EQUITABLE COMPENSATION FOR DISTRESS IN COMMERCIAL CONTEXTS

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Despite equity's longstanding jurisdiction to grant compensation for breaches of equitable obligations, there has been limited analysis of whether that jurisdiction extends to purely personal interests. In two relatively recent breach of confidence cases, Australian courts have awarded equitable compensation for distress. Drawing on those cases, this article seeks to challenge the traditional view that equitable compensation can only vindicate financial losses. It takes the example of ethical investment funds and considers the scenario where the trustees of those funds make profit-generating but unethical investments. It argues that in those circumstances, it would be doctrinally sound to award equitable compensation to beneficiaries who have suffered distress as a result of the unethical investments. That conclusion is arrived at by considering the principles underlying equity's inherent jurisdiction to award equitable compensation for breaches of general equitable obligations. Based on an inductive approach to earlier cases, the article suggests that equity may award compensation wherever the affected interest is the subject matter of the equitable obligation said to have been breached, regardless of whether that interest is financial in nature.

I INTRODUCTION

The task of pinning down equity's jurisdiction to grant compensation has produced significant academic discussion.[1] Courts of equity have historically awarded 'compensation' on numerous bases for breaches of a variety of equitable

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1 See, eg, Julie Ward, 'Equitable Compensation: An Overview' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 65, 65; Charles Mitchell, 'Equitable Compensation for Breach of Fiduciary Duty' (2013) 66(1) *Current Legal Problems* 307, 339.

obligations.[2] Moreover, the nomenclature around compensation has evolved over time, adding significant complexity to the task of deciphering authority.[3] It follows that the precise circumstances in which equity may award compensation are worthy of academic inquiry. Recently, Australian courts have pushed the boundaries of equity's traditional principles, by awarding equitable compensation for the distress caused by breaches of confidence.[4] That has given rise to a more general question of whether the remedy of equitable compensation is capable of vindicating purely personal interests.

Prompted by the Australian courts' breakaway from tradition, this article explores the doctrinal boundaries of equitable compensation by considering whether equity can monetarily compensate for distress in commercial contexts. Over the last few decades, personal interests have been integrated into the world of commerce, through the increasing demand for commercial enterprises to develop a social conscience. Managers of wealth are no longer expected to consider profit maximisation in a vacuum. Rather, they are expected to be cognisant of the social implications of the decisions they make.[5] Insofar as the trust is used as a vehicle to manage complex financial assets, it is an opportune time to consider whether, doctrinally, equity can vindicate personal interests in a commercial setting.

To anchor the doctrinal inquiry into the boundaries of equitable compensation, this article takes the example of an investment fund that is structured through the trust relationship, such as a managed investment scheme or superannuation fund. It considers the scenario where the trustees of such a fund commit to investing ethically by prohibiting investments into certain 'unethical' industries.[6] It is suggested that in such funds, a substantial portion of beneficiaries have invested their money on the basis of their moral intuitions. Accordingly, these funds represent an intersection of equity, commerce and personal interests that is ideal for the inquiry with which this article is concerned. To isolate distress as the loss that is being compensated, the article considers the scenario where trustees commit to ethical investing but subsequently make unethical, *profit-generating*

2 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 801 [23-015]; Ward (n 1) 70. See, eg, *McKenzie v McDonald* [1927] VLR 134; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 ('*O'Halloran*'); *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46; *Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services and Health* (1990) 22 FCR 73 ('*Smith Kline*'). See generally, Ian E Davidson, 'The Equitable Remedy of Compensation' (1982) 13(3) *Melbourne University Law Review* 349.

3 See generally James Edelman, 'An English Misturning with Equitable Compensation' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profits* (Hart Publishing, 2017) 91, 91–5 ('An English Misturning with Equitable Compensation').

4 *Giller v Procopets* (2008) 24 VR 1 ('*Giller*'); *Wilson v Ferguson* [2015] WASC 15 ('*Wilson*').

5 See, eg, Geoff Summerhayes, 'Australia's New Horizon: Climate Change Challenges and Prudential Risk' (Speech, Insurance Council of Australia Annual Forum, 17 February 2017).

6 The precise ethical parameters chosen are immaterial — the argument is not that there are some 'objective' ethical criteria that all funds ought to consider. Instead, it operates in circumstances where the trustees have adopted some specific ethical criteria and undertaken to invest subject to those criteria.

investments. In that scenario, while the trustees have breached their equitable duties, the beneficiaries of the fund have suffered no financial loss.[7] This article argues that in such a situation, it is doctrinally sound for courts of equity to award compensation for distress. The argument is advanced through five substantive sections.

Part II sets the scope of the article's inquiry, detailing the type of fund to which the doctrinal analysis in this article is suited. It explains precisely how non-pecuniary interests, such as the avoidance of distress, become relevant to such funds, and further suggests that such interests are a central focus of, rather than incidental to, the objectives of the fund.

