. Entry into the transaction is the direct consequence of the influence. The harm is then cured by undoing the transaction in monetary terms. Presumably, if equitable compensation based upon recovery principles applicable for intentional torts were to be ordered, a result similar to that reached by way of monetary award for rescission would be achieved. This suggests rescission is still the most appropriate remedy.

If undue influence awards are calculated according to the negligence model, which might be more appropriate for presumed undue influence, the tortious test to be applied would be whether the damage was reasonably foreseeable. What is reasonably foreseeable from the harm involved in the use of undue influence? The answer must be that it was foreseeable that the plaintiff would enter into the transaction, thereby losing the benefit of the asset involved. Again, the most appropriate remedy is rescission, or pecuniary

90 Ho, above, n 8, 207. See also Akkouh, above n 16, 151; Contra Vann, above, n 26, 66.
rescission. Therefore, on either tortious test the exertion of undue influence would have caused the compensable loss, that being represented by entry into the transaction. Usually, the most appropriate remedy would be rescission or pecuniary rescission.

However, reference to tort law might allow greater finesse and discretion to deal more fairly with the ‘innocent’ defendants identified by Birks, or where it appears some injustice will result. What is referred to here is a ‘partial rescission’ remedy, or its pecuniary equivalent. For example, in *Vadasz v Pioneer Concrete (SA) Pty Ltd*92 the High Court ordered that a guarantee given for past and future indebtedness be set aside as to the past indebtedness, on the ground of misrepresentation. The plaintiff had been prepared to guarantee future indebtedness, so to relieve him of the entire guarantee would have been inequitable to the lender. Something similar might be appropriate where perhaps the undue influence only relates to part of the subject transaction, or only partially led to the transaction. This may be what Getzler envisaged when approving the availability of statutory damages, and appears to hold the greatest potential for equitable compensation in this area.

The difficulty though, is that use of tortious recovery principles might uncover a greater range of remedial difficulties than it solves. Courts might be called upon to consider contributory fault, mitigation, or punitive awards. These kinds of alterations might allow the court to fashion a remedial response that is just in the given circumstances. But if none of these factors that alter recovery in tort apply to monetary awards for undue influence,93 there would be little to distinguish such awards from what is already available by way of rescission or pecuniary rescission.94

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91 Akkouh’s reference to foreseeable damage implies negligence: Akkouh, above, n 26, 163.
93 There is no indication whatsoever that these apply to undue influence, and there is considerable authority that none of these issues apply in equity. See Chapter 7.
94 If the courts were to allow equitable compensation as a remedy for undue influence, doubt could attach to the status of rescission. One of the distinguishing factors between equity and the common law has traditionally been that where the common law generally accepts compensation for the wrong, equity is prepared to award *in specie* relief. Whereas the common law plaintiff is compensated for the wrong
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In summary, the only advantage of tortious calculation might be to limit the recovery awarded against a defendant to some amount less than the equivalent of rescission in the interests of justice. This, of course, is a laudable aim. However, the cause of action itself is predicated on the absence of true consent to the subject transaction, and the normative remedy is relief from the transaction. In the overwhelming majority of cases, no lesser sum would be warranted, and tortious recovery would mirror pecuniary rescission. Equitable compensation calculated as for loss is superfluous as a remedy for undue influence.

6.4 CONCLUSION: UNDUE INFLUENCE

There are currently no real grounds for asserting that equitable compensation, as distinct from pecuniary rescission, is available in cases of undue influence although there is support for that eventual development. It can be asserted however, that pecuniary rescission should be and is being awarded for undue influence when specific asset rescission is unavailable. At present, difficulties with the development of the availability of equitable compensation for undue influence revolve around the relationship of moral fault to liability, that is, in regarding undue influence as a ‘wrong’. In cases of presumed undue influence, where the plaintiff is already advantaged, it may not be appropriate to provide compensatory relief. Disgorgement by way of rescission remains the most appropriate remedy. This should include pecuniary rescission. This remedy adequately fulfils equity’s aim of restoring the plaintiff to the position he or she should have occupied, namely, being in a position to give or deny real consent to the transaction. There is no need for a separate

committed against him, equity as the court of conscience prevents the wrong complained of being continued or enforced against the plaintiff. As the primary aim of those claiming undue influence would still be to be relieved of a flawed transaction, it is suggested that rescission should usually be granted as the in specie relief. If the subject matter of the transaction remains in existence, the plaintiff should be entitled to seek the return of that asset, in conformity with general equitable principle. Otherwise, the plaintiff is forced to accept the transaction, possibly against his wishes, ‘making do’ with monetary compensation instead. In those cases where, for whatever reason, a plaintiff might prefer a monetary award instead of restoration of the specific asset, that should be at the plaintiff’s option, rather than at the defendant’s request.
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compensatory remedy here. However, if compensation eventually becomes an accepted remedy, it can be expected that the amount sought will be equal to or less than could be recovered by way of rescission. The monetary equivalent of rescission marks the upper limit of equitable compensation in undue influence cases.

6.5 UNCONSCIONABLE CONDUCT

In Australia, unconscionable conduct has become the preferred claim for plaintiffs wishing to be relieved of the consequences of an unfortunate transaction. As claims of unconscionable conduct are rarely made in other Commonwealth jurisdictions, the focus of this section will be on Australian decisions.

(i) Undue Influence and Unconscionable Conduct: One doctrine or two?

There is considerable literature advocating the reconsideration of the roles played by the doctrines. Some argue that undue influence and unconscionable conduct can be treated as emanations of a single doctrine of unconscionability. Others maintain there is an essential difference in the doctrines. A third variant proposes merger of actual undue influence with unconscionable conduct, and presumed undue influence with fiduciary law. Although unconscionable conduct has eclipsed undue influence in Australian jurisprudence, the latter is still pleaded and must be taken to have survived, though it is

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95 This doctrine bears various titles, including unconscientious conduct, unconscionable dealing, unconscientious dealing and unconscionability; see ANZ Banking Group Ltd v Dzienciol [2001] WASC 305 (unreported, McLure J, 9 November 2001) [284].

96 They are particularly unusual in the United Kingdom: see Credit Lyonnais Bank Nederland NV v Burch [1997] 1 All ER 144, 151.


98 Bridgewater v Leahy (1998) 194 CLR 457, 478 (Gaudron, Gummow and Kirby JJ); Birks and Chin, above, n 18, 57.

probably of most appeal in recognised relationships where undue influence is presumed. Cases regularly arise where the plaintiff is unable to establish undue influence but is successful in a claim of unconscionable conduct, thus indicating need for the latter doctrine. This thesis treats undue influence and unconscionable conduct as separate doctrines. This is certainly the way they are treated in Australia.

(ii) The nature of unconscionable conduct

As it is now viewed, unconscionable conduct occurs where one party to a transaction is under a special disability compared with the other, which special disability is sufficiently obvious to the second party. In those circumstances, it is prima facie unconscionable for the second party to take advantage of the transaction. The defendant must then demonstrate that no unconscientious advantage was taken of the plaintiff. Inequality of bargaining position is not sufficient.

At the risk of emphasising the obvious, unconscionable conduct invariably arises transactionally. This reflects equity’s very limited interest in economic harm. Unconscionable conduct is not concerned with parties unconscientiously taking advantage of others in an emotional sense, or in such a way as will cause physical harm. The doctrine

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100 An interesting recent example is Bar-Mordecai v Hillston [2004] NSWCA 65 (unreported, Mason P, Tobias JA and Davies AJA, 17 March 2004). There, a doctor aged 36 and his patient aged 72 lived in a de facto relationship. The patient made several large inter vivos gifts to him. Her estate relied upon the presumed relationship between them as showing undue influence. The doctor’s claim that the de facto relationship provided justification for the gifts was unsuccessful. The doctor was only able to rebut the presumption in relation to one of the gifts, where the deceased has received independent advice. See also Weiss v Barker Gosling (1993) 114 FLR 223 where a client sought to rely on the presumptive relationship with a solicitor, in order to set aside a costs agreement between them.

101 For example, see Bridgewater v Leahy (1988) 194 CLR 457; Westpac Banking Corp v Cockerill (1998) 152 ALR 267.

102 Special disability or disadvantage covers a wide range of relevant shortcomings, and can include physical impairments (Wilton v Farnworth (1948) 76 CLR 64), educational and experiential limitations (Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447), intellectual deficiencies (Wilton v Farnworth), and emotional dependence (Louth v Diprose (1992) 175 CLR 621), or a combination of any of these factors (Wilton v Farnworth; Amadio).

103 Louth v Diprose (1992) 175 CLR 621, 632 per Brennan J.

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is solely concerned with transactional exploitation, and equity intervenes to prevent exploitation in what would otherwise be a legally enforceable contract of sale, loan or guarantee, or gift.

As with undue influence, the intuitive remedy for equity is rescission. The second party is not permitted to take advantage of the party at special disadvantage. Until very recently there did not appear to be any reported cases where a remedy other than rescission (or refusal to specifically perform the transaction) has been sought, in the absence of some other equitable wrong. ¹⁰⁵ 'Compensatory damages have historically been unavailable for unconscionable transactions. ¹⁰⁶

(iii) Remedial awards for unconscionable conduct

Amadio ¹⁰⁷ elevated unconscionable conduct to its current position in Australian law. Although fairly clearly a case of undue influence being exerted by their son on the plaintiffs, together with notice of that undue influence to the defendant bank, it has become authority for the doctrine of unconscionable conduct. The Amadios signed a guarantee and mortgage to support their son's business borrowings in what can only be described as highly questionable circumstances. ¹⁰⁸ It was alleged that it was unconscionable for the bank to take advantage of the Amadios because of their special disability as against the bank.

¹⁰⁵ The plaintiff unsuccessfully sought equitable compensation in ANZ Banking Group Ltd v Dzienciol [2001] WASC 305 (unreported, McLure J, 9 November 2001). This followed on an apparent acceptance by the Full Court in Western Australia that equitable compensation could be awarded for unconscionable conduct: Smith v Town & Country Bank (unreported, FCt SCt of WA, Library No. 970716, 18 December 1997). A successful claim was made in the decision Karam v ANZ Banking Group Limited [2001] NSWSC 709 (unreported, Santow J, 21 August 2001). This decision will be discussed below.

¹⁰⁶ Edelman, Gain-Based Damages, above, n 49, 62. See also P D Finn, 'The Fiduciary Principle' in T G Youdan (ed) Equity, Fiduciaries and Trusts, (Toronto, Carswell, 1989) 1, 9: 'The orthodox view in common law countries is that it is limited to the avoidance (total or partial) of transactions and has no capacity to attract a damages award.' Bryan, above, n 26, 74.


¹⁰⁸ Their son had actively misled them as to the viability of his business, the duration of the mortgage and the amount it secured. The defendant bank had contributed to the success of the son's deceptions by selectively dishonouring the son's cheques when presented for payment, so that it did not appear the son's business was insolvent.
Factors found to constitute this special disability included their age, limited English, limited business experience and lack of explanation from the bank.

When the bank sought to enforce its security, the Amadios successfully sought rescission of the mortgage and guarantee. Mason, Wilson and Deane JJ set it aside on the grounds of unconscionable conduct. Deane J discussed the possibility that the Amadios might be overcompensated if rescission was granted. He accepted that the Amadios had been prepared to act as surety for their son the extent of $50,000. He was:

at one stage, inclined to think that the appropriate relief ...would be an order setting aside the guarantee/mortgage only to the extent to which it imposed upon Mr. And Mrs. Amadio a potential liability in excess of $50,000. However, he ultimately set the transaction aside unconditionally because the whole transaction flowed from the special disability that was evident to the bank. Amadio never lent itself to analysis in terms of compensation for loss, no loss having materialised given that the bank had not enforced the mortgage. Clearly, the remedy of choice was to have the transaction set aside. Nevertheless, at least Deane J was prepared to consider something other than a rescissionary response, showing a preparedness to set aside only that part of the transaction that was unconscionable.

Many cases of unconscionable conduct involve security arrangements. In third party guarantee cases rescission is the most attractive remedy. Rescission accomplishes release of the plaintiff from the obligations under the guarantee, without need for counter-restitution.

\[\text{Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447, 468 (Mason J); 468 (Wilson J); 481 (Deane J).}\]
\[\text{Ibid.}\]
\[\text{Ibid.}\]
\[\text{This theme of rescission in part was returned to by the High Court in the decision Vadasz v Pioneer Concrete Pty Ltd (1995) 184 CLR 102. There, the partial rescission foreshadowed in Amadio was}\]

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(as the defendant will not have provided a benefit to the plaintiff). However, unconscionable conduct is also applicable to instances where the plaintiff and defendant have transacted directly, such as gifts, sales of property and loans, and counter-restitution might be called for on those facts.

*Louth v Diprose* is perhaps one of the most criticised decisions of the High Court in recent years. There it was held that it was unconscionable for a woman to take advantage of the plaintiff's special disability, namely his abnormal infatuation with her. It was found she acted unconscionably in attempting to keep his large gift. *Louth v Diprose* is very difficult to explain in the normal language of rescission. The plaintiff did not in fact give real property to the defendant. Instead, he advanced a sum of money for a house to be purchased in her name. The relief he sought was that the house be transferred to him. At common law, this would be classified as a case where the subject matter of the transaction (the money) had been consumed (when the house was purchased), thereby ruling out rescission. However, the remedial order made was that the house be transferred to the plaintiff. In fact, neither party sought to challenge the relief ordered in the court of first instance, even though Jacobs ACJ and Legoe J in the South Australian Full Court suggested that an order for restitution of a sum of money might have been more appropriate.

There are two possible explanations for the remedy in *Louth v Diprose*. The first is that the gift of money and purchase of the house were so contemporaneous that it was ordered. *Vadasz*, however, concerns fraudulent misrepresentation; its interest in the current discussion lies in the willingness of the court to consider matters of practical justice.

*Vadasz* (1992) 175 CLR 621.

The more common indicators of special disability would have suggested that the plaintiff was in a much stronger position than the defendant. He was a well-educated solicitor, who was unable to establish that the plaintiff had exercised undue influence over him.

*Louth v Diprose* (1992) 175 CLR 621.

The remedy was not subject of the appeal to the High Court. The majority of the High Court confirmed the trial judge’s award of a constructive trust over the house for Diprose’s benefit: *Louth v Diprose* (1992) 175 CLR 621, 638-9.

*Diprose v Louth* (1990) 54 SASR 45.

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*Diprose v Louth* (1990) 54 SASR 45.

(1992) 175 CLR 621.
just to regard the house as the subject matter of the plaintiff's gift. Viewing the subject matter of the gift as the house, the remedy in *Louth v Diprose*\(^{120}\) effected rescission. The second is that, because the defendant was found to have acted unconscionably she was regarded as fraudulent in equity (opening the way for a more flexible remedial order). As neither party challenged the form of relief before the High Court, it is perhaps unwise to draw conclusions. The parties' decision not to challenge also relieved the High Court of potentially difficult decisions concerning any increase in value of the house between the time of purchase and the time of trial, either due to market increases or inputs by the defendant.

Remedy was infinitely more complicated in *Bridgewater v Leahy*.\(^{121}\) There, a grazier doted on his nephew, to the cost of his wife and daughters. First, he executed a will, giving his nephew the option to buy farming land for $200,000, a significant undervalue. Less than a year before his death, he sold part of this property to the nephew at market value. However, by a separate instrument executed on the same day as the sale contract, he forgave the nephew all but $150,000 of the purchase price. When the grazier died, the nephew exercised the option, purchasing the balance of the land for $200,000. Thus, for a total of $350,000 the nephew received land worth almost $700,000. His daughters sought to have the grazier's will set aside for undue influence\(^{122}\) and the deed of forgiveness set aside for undue influence or unconscionable conduct. Neither claim of undue influence was successful. However, the majority of the High Court decided that the deed of forgiveness was 'neither fair nor just and reasonable'\(^{123}\) on grounds of unconscionable conduct. Finding a remedy, however, was complex. If the *inter vivos* disposal of land to the nephew was upset entirely, the nephew stood to gain the same property under the will upon payment of $200,000. But the *inter vivos* sale had removed most of the land from the grazier's estate,

\(^{120}\) *Ibid.*

\(^{121}\) (1998) 194 CLR 457.

\(^{122}\) The law as to undue influence in respect of wills differs from that concerning *inter vivos* transactions, and is administered in Probate. Put shortly, it is more difficult to set aside testamentary gifts on the basis of undue influence.

\(^{123}\) (1998) 194 CLR 457, 492.
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thereby protecting the nephew from attack concerning the testamentary gift under Queensland family provision legislation. Usually, rescission is not available to undo only one of a series of transactions, but the majority ordered that the deed of forgiveness be set aside, leaving the original sale intact. Their Honours sent the matter back to the Supreme Court of Queensland to determine what allowance should be made in favour of the nephew, to take into account that his uncle had intended him to benefit under the will and possibly including proper provision for the uncle’s wife and daughters.

Bridgewater v Leahy has been called "(t)he high water mark of what can be seen as a process of discretionary “practical justice” in which the competing interests are balanced". While no order for equitable compensation was sought for unconscionable conduct, that type of relief might have been of great assistance in the case. An estimation of what the plaintiffs (or rather, the uncle’s estate) had lost, because of the exploitative conduct of their cousin, might have been more appropriate than the inelegant setting aside of the forgiveness, but not the sale, with allowances to be assessed by the Queensland Supreme Court in the context of the will.

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124 The Succession Act 1981 (Qld) s 41 allows the Court to make orders for the maintenance and support of family members if proper provision is not made under the will. Proceedings under the Act were commenced but dismissed for want of prosecution.
125 Proksch, above, n 5, 921.
126 In fact, the transfers to the nephew could not be set aside because third parties had interests in the properties: Bridgewater v Leahy (1998) 194 CLR 457, 493.
127 Ibid, 495-6. The Supreme Court of Queensland is not envied its task.
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The traditional view has been that equitable compensation is not available for unconscionable conduct:

The remedies available in equity for unconscionable conduct are limited. A party who can establish unconscionable conduct in equity is entitled to have the contract set aside or may obtain a declaration obtained that the contract has been validly rescinded. Unconscionability can also be used as a defence to an action for specific performance, or to have a gift set aside. ...These remedies are essentially negative and do not allow for the regulation of a continuing contractual or commercial relationship. Pro-active remedies such as damages or proprietary remedies such as a constructive trust would generally be unavailable.¹³¹

However, this view must now be under attack. *Louth v Diprose*¹³² and *Bridgewater v Leahy*¹³³ show that an intensive moulding of the remedy is possible. The conclusion must be drawn that the Courts are prepared to do whatever is necessary to achieve the removal of unconscionability.

(iv) Should pecuniary rescission be available for unconscionable conduct?

The observations made concerning whether pecuniary rescission should be available for undue influence are pertinent here. As before, there are few sensible objections to extending pecuniary rescission to cases where rescission would have been available to set aside a transaction procured by unconscionable conduct, but is no longer possible.¹³⁴ The focus of pecuniary rescission in cases of fiduciary breach is setting aside the flawed transaction. There does not seem to be anything peculiarly fiduciary in that aim. The same policy considerations seem to operate whenever equity seeks to set aside a transaction.

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¹³² (1992) 175 CLR 621.
¹³⁴ Bryan says '(t)he arguments for recognising pecuniary restitution are strong': Bryan, above, n 26, 75.
The obvious and sufficient remedy for unconscionable conduct, which always arises in a transactional setting, is usually rescission (or pecuniary rescission). It is plainly unjust if the plaintiff is denied any remedy simply because *restitutio in integrum* is not possible. For example, in *Bridgewater*¹³⁵ the sale of land to the nephew could not be set aside because third parties had acquired interests in the property. Had the High Court been unable to set aside the deed of forgiveness (say, if none had existed) the plaintiffs might have been deprived of a remedy. Equity's restoration interests would be entirely defeated if that were so. Equity should be sufficiently flexible to make a monetary award in lieu of specific asset restitution.

Further, it seems highly unlikely that an Australian High Court prepared to go to the remedial lengths exhibited in *Bridgewater v Leahy*¹³⁶ would baulk at the prospect of pecuniary rescission, where the alternative would be to deny the plaintiff a remedy. The conclusion is that, in an appropriate case, pecuniary rescission would be available for unconscionable conduct, even in the absence of a fiduciary relationship. Indeed, such a remedy may already be available.¹³⁷

(v) **Should equitable compensation be available for unconscionable conduct?**

Whether or not pecuniary rescission is appropriate to unconscionable conduct, it remains a separate question whether equitable compensation, calculated by reference to loss, should be available. Equitable compensation is clearly available for breach of fiduciary duty. The last section of this chapter concluded that equitable compensation was not necessary in cases of undue influence. Unconscionable conduct can be highly transaction-specific, and there may be no ongoing relationship between the parties who in every other respect are at arm's length. This differentiates unconscionable conduct from

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¹³⁶ Ibid.
¹³⁷ *Karim v Australia New Zealand Banking Group* [2001] NSWSC 709 (unreported, Sarnow J, 21 August 2001) which is discussed bel. w.
fiduciary law, and from many cases of undue influence. The question is where unconscionable conduct falls on the remedy continuum.

(a) A 'Wrong'?

On some facts it is somewhat easier to establish a case of unconscionable conduct than it is to establish undue influence. Unconscionable conduct has greater reach than the doctrine of presumed undue influence, being able to be found in quite distant relationships. If it is easier to establish, and more plaintiff-friendly, the implication may be that it is in some way more reprehensible than undue influence. This may earn unconscionable conduct the label of a 'wrong'. Ricke and Myburgh suggest that the 'heavy focus on proof of overreaching or active victimisation of one party by the other (indicates that) English law seems to regard unconscionable bargain as a species of wrongdoing'. Duggan also says that 'the main concern of the unconscientious dealing doctrine is with (the defendant's) wrongdoing.' This is borne out in the case law. In Amadio, Dawson J said:
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What is necessary for the application of the principle is exploitation by one party of another party’s position of disadvantage in such a manner that the former could not in good conscience retain the benefit of the bargain. 146

One commentator recently remarked that unconscientious conduct ‘cannot be conclusively classified so might be classified by courts as wrongs’. 147

If one accepts that there is misconduct or wrong involved in unconscientiously taking advantage of another’s special disability, then there can be little objection to remedying that wrong. The difficulty with accepting this proposition lies in the unfortunately wide ambit now covered by the term ‘special disability’, coupled with the lack of clarity as to what degree of notice is required before it can be said that the defendant has taken unconscientious advantage. ‘Special disability’ now covers infatuation, even by a well-educated solicitor with a less educated unemployed woman,148 and an old-fashioned world-view best described perhaps as primogeniture.149 It no longer seems necessary that the alleged disability be able to be assessed against any objective standard, as was possible when special disability cases tended to involve factors like age, health, linguistic abilities and the like. The element of subjectivity introduced into the law opens the doctrine to criticism concerning its grounding in principle. However, Bryan points out:

The contextual analysis of specific disadvantage, combined with the divisions of judicial opinions which occur in the evaluation of context... naturally invite

147 Edel v Gain-Based Damages, above, n 49, 60.
148 Louth v Diprose (1992) 175 CLR 621. However, Deane J (at 638) said that Diprose’s special disadvantage: ‘arose not merely from the respondent’s infatuation. It extended to the extraordinary vulnerability of the respondent in the false “atmosphere of crisis”.’
149 Bridgewater v Leahy (1998) 194 CLR 457; in ACCC v CG Berbatis Holdings Pty Ltd (2003) 197 ALR 153, Gleeson CJ indicated (at 156) he did not believe Bridgewater to be a case of emotional dependence.
criticisms of the doctrine on the grounds of indeterminacy and poor predictive value. But contextual inquiries are unavoidable. 150

Bryan concludes that uncertainty in the doctrine is inevitably present because of the nature of any doctrine prohibiting transactional exploitation, and not because of inherent uncertainty in the concept of special disability. 151 While this is so, the need for context-specific application of the concept of special disability makes it problematic to convincingly label unconscionable conduct a wrong in the way that we discuss criminal and tortious wrongs.

The other great difficulty with labelling the doctrine a wrong concerns the degree of knowledge the defendant needs to have concerning the plaintiff's special disability. It is frequently said that the cause of action focuses on the defendant's unconscionious conduct. 152 However, it is not necessarily apparent that the doctrine as applied in Australia requires much fault on the part of the defendant. Since Amadio, it is not clear in Australia whether mere constructive notice is sufficient to attract the court's attention, 153 courts having approached knowledge inconsistently. 154 It is much more difficult to regard a defendant as a wrongdoer if the notice held of the disability is only constructive. This has led to calls for a re-focussing of the knowledge requirements:

If the law is to stigmatise one party’s conduct as unconscionable, it must make credible demands of that party. It cannot stray too far from actual knowledge before it leaves itself open to the criticism of pursuing a policy of protecting the

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Bryan, above, n 28, 60.

Ibid.


For a discussion of this issue, see Duggan, above, n 99, 146-48; Glover, above, n 54, 287.

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mistaken or disadvantaged under the guise of proscribing what is essentially innocent behaviour.\footnote{155}

If the knowledge requirement becomes more elastic, ‘(r)elief of (the plaintiff’s) misfortunes replaces prevention of (the defendant’s) wrongdoing as a basis for intervention’.\footnote{156} For this reason it is preferable that the knowledge requirement be strengthened to clearly cover only actual knowledge, including wilful ignorance.\footnote{157}

Perhaps, however, cases like Bridgewater\footnote{158} and Louth\footnote{159} can only be understood if the focus of the action is the defendant’s wrongful conduct. The special disabilities involved in those cases slipped to the point that they were largely irrelevant; objectively little needed to be shown to satisfy that requirement. It may well be then that the perceived unfairness of the defendant is the crucial element of the action. This view is reinforced by a consideration of the position when third parties are involved, that is, where the person who takes unconscientious advantage is not the party who receives the benefit of the transaction.\footnote{160} A plaintiff cannot set aside a transaction as against a party who was not involved in the taking of unfair advantage. The defendant must be shown to have exploited the situation.\footnote{161}

\footnote{156} Duggan, above, n 99, 148.
\footnote{157} Burns notes that courts are applying two inconsistent approaches to knowledge in these cases, with ‘the strong possibility that the courts will apply the narrow knowledge-based approach [actual knowledge] articulated by Gibbs CJ and applied by Dawson J in Amadio’: Burns, above, n 154, 372.
\footnote{158} Bridgewater v Leahy (1998) 194 CLR 457.
\footnote{159} Louth v Diprose (1992) 175 CLR 621.
\footnote{160} For example, as in a non-spousal guarantee case; guarantees involving wives (at least) are covered by a special application of unconscionable conduct principles: Garcia v National Australia Bank (1998) 194 CLR 395.
\footnote{161} Thus, where a guarantor has been unable to show that the lender had any knowledge of his or her special disability, the guarantee cannot be set aside: Outlook Credit Union Co-operative Ltd v Popovic (1987) Q Conv R 54-269; Tessler v Costello [1987] 1 Qd R 281; Lisciandro v Official Trustee in Bankruptcy (1996) 69 FLR 180; Micaronc v Perpetual Trustees Australia Ltd (1999) 75 SASR 1.
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Unconscientious dealing requires proof that B knew, or at least had reason to know, of A’s disadvantage. The consequence of this requirement is to limit the doctrine to cases involving victimisation or advantage-taking on B’s part.  

This distinguishes unconscionable conduct from undue influence, and it is arguable that recovery is not available against the third party defendant because the doctrine is limited to defendants who are wrongdoers. Unconscionable conduct then appears to be a wrong. If it is a wrong, it may sustain a compensatory remedy.

(b) New Developments

Despite uncertainty as to whether the cause of action is a wrong, Edelman says, ‘in Australia, there is clear authority that compensatory damages are available for unconscionable transactions...independently in the form of equitable compensation’, citing the recent decision of Harrison v Schipp. This is certainly true of statutory unconscionability pursuant to the Trade Practices Act. However, it is by no means clear that this case establishes an equitable jurisdiction to award compensation. It concerned a three-party joint venture arrangement to develop property between an investor, a real estate agent and a solicitor. The latter two took unconscientious advantage of the investor’s weaknesses and vulnerability to involve her in a money-making scheme that ultimately failed. However, in each instance cited where unconscionable conduct occurred, there was a clear fiduciary relationship in existence and equally clear breaches of fiduciary duty. To
that extent, the case is similar to *Mahoney v Purnell*\(^{168}\) where the finding of a fiduciary relationship underpinned an award of equitable compensation for undue influence.

*Harrison v Schipp*\(^{169}\) is not convincing authority for the proposition that equitable compensation is available in the absence of a breach of fiduciary duty. First, it would appear that the parties did not contest the availability of equitable compensation for unconscionable conduct. Two of the three judges did not fully consider whether equitable compensation would have been available if no fiduciary duties had been owed, because it was unnecessary.\(^{170}\) Further, the remaining judge, Fitzgerald JA (who agreed with the orders proposed) was clearer on this point. He held that:

> In the circumstances, including the parties' relationships and the respective roles played by Mr Cameron and Mr Harrison, Mrs Schipp became entitled to equitable compensation and compound interest for their unconscionable conduct in breach of their fiduciary obligations.\(^{171}\)

Therefore, while the case is authority for the proposition that equitable compensation is available for breach of fiduciary duty (which breach can be occasioned by unconscionable conduct of the fiduciary), it is not authority for the view that equitable compensation is available for unconscionable conduct in the absence of a fiduciary relationship.

However, Edelman may have been anticipating the future course the doctrine would take. Six months after *Harrison v Schipp*\(^{172}\), a single judge of the New South Wales Supreme Court held that plaintiffs could recover equitable compensation for unconscionable conduct in the absence of a fiduciary obligation. *Karam v ANZ Banking*

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\(^{168}\) [1996] 3 All ER 61.


\(^{171}\) Ibid, [158] (emphasis added).

\(^{172}\) Ibid.
Group concerned a more involved variant of Amadio-style facts. Santow J held that the plaintiffs, four members of the Karam family, had been at a special disadvantage with the defendant bank concerning their borrowing transactions over a long period of time, and that the bank’s conduct was unconscionable. Rescission of these transactions was no longer possible because the plaintiffs had sold the secured properties themselves, in order to meet the demands made by the bank. The plaintiffs argued that as the transactions could no longer be set aside, they were entitled to equitable compensation. 174

The defendants countered with an argument that equitable compensation was not available in the absence of a breach of fiduciary obligation. Santow J dismissed this suggestion promptly:

The short answer to that contention is that it is now well established that equitable compensation is not limited to actions against fiduciaries for breach of fiduciary duty. Rather it extends to actions against defendants who, although not fiduciaries in respect of the breach in question, have acted in breach of an equitable obligation. 175

His Honour reasoned (with respect, not entirely convincingly) that equitable compensation was available for fraud in equity: fraud in equity is merely a breach of an equitable obligation; therefore unconscionable conduct is a species of equitable fraud; and thus equitable compensation is an available remedy for unconscionable conduct. 176 This reasoning would make equitable compensation available in respect of any breach of any equitable obligation. With respect, it is not clear that equity regards all breaches of

174 Ibid, [240].
175 Ibid, [425].
176 Ibid, [426,427]; see also Wood v Lavery [2003] QSC 405 (unreported, Muir J, 27 October 2003), where Muir J refused to strike out a statement of claim merely on the basis that the remedy sought (equitable compensation) was not an available remedy for unconscientious conduct.
obligations equally. Breaches of equitable obligations are not necessarily regarded as fraudulent.\textsuperscript{177} The status of unconscionable conduct as equitable fraud is unclear.\textsuperscript{178}

However, although it was titled ‘equitable compensation’, what Santow J ordered was pecuniary rescission. The transactions themselves could no longer be set aside, but the transactions could be reversed in monetary terms. At no point in the judgment did Santow J appear to envisage any other method of calculation. No suggestion seems to have been made that the plaintiffs might have been entitled to any other measure, or for any other head of damage, such as consequential loss occasioned by their reduced means. This suggests that the term 'equitable compensation' is being used as a label to signify a monetary award in substitution for rescission. The fact that the quantum equals exactly the economic effect that would be achieved by rescission entitles us to query whether the remedy is really equitable compensation, calculated by reference to the plaintiffs loss, or calculated by reference to the defendant's unjustifiable gain at the plaintiffs expense, and better labelled ‘pecuniary rescission’. In the only case where equitable compensation in excess of pecuniary rescission has been sought, the plaintiff was not successful in establishing unconscionable conduct.\textsuperscript{179}

The conclusion is that unconscionable conduct is more likely to be regarded as a wrong than undue influence, and therefore more likely to be able to support an award of equitable compensation. However, equitable compensation will often not be an appropriate remedy for unconscionable conduct. In many cases, there will have been no loss incurred by the existence of the transaction, as for example, in third party guarantee cases. Rescission is the obvious remedy in those situations. When the transaction has been completed, or \textit{restitutio in integrum} can no longer be made, equitable compensation could be an appropriate remedy. This would bring equity into line with statutory unconscionable

\footnote{\textit{Bristol and West Building Society v Mather} [1998] Ch 1.}

\footnote{There is some authority that unconscionable conduct is equitable fraud: \textit{Armitage v Nurse} [1998] Ch 241, 252-3, (Millett LJ). However, Lord Dunedin suggested in \textit{Nocton} that all the old Chancery cases concerning equitable fraud were based on the existence of a fiduciary relationship: \textit{Nocton v Lord Ashburton} [1914] AC 932, 963-4.}

\footnote{\textit{ANZ Banking Group Ltd v Dzienciol} [2001] WASC 305 (unreported, McLure J, 9 November 2001).}
It is then necessary to consider how equitable compensation would be calculated.

6.6 CALCULATION OF EQUITABLE COMPENSATION FOR UNCONSCIONABLE CONDUCT

On the assumption that equitable compensation for loss is (or may become) available for unconscionable conduct, precise calculation of the remedy becomes relevant. As with the doctrine of undue influence, the causative effect of the unconscionable conduct on the entry into the transaction is presumed; it is irrelevant that the plaintiff would have entered into the transaction even in the absence of the unconscionable conduct. This is effectively the same 'but for' test we have seen in relation to all other equitable breaches, tailored to the cause of action in question. The question is what position would the plaintiff have occupied but for the defendant's use of unconscionable conduct.

Whereas equity's aim with respect to undue influence is to put the plaintiff in the position as if the transaction had not been entered, the same is not true of unconscionable conduct. With undue influence, the quality of the plaintiff's consent is absent to the point that the transaction cannot stand. But with unconscionable conduct, equity's aim is to restore the plaintiff to the position as if unconscionable conduct had not been used against her in the transaction. Equity's focus then will be on removing the element of exploitation from the transaction. This suggests that in some cases the plaintiff may need to be returned to the position as if the transaction had not been entered, but in others might be satisfied by a monetary remedy, otherwise leaving the transaction on foot. This necessarily supposes that a monetary remedy would not exceed the value of rescission of the transaction.

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Statutory unconscionability can give rise to awards of damages: ss 82, 87 Trade Practices Act 1974 (Cth).  
As in Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447.
There appears to be only one Australian decision where the plaintiff claimed an
amount in excess (or potentially in excess) of the value of rescission of the transaction. In
\textit{ANZ Banking Group v Dzieniol} an elderly Polish-born man, who may have been
suffering Alzheimer's disease at the time, borrowed from the ANZ Bank. Later, it was
claimed that the man had been at a special disadvantage with the bank and that the
transaction was unenforceable for unconscionable conduct. Further, it was claimed there
was an entitlement to equitable compensation, on the grounds that the loan (made as a
result of unconscionable conduct) had allowed the man and his wife to enter into business
transactions they would not otherwise have been able to enter, and as a result had suffered
compensable loss. It was held on the facts that there had been no unconscionable conduct,
thus no discussion of equitable compensation was necessary. However, this thesis contends
that recovery in such a situation is impossible.

First, it would extend the equitable action of unconscionable conduct beyond its
natural boundaries. The action is transactional, but the transaction itself is not necessarily
offensive to equity. What offends equity is the exploitation.\textsuperscript{184} Therefore equity does not
necessarily aim to undo a transaction affected by unconscionable conduct. Instead, it seeks
to remove the effect of the exploitation. The most that can be achieved here is rescission.
\textsuperscript{185} In some cases, the plaintiff may have to be satisfied with a lesser monetary amount.
Further, recovery on such facts would not properly reflect the risks the parties were
prepared to bear when entering into the transaction. It cannot be the case that a lender is
responsible for all the risks attached to the way in which the borrower uses borrowed
money. The lender contracts to accept the risk of possibly facing the setting aside of the
transaction upon some equitable ground,\textsuperscript{186} and the risk that the borrower will not make
repayment (usually taking some sort of security). But the lender does not contract to accept
the risk of the borrower's lack of luck or skill in using the borrowed sum. The lender may

\textsuperscript{183} [2001] WASC 305 (unreported, McLure J, 9 November 2001).
\textsuperscript{184} \textit{Commercial Bank of Australia Ltd v Amadio} (1983) 151 CLR 447, 489 (Dawson J).
\textsuperscript{185} This is illustrated by the result in \textit{Commercial Bank of Australia Ltd v Amadio} (1983) 151 CLR 447.
have acted wrongly in employing unconscionable conduct in completing the transaction, but that is where the wrong ends. It cannot be said there is any causal connection between that wrong and the subsequent loss of the money. Recovery of the kind claimed would convert the responsibility not to employ unconscionable conduct into a fiduciary duty or duty of care, and would seriously undermine the ability of lenders to do business in this country.

Equitable compensation for unconscionable conduct thus has no run-away potential and is limited to, at the most, the amount required to effect rescission. This satisfies equity's interest in restoration. The plaintiff is restored to the position as if no unconscionable advantage has been taken of him or her. Once this is done, equity's interest in the matter is exhausted.

6.7 CONCLUSION: UNCONSCIONABLE CONDUCT

Therefore, it seems that equitable compensation is not generally necessary for unconscionable conduct. The usual remedy is rescission. In the only reported case where it was held equitable compensation was available for unconscionable conduct, the quantification of the remedy reflected the monetary equivalent of rescission. Equitable compensation may not be an appropriate remedy for unconscionable conduct. The generous identification of 'special disadvantage' and the very plaintiff-friendly interpretation afforded the requirement of notice under the doctrine of unconscionable conduct makes classification of the action as a wrong problematic. The action is more easily classified as a wrong if the defendant must have known of the plaintiff's special disability.

If equitable compensation becomes generally available for unconscionable conduct, it is appropriate that it be limited by a causation test that results in a remedy equivalent to rescission. This tests what the position would have been had the defendant not indulged in

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120 Usually, there is very little risk in this because the borrower is normally required to make restitution: *Maguire v Makarimis* (1997) 188 CLR 449.
the unconscionable conduct. This may involve setting aside the transaction totally, or placing the plaintiff in the same position as if no unconscionable conduct had occurred. This can be accomplished by pecuniary rescission in all cases, with counter-restitution being made as appropriate. If that is so, there appears no point in having a separate remedy of equitable compensation. Although unconscionable conduct can possibly support a compensatory award, rescission sufficiently fulfils equity's restoration interests, making equitable compensation unnecessary.

6.8 EQUITABLE ESTOPPEL

Davidson's ground-breaking article on equitable compensation of 1982 was received in a pre-Waltons world. The development of an equitable estoppel action was a major paradigm shift, and has been the subject of extensive debate. But Davidson arguably pointed to the basis for the emergence of the estoppel action. He questioned the then-accepted orthodoxy that estoppel could only be used as a shield, and he provided early scholarship on a potential remedy for such a cause of action, namely, equitable compensation. Davidson discusses an early compensatory remedy for misleading representations in equity. Burrowes v Lock is an example of equity compensating the plaintiff for a misrepresentation as to fact made by a trustee concerning the trust estate. The

188 Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387 ('Waltons').
190 (1805) 10 Ves.470; 32 ER 927.
defendant took the point that the relief sought was a claim for damages, but Sir William Grant held that the demand was properly made in equity. A similar decision was reached in *Slim v Croucher*, where the representation also concerned existing fact. But the aftermath of *Derry v Peek* caused this jurisdiction to wither, until the explosion of Australian case law in the latter part of the twentieth century.

(i) Development of the Remedy

In Australia, it is now recognised that when representations or conduct of the defendant are relied upon by the plaintiff, to the plaintiff's detriment, the defendant may be estopped from resiling from such representations or conduct. This is an equitable obligation, capable of supporting an independent cause of action, and many commentators recognise equitable compensation as being an available remedy for such a breach.

The modern Australian law stems from *Waltons*. There, put briefly, representations by Waltons led the Mahers to believe that Waltons would execute a lease as tenants of a building to be constructed. In reliance on the representation, the Mahers demolished the existing building on the site, and commenced construction of a new building that would have suited Waltons' specifications. The High Court held that it would be unconscionable to allow Waltons to resile from its representation.

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191 (1805) 10 Ves. 470, 476; 32 ER 927, 929.
192 (1860) 1 De. G.F. & J. 518; 45 ER 462.
193 (1889) 14 App Cas 337.
195 C Rickett, 'Compensating for Loss in Equity - Choosing the Right Horse for Each Course' in P Birks and F Rose (eds) *Restitution and Equity: Volume 1 Resulting Trusts and Equitable Compensation* (London, Mansfield Press, 2000) 173, 174; J Getzler, above, n 8, 247. Tilbury and Davis comment that 'it is more likely that compensation will be awarded as damages (at law) by asserting the unity of the doctrine of estoppel at law and in equity': Tilbury and Davis, above, n 189, 894. However, on the last occasion the High Court discussed whether or not a unified doctrine has emerged, their Honours held it was not necessary to decide the point: *Giumelli v Giumelli* (1999) 196 CLR 101.
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The interest for these purposes came in the remedy ordered; the judgment at first instance awarding damages under Lord Cairns' Act in lieu of specific performance was affirmed. It seemed therefore that the High Court was endorsing an expectation-based award. Debate has raged since concerning whether this is actually the correct basis for compensating in estoppel cases. The other basis for relief is reliance relief; the plaintiff is given what is ‘the minimum equity’ to cure losses incurred through reliance on the representation, rather than having any expectation fulfilled.

The reliance interest is protected when the court awards damages to the plaintiff for the purpose of undoing the harm which the plaintiff’s reliance on the defendant’s promise has caused the plaintiff. In protecting the reliance interest, the court seeks to put the plaintiff in the position he or she would have occupied if the contract had not been entered into. The expectation interest is protected when the court gives the plaintiff the value of the expectancy which the promise created, putting the plaintiff in as good a position as he or she should have occupied if the defendant had performed his or her promise.

Waltons was followed by the High Court decision of Commonwealth v Verwayen. Reliance-based relief for equitable compensation was more clearly adopted there by a majority of the High Court, but it is not possible to say that an entirely uniform approach emerged. Verwayen concerned a personal injuries claim arising out of the HMAS Voyager naval disaster of 1964. Verwayen was a serving member of the Royal Australian Navy, and was believed to be barred from suing the Commonwealth for personal injuries. The case was followed by the High Court decision of Commonwealth v Verwayen.

McDermott makes the point that Lord Cairns’ Act jurisdiction to award damages is dependent upon the possible availability of the remedy of specific performance. If that remedy is not available a monetary award must be ‘an instance of the inherent jurisdiction of equity’: P M McDermott, Equitable Damages (Sydney, Butterworths, 1994) 186.

Robertson, ‘Satisfying the Minimum Equity’ above, n 18, 806-7.


(1990) 170 CLR 394 (‘Verwayen’).

Gummow J has referred extra jurisprudentially to the decision having an 'inconclusive outcome': Gummow, above, n 129, 40.
injury at the time of the disaster. He commenced negligence proceedings in 1984. The Commonwealth did not deny it owed him a duty of care, or plead the obvious limitations defence. The Commonwealth’s solicitors represented that those defences would not be taken against any of the survivors of the *Voyager* disaster. However, in 1986 the Commonwealth sought leave to amend its pleadings and claim the protection of those defences. Verwayen claimed an estoppel against the Commonwealth, saying he had continued his action in reliance on the representations made. The High Court split, both as to the detriment Verwayen needed to show, and an appropriate remedy for any estoppel.

Mason CJ, who thought that no estoppel had been made out, accepted that detriment would include ‘significant expense and inconvenience’ but said that including deterioration of the plaintiff’s emotional condition as detriment would be ‘sheer speculation’. However, as to remedy, the Chief Justice thought:

> equitable estoppel will permit a court to do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party chopped, but no more. ....there is no longer any justification for insisting on the making good of assumptions in every case.

Brennan J said that the remedy was ‘not designed to enforce promises’. Here, the loss was the detriment occasioned by reliance on a promise and did not ‘consist in a loss attributable merely to non-fulfilment of the promise’. Thus, the only detriment Verwayen

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203 Ibid, 415.
204 Ibid, 416.
205 Ibid, 417.
206 Ibid, 429.
207 Ibid, 429.
suffered was in continuing the action, and Brennan J would have ordered an inquiry into the plaintiff’s costs thrown away due to the amendment of pleadings.  

Deane J denied that estoppel gives an independent cause of action for compensatory damages and accepted that in certain cases the effect of the estoppel could be:

disproportionately greater than any detriment which would be sustained by the other party to an extent that good conscience could not reasonably be seen as precluding a departure from the assumed state of affairs if adequate compensation were made or offered by the allegedly estopped party for any detriment sustained by the other party.  

This view places estoppel as *prima facie* relieved by reference to the assumed state of affairs, tempered when it appears this would result in injustice to the estopped party. According to Deane J, Verwayen’s detriment included ‘past stress, anxiety, inconvenience and effort ...(and) ...the potentially devastating effects of a last-minute denial of an expectation of just compensation for his injuries.’

Dawson J also based relief on reliance, citing Brennan J’s *Waltons* analysis. For him, Verwayen’s detriment was the lost chance to settle the litigation earlier, coupled with prolonged stress. Toohey J would have given the plaintiff the chance to prove detriment in addition to lost legal costs, also endorsing reliance-based relief.

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208 Ibid, 430.
209 Ibid, 439.
210 Ibid, 441.
211 Ibid, 442.
212 Ibid, 448.
213 Ibid, 454.
215 Ibid, 476.
216 Ibid, 475.
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Gaudron J, however, was not as definite as the rest of the bench. Her Honour agreed with Mason CJ that the doctrine of estoppel ‘permits a court to do what is required to avoid detriment and does not, in every case, require the making good of the assumption.’ However, her Honour went further, and indicated support for *prima facie* fulfilment of the promise, stating that ‘it may be that an assumption should be made good unless it is clear that no detriment will be suffered other that that which can be compensated by some other remedy.’ On the given facts, the mere possibility of increased stress and anxiety for Verwayen favoured making the assumption good.

The final member of the bench, McHugh J, did not believe Verwayen could establish that he relied upon the representation. However, he took the view that that enforcement of the promise was not the object of the doctrine. As to remedy, his Honour felt that even if Verwayen had suffered additional worry and stress, these could have been remedied by an award of compensation and did not require that the Commonwealth be estopped from employing its defences against negligence.

The remedial upshot was that the Commonwealth was not permitted to resile from its representations (either on the grounds of waiver or estoppel). This had the effect of fulfilling the promise made to Verwayen, even though from the views of six judges it appeared that the correct approach to remedy for equitable estoppel is to relieve against reliance, unless the detriment cannot be satisfactorily remedied by anything other than fulfilment of the expectation. Importantly, there is nothing in any of the judgments to suggest that the plaintiff can in any circumstances be compensated for greater detriment than expectation loss. Fulfilment of the expectation marks out the upper limit of the

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217 Ibid, 487.
218 Ibid, 487.
219 Ibid, 487.
221 Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ.
remedy. The plaintiff cannot complain if the defendant has fulfilled the promise. The plaintiff bears the risk of detriment over and above the expectation.

However, despite the weight of opinion of the *Verwayen* court, relief against reliance has not been the Australian experience, as Robertson has shown. In 24 of the 26 reported superior court cases involving equitable estoppel in the five years following *Verwayen*, expectation relief was awarded. There are a number of explanations of this trend. Robertson points out that the basis of relief was only discussed in 10 of the 26 cases. This may be due to a lack of familiarity or comfort with the distinction between the bases of awards. Even so, in only three of those cases did relief apparently go beyond what was required to relieve reliance. This suggests that estoppel cases tend to self-select. Most of those that reach superior courts can perhaps only be resolved fairly by the fulfilment of expectation. Robertson notes that this is usually either because the detriment is hard to quantify, or because reliance and expectation coincide. A third possible explanation is the relative lack of development of clear guidelines for the assessment of equitable compensation. The absence of a well recognised compensatory jurisdiction means that it is much easier for courts to simply fulfil the expectation, than to embark on a difficult quantification process.

In view of the two divergent methods of calculating remedy that appeared in *Waltons* and *Verwayen*, and the apparent preference of Australian courts for the

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223 Ibid, 821.

224 Ibid, 833. Robertson also suggests other possible justifications, including that the assumption was relied upon for an extended period of time (834) or that the detriment is still hypothetical (846).

225 As Michalik notes in a different context, '(if) a remedy is introduced without a closely reasoned basis, it is very difficult to decide if it is appropriate to apply it to new fact situations. Judges may shy away from its use altogether': P Michalik, 'The Availability of Compensatory and Exemplary Damages in Equity: A Note on the *Aquaculture Decision* (1991) 21 *Victoria University of Wellington Law Review* 391, 405.

method ostensibly less-favoured in Verwayen, it was hoped that clarity would be supplied when the High Court next had the opportunity to consider relief for equitable estoppel. This chance came in Giumelli v Giumelli.\textsuperscript{229} Unfortunately, this decision did little to expound a unified understanding of remedial aspects of equitable estoppel because the large issues with the doctrine were effectively by-passed by the court. It remains unclear today which basis of relief is endorsed by the High Court.\textsuperscript{230} The case concerned the disintegration of a family farming concern. Robert Giumelli worked in the family orchard business for many years. Promises were made to him by his parents that they would transfer part of the real property to him. There was evidence of his reliance on those promises. Later, the farming partnership collapsed. His father, who was the sole registered proprietor of the land, had not and did not transfer the land to Robert. Factually, Giumelli appeared an ideal vehicle for High Court consideration of which of the general approaches to relief is correct, expectation relief derived from Waltons,\textsuperscript{231} or reliance relief endorsed in Verwayen.\textsuperscript{232} Expectation relief would entitle the plaintiff to fulfilment of the promises, and therefore transfer of the land to him, but reliance relief might lead to a monetary remedy (including perhaps a lesser monetary remedy) to compensate him for the detriment suffered in reliance on the promises. However, the facts were further complicated by the existence of another brother, Steven, who had worked and lived on the same piece of land, and made improvements to it. There was no evidence as to what promises, if any, had been made to him.

The Full Court of the Supreme Court of Western Australia\textsuperscript{233} held that the plaintiff was entitled to expectation relief\textsuperscript{234} to be achieved through a constructive trust. On appeal,
the High Court held\textsuperscript{235} that although an estoppel was made out, the constructive trust ordered in the court below was an excessive remedy; the matter was remitted to the Western Australian Supreme Court for calculation of a monetary remedy:

\begin{quote}
of a sum representing the present value of the (promised land)....taking into account all considerations for which allowance should be made in calculating that sum so as to do equity between the parties to the action and all relevant third parties.\textsuperscript{236}
\end{quote}

The decision is extremely disappointing because the High Court failed to conclusively establish the basis of the remedy for equitable estoppel. The joint judgment surveyed the various opinions canvassed by the court in \textit{Venvayen} \textsuperscript{237} and concluded that the reasoning in those judgments did not foreclose, as a matter of doctrine, the making of an order for expectation relief in a case such as the present. \textsuperscript{238} This has since been interpreted as indicating a lack of enthusiasm for reliance relief, and movement towards acceptance of \textit{prima facie} expectation relief.\textsuperscript{239}

This impression is reinforced by the language used by the court, and the comment that in this case, expectation relief ‘went beyond what was required for conscientious conduct by Mr and Mrs Giumelli.’\textsuperscript{240}

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\textsuperscript{234} However, Ipp J (Franklyn J concurring) had held this was on the basis of a joint endeavour constructive trust rather than on the basis of estoppel: (1996) 17 WAR 159, 175.
\textsuperscript{235} Gleeson CJ, McHugh, Gummow and Callinan JJ delivered a joint judgment. Kirby J delivered a separate judgment essentially agreeing with the joint opinion.
\textsuperscript{236} (1999) 196 CLR 101; 126 (Gleeson CJ, McHugh, Gummow and Callinan JJ).
\textsuperscript{237} \textit{Commonwealth v Venvayen} (1990) 170 CLR 394.
\textsuperscript{238} \textit{Giumelli v Giumelli} (1999) 196 CLR 101, 125 (Gleeson CJ, McHugh, Gummow and Callinan JJ).
\textsuperscript{239} Robertson, ‘Reliance, Conscience and the New Equitable Estoppel’, above, n 189. 15; J Edelman, ‘Remedial Certainty or Remedial Discretion in Estoppel after \textit{Giumelli}?’ (1999) 15 \textit{Journal of Contract Law} 179. However, extracurially, Gummow presents the case as an example of equity fashioning a remedy to fit the individual case: Gummow, above, n 129, 40.
\end{flushright}
It is possible to argue that, reading between the lines, this shows some approval for the approach of Deane J in *Venvayen*. This is exactly the way that Deane J phrased his reasons to justify why it may not always be appropriate to grant the prima facie entitlement to enforcement of the assumption. Perhaps it can be argued that if the Court actually approved of the 'minimum equity' approach it would have stated that the remedy given 'went beyond the minimum equity'. ...This certainly did not happen.  

The implication may be that expectation relief is to be favoured. One of the early arguments against awarding expectation relief was that this would encroach on the traditional territory of contract law. The *Giumelli* court was at pains to point out the differences between contract and equitable estoppel. If the fear of undermining contract law is irrelevant, an impediment to the adoption of *prima facie* expectation relief is removed. All these matters may indicate a sea change towards *prima facie* expectation enforcement.

However, on the other hand, it cannot be said that their Honours obviously disapproved of the reliance relief approach. Their Honours' observation that nothing in *Venvayen* precludes the fulfilment of the assumption as the final remedy granted goes without saying, given the outcome in that case itself. This may have been merely stating the obvious, rather than frowning on reliance relief. Indeed, their Honours said so little, any conclusions about their preferences as to remedial doctrine appear speculative. The only safe conclusion is that the High Court has left the thorny question of the correct remedial basis for another day. As a result, it is necessary to consider both remedial possibilities here.

(ii) **The nature of equitable estoppel**

Equitable estoppel can be distinguished from the other causes of action discussed in this chapter. Undue influence and unconscionable conduct are directed at undoing

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241 Barkehall Thomas and Vann, above, n 206, 97.
transactions, but equitable estoppel is not clearly transactional. Frequently there is a transactional relationship between the parties, but this is not necessary. It is not essential that the representations that can ground an estoppel address a transactional relationship between the parties.

This distinction is of major importance to remedy. In the cases of undue influence and unconscionable conduct, rescission (including pecuniary rescission) is the appropriate remedy simply because those doctrines concern transactions. This is also why rescission is an appropriate remedy where there has been a transactional dealing between a fiduciary and a principal. But the same is not necessarily true of equitable estoppel. Although the defendant must be responsible for the representation, it is not essential that a transaction between the parties results from the representation. In short, it is frequently the case that the remedy of rescission will not reach the effect of the conduct. To this extent there are similarities with the situation where the fiduciary’s breach has affected the principal economically, but not in such a way as to result in a transaction between them (as in Nocton). Equity’s solution in those cases is to use equitable compensation to remedy loss; this might suggest that equitable compensation should be available to remedy losses caused by representations that can support estoppel.

As undue influence and unconscionable conduct align naturally with rescission, it is suggested that the action of equitable estoppel lends itself to the seeking of one remedy, namely fulfilment of the plaintiff’s expectation. This can be by way of performance of the

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244 In Commonwealth v Verwayen (1990) 170 CLR 394 and Commonwealth v Clark [1994] 2 VR 333, the representations concerned the conduct of the defence by the party being sued. The representation in W v G (1996) 20 Fam LR 49 concerned support of children born during the course of a lesbian relationship. In Gray v National Crime Authority [2003] NSWSC 111 (unreported, Austin J, 28 February 2003) the representation was that witnesses would be protected and maintained in a certain manner during and after their participation in a witness protection scheme.
245 Maguire v Makaronis (1997) 188 CLR 449.
246 Nocton v Lord Ashburton [1914] AC 932.
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247 promise, either positively or negatively in the sense that the defendant is restrained from insisting on what otherwise are its legal rights. Alternatively, it can be by way of proprietary remedy in an appropriate case. The fact that plaintiffs generally seek to have their promises fulfilled tends to skew the cases statistically. Frequently, the only way justice can be achieved is to fulfil the expectation because it is too difficult to attempt another calculation. Even when courts attempt to award compensation, it often appears that expectations are being fulfilled.

A recent decision demonstrates this. In *Gray v National Crime Authority*, a husband and wife entered a witness protection scheme. Austin J found that they had done so in partial reliance on representations to the effect that they would be looked after for a reasonable time after termination of their protection, to allow rehabilitation back into the community. After seven years, their participation was terminated, and they were left (virtually penniless) to their own devices. Austin J held that it would be unconscionable for the defendant to resile from its representations. He awarded compensation on the basis of the minimum equity necessary to prevent the plaintiff suffering detriment as a result of the unconscionable conduct, but this had the appearance of fulfilling the promise in monetary terms.

Nevertheless, compensation (rather than actual fulfilment of the promise) is sometimes awarded. In *Rogers v Rogers* the plaintiff, who had been promised that a

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249 For example, as in *Giumelli v Giumelli* (1999) 196 CLR 101, although third party interests stopped the court ordering a constructive trust in that case.
251 On appeal, it was held that the representation as to the length of time over which assistance would be given could not reasonably be relied upon. However, the court did not question the ‘minimum equity’ approach adopted by Austin J: *Australian Crime Commission v Gray* [2003] NSWCA 318 (unreported, Mason P, Tobias JA, Ipp JA dissenting, 22 December 2003). See also *Atwell v Atwell* [2002] TASSC 119 (unreported, Slater J, 20 December 2002), where compensation was ordered because the promise could not be fulfilled.
farm would be left to him by will, was awarded the sum of $250,000. Hansen J held that it was inappropriate to enforce the defendant's promise by imposition of a constructive trust, in part because of the potentially lengthy time that might pass before the defendant's death. Nor was it appropriate to make an order for a sum sufficient to purchase another farm, because that would represent a 'windfall accelerated benefit'. Hansen J made no attempt to categorise this remedy, apart from identifying it as a figure sufficient to satisfy the equity, but it is obvious the promise was not being fulfilled; otherwise the plaintiff's claim should have been satisfied by a remedy that delivered the land to him on the defendant's death.

The current state of the authorities means that it is difficult to draw conclusions concerning the way in which courts will view remedial responses. Usually expectation is fulfilled; it is not always clear if this is because the court views enforcement of the promise as prima facie relief, or because nothing else will give relief against the detriment suffered. This reveals a greater underlying difficulty in the doctrine of equitable estoppel as currently understood. The appropriate remedy cannot be determined until such time as the balance of the doctrine is articulated.

(iii) Should equitable compensation be available for equitable estoppel?

In Verwayen two judges clearly supported equitable compensation as being a remedy appropriate for equitable estoppel. These two judges are proponents of reliance-based relief. Robertson has commented that, 'if the courts are to give full effect to the reliance based approach to relief...then it is clear that the compensation jurisdiction must be embraced.' If reliance based relief is the proper basis of the doctrine, then equitable compensation appears indispensable; if expectation based relief is preferred, scope for equitable compensation is slight because the promise should be fulfilled.

253 Ibid, [103].
254 (1990) 170 CLR 394, 430-I (Brennan J), 504 (McHugh J).
255 Robertson, ‘Satisfying the Minimum Equity: Equitable Estoppel Remedies After Verwayen’, above, n 189, 843.
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(a) A 'Wrong'?

Equitable estoppel can possibly support an award of equitable compensation if it can be classified as a wrong. Robertson says that equitable estoppel is a wrong, because:

(a) it is a duty imposed by law and not by consent or by the occurrence of an event. It is a duty ‘owed at all times to all parties with whom one deals’;

(b) it is not contractual in pattern, because defendants are not under a duty to perform their promises (as with contract), but are merely under a duty to prevent detrimental reliance; and

(c) courts give compensatory awards for breach of an estoppel.

Burrows says that ‘those forms of estoppel that constitute causes of action’ are wrongs. However, many would not classify equitable estoppel as a wrong. Several commentators see estoppel as best viewed as a species of contract. Birks says that estoppel ‘is about holding people to their representations, and is as such very close to contract’. Edelman says ‘(t)here is no reason why the breach of an estoppel-promise should be treated differently from a breach of a contractual promise’, and says that since *Giumelli* it is not possible to view estoppel as a wrong. Edelman notes that if estoppel is a wrong the plaintiff’s reliance should be protected, but the court in *Giumelli* appears to have considered

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256 Robertson, ‘Situating Equitable Estoppel within the Law of Obligations’ above, n 189; but see also Spence, *Protecting Reliance: the Emergent Doctrine of Equitable Estoppel*, above, n 189.

257 Robertson, ‘Situating Equitable Estoppel Within the Law of Obligations’, above, n 189, 57.

258 Ibid. However, Robertson notes that courts also give expectation relief, which would situate equitable estoppel as the equivalent to contract: Ibid, 58.

259 Ibid. However, Robertson notes that courts also give expectation relief, which would situate equitable estoppel as the equivalent to contract: Ibid, 58.


261 Edelman, *Gain-Based Damages*, above, n 49, 188.


263 Edelman, above, n 238, 195.
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detriment to be that which would result from resiling from the assumption rather than the loss from reliance. Further, if equitable estoppel is a wrong, it is hard to see why recovery can be reduced due to third party interests.

It is difficult to determine whether or not equitable estoppel can be regarded as a wrong on the basis of authority. However, the fact that equity does not enforce all promises, or even give relief against reliance on all promises, tends to support wrongs analysis. Equity only grants an estoppel where there is wrongfulness in the defendant’s attempt to resile from the representation that has engendered the expectation. Because no estoppel arises where it would not be wrongful to so resile, estoppel is arguably best seen as wrong. This is illustrated by the English decision, Sledmore v Dalby. Mr and Mrs Sledmore purchased a house in 1962. In 1965, their daughter married Dalby and the couple moved into the house as tenants, paying a weekly rent. In 1976, the daughter became seriously ill and died in 1983. Dalby made improvements to the house between 1976 and 1979, and although he paid no rent after 1976, he paid rates and outgoings. Mr Sledmore died in 1980, and in 1990 Mrs Sledmore sought possession of the property. The Court of Appeal held that it was no longer inequitable for Mrs Sledmore to regain possession. Any detriment Dalby had suffered was counterbalanced by his 15 year rent free occupation of the property. There was nothing wrongful in Mrs Sledmore resiling from the assumption that had been created.

If equitable estoppel is a wrong, compensation for loss seems appropriate. If the remedial basis of the estoppel action is reliance-based, equitable compensation is the appropriate remedy, and should be assessed on the basis of loss. But, if the aim of the action is to fulfil promises, then fulfilment of the promise is the appropriate remedial response, although compensation for non-fulfilment could be one of the appropriate remedies. This is reflected in the approach of Mason CJ in Verwayen. In either case,
whether expectation relief or reliance relief is ultimately adopted, the scope for equitable compensation awards appears justified. However, the approach of fulfilling the promise unless that is for some reason unjust (in which case a monetary award is made in lieu) appears to be on the ascent in Australia. This suggests that although there is scope for awards of equitable compensation, there will be little call for them as a remedy in estoppel cases.

6.9 CALCULATION OF EQUITABLE COMPENSATION FOR EQUITABLE ESTOPPEL

Although equitable compensation can be justified as a remedy for equitable estoppel whether relief for that doctrine is reliance-based or expectation-based, it is not clear that the same kind of assessment principles can apply to both. Further, neither of these bases necessarily mirrors the calculation of equitable compensation for other equitable breaches. For example, Edelman concludes that 'the money award made to satisfy the expectations of the promisee ...is compensatory damages calculated for a breach of contract', and advocates treating estoppel cases in the same manner as actions for breach of a contractual promise. If the bases of equitable compensation in recognised classes are considered, namely reconstitution of the trust fund in cases of breach of trust, and removing the effect of the fiduciary’s conflict upon transactions entered into, it can be seen that estoppel based on expectation relief does not lend itself to analysis in those terms, although reliance relief might.

(i) Calculation of expectation relief

Assuming that expectation relief becomes dominant in the field of estoppel, equitable compensation has only a small role to play. This is in those cases where it would not be just and equitable to enforce the promise. How then is this figure to be calculated?

267 Edelman, Gain-Based Damages, above, n 49, 188.
Some small amount of guidance can be extracted from *Waltons* and *Giumelli*. In *Waltons*, although the issue was not really discussed, the trial judge’s order for damages in lieu of specific performance was upheld. In *Giumelli*, the matter was remitted back to the Supreme Court of Western Australia to calculate an amount ‘representing the present value of the promised Lot’ taking into account various valuations and allowances on both sides, it being ‘neither possible nor appropriate now to fix any closed list of matters properly to be taken into account when the matter is remitted.’ These two examples tend to indicate a starting-point of the full monetary equivalent of the expectation, reduced if necessary to do equity to all litigants, and any third parties. The full monetary equivalent of expectation strongly resembles recovery for breach of contract.

Causation is limited to proving the link between a representation reasonably relied upon and detriment that has, or will, be caused by the representor resiling from the promise. That detriment is the non-satisfaction of the expectation. A simple ‘but for’ test suffices. The question asked is: what position the plaintiff would have occupied but for the non-fulfilment? There is no extra causative question concerning loss because the monetary equivalent of expectation is being calculated. This resembles contract law. However, in contract law, the chain of causation can be broken by independent acts or events that can be seen as the sole cause of the damage. This would be at odds with general equitable doctrine and it is not clear how analogous contract analysis is here. In any event, equity can accommodate what the common law would see as breaks in the chain of causation within the concept of scope of the duty. If the basis of equitable estoppel is to prevent unconscionable departures from induced assumptions, then the scope of the ‘duty’ is not to depart from the representation. As a matter of logic, only those matters covered by the assumption can be sheeted home to the representor. If the true cause of the loss is in fact referrable to an independent event, that loss is outside the scope of the representation. If the

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270 Ibid, 126.
271 Ibid, 125-6.
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Giunnelli facts are altered slightly, this becomes apparent. Suppose a freeway was built very close to the disputed land, but not so close as to require its resumption. Robert Giunnelli could still complain if the land was not transferred to him, but he could not complain that the amenity of the land had decreased, and he was getting something less than he had been promised. The scope of the duty is not to depart from the representation, not to ensure the promisee receives the full value of what was promised. The change in the value of the land is outside the scope of the representation.

(ii) Calculation of reliance relief

If reliance relief is ultimately recognised as the correct basis of the remedy, the focus of the remedy moves from the expectation to the detrimental reliance. The plaintiff must show that reasonable reliance on the representation caused or will cause the detriment complained of. Demonstration of detriment alone is not enough. Loss must then be compensated, and it is reasonable to require a causative link between the plaintiff’s reliance on the representation and the alleged loss. This point is rarely tested in the case law, no doubt in part due to the overwhelming tendency to provide expectation relief. When it does arise, there is then doubt about the proper causation test to be applied. The ‘but for’ test has obvious claims being the test usually adopted by equity, though made specific to the duty breached.

In one reported case, a ‘common sense’ test was apparently applied. In Gray v National Crime Authority a husband and wife went into the witness protection scheme in New South Wales for 7 years. The police officer who entered them into the scheme was found to have made representations concerning immunity from prosecution, physical protection and future financial security to the husband in a situation that gave the husband very little time for reflection. The trial judge, Austin J, held these representations were sufficient to establish an estoppel, when the National Crime Authority later resiled from the

274 Ibid, [194-6].
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representations and released the couple from the scheme without any financial security.\textsuperscript{275} The trial judge does not appear to have considered any changes \textit{Giumelli}\textsuperscript{276} may have made to the doctrine of equitable estoppel, apparently awarding reliance relief rather than expectation relief. Equitable compensation was the appropriate remedy in the circumstances, but recovery was limited to ‘compensation for the loss caused by the defendant’s unconscionable conduct’.\textsuperscript{277}

However, the ‘loss caused by the defendant’s unconscionable conduct’ and ‘detrimental reliance’ are not necessarily co-extensive concepts. For example, in \textit{Gray}, reliance had caused (in part) the plaintiff’s entry into the witness protection scheme. That entailed a variety of economic losses for the couple caused by their abandonment of their old lives, which may or may not have included an amount to tide them over through rehabilitation into the community. But the loss caused by the unconscionable conduct, that is, the wrongful departure from the assumption, was the non-fulfilment of the expectation that they would be financially secure, in addition to the clearly incurred economic losses.

\textit{Austin J} then considered the appropriate causation test to be applied. Although application of the ‘common sense’ test was not in dispute between the parties, \textit{Austin J} indicated that he regarded it as appropriate on the facts. His Honour did not draw a distinction between cases of breach of trust and breach of fiduciary duty, or for that matter, equitable estoppel. ‘In my view’, he said:

\begin{quote}
the choice of a ‘common sense’ test in some cases and a ‘but for’ test in others does not mean that the authorities are inconsistent. Rather, it demonstrates that the principles governing equitable compensation have about them a measure of flexibility, which enables the Court to choose the most appropriate means to
\end{quote}

\textsuperscript{275} The decision was largely reversed on appeal, on its facts. However, Mrs Gray was still found to be entitled to compensation for an economic loss she incurred at time of entry into the scheme: \textit{Australian Crime Commission v Gray} [2003] NSWCA 318 (unreported, Mason P, Tobias JA; Ipp JA dissenting, 22 December 2003).

\textsuperscript{276} (1999) 196 CLR 101.

\textsuperscript{277} [2003] NSWSC 111 (unreported, Austin J, 28 February 2003) [252].
redress unconscionable behaviour in the circumstances of the case. In some cases a ‘but for’ approach is the common sense approach. In other cases, a strict ‘but for’ approach may produce a distorted outcome.\(^{278}\)

His Honour went on to note that the couple satisfied the ‘but for’ test, because they would not have acted ‘just as they did but for (the) representations.’\(^{279}\) Thus, his Honour’s diversion to common sense causation may not have been necessary, or justified. ‘But for’ causation suffices, because it has never been the case that the representation has to be any more than one of the reasons the plaintiff acts (or conversely, fails to act) to her detriment. Had his Honour really been awarding relief for detrimental reliance, rather than expectation relief, the ‘but for’ test would have sufficed.

The plaintiff must show affirmatively that the reasonable reliance is causally linked to the detriment. The plaintiff does not have to show that departure from the assumption caused the detriment. Austin J appeared to think that the plaintiffs might not be able to satisfy a ‘but for’ causation test, saying ‘(it) is a little more difficult to say that the plaintiffs would not have suffered their losses but for the defendant’s representations,’\(^{280}\) but it is more correct to question whether the plaintiff reasonably relied on the representations. This is a question of fact. Once reliance is established, it is wrongful for the defendant to depart from the expectation. The detriment and the reasonable reliance must be causally linked, but the detriment and the wrongful conduct do not require a separate causal link.\(^{281}\)

Concerns about the potentially limitless quantum that arise in cases of breach of fiduciary duty do not cause the same disquiet in equitable estoppel. The action has a natural limit placed upon its remedial response. Whether expectation is being fulfilled or reliance

\(^{278}\) Ibid, [255]; that said, it is arguable that Austin J went on to calculate an amount equivalent to fulfilling the expectation.

\(^{279}\) Ibid, [256].

\(^{280}\) Ibid.

\(^{281}\) This is borne out by the decision on appeal. This was that Mrs Gray was entitled to compensation for one item of economic loss at time of entry into the scheme: *Australian Crime Commission v Gray* [2003] NSWCA 318 (unreported, Mason P, Tobias JA; Ipp JA dissenting, 22 December 2003).
relieved, it is not possible to recover more than expectation interests. All that the court is providing relief for is the unconscionability inherent in the defendant resiling from the representation. The best the court can do is enforce the representation. If the plaintiff suffered detriment exceeding the expectation encouraged by the representation, that loss cannot be sheeted home to the defendant. 282

(iii) Types of Compensable Loss

Regardless of which approach is ultimately adopted, one potential difficulty arises in relation to the calculation of compensation for estoppel. This is the question whether it is really possible to use equitable estoppel to recover compensation for emotional harm, pain and suffering. In Australia, equitable remedies generally only attempt to fulfil equity's restoration aims, which are limited to restoration to the economic position that should have been occupied. This last statement is challenged by cases like *Verwayen* 283 and *Clark*. 284 (another *Voyager* naval disaster case) where harm to the plaintiff's emotional state possibly constituted detriment.

*Verwayen* 285 can mislead, because only two members of the court would have decided in the plaintiff's favour on the basis of equitable estoppel alone. *Clark* 286 may also be misleading if taken too literally here. In both cases, the claimed estoppel was for use as a 'shield' against the Commonwealth's attempts to amend pleadings. Use of estoppel as a shield rather than as an independent cause of action may facilitate enforcement of the expectation. 287 The detriment in both cases remained hypothetical, and would remain so until such time as the Commonwealth was allowed to resile. Factually, both cases lead to an

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282 Ibid. The detriment of not being looked after indefinitely exceeded the expectation encouraged by the representation.
283 Commonwealth v Verwayen (1990) 170 CLR 394.
287 See discussion in Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*', above, n 189, 837-40.
all-or-nothing response. However, if only reliance relief were to have been ordered, the High Court in *Verwayen* \(^{288}\) were divided as to what amounts could be included.

It would be more consistent with equity’s usual aims concerning restoration to the appropriate economic position if non-economic losses were excluded from calculation. Even though some of the *Verwayen* \(^{289}\) court indicated psychological damages could possibly be included under reliance relief, it is reasonably clear that neither Verwayen nor Clark could have recovered extra damages referable to the Commonwealth’s attempt to resile from its promise. That is, the plaintiffs could not have had their promises fulfilled and also recovered damages for the additional emotional damage they may have suffered. The upper limit of recovery for equitable estoppel is fulfilment of the expectation, and that holds true even when the monetary equivalent is ordered.

Therefore it should not have been possible to compensate either Verwayen or Clark for the extra stress caused by the Commonwealth’s attempt to resile, had the court decided against fulfilling the expectation. Reliance based relief should protect against detrimental reliance, but it should not compensate for disappointment. Lack of a proper jurisdiction to award personal injury compensation in these extreme cases is no doubt another reason why courts have preferred to provide expectation relief.

### 6.10 CONCLUSION: EQUITABLE ESTOPPEL

It seems clear that equitable compensation is available to remedy equitable estoppel, and may in some cases be the only method by which the plaintiff can obtain relief. However, it is not possible to describe with any certainty the remedial basis of such awards. Even though estoppel appears to be a wrong, it is apparently usually remedied with expectation fulfilment. If reliance based awards are eventually adopted as the correct

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\(^{288}\) (1990) 170 CLR 394.

\(^{289}\) Ibid, 448-9 (Deane J), 462 (Dawson J), 487 (Gaudron J) and 504 (McHugh J).
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remedy for equitable estoppel, then there seems no other way of calculating those awards except by reference to the plaintiff's loss, giving great scope for an equitable compensation jurisdiction. Awards will then be made according to 'but for' causation, the plaintiff being placed in the position he would have occupied but for the detrimental reliance on the representation.

On the other hand, if expectation based awards eventually dominate, there is little need for equitable compensation calculated by reference to the plaintiff's loss. The appropriate remedy will be to fulfil the promise, which bears no relationship to compensating the plaintiff for any loss. The exception will be in cases where fulfillment of the promise has become impossible or undesirable. It might then be appropriate for an award to be made on the basis of compensation for that non-fulfilment, but again, this is not calculated according to loss. What is achieved is the monetary equivalent of fulfilment. Seen in this light, the term 'equitable compensation' when used for expectation relief for equitable estoppel would only signify that the cause of action was based in equity rather than the common law. Its application in cases of expectation relief for equitable estoppel is extremely limited.

6.11 CONCLUSION: EQUITABLE COMPENSATION FOR OTHER CAUSES OF ACTION

In the three examples of causes of action examined, the potential for employment of equitable compensation appears overstated. It is not presently available in cases of undue influence, although that development has been mooted. Rescission, including pecuniary rescission seems to be a better remedy in most undue influence cases, especially those where the defendant cannot be said to have committed a wrong. Equitable compensation may perhaps be available for unconscionable conduct because it is possibly a wrong.


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However, in Australia, there are good arguments against its extension into that field. These arguments find their basis in the current understanding of the cause of action, most notably in the ready identification of 'special disadvantage' and in the possibility that constructive notice may suffice to attract the court's attention. Further, the transactional nature of the cause of action indicates that rescission should satisfy any remedial objective.

Equitable compensation calculated for loss is not justified as a remedy for either undue influence or unconscionable conduct; it is an unnecessary response to those doctrines, because in each case the plaintiff can be fully restored through the remedy of rescission (including pecuniary rescission).

On the other hand, with the cause of action of equitable estoppel, equitable compensation should be available (and may already be available), albeit in a limited way. If reliance relief is the correct remedial basis, that can only be achieved by compensation calculated for loss. If expectation relief is preferred, that can be satisfied either by performance of the promise, or compensation calculated for disappointment of the expectation (in short, as for breach of contract). In any case, though, there is a natural upper limit upon recovery, namely fulfillment of the promise. Equitable compensation poses no threats of run-away awards in this cause of action. However, the remedy will remain of little real use in equitable estoppel cases if the overwhelming trend to award expectation relief continues.

These three causes of action, together with the three examined in earlier chapters, demonstrate that the remedy of equitable compensation is specific to each particular cause of action, and dependent upon the proper description of the action. Equitable compensation is not necessarily an appropriate or essential remedy for all equitable actions. Equitable compensation is only justified where it is required in order to satisfy equity's interest in restoration. This is frequently fulfilled by other remedial responses. Causatively, the 'but for' test suffices for all causes of action examined, but it must always be remembered that the test is context-sensitive. The 'but for' formula is meaningless unless considered in the context of each particular cause of action.
Arguments that common law principles should be used to adjust awards of equitable compensation surface regularly. Recently, claims that notions of contributory fault and exemplary damages should be assimilated into equity have been judicially considered. This chapter will consider whether some of the adjusting concepts of common law are necessary or justified in the context of equitable compensation. In particular, the notions of contributory fault, mitigation and exemplary awards are discussed. It will be shown that, assuming equitable compensation has been calculated so as to restore the plaintiff to its proper economic position, there is no need to adopt these common law adjustments.

7.1 CONTRIBUTORY FAULT

In negligence actions the defendant’s liability can be reduced in circumstances where the plaintiff’s own lack of care has contributed to the loss. The purpose of the doctrine is to overcome the risk that the defendant is held responsible for damage he did not cause. The plea of contributory negligence was originally a more extreme defence, completely barring the plaintiff’s recovery. Legislation now covers the field in all Australian states, and typically defines the defence as confined to cases where negligence


2 The plaintiff must have failed to take reasonable care for its own safety or interests: Barclays Bank plc v Fairclough Building [1995] 1 All ER 289.

3 For example, The Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s 10 (1) provides: Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as
is pleaded against the defendant. Therefore, \textit{prima facie} the plea does not apply to deceit,\textsuperscript{4} intentional torts or other compensatory claims such as for breach of contract\textsuperscript{5} or breach of an equitable duty. Nevertheless, because equity aims only to restore and not to overcompensate, fears that failure to take contributory fault into account will result in an inequitable result are frequently aired. Most cases in which arguments concerning contributory fault have arisen have concerned breaches of fiduciary duty, and for that reason, discussion of fiduciary breach will dominate.

(i) Breach of Trust

The concept of trust is antithetical to the proposition that a beneficiary can bear any responsibility in relation to \textit{performance} of the trust. The requirement that the trustee reconstitute the trust estate trumps any suggestion that the beneficiary has contributed to the loss. In \textit{Alexander v Perpetual Trustees WA Pty Ltd} \textsuperscript{6} Rolfe J held that, even though he would have apportioned liability had the matter turned on negligence, the ‘highest duty’\textsuperscript{7} owed by a trustee to a beneficiary entitled the beneficiary to full reconstitution of the trust estate, without reduction for contributory negligence. Rolfe J’s judgment was affirmed on appeal to the New South Wales Court of Appeal,\textsuperscript{8} and again on further appeal to the High Court.\textsuperscript{9} The majority\textsuperscript{10} said Rolfe J’s conclusion as to contributory negligence ‘was correct.’\textsuperscript{11} \textit{Per se}, there is no scope for the concept of contributory negligence or fault in the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.

\begin{itemize}
\item \textsuperscript{4} \textit{Standard Chartered Bank v Pakistan National Shipping Corp} [2003] 1 All ER 173.
\item \textsuperscript{5} \textit{Astley v Austrust Ltd} (1999) 197 CLR 1.
\item \textsuperscript{6} (1998) 29 ACSR 642.
\item \textsuperscript{7} Ibid, 757.
\item \textsuperscript{8} \textit{Alexander v Perpetual Trustees WA Ltd} [2001] NSWCA 240 (unreported, Stein JA, Davies and Ipp AJA, 30 July 2001); \textit{Alexander v Perpetual Trustees WA Ltd (No 2)} [2002] NSWCA 107 (unreported, Stein JA, Davies and Ipp AJA, 15 April 2002).
\item \textsuperscript{9} (2004) 204 ALR 417.
\item \textsuperscript{10} (Gleeson CJ, Gummow and Hayne JJ).
\end{itemize}
actions calling for reconstitution of the trust fund. Canadian authority that a statutory right to reduction of damages on the basis of contributory negligence is not available in cases of breach of trust supports this view.  

The trustee is the legal owner of the trust property and therefore carries all risks in relation to that property. However, as was discussed in Chapter 3, trustees are also fiduciaries, and can breach their fiduciary duties. There is no necessary corollary between recovery following breach of fiduciary duty and reconstitution of trust funds. In such cases, breaches are dealt with in the same manner as breaches by all non-trustee fiduciaries.  

(ii) Breach of fiduciary duty  

Chapter 4 argues that there are only two fiduciary duties; the duty not to make an illicit profit and the duty not to permit the continuance of an unresolved conflict of interest or duty. It has been shown that equitable compensation has no place as a remedy in cases of breach of the profits rule. Clearly, there is no scope for an argument concerning contributory fault when an account of profits is sought. Accounts of profits concern gains; arguments concerning degrees of fault arise in the context of loss.  

Nevertheless, a defendant ordered to account for profits made in breach of the profits rule is entitled to recompense for the time and effort put into the realisation of the profit. This is so whether the errant fiduciary is honest or dishonest in having sought the profit. This allowance is made to avoid the principal being enriched undeservedly at the expense of the fiduciary. Concern with the defendant’s position indicates equity is interested in justice inter partes. It might then be surprising if this concern did not extend to ensuring the plaintiff bear some responsibility where its own actions contributed to the loss

13 Boardman v Phipps [1967] 2 AC 46.  
15 It may be the case that the court can order a more generous amount in favour of an honest fiduciary; Boardman v Phipps [1967] 2 AC 46.
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... otherwise the plaintiff might be effectively profiting from its own lack of care. This thesis suggests the issue is better resolved at the threshold point; if the breach is within the scope of the fiduciary obligation there is no relevant sense in which the plaintiff can have contributed to the loss. Loyalty and disloyalty are unilateral. There is no real manner in which a principal owed loyalty can contribute to the disloyalty of the fiduciary. If, on the other hand, the breach is outside the scope of the fiduciary obligation, equity has no interest in the matter.

There are few reported decisions where a fiduciary has argued that the award against him should be reduced because the principal also caused the loss. The New Zealand decision *Day v Mead* is the best known example. Here, the plaintiff sued his former solicitor after losing money invested on the solicitor's advice. The solicitor was interested in the company in which the investment was made and did not resolve his conflict of interest. The trial judge allowed a reduction in the amount of equitable compensation payable on the basis that the plaintiff should have taken independent advice himself before making the investment. The plaintiff's appeal was dismissed, though the members of the bench expressed their reasons for allowing the reduction differently.

Somers J referred to *Re Dawson* and said compensation should be assessed according to 'considerations of conscience, fairness and hardship and other equitable features such as laches and acquiescence.' However, his Honour then appeared to introduce notions of contributory negligence, saying the plaintiff had displayed a want of

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17 *[1987] 2 NZLR 443*. See also *Taylor v Schofield Peterson* [1999] 3 NZLR 434; *Equiticorp Industries Group Ltd (in stat man) v R (No.47)* [1998] 2 NZLR 481, 659-660 (Smillie J), where an award of equitable compensation for knowing assistance in a breach of fiduciary duty was reduced on the basis the plaintiff shareholders should have taken care to ensure they knew what the fiduciary was doing.
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care that went beyond his reliance on the fiduciary. With respect, this is difficult reasoning to follow, because it appears to conflate three separate concepts: traditional equity learning on recovery; contributory negligence; and the question of scope of the fiduciary relationship. Casey J said the aim should be to award the plaintiff 'no more than the loss fairly attributable to the defendant, or no more than the property or expectation of which he has been deprived.' This remark appears directed at causation of loss rather than award reduction.

Two other members of the court were more obviously in favour of assimilation of tortious concepts. Hillyer J said contributory negligence was a convenient way of calculating the plaintiff's loss. In a much criticised judgment, Cooke P said he saw no reason not to assimilate the concept of contributory negligence, especially after fusion between the common law and equity. Cooke P said that he was not applying the apportionment legislation but found the concept of contributory negligence helpful as an analogy.

Commenting extracurially, Handley J says Day v Mead was wrongly decided because contributory negligence has never been a defence to an action for legal or equitable fraud. In such cases, awards are not susceptible to reduction even if there are other causes of the loss. This categorisation automatically excludes most cases of breach of fiduciary duty, where disloyalty and dishonesty usually go hand in hand. Gummow J is also critical

20 Ibid.
21 Ibid. 468.
22 Ibid. 469.
24 See above, n 3 and text. The wording of the legislation excludes application to equitable compensation.
25 Handley, above, n 23, 127.
26 [1987] 2 NZLR 443.
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extracurially. He draws a distinction between the demands placed on a defendant via the law of negligence and those placed on a fiduciary in equity. The fiduciary's duty is:

one of undivided and unremitting loyalty...One must fear that the introduction of concepts of contributory negligence into that setting inevitably will work a subversion of fundamental principle. \(^{27}\)

Justice Gummow's other objection is technical. He notes that if statutory contributory negligence schemes do not apply to equitable compensation, \(^{28}\) one is thrown back to the old common law position; a plea of contributory negligence would be a complete defence to a claim for equitable compensation rather than a method of apportionment. \(^{29}\) The plaintiff would be denied a remedy.

*Day v Mead* \(^{30}\) has received support in Canada where the majority in *Canson* cited the decision positively. \(^{31}\) Davies also favours apportionment, in part because of the close relationship between contributory fault and mitigation, and the lack of consistency if one is included (as he says mitigation is) in the calculation of equitable compensation but the other excluded. \(^{32}\) Beatson claims that the fears expressed by Justice Gummow are largely unfounded.

The argument is made that introduction of contributory negligence would subvert the fundamental principle that a fiduciary's duty is one of 'undivided and unremitting loyalty'...the argument appears to assume an oversimplified and rather two-dimensional version of the doctrine of contributory negligence. ...it appears to take insufficient account of the way in which contributory negligence

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\(^{27}\) Gummow, above, n 23, 86.

\(^{28}\) Statutory schemes do not usually apply to reduce equitable compensation because their language is generally limited to 'damages' for 'negligence'.

\(^{29}\) Gummow, above, n 23, 86

\(^{30}\) *Day v Mead* (1987) 2 NZLR 443.

operates in a context in which the relevant risks have been assigned (whether by agreement or by law) to the defendant.  

Contributory negligence in equity came up before the High Court for discussion, though not decision, in *Pilmer v Duke Group*. One company had been attempting a takeover of another company. The directors of the first company were interested in the second company. As a result, stock exchange regulations required an independent report be prepared by accountants certifying as to the value of the shares being purchased, to enable shareholders to be properly informed before voting in general meeting on the takeover proposal. However, the accountants took their instructions from the concerned directors, doing as they were told, and delivering a wildly inaccurate valuation of the takeover target.

It was claimed that the accountants owed the company a fiduciary duty in preparation of the report which they had breached by being in a position of conflict. The accountants admitted contractual and tortious breaches, but denied that they owed a fiduciary obligation. The trial judge agreed. This was overturned on appeal to the Full Court of the Supreme Court of South Australia. At that point, the case provided an example of where monetary compensation was available for negligence, breach of contract and breach of fiduciary duty. Damages for negligence were susceptible to reduction for contributory negligence on the part of the plaintiff. However, the High Court decision in *Astley v Austrust Ltd* was binding upon the Full Court and damages for breach of contract

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35 *Duke Group Limited (in liq) v Pilmer* (1999) 73 SASR 64, 86-7. The accountants altered the report to remove certain information and increase the valuation at the request of the general manager. The trial judge commented that the relationship between the accountants and the company’s controllers was one of subservience.
36 (1999) 197 CLR 1. In that case, the defendant was concurrently liable for a breach of contract and a breach of a duty of care. The High Court held by a majority that damages for breach of contract could not be reduced under the relevant apportionment legislation, even though there had been contributory
could not be reduced in a like manner. The Full Court then considered contributing fault in the context of equitable compensation. Their Honours thought that it was appropriate to make allowance for the plaintiff’s conduct that contributed to the loss.

It would seem to us ... a plaintiff should not be accorded relief against the wrongdoing of the defendant without accounting at the same time for his own want of care in protecting himself. To do otherwise is to allow the plaintiff to profit from his own wrongdoing - a principle foreign to the notions of conscience at the heart of equity.  

The accountants appealed to the High Court against the fiduciary finding and the order for equitable compensation. The majority of the High Court found there was no fiduciary breach, and did not need to discuss compensation, but offered up some brief comments. Their Honours were not prepared to rule out the possibility that the amount recoverable for equitable compensation might exceed damages awarded in contract in an appropriate case. However, they were most damning of the possibility that contributing fault could be used to reduce an award of equitable compensation. Astley v Austrust Ltd indicated ‘the severe conceptual difficulties in the path of acceptance of notions of contributory negligence as applicable to diminish awards of equitable compensation for negligence by the plaintiff. The decision has been the subject of criticism in Australia. See, eg A Freilich, ‘Contributory Negligence and Breach of Contract: The Implications of Astley v Austrust Ltd’ [2000] 29 Western Australian Law Review 18.

Astley v Austrust Ltd (1999) 73 SASR 64, 249. The plaintiff company’s contributing fault, according to the Full Court, was to engage the accountants in the first place (at 256). Fiduciary duties are owed to the company; it is only in unusual cases that fiduciary duties are owed to shareholders: see Coleman v Myers [1977] 2 NZLR 225. Therefore, it is arguable that the company exposed itself to breach of fiduciary duty: see Canadian Dredge and Dock Co Ltd v The Queen (1985) 19 DLR (4th) 314. However, this tends to overlook the realities. What was found to have occurred was that the directors hired the accountants, with the knowledge that the accountants would act in the personal interests of those directors. It seems inconsistent to say that the conflict that constituted the breach was the clash between the interests of the company and the interests of the directors, and yet maintain that the company somehow contributed to the choice of accountants, when, in fact, the directors selected the accountants. The plaintiff raised this point on appeal to the High Court but it was not addressed by the bench. Perhaps it would have been more satisfactory had the non-aligned shareholders been regarded as the party owed the fiduciary duty.

Ibid.

breach of fiduciary duty.\textsuperscript{40} Contributory negligence, it was said, focused on the conduct of the plaintiff, while fiduciary law focused on the obligations of the fiduciary to act in the interests of the plaintiff.\textsuperscript{41}

With respect, this interpretation stresses a very narrow understanding\textsuperscript{42} of the term 'contributory negligence'. What is relevant is that, in negligence, risks have not necessarily been pre-assigned to one party or the other. The court assesses the risks created by both the defendant and the plaintiff. On the other hand, once the scope of the fiduciary obligation owed is determined, risks have been assigned. The fiduciary carries the risk of losses caused by his disloyalty within the scope of that obligation. The decision shows that the conduct of the plaintiff is irrelevant to the disloyalty of the fiduciary.

Kirby J\textsuperscript{43} was possibly even less encouraging than the majority. His Honour did not 'consider that equitable remedies...are chained forever to the rules and approaches of the past.'\textsuperscript{44} However, he recognised the traditional arguments against adopting an idea of contributory fault,\textsuperscript{45} and found the attitude of the High Court expressed in \textit{Astley v Austrust Ltd}\textsuperscript{46} overwhelming: 'the attempt to push common law notions of contributory negligence, as now modified by statute, into equitable remedies collapses in the face of insurmountable obstacles.'\textsuperscript{47}

\begin{thebibliography}{9}
  \bibitem{40} \textit{Pilmer v The Duke Group Ltd (in liq)} (2001) 207 CLR 165, 201.
  \bibitem{41} Ibid.
  \bibitem{42} Ibid, above, n 33, 256.
  \bibitem{43} His Honour would have held that the accountants breached a fiduciary duty. Nevertheless, he agreed that equitable compensation could not be reduced on the basis of contributory fault: \textit{Pilmer v The Duke Group Ltd (in liq)} (2001) 207 CLR 165, 203-233.
  \bibitem{44} Ibid, 230.
  \bibitem{46} \textit{Astley v Austrust Ltd} (1999) 197 CLR 1.
\end{thebibliography}
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Other respected courts do not see the obstacles as so insurmountable. Rolfe J in *Beach Petroleum NL v Abbott Tout Russell Kennedy* thought that taking contributing fault into account was a logical extension of the law of equitable compensation in cases concerning commercial circumstances. Similar thinking was illustrated recently in *Nationwide Building Society v Various Solicitors (No 3).* The plaintiff building society made advances to various borrowers. It retained twelve firms of solicitors which already acted for the borrowers to also act on its behalf. In each case the solicitors breached the conflicts rule, failing to disclose to the building society some information that (it claimed) would have stopped the loan going ahead. The English High Court reduced compensation payable by the defendants on the basis of the building society’s contributory negligence. Behaviour contributing to the loss included failure to provide explicit instructions to the solicitors, failure to heed industry warnings concerning lending practices, and acceptance of risky loans.

Some of these factors can be accounted for in an equitable system that demands ‘but for’ causation, but denies contributory fault. For example, failure to provide fulsome instructions can be described as placing some of the duties that would otherwise be required of the solicitor outside the scope of the fiduciary duty. It is not so easy to explain failure to pay attention to industry warnings and accordingly modify business practices as a matter readily excluded by reference to causation tests for breach of fiduciary duty. It suggests, however, that the status of the plaintiff can be important. It may be more difficult to resist claims of contributory fault where the plaintiff is a well-advised commercial enterprise.

This thesis suggests the better explanation involves a consideration of risk assignment. The building society was in a much better position than the various solicitors to appreciate risks associated with industry warnings and questionable loans. Those risks were

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49 Ibid, 304.
51 The information varied on a case-by-case basis but included instances of the purchaser overstating the purchase price in the loan application, failures to disclose other borrowings to make the purchase, and successive contracts of sale.
already incurred before the solicitors became involved. The building society should not be able to shift those risks to the solicitors merely because solicitors are assumed to be acting as fiduciaries. These situations may be best solved by a more searching identification of the scope of the fiduciary obligation owed at the outset, rather than later adjustment by reduction for contributory fault.

Ho suggests rather than rejecting the plea of contributory negligence altogether, a better solution would be to adjust the degree of fault required on the plaintiff to suit the special circumstances of someone who has reposed confidence in another. She concludes that:

the plea of contributory negligence should be available if a principal's conduct is such that he can be said to have accepted the risks of the impugned transaction rather than relied on his fiduciary agents to protect against those risks. This proposed partial plea should simply be called 'contributory responsibility' as negligence is no longer the requisite degree of fault.\(^52\)

Ho is correct that the matter really concerns allocation of risks. The shortcoming with this argument is that it should be unnecessary to resort to a plea of contributory fault. If the plaintiff has not relied on the fiduciary in respect of particular risks, those particular risks should on a proper consideration fall outside the scope of the fiduciary duty. This suggests courts should approach questions of the scope of fiduciary obligations in a more critical frame of mind. This is especially so in the case of status-based relationships traditionally regarded as fiduciary.

For Australian purposes, notions of contributory fault as a limitation to awards of equitable compensation appear totally ruled out for the foreseeable future. Equitable technique is to deny the defendant's actions caused the plaintiff's loss,\(^53\) or to exclude the

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\(^{52}\) L Ho, 'Attributing losses to a breach of fiduciary duty' (1992) 12 Trust Law International 66, 74.

relevant act from the scope of the fiduciary’s duty.\(^5^4\) Ironically, frequently the effect is to provide a full answer to the principal’s claim of breach of fiduciary duty; Gummow J’s fear that allowing a plea of contributory negligence would relieve defendants of liability is paradoxically realised by not allowing such a plea. Nevertheless, if the loss is outside the scope of the fiduciary obligation, a defendant should not be liable for it, merely because he owes the plaintiff fiduciary obligations in respect of other risks.

(iii) Breach of confidence

The structure of the action of breach of confidence virtually rules out contributory fault by the consider limiting recovery against the confidant. Certain relatively well-defined elements must be proved to establish an action for breach of confidence. The information must be confidential to the plaintiff, obtained in confidential circumstances, and its use must be unauthorised.\(^5^5\) It is an absolute responsibility.

If the plaintiff has somehow failed to take care of its information or own interests, this might possibly go towards defeat of the claim, but not on the basis of contributory fault. For example, careless behaviour by the plaintiff tends to totally destroy the claim of confidentiality, as is shown in *Fractionated Cane Technology Ltd v Ruiz-Avila*.\(^5^6\) The plaintiff demonstrated his machine to the defendant without in any way claiming confidence or indicating a limit on the defendant’s use. In that situation no obligation of confidence arose. If the plaintiff has seriously contributed to the situation where its information is used, it is highly unlikely an obligation of confidence will have arisen. There are no cases where it has been held that an obligation of confidence exists, but recovery for unauthorised use is reduced due to the plaintiff’s own fault.

\(^5^4\) *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, 165 (Stevenson J); *Day v Mead* [1987] 2 NZLR 443, 462 (Somers J).

\(^5^5\) See generally Chapter 5.

\(^5^6\) [1988] 1 Qd R 51.
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(iv) Undue Influence

Equitable compensation is arguably not available for undue influence. The traditional remedy is rescission of the subject transaction. The essence of the action is a demonstration that the plaintiff can no longer be said to have consented to the transaction in question. Unsurprisingly then, there are no reported cases where the defendant has claimed that the plaintiff's lack of care entitles her to a reduced remedy.

However, Cheese v Thomas may present an example of some kind of reduction of compensation. A relationship of presumed undue influence was found to exist between a young man and his older uncle, which resulted in them purchasing a residence together. No wrongdoing was alleged against the nephew, but he was not able to rebut the presumption that undue influence had been used to conclude the transaction. In the meantime, the house had dropped in value. Instead of ordering return of the full sum invested by the uncle, the court ordered the house be sold and the proceeds distributed pro rata, based on the respective contributions. Arguably, this might be seen as a reduction for contributory fault; however Chin-Wishart argues convincingly that it is best seen as a successful defence of change of position on the part of the nephew.

(v) Unconscionable Conduct

The reports on unconscionable conduct are littered with plaintiffs who might be thought to have realised they were in a position where they should take care. Yet there has never been a suggestion that these plaintiffs were under any responsibility to take care for themselves. This is due to the nature of the cause of action. What is relevant is that the special disadvantage under which the plaintiff operates is sufficiently obvious to the defendant. There is no scope within that concept for contributory fault by the plaintiff. As long as the requirement of knowledge of the special disability by the defendant is not

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57 [1994] 1 WLR 279.
overly diluted, there are sufficient similarities between the doctrine of unconscionable conduct and the tort of deceit to justify the exclusion of the plea of contributory fault.

(vi) Equitable estoppel

Like breach of confidence, the action of equitable estoppel appears to rule out any possibility of a claim for contributory fault. A plaintiff claiming equitable estoppel must affirmatively prove that the defendant made a representation that the plaintiff reasonably relied upon, and that detriment will be suffered if the representation is not fulfilled. The requirement that reliance on the representation be reasonable does not admit of a possibility that the plaintiff’s own behaviour contributed to the loss. If it can be established that the plaintiff’s own behaviour substantially contributed to the loss, the plaintiff’s reliance on the representation will not satisfy the requirement for reasonableness.

(vii) Conclusion: contributory fault

There is extremely limited scope for the application of a concept of contributory fault in the causes of action examined. The nature of the cause of action positively rules out a possibility of contributory fault in cases of breach of trust, breach of confidence, undue influence, unconscionable conduct and equitable estoppel. There may be a small window of opportunity in relation to breach of fiduciary duty. New Zealand, Canadian and recent English authority exhibit a willingness to describe reduction in awards of equitable compensation for breach of fiduciary duty as attributable to contributory fault. For Australian purposes, even this narrow window is firmly bolted. This thesis suggests that application of any concept of contributory fault is unnecessary. By analogy with tort, there is no place for argument concerning the plaintiff’s fault where the defendant has been fraudulent. This disposes of most cases of fiduciary obligation. If the risk involved is within the scope of the fiduciary obligation, the defendant is responsible for all the effects of his

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59 Thus, the Amadios might have realised their limitations: Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447; Diprose might have realised he was hopelessly infatuated with Mary Louth: Louth v Diprose (1992) 175 CLR 621.

60 See Chapter 6.4.

disloyalty. That is what is required to restore the plaintiff to her correct position. The defendant should not be responsible for risks outside of that scope. Equity determines risks carried by the defendant at an earlier stage than the law of negligence, without need to refer to a consideration of contributory fault.

7.2 MITIGATION

Mitigation at common law sets an appropriate level of behaviour for the plaintiff to achieve in response to the defendant’s breach of duty. The purpose of the doctrine is to encourage plaintiffs to take steps to cut their losses, rather than let them accumulate indefinitely. The standard set is that the plaintiff must take those steps a reasonable and prudent person would take to avoid loss. Thus, not all loss which might otherwise be said to flow from the defendant’s breach is recoverable from the defendant as damages in both contract and tort, and under the Trade Practices Act 1974 (CW).

However, the requirement that the plaintiff mitigate tends to be fairly plaintiff-friendly in application. In Banco de Portugal v Waterlaw & Sons Ltd, Lord Macmillan pithily noted that ‘criticism does not come well from those who have themselves created

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63 This differentiates mitigation from contributory fault, which does not apply to contract.
65 There are numerous propositions discernable from the cases indicating that the responsibility on the plaintiff is not onerous. For example, the plaintiff is not required to take steps that are not in its ordinary course of business: Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd [1976] 1 NSWLR 5, 9; the plaintiff is not required to take unacceptable risks: Metal Fabrications (Vic) Pty Ltd v Kelecy [1986] VR 507; and the plaintiff will not be prejudiced by financial inability to take reasonable steps in mitigation: Liebosh Dredger v SS Edison [1933] AC 449.
66 [1932] AC 452.
the emergency.' Continuing this theme, the onus of proof is on the defendant to show the plaintiff has acted unreasonably in failing to take some appropriate step to mitigate.

The policy consideration informing the plaintiff's responsibility to mitigate is an interest in justice _inter partes_. The defendant should be responsible for the damage she has caused but no more. Social interests are also served; it is clearly more efficient that the plaintiff act reasonably to limit loss suffered, rather than letting inefficient losses accrue. Therefore, the common law requires the plaintiff mitigate even though fraud on the part of the defendant has been established. Once the plaintiff becomes aware of the defendant's fraud, reasonable steps must be taken to mitigate the loss. This responsibility transcends the usual rules relating to recovery for fraud. Foreseeability is not relevant to damages for deceit but the plaintiff cannot ignore the need to mitigate. This reflects the efficiencies and justice required at both a personal and societal level. The question arises whether the same requirement to mitigate applies in equity.

(i) Breach of trust

The starting point in breach of trust in Australia is the case of _Re Dawson_. The famous statement of the law from that case is notable in that it makes no mention of mitigation, while expressly discounting other concepts such as foreseeability and remoteness:

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67 Ibid, 506.
69 It is misleading to regard the plaintiff's responsibility to mitigate as a duty although that terminology is often used. The plaintiff is not under any 'duty' in the positive sense. No one can enforce a 'duty to mitigate' against a plaintiff. Instead, the plaintiff might fail to recover part of the loss actually suffered if the plaintiff is proven to have failed to take sufficient steps to limit that damage.
70 This differentiates mitigation from contributory responsibility, which is irrelevant in cases of deceit.
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If a breach has been committed then the trustee is liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter...\(^\text{74}\)

This omission may mean that Street J implicitly viewed mitigation as being appropriate in certain circumstances. The more likely explanation is that the issue of mitigation did not arise in any manner on the facts of the case. As the primary obligation upon the trustee is to account for the trust fund, questions of mitigation will not arise easily. The only step required, or indeed possible, to repair any breach must be taken by the trustee. This is to reconstitute the trust fund.

Nor is it clear that beneficiaries can ever be under a duty to mitigate. Getzler, citing Canadian cases where mitigation was assumed to be available to reduce an award of equitable compensation,\(^\text{75}\) thinks there may be a duty to mitigate once the beneficiary discovers the trustee’s breach.\(^\text{76}\) Justice Gummow prefers to explain those cases as examples of where ‘a plaintiff who allowed his loss to continue unchecked was guilty of laches or acquiescence.\(^\text{77}\) Similarly, Alliott J in *Lipkin Gorman v Karpnale Ltd*\(^\text{78}\) called contributory negligence in the context of breach of trust a ‘short hand phrase to cover all conduct disentitling the plaintiff to recover.’\(^\text{79}\) Chambers says it is not clear whether beneficiaries have a duty to mitigate, ‘but in most cases they will have no power to do so.’\(^\text{80}\)

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\(^\text{74}\) Ibid, 214-5.


\(^\text{77}\) Gummow, above, n 23, 75.

\(^\text{78}\) [1992] 4 All ER 331.

\(^\text{79}\) Ibid, 357.

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Although it may not be acceptable for a beneficiary to allow a known loss-causing breach to continue unchecked without making complaint,\(^1\) it would be taking the matter further to require that beneficiaries take any more positive steps to mitigate (such as to sell up property, or carry on a business). If this is so, then the duty to mitigate for breach of trust would be a lesser thing than the common law equivalent.

Generally, beneficiaries should not be required to take steps to mitigate. This is evident in cases where beneficiaries are not *sui juris*, but the same principle should apply to all express trusts. The trustee’s legal ownership of the property justifies the beneficiary paying no attention to the trustee’s performance. There are no appropriate legal steps a beneficiary can take to mitigate loss caused by improper performance of the trust, save taking a complaint to a court of equity. Any such claim is then subject to equitable discretionary devices like laches. If the beneficiary fails to claim sufficiently quickly recovery may be reduced, although laches defences against claims for reconstitution of the trust are not often successful.\(^2\)

(ii) Breach of fiduciary duty

Mitigation only arises in respect of loss. It can never be at issue where the plaintiff complains of a breach of the profits rule, although justice may require the court limit the amount payable by way of account of profits for other reasons.\(^3\) However, questions of mitigation can arise when the issue is whether the fiduciary’s breach had led to a loss. There are Canadian authorities\(^4\) for the proposition that a principal is required to mitigate in such circumstances. There may also be Australian support. *Commonwealth Bank of*  

\(^1\) Evans, above, n 23, 640.  
\(^3\) *Boardman v Phipps* [1967] 2 AC 46.  
\(^4\) L Hoyano, ‘The Flight to the Fiduciary Haven’ in P Birks (ed) *Privacy and Loyalty* (Oxford, Clarendon Press, 1997) 174-6, notes that one of the reasons plaintiffs seek to establish the existence of a fiduciary relationship is in order to avoid the mitigation principle operating against the plaintiff in common law wrongs.  
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*Australia v Smith* \(^{69}\) was an appeal concerning a conflict of duties suffered by a bank manager in respect of the competing interests of two clients. The bank manager was found to owe fiduciary duties in addition to tortious and statutory duties. Von Doussa J at first instance reduced equitable compensation payable to the plaintiffs because:

(i)they realised by June 1989 ... that they had paid too much for the hotel business ...

They chose not to do so. Subject to the allowance of a reasonable time to sell the business once they realised the true position, the (plaintiffs) could not recover consequential loss thereafter. \(^{87}\)

The Full Court of the Federal Court affirmed the trial judge’s assessment of compensation as being of the same measure for breach of the tortious, equitable and statutory duties. Importantly, their Honours did not disapprove of the reduction in equitable compensation for what was arguably a failure to mitigate. Further, in *Permanent Building Society (in liq) v Wheeler*, \(^{89}\) Ipp J \(^{90}\) apparently allowed a plea of mitigation in relation to a claim for equitable compensation, holding that the burden of proof of failure to mitigate lay on the defendant. \(^{91}\)

Ho suggests once a principal has notice of a breach, he should cease placing trust in the fiduciary and take responsibility for his own protection. \(^{92}\) This highlights an essential difference between the trustee/beneficiary relationship and that of principal/fiduciary. The trustee’s holding of the trust property means mitigation by the beneficiary is probably limited to complaining of the breach to the court. But a principal may have greater means

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\(^{69}\) (1991) 102 ALR 453.

\(^{7}\) Ibid, 479.

\(^{8}\) Ibid, 480-1 (Davies, Sheppard and Gummow JJ).

\(^{89}\) (1994) 11 WAR 187, 249.

\(^{90}\) (Malcolm CJ and Seaman J concurring).

\(^{91}\) No evidence relating to failure to mitigate was led, so the plea failed: (1994) 11 WAR 187, 249.

\(^{92}\) Ho, above, n 52, 75.
of self-protection available against a fiduciary, and may be accused of failure to mitigate if appropriate steps are not taken. Commonwealth Bank v Smith provides a good factual example.

Nevertheless, it is common for commentators to deny the availability of a mitigation plea in the context of breach of fiduciary duty. Equity usually achieves the same effect as mitigation pleas at common law by employing the language of equity. Thus, causation, laches, acquiescence, unreasonableness and discretion are words commonly heard in this context. Commentators frequently deny recovery for losses incurred after discovery of breach on the basis of causation. The concept of unreasonableness of the plaintiff's behaviour is often linked to lack of causation.

Laches appears to have both inter partes objectives and public policy objectives; in this it resembles mitigation. Similarly, it is also plaintiff-friendly in operation. However, there are substantial differences. Mitigation concerns a plaintiff
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taking reasonable steps towards self protection. The gist of laches is delay and perhaps
unfairness based on that delay, with a public policy objective of seeing property
transactions finalised. Although similar results may be achieved practically, the two
doctrines are dissimilar.

Acquiescence requires that the defendant show the plaintiff has given an express or
implied representation that he will not insist on performance of the particular obligation or
insist upon his legal rights.\footnote{Law Commission (UK) The Limitation of Actions CP 151 (January 1998) 9.20.} It is unclear whether this defence covers the same ground as
the traditional defence to breach of fiduciary duty; full and informed consent. The scope of
the defence of acquiescence in cases of breach of fiduciary duty is rendered doubtful,
however, when \textit{Nocton v Lord Ashburton}\footnote{[1914] AC 932.} is considered. Two claims were made by Lord
Ashburton in the first instance. One concerned his original entry into the mortgage. This
was held to be time-barred. Viscount Haldane said it was also defeated by acquiescence.\footnote{Ibid, 958, 974 (Lord Parmoor).}
Lord Ashburton knew of Nocton’s involvement in the transaction and had been warned in
writing by one of Nocton’s partners of the risks he was taking. Lord Ashburton’s second
claim concerned the advice he received from Nocton to allow release of the security he
held. The House of Lords do not appear to have considered that the defence of
acquiescence was available in this case. Their Lordships gave no reasons; arguably, the
facts that went towards acquiescence only related to the mortgage and not the subsequent
release. If this is so, the availability of the plea of acquiescence is quite limited and
dependant upon strict ties to the alleged breach. The conclusion is that, in most cases, facts
that would give rise to such a specific plea of acquiescence would also satisfy the
probably play a lesser role in performing a task similar to mitigation than is sometimes
suggested.\footnote{349}
Equitable discretion is the other method of achieving something like mitigation. Getzler, for example, suggests that the discretion retained over the availability and quantum of interest awards (as exhibited by the High Court in *Maguire v Makaronis* 107) "amounts to a pressure on the innocent party to mitigate loss following knowledge of the breach." 108 Evans suggests the court’s discretion can be exercised as to the ‘actual amount of compensation payable and the terms upon which it should be paid.’ 109

Mitigation is not as clearly unnecessary as contributory fault to equitable compensation. While there is no sense in which a principal can contribute to a fiduciary’s disloyalty, principals may be in a position to stop unreasonable losses accruing. Nevertheless, equity’s interest in restoration aims to stop injustice to the defendant occurring. Equity sees the principal restored to its correct position but goes no further. The equitable concepts employed in cases of breach of fiduciary duty to prevent injustice to the defendant perform much the same function as mitigation in common law. There is little need for adoption of a separate mitigation requirement; however, resort to the language of mitigation may make the exercise of equitable discretion more transparent.

(iii) Breach of confidence

Mitigation issues rarely arise in respect of allegations of breach of confidence, in part because the primary remedy for breach is an injunction to arrest the unauthorised use of the information. In many cases this will be all the plaintiff can do by way of self-help. However, the possible availability of the defence of delay 110 may indicate that the plaintiff is not at liberty to sit by watching the breach without taking timely action. This resembles mitigation, albeit a limited form. As in the case of breach of trust, the only step a plaintiff can reasonably be expected to take is to seek quick relief. Equity is more likely to resolve claims concerning mitigation following breach of confidence by reference to causation of

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107 (1997) 188 CLR 449.
108 Getzler, above, n 76, 245 (n 51).
loss, unreasonableness of the plaintiff’s delay, equitable defences including laches and unclean hands,\(^{111}\) and general equitable discretions.

(iv) **Undue influence and unconscionable conduct**

The availability of the plea of mitigation is naturally dependant upon a monetary award calculated by reference to the plaintiff’s loss becoming available for undue influence and unconscionable conduct. If the remedial response is limited to rescission, mitigation is irrelevant. Nevertheless, the remedy of rescission carries with it something similar to the duty to mitigate, in that injustice to the defendant is avoided. Rescission is essentially two-sided. Both parties must be restored to their former positions.\(^{112}\) The possible order of partial rescission\(^{113}\) might however allow the court some flexibility here.

If compensation becomes available for undue influence, it might be possible to draw an analogy with statutory damages pursuant to the *Trade Practices Act*. For example, sections 52 and 82 of that Act allow an action for damages for misrepresentation. Indications are that plaintiffs seeking such damages are under a duty to mitigate loss.\(^{114}\) Something similar may occur with undue influence and unconscionable conduct. However, as Chapter 6 has shown, equity’s restoration interests will usually be satisfied by rescission or its pecuniary equivalent. If this is so, mitigation is unnecessary here too.

(v) **Equitable estoppel**

It is likely that the doctrine of equitable estoppel has an in-built mechanism that removes the possibility of injustice to the defendant. Reliance upon the defendant’s representation must be reasonable. What the common law might exclude by way of mitigation, equitable estoppel will exclude at the earlier point of responsibility. If reliance

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\(^{111}\) Relief was refused on the basis of unclean hands in *Hubbard v Vosper* [1972] 2 QB 84, 101 (Megaw J) and *Church of Scientology v Kaufman* [1973] RPC 635, but the defence failed in *Argyll v Argyll* [1967] 1 Ch 302.

\(^{112}\) *Alati v Kruger* (1955) 94 CLR 216.

\(^{113}\) *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102.

on the representation was unreasonable or excessive, the defendant will not be estopped
from resiling from it. Further, as the general approach to remedy is to fulfil the plaintiff's
expectation, there is little scope for mitigation. Any loss in excess of expectation (against
which a plaintiff might be expected to mitigate) is not able to be recovered against the
defendant in any case.

(vi) Conclusion: mitigation

Compared to the concept of contributory fault, mitigation is not so clearly ruled out
as a method of reducing equitable compensation awards. It is not clear in the case of trust
whether beneficiaries are under a duty to mitigate, but in most cases they will have no such
ability. In any event, the responsibility to mitigate is probably limited to making complaint
to the court of the breach. The same is likely to be true of mitigation in the context of
breach of confidence. Mitigation appears unnecessary for undue influence or
unconscionable conduct, at least until such time as monetary compensation is more clearly
available. Nor does mitigation appear appropriate in cases of equitable estoppel.

There is, however, some authority suggesting mitigation is required in response to
breaches of fiduciary duty. On the whole though, Australian equity utilises traditional
equitable modifications to avoid over-penalising the defendant. These include laches,
acquiescence, causation, and general equitable discretions. This approach is likely to
remain dominant. Equity's current regime is sufficient to see the plaintiff properly restored
and the defendant properly protected. A further requirement to mitigate is strictly
unnecessary, though it may be preferable for reasons of transparency.
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7.3 EXEMPLARY AWARDS

In Australia, the law of torts awards the plaintiff punitive or exemplary damages, in addition to compensatory damages, in certain circumstances. These circumstances include where the defendant has shown 'a cynical disregard for a plaintiff’s rights,' or has 'been high-handed, insolent, vindictive or malicious or...exhibited a contumelious disregard of the plaintiff’s rights.' The purposes exemplary awards are usually said to address are punishment of the wrongdoer and deterrence of others. Exemplary awards have been made in equity and contract in other jurisdictions.

(i) Are exemplary awards available in equity in Australia?

The recent decision of the New South Wales Court of Appeal, *Harris v Digital Pulse Pty Ltd*, has revealed the depth of division on the availability of exemplary awards in equity. Although it was held on that occasion that no exemplary award could be made, the decision could hardly be called an overwhelming victory for the forces railed against exemplary awards. The highly distinctive approaches taken by the members of the bench virtually ensures that the matter will arise for further debate. In *Harris*, the plaintiff company sought exemplary damages against former employees who had diverted business opportunities in breach of their fiduciary obligations. Palmer J at first instance decided he was able to award a small amount by way of exemplary award largely to cover the likelihood that the plaintiff would otherwise be under-compensated, given the ability of the

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115 *Rookes v Barnard* [1964] AC 1129, 1227 (Lord Devlin).
117 Just as it is misleading to refer to equitable ‘damages’ when what is really meant is equitable compensation, it is unhelpful to refer to ‘exemplary damages’ in relation to breaches of equitable duties. Wherever possible, the term ‘exemplary award’ is used to indicate an award of an exemplary or punitive nature in equity. The adjective ‘exemplary’ has been adopted because it better reflects the range of objectives the award can encompass. The adjective ‘punitive’ tends to focus on the objective of punishment at the expense of other recognised objectives, such as deterrence, vindication and expression of outrage.
120 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 (‘Harris’).
defendants to hide their wrongdoing. Despite the modest amount awarded, the matter went on appeal to the New South Wales Court of Appeal where it was heard by a distinguished bench, Spigelman CJ, Mason P, and Heydon JA in one of his final judgments before his elevation to the High Court.

Mason P held that exemplary awards were available and justified in the matter. Heydon JA was diametrically opposed to the view that such an award could be made. Spigelman CJ took the middle line. Although holding that this was not an appropriate case for an exemplary award, he refused to rule out the possibility that such an award could be ordered in equity. The result is that exemplary awards in equity have not been categorically excluded.

The decision raised several important issues. For the purposes of this thesis, these include:

(a) whether there is any inherent jurisdiction in equity to make an exemplary award,

(b) whether such a jurisdiction is part of, or in addition to, the inherent jurisdiction to award equitable compensation; and

(c) whether the theoretical divisions between the members of the bench are capable of resolution.

(a) An inherent jurisdiction in equity to make an exemplary award?

Arguably, a majority of the New South Wales Court of Appeal accepted that there was a jurisdiction to make exemplary awards. Mason P commented that the issue was 'a question of power, not jurisdiction.' He was 'unpersuaded that the silence of the past on the matter...can be translated into a positive conclusion', dismissing the appellant's argument that the absence of earlier authority indicated that power did not exist as
"speculation." Spigelman CJ's judgment cannot be read as a wholesale denial of such a jurisdiction or power. His Honour (though in general agreement with Heydon JA) thought it 'unnecessary and undesirable to decide this case on the basis that a punitive monetary award can never be awarded in equity. Remedial flexibility is a characteristic of equity jurisprudence'. If it is possible that equity might award an exemplary amount when displaying its remedial flexibility, it must be because there is inherent jurisdiction to make such an award. That the remedial flexibility of equity is the source of a inherent power to make an exemplary award has support in some American authorities.

Heydon JA, however, was dismissive of the argument that remedial flexibility gave equity the power to make exemplary awards. He said equity has a limited power to fashion the precise form of an existing remedy to meet the needs of the case. Whether the law required change was another question, not for answer by the New South Wales Court of Appeal. Nevertheless, given Mason P's acceptance of a power to make exemplary awards in equity, and the apparent acceptance of a possible power by Spigelman CJ, it seems certain that if such a power exists it must derive from equity's inherent jurisdiction.

(b) Is any inherent jurisdiction part of, or in addition to, the jurisdiction to award equitable compensation?

Much of the report of Harris concerns whether a jurisdiction to make exemplary awards is separate from, or part of, the jurisdiction to award equitable compensation. Because exemplary awards in tort are called 'exemplary damages', there seems to have been a view that equitable compensation awards should include exemplary awards as a total...
package. This reasoning would exclude a separate exemplary award. However, as Spigelman CJ commented:

The use of the word ‘damages’ with respect to both compensatory damages and exemplary damages obscures the fact that a common law litigant who received an award of the latter has not in fact suffered any ‘damage’ in the relevant sense.130

Once this point is kept in mind, arguments that suggested exemplary awards were not available simply because equitable compensation was were largely unnecessary. This view is reinforced when one considers that, even in the case before the court, equitable compensation was not the only basis for a monetary order. In fact, the plaintiff had elected an account of profits. Accounts of profits are clearly not compensatory; thus the fact that exemplary awards are not compensatory in nature is irrelevant to their possible availability in equity generally.

Nevertheless, this thesis suggests that if exemplary awards are available in equity, they are necessarily in addition to awards of equitable compensation. Equitable compensation should restore the plaintiff to the correct economic position. Exemplary awards should not be necessary to perform any compensatory role. This was the main flaw in the judgment at trial. If an exemplary award was needed to avoid a risk of under-compensating the plaintiff, insufficient equitable compensation had been ordered. This is true whether the wrong under consideration is a breach of trust, fiduciary obligation or confidence, undue influence, unconscientious conduct or equitable estoppel.

\[130\text{Ibid. 303.}\]
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(ii) Differences in approach taken by the bench

Harris v Digital Pulse Pty Ltd\textsuperscript{131} is notable for the differences in approach to the most fundamental aspects of equity theory shown in the three judgments. In particular, their Honours disagreed as to the role of common law analogy, the purpose of fiduciary law and the role of punishment in equity.\textsuperscript{132}

(a) Purpose of fiduciary law

An interesting division impacting on the possible addition of exemplary awards to equitable compensation appeared between Spigelman CJ and Mason P. This concerned the organising purpose behind fiduciary obligations. Spigelman CJ focused on rights and remedies \textit{inter partes}, that is, between the fiduciary and the principal. Through the observation that equity seeks justice between the parties, the subsidiary principle that equity does not punish is visible.\textsuperscript{133} Spigelman CJ thought that the purposes behind awards of exemplary damages in tort were primarily public purposes, and did not involve any balancing \textit{inter partes}.\textsuperscript{134} This view would largely deny exemplary awards in equity. With respect, his Honour’s conclusion that equity’s concerns only serve private justice interests may not be fully justified. There is a considerable body of opinion that maintains the fiduciary obligation exists largely for public purposes.\textsuperscript{135}

Mason P disagreed with Spigelman CJ’s analysis. He denied that equity proceeded ‘according to some overarching doctrine of proportionality of response or balancing of rights as between plaintiff and defendant.’\textsuperscript{136} His Honour held that equitable remedies could

\textsuperscript{131} Ibid.
\textsuperscript{132} Their Honours also clashed over the ‘fusion fallacy’ debate: ibid, 325 (Mason P), 391-2 (Heydon JA).
\textsuperscript{133} Ibid.
\textsuperscript{134} Ibid, 312.
\textsuperscript{135} Ibid, 357.
\textsuperscript{136} See, for example, Mailcsons Stephen Jaques v KPMG Peat Marwick (1991) 4 WAR 357, 362; D De Mott, ‘Fiduciary Obligations under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal’ (1992) 30 Osgoode Hall Law Journal 471, 472, 491.
\textsuperscript{137} Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298, 324. Proportionality is often a theme in cases concerning exemplary damages. See for example, Vorvis v Insurance Corp. of British Columbia [1989] 1 SCR 1085; Whiten v Pilot Insurance Co (2002) 209 DLR (4\textsuperscript{th}) 257.
vindicate public rights as well as private rights. If this is so, exemplary awards can be justified on the basis of public purposes.

Perhaps this division between two members of the bench reveals a difference in focus. At the level of generality of the purpose of fiduciary obligations, there seems little doubt that the institution exists for reasons of social policy. The same is probably true of the duty of care imposed by the law of negligence. On this approach, it is apparent that equity and tort are concerned with a public purpose. But at the level of remedies, it is clear that equitable remedies are concerned with a private purpose - rights *inter partes*. The difference between equity and tort is that tort already clearly recognises a remedy that addresses largely public purposes. Tort law divides its awards clearly into categories. So much is awarded for general damages, aggravated damages or exemplary damages, if appropriate. Some categories address private purposes, some address largely public purposes. Equity does not analyse its awards to the same extent. Spigelman CJ’s analysis is preferred. Recovery for public purposes goes beyond what is necessary for restoration.

(b) Common law analogies

It would seem that the temptation to explain equitable remedies by analogy with the common law doctrines is almost irresistible. Spigelman CJ was most concerned with the factual contractual root of the fiduciary obligation in this case, shown in the employment relationship. An explanation of fiduciary relations stressing the undertaking and agreement aspects of fiduciary law was central to this reasoning. Because the fiduciary duties here were derived from an employment relationship, it was not appropriate to make an

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137 Ibid, 325.
138 (U)nlike Common Law damages, there is no call made by Equity of great exactitude in the determination of the quantum of equitable compensation: *Catt v Marac Australia Ltd* (1987) 9 NSWLR 639, 661 (Rogers J).
139 As contained in Mason J's widely approved judgment in *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41, 96-97. Mason J's comment that the 'critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense' was approved by three members of the High Court in *Concut Pty Ltd v Worrell* (2000) 176 ALR 693, 697-8 and by four members of the High Court in *Pilmer v Duke Group Ltd(In Liq)* (2001) 207 CLR 165, 196 (McHugh, Gummow, Hayne and Callinan JJ).
exemplary award, because no such award would be available for breach of contract. His Honour attached a rider:

This analysis does carry with it the corollary that the refusal to develop the law should be confined to cases of the character now before the Court, as identified above. There may be other cases in equity in which a tort analogy is more appropriate.

Two points emerge from this analysis. The first is that the vast majority of fiduciary obligations have their roots in contract, or something like contract. It is not clear whether his Honour meant to restrict his analogy to the employer/employee relationship, or extend it to all contractually-based fiduciary obligations. If the latter, there may be precious little room for a tortious analogy to be drawn. The second point is that it is not clear which analogy should apply when it is possible on the facts to draw a tortious analogy as well as a contractual one. The solicitor/client relationship illustrates this. Solicitors owe clients contractual, tortious and fiduciary obligations all at once. All three obligations can be breached in the one causative occurrence. Exemplary awards are not available for breach of contract, but are for tortious breaches. Spigelman CJ’s analysis is of no assistance in indicating whether an exemplary award is available by analogy with tortious recovery when concurrent duties are owed.

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142 Solicitor/client relationships always have a contractual component; trustee/beneficiary relationships may originate in contract, company directors owe contractual duties to the company, and as is obvious from Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298 the employer/employee relationship emanates from contract.

143 For example, see Stewart v Layton (1992) 11 ALR 687.

144 However, it should be noted that Spigelman CJ was only expressing a preference. He was not entirely comfortable with analogies of any sort, favouring doctrinal purity in equity. He commented, ‘(t)he 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.’: Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298, 306.
Mason P favoured the tort analogy.\textsuperscript{145} Mason P dismissed Spigelman CJ's concerns with similarity to contract pointing out instead inherent differences and focusing on the similarity between equity and tort. He noted that fiduciary obligations and tort are imposed by law and arise out of a relationship or conduct. Further, there is no principle of efficient breach applicable to fiduciary law, as opposed to contract. Thus he saw greater similarity between breach of fiduciary duty and a tort. More than just the interests of the two parties are at stake; public interests are served too.\textsuperscript{146}

Mason P adopted a different technique from that of Spigelman CJ, starting with the breach of fiduciary duty and questioning whether the incidents of the cause of action and the legal policies reflected more closely resembled contract or tort.\textsuperscript{147} The Chief Justice approached the question from the other direction, asking first how the underlying relationship came into being and categorising the obligation on that basis. Mason P's approach is to be preferred. Given that contractual, tortious and fiduciary obligations can co-exist, it makes little sense to enquire about the historical antecedents of the parties' relationship as a method of limiting recovery. It is better to look at what ill the cause of action is attempting to cure. This, however, does not establish that because a remedy is available in tortious actions, it should necessarily be available in other actions. Looking at the rationale behind the cause of action, Mason P agreed with the trial judge that the aim of the equitable remedy involved (an account of profits) was 'the composite goal of punishing, deterring and vindicating a person who is the victim of wrongdoing clearly proscribed.'\textsuperscript{148} This was co-extensive with the rationale for exemplary damages in tort. The implication is that the rationales for both recovery in equity and recovery in tort largely coincide.

\textsuperscript{145} The trial judge had preferred a tortious analogy, particularly with the tort of deceit.
\textsuperscript{146} \textit{Harris v Digital Pulse Pty Ltd} (2003) 56 NSWLR 298, 334.
\textsuperscript{147} Ibid, 335.
\textsuperscript{148} Ibid.
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(c) Punishment, deterrence and vindication in equity

More than one remedy can be awarded against wrongdoing. If the law selects between remedies (rather than the plaintiff so selecting), this indicates the selection is policy-driven. The remedies Australian law makes available for both tortious and equitable breaches reflect social policy. It seems clear that the objective of awarding damages for loss caused by a defendant’s negligence is compensatory. This is not necessarily true of all damages in tort, such as nominal damages for trespass. Therefore, compensation is not the only object of torts law. Other objectives are served as well. Punitive damages in tort may serve several objectives. These can be wholly public purposes such as punishment and deterrence, or there can be a private dimension to the award such as vindication of rights or because there is no adequate way to compensate.

Much of the discussion in Harris concerned the purposes of equity. Though interesting, the discussion was largely misguided and unnecessary. Tortious remedies can be described as compensatory in some cases, vindicatory in others, or may serve a combination of goals. No one suggests that the aim of all tort law is punishment and deterrence simply because that is a major goal of one of the remedies available in tort. The preoccupation with discerning the aims of equity as a whole is therefore hard to understand.

Nevertheless, a good deal of energy was expended in that debate, partly due to the manner in which the case was argued. The appellants submitted that equity and penalty are strangers. They argued there was a fundamental distinction between a deterrent and a punitive role; while equity clearly exercises a deterrent function, it does not have a punitive jurisdiction. Mason P doubted there was a relevant distinction between punishment and deterrence, but accepted the ‘profound learning’ exhibited by Heydon JA, which showed ‘the case law, taken as a whole, reveals that Equity does not set out to punish as an end in

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149 For example, different societies apply different punishments for murder. Australia no longer has capital punishment but many other countries do. Saudi Arabia has capital punishment but also allows the victim’s family to accept a monetary sum from the murderer in lieu of execution.


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This was not the end of the argument for Mason P. Equity was still prepared to apply a harsher remedy where the fiduciary's behaviour that needed deterring warranted punishment. His Honour's inability to segregate punishment and deterrence placed him in a difficult position. If Equity did not set out to punish, but punishment and deterrence were indivisible, it might happen that the punishment component of an award went beyond vindication and deterrence. If this occurred:

this might contravene some overarching equitable prohibition. The solution would be for equity to set aside an award of exemplary damages containing anything more than a 'penal element calculated to deter'..., rather than to deny the power altogether.

With respect, his Honour's judgment was weakened by this discussion. Punishment and deterrence can be separated. Berryman suggests that the punitive objective is 'backward looking and seeks to express society's condemnation of the defendant's actions which have departed from acceptable norms.' This is necessarily concerned with individual defendants. On the other hand, '(d)eterrence, both specific and general, is forward looking,' specific deterrence only being concerned with the individual defendant, and general deterrence acting as a warning to all others. This difference in aims necessarily leads to a different monetary result. Awards designed to punish tend to reflect the seriousness of the behaviour. On the other hand, awards designed to deter:

reflect the probability of successful prosecution. Where that probability is low, that is, it is unlikely that all individuals guilty of the proscribed behaviour will be prosecuted, an enlarged award of punitive damages is justified. Where the

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152 Ibid, 331.
153 Ibid, 332.
154 Ibid.
155 Ibid.
156 J Berryman, 'The Case For Restitutionary Damages Over Punitive Damages: Teaching the Wrongdoer That Tort Does Not Pay' (1994) 73 Canadian Bar Review 320, 322 calls this 'retribution'.
157 Ibid.
158 Ibid.
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probability is high, punitive damages may not be warranted and compensatory damages may carry sufficient general deterrence.\footnote{158}

Thus, punishment and deterrence cannot necessarily be expected to cohabit easily together.

The tenor of the judgments in \textit{Harris}\footnote{159} is to the effect that equity does not hold punishment as a goal. Some suggest punishment is not a valid goal for civil law at all.\footnote{160} Jaffey suggests the issue of exemplary awards usually arises where ‘the measure of compensation falls short of what would be apt as punishment.’\footnote{161} The obvious solution ‘if there is a civil cause of action for which this is commonly the case...is to recognise the conduct in question as a crime.’\footnote{162} Jaffey points out that punishment does not involve justice between the parties, but between the defendant and the community. This suggests generalised justice, as opposed to equity’s concerns with individualised justice. In any case, punishment in civil matters is an inefficient method of enforcement of civil values\footnote{163} and raises the risk of injustice to the defendant. While punishment in civil cases might sometimes be convenient, it ‘is only acceptable ... if it is possible to install appropriate safeguards for the defendant in respect of the punishment.’\footnote{164}

If exemplary awards are justified in equity, it may be on the basis that existing equitable remedies do not achieve deterrence. Equity’s success or otherwise here is very much dependent upon which equitable wrong and remedy is being discussed. Setting aside a contract for unconscientious dealing is not regarded as punishment, but there is anecdotal

evidence that it carries with it some general deterrent effect. Though an account of profits for breach of fiduciary duty is not intended to punish, opinion is divided as to its deterrent effect. The appellants in *Harris* argued that an account performs as a sufficient deterrent, because the fiduciary is forced to take all the risks of the behaviour. Some writers argue that this is not so; occasionally being forced to disgorge profits performs no real deterrent function.

On Berryman’s analysis, deterrence justifies exemplary awards if there is a low probability of detection of breach. The difficulty here is to know what is the likelihood the fiduciary will be caught. The fiduciary’s ability to escape detection is well recognised and explains the ‘strong deterrent element in the formulation of duties imposed on fiduciaries.’ It is almost impossible to assess whether the special allowances equity already makes are effective in deterring defaulting fiduciaries, but allowances are made. Equity attempts to cover the gap that may exist between compensation on the one hand, and deterrence on the other. This is not the same method adopted in tort, but it is not clear that a plaintiff should be entitled to the benefit of both systems. Equity’s rather limited interest in restoring the plaintiff to his deserved economic position is satisfied by the current system. Once the plaintiff is restored to the required position, there is no outstanding flaw in the defendant’s conscience upon which equity can act.

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164 Jaffey, above, n 161, 863; see also Heriot, above, n 163, 885.
165 For example, following *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 most Australian banks altered their lending processes to avoid repetition, requiring a solicitor’s certificate that the borrower or guarantor had received sufficient independent advice: although there is some disagreement on this point, Heydon JA’s examination of the topic is preferred, which concludes that there is no punitive element to an account of profits: *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 369-71.
166 Ibid, 351.
168 Berryman, above, n 155, 322. See also Heriot, above, n 163, 883.
170 The outcome in the *Harris* case should be briefly noted. The trial judge had awarded a modest sum of $10,000 by way of exemplary damages in addition to an account of profits. Heydon JA (having explained at great length how equity did not aim to punish), allowed the appeal but the victory was
In any event, it can be questioned whether exemplary awards achieve deterrence. Some research has shown that exemplary awards in torts do not achieve deterrence. The research available tends to concern general deterrence. Specific deterrence is not achieved either, because exemplary awards are probably antithetical to the continuation of individual relationships. Any litigation against the fiduciary is likely to poison the relationship with the principal. The conclusion is that exemplary awards may not achieve either specific or general deterrence. If this is so, exemplary awards would need to address some other goal, such as vindication.

Vindication might be a valid goal for an exemplary award in equity. However, Australian equity is traditionally unconcerned with ‘feelings’ that might require vindication. Once the plaintiff is returned to the economic position he should have occupied, equity’s interests are exhausted. Equitable compensation must be calculated to accord with equity’s interest in restoring the plaintiff to its proper economic position. Vindication plays no role in restoration.

(iii) Conclusion: exemplary awards

Exemplary awards would not appear to be required in the current recovery regime of equity. This is particularly so with the remedy of equitable compensation. Exemplary awards go beyond the restoration being aimed for when equitable compensation is sought. Exemplary awards would necessarily have to be awarded in addition to equitable compensation; therefore they can play no role in the calculation of equitable compensation. If equity is to award exemplary sums, it would have to be for purposes other than...
restoration. However, the traditional reasons for exemplary awards, punishment, deterrence and vindication are discounted in equity. First, equity does not aim to punish. It merely aims to correct and does not need exemplary awards to achieve correction. Secondly, Australian equity is not concerned with personal feelings; therefore the plaintiff is sufficiently vindicated when restored to its correct economic position. This also indicates an exclusion of exemplary awards. Finally, there are insufficient indications that exemplary awards are needed for equity to achieve deterrence. Equitable causes of action appear to have a deterrent effect, although it is not clear whether this effect is uniform. Equity already allows for the fact that the fiduciary’s breach can be difficult to detect, which may narrow any gap between compensation and what is required to deter. In any event, it is certainly not established that exemplary awards themselves achieve deterrence. Exemplary awards may not be necessary in equity at all. Nevertheless, the discomforting problem that the honest fiduciary and dishonest fiduciary are treated without distinction by equity remains and may one day lead to adoption of a more obvious discretion to punish. This would, however, be a major policy shift.

After years of opposition to exemplary damages, courts across the English speaking world seem to be heading back to a wider acceptance of them in tort,\textsuperscript{175} in contract,\textsuperscript{176} and in some countries, in equity. Australian opposition to exemplary awards in equity is unlikely to dissipate quickly. The trend seen in Australian courts to strictly quarantine equitable concepts from common law concepts is continued. Given the make up of the present High Court (now including Heydon J), it is unlikely exemplary awards will soon be recognised as available in equity. This is yet another sphere where Australian equity jurisprudence is at variance with other commonwealth countries.

\textsuperscript{175} Kuddus v Chief Constable of Leicestershire [2002] AC 122; A v Bottrill [2002] 3 WLR 140t.
7.4 CONCLUSION: COMMON LAW MODIFICATIONS

Australian courts have remained firmly opposed to the use of common law concepts to increase or decrease monetary awards in equity based on concerns about justice *inter partes*. Indications are that the calculation of equitable compensation will not be altered by anything other than traditional equitable limitation devices. This approach is to be preferred, when equity’s interest in restoration is considered. Equity’s limited interest lies in restoring the plaintiff’s economic position. If the specific duty allegedly breached is considered, there is no real scope to reduce the award on the basis of contributory fault. Correction of the inequitable outcome of the defendant’s behaviour does not admit of contribution by the plaintiff. Equity’s interests are exhausted when the plaintiff is ‘restored’. Similarly there is little scope for mitigation. Punishment is not one of the goals of equity, and there seems no other effective argument for the addition of exemplary damages to awards of equitable compensation. Exemplary awards go beyond what is required for restoration, and cannot be relevant in the calculation of equitable compensation. The conclusion is that the common law modifications examined in this chapter are unnecessary to the calculation of equitable compensation.
This thesis has attempted to throw light upon the principles underlying the remedy of equitable compensation and the problems the remedy currently faces. It has sought to provide an explanation of the availability and quantification of the remedy. In Australia, equitable compensation has traditionally been seen as a remedy of last resort. This thesis concludes that it should still be seen in a similar light. Equitable compensation is a remedy of limited utility in cases of equitable wrongs. Sometimes, equitable compensation cannot address the wrong in any meaningful way. If the plaintiff has not suffered a loss or is seeking to recover a profit or rescind a transaction, equitable compensation is not the appropriate remedy for that task. Litigants are usually adequately protected by other specific equitable remedies that satisfy equity's interest in restoration. Sometimes equitable compensation is effectively excluded because litigants can be compensated at common law; there is no advantage in seeking an equitable remedy. Nevertheless, equitable compensation has a specific limited role to play in a restricted number of cases.

Equitable compensation developed from two bases. The first was in respect of breaches of trust, where the trust estate required reconstitution. The second was in relation to transactional dealings between a fiduciary and principal, where rescission of the transaction was no longer either available or attractive. From this second base, the jurisdiction revealed in Nocton v Lord Ashburton\(^1\) emerged. This extended the remedy of equitable compensation to cases where there was no transactional outcome between the fiduciary and the principal that could be set aside, but nevertheless, the fiduciary's conflict in relation to a transaction between the principal and a third party had resulted in loss for the principal. These two bases provide the causation standard for equitable compensation.

\(^1\) [1914] AC 932.
This thesis has shown that equitable compensation is a remedy of limited application in cases of breach of trust. Trust calls for a primary remedy of account. Equitable compensation for breach of trust is limited to cases where account is superfluous. The specific qualities of trust determine the manner in which compensation for its breach must be calculated. Whether the trustee is called upon to reconstitute the fund or to pay compensation in cases where reconstitution is pointless, compensation is limited by reference to reconstitution. Foreseeability and remoteness are irrelevant to this inquiry and therefore do not restrict recovery for breach of trust in any way. However, a trustee is a fiduciary and also able to breach fiduciary duties unrelated to accounting for the trust. Equitable compensation is available for these breaches, calculated upon the same principles as equitable compensation for breach of fiduciary duty.

Equitable compensation is not an appropriate remedy for breach of the profits rule. As that rule interdicts the making of unauthorised profit through use of the fiduciary position, there is no scope for equitable compensation. Equitable compensation is a loss-driven remedy, used to remedy breaches of the conflicts rule that have resulted in loss to the plaintiff. Because this is a different inquiry to reconstitution of the trust fund, there is no direct correlation between reconstitution for breach of trust and compensation for breach of the conflicts rule. Causation becomes relevant, even though it is not relevant to reconstitution for breach of trust. This thesis argues that causation for breach of the conflicts rule falls to be determined on a ‘but for’ basis, once the scope of the duty breached is described. Recovery by way of equitable compensation is limited to an amount required to remove the effect of the fiduciary’s conflict from the transaction in question. Once the effect of the conflict is removed, it is as if the fiduciary’s obligation is performed. Equity has corrected the fiduciary’s misbehaviour. The fiduciary is not responsible for losses that are not referable to the conflict. If the court (with the full benefit of hindsight), judges that loss would have occurred even if the fiduciary had properly performed the duty at the outset, then that loss is beyond the reach of equitable compensation.

Equitable compensation is available as a remedy for breach of confidence, although it is not the primary remedial response to that wrong. Injunctions and accounts of profits are more commonly sought. The equitable action of breach of confidence is undergoing the
process of redefinition of its borders. This thesis argues that protection of privacy interests is better left to tort, as privacy is beyond equity’s borders. Tort is better equipped to protect the particular interests encompassed by privacy concerns. The equitable obligation of confidence is best confined to information that has a commercial value to the plaintiff. In those cases where unauthorised use is made of commercially valuable information in such a manner that the plaintiff suffers loss, the plaintiff is entitled to be compensated. The plaintiff must have the value that the information had for him restored to him. In this way equity corrects the effect of the dissemination that the common law would otherwise permit. Compensation is also calculated here according to ‘but for’ causation, although that causes few controversies.

Matters are not quite so clear in the case of the three causes of action for which equitable compensation is not so obviously available, undue influence, unconscionable conduct and equitable estoppel. Traditionally, undue influence and unconscionable conduct are remedied by rescission or refusal to enforce the affected transaction and it is preferable that rescission (including pecuniary rescission) remain the remedial response to such affected transactions. However, there are signs that equitable compensation will come to be regarded as a suitable remedy for undue influence and unconscionable conduct. This thesis argues that its availability will be limited in such cases and quantum will be restricted to an amount that is the equivalent of rescission of the transaction. In both cases, once the nature of the duty is examined the remedy is limited to undoing transactional consequences. ‘But for’ causation applies to both these cases too, but is readily answered by reference to the transaction that resulted from the objectionable behaviour of the defendant.

Equitable estoppel provides new challenges for equitable compensation. The scope for the remedy is obvious, whether the basis of the doctrine is the relief of detrimental reliance or the enforcement of promises. In the first case, relief of detrimental reliance can only occur through the auspices of equitable compensation, here equitable compensation has much potential for expansion. However, in the second case, equitable compensation has a very limited role to play. Promises are enforced unless that is for some reason impossible or undesirable. If enforcement of promises becomes the dominant doctrinal basis in
equitable estoppel (as it seems it will), the remedy of equitable compensation again becomes the remedy of last resort.

Consideration of the six causes of action discussed shows that the calculation of equitable compensation is specific to the duty allegedly breached. This reflects the fact that equity is not a unified system of wrongs; instead, there are doctrines loosely connected by a unified purpose, independent in operation and capable of evolution. Just as we understand that damages for negligence and deceit differ from each other, we should appreciate that equitable compensation for breach of trust, breach of fiduciary duty and equitable estoppel will be calculated differently. This may give equitable compensation the appearance of only being a label attaching to any monetary award in equity, but that is not so. Despite the apparent lack of cohesion, inherent consistency can be found in cases where equitable compensation is awarded, in the achievement of equity’s aim to bring restoration to the plaintiff.

When equity’s interest in restoration is kept in mind, it is obvious that common law limitation devices have little, if any, role to play in quantification of equitable compensation. Equitable compensation restores the plaintiff to the correct position, which exhausts equity’s remedial interest in the matter. The High Court shows no sign of accepting any role for contributory fault in equitable matters. Exemplary damages have no place in the calculation of equitable compensation, and may have no place in private law in Australia. Equity has no need in any event for these devices. Because of its corrective focus, equity is satisfied when the injustices the common law cannot reach are corrected. Equity restores the plaintiff to the position she would have occupied in the absence of the 

Chapter Eight: Conclusion

protect the defendant against over-compensation by application of traditional equitable modifications.

This strict reading of the applicability of equitable compensation is not to deny its role in contemporary Australian law, or forestall its development as equity expands into other, previously unimagined, areas.\(^3\) Equitable compensation may yet become the Australian remedy of choice to deal with undue influence, unconscionable conduct, estoppels based upon reliance relief and cases that might be called examples of ‘unjust enrichment’.\(^4\) This view of equitable compensation merely aims to put the remedy into perspective. In some cases, equitable compensation is the only means by which the plaintiff can obtain redress. Equitable compensation is a powerful personal remedy, but it is not a general method of risk-shifting made available merely because equity’s intervention is attracted. Equity is limited to its restoration role, as a corrective of the common law. Equitable compensation cannot be used as a passport to limitless recovery.

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\(^3\) The best recent example of such expansion remains the doctrine of equitable estoppel. The example least imagined by previous generations is probably \(W v G\) (1996) 20 Fam LR 49, where it was held an estoppel was made out against a lesbian who had agreed to co-parent two children with her lesbian partner. A monetary award for support of the children was made.

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