Part III then turns to equity's jurisdiction to award compensation. It notes that the jurisdiction to award compensation is not homogeneous — instead, compensation for breaches of trust is awarded on a distinct basis from compensation for breaches of general equitable obligations. Accordingly, it is necessary to clearly pinpoint the breach of obligation for which compensation for distress is being sought. The section canvasses the possibility of seeking compensation for a breach of trust before explaining why compensation in that jurisdiction cannot extend to distress. It notes that compensation for a breach of trust is based on identifying a deficit in the trust account, which the trustee is obliged to restore. As non-pecuniary losses will never appear as a deficit in the trust funds, the jurisdiction to grant compensation for a breach of trust is of little use to the core inquiry of this article.

In light of the limitations of compensation for breach of trust, Part IV suggests that distress is more likely to be embraced by equity's separate inherent jurisdiction to grant compensation for general equitable obligations. The general obligation the section focuses on is the trustee's duty to act in the best interests of the beneficiaries. It argues that the beneficiaries' best financial interests must be understood in light of the context of the fund, which includes the trustee's undertaking to invest ethically. By ignoring their undertaking to invest ethically, the trustees cannot be said to have acted in the beneficiaries' best interests.

After establishing that the best interests duty is breached by unethical investments, Part V turns to whether equity's inherent jurisdiction to grant compensation can vindicate non-pecuniary interests. It argues that, in principle, courts can legitimately award equitable compensation for the distress suffered by beneficiaries as a result of unethical investments. That analysis is novel — despite equity's long-recognised inherent jurisdiction to grant compensation for breaches of equitable obligations,[8] there is limited academic discussion on whether that

7 The trustees have not made any personal profits, such that an account of profits would be an inapposite remedy. In any case, investors would wish to avoid profits from a morally tainted source.

8 *Nocton v Lord Ashburton* [1914] AC 932, 952 (Viscount Haldane LC) ('*Nocton*').

jurisdiction extends to non-financial losses such as distress.[9] Where the existing literature has addressed non-financial losses, its focus has been on cases where courts have granted equitable compensation for breaches of confidence.[10] The section considers those cases (and the cases on compensation preceding them) to derive a guiding principle for when equitable compensation will vindicate a particular loss. It suggests that a focus on a priori categories of losses capable of being vindicated by equity should be avoided. Instead, the relevant question for courts of equity should be whether a particular loss is sufficiently connected to the subject matter of the equitable obligation said to be breached, such that it falls within the ambit of the jurisdiction to award compensation. In the peculiar circumstances of ethical funds, non-pecuniary interests are the subject matter of the equitable obligations imposed on trustees. Therefore, I suggest that in principle, the distress suffered by beneficiaries should be capable of being vindicated by equitable compensation.

Part VI briefly addresses the question of how equitable compensation for non-pecuniary losses may be quantified. It suggests that difficulties in quantification should not serve as a barrier to recognising equity's jurisdiction to award compensation for distress.

II SCOPE OF INQUIRY

A *Core Scenario*

To frame the scope of this paper's inquiry more precisely, it is useful to provide an example of a commercial scenario in which the need to remedy 'distress' through equitable compensation may arise. Take the example of an investment fund that is structured using a trust relationship (such as a superannuation fund or managed investment scheme) which is marketed to prospective investors as an 'ethical fund'. The trustees of the fund commit to engage in the practice of 'ethical investing' — for example, they commit never to invest in certain industries based on a set of ethical criteria.[11] One such industry that is subject to the fund's prohibition on investment is the arms industry. Jane, a lifelong anti-war activist, on

9 See PG Turner, 'Rudiments of the Equitable Remedy of Compensation for Breach of Confidence' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 239; William Khun, 'Equity's Wergeld: Monetary Remedies for Emotional Distress by Way of the Equitable Obligation of Confidence' (2020) 42(2) *Sydney Law Review* 181.

10 *Giller* (n 4); *Wilson* (n 4).

11 Note that this is a form of 'ethical investing' that is distinct from a promise merely to consider social factors when investing that is characteristic of 'sustainable investing': see, eg, Richard Copp, Michael L Kremmer and Eduardo Roca, 'Socially Responsible Investment in Market Downturns: Implications for the Fiduciary Responsibilities of Investment Fund Trustees' (2010) 19(1) *Griffith Law Review* 86, 86–7; Julian Donnan, 'Regulating Ethical Investment: Disclosure under the Financial Services Reform Act' (2002) 13(3) *Journal of Banking and Finance Law and Practice* 155, 156–7; Lorne S Cummings, 'The Financial Performance of Ethical Investment Trusts: An Australian Perspective' (2000) 25(1) *Journal of Business Ethics* 79, 87.

the basis of this commitment by the trustees, decides to invest in the funds. She is committed to ensuring that her savings do not contribute to the proliferation of an industry she perceives to be immoral. However, some years down the track, Jane realises that the fund's trustees have made profit-generating investments in the arms industry. As a result, Jane suffers a degree of moral perturbation, arising from the realisation that, contrary to her wishes, her funds have contributed to an industry to which she is ethically opposed. Insofar as Jane considers the profits made to have been 'tainted', she does not wish to seek an account of profits from the trustees. Instead, she seeks equitable compensation for the moral perturbation arising from the trustees' 'unethical' investments.

B *Connecting Distress and Ethical Investing*

Funds such as the one described above are suitable to the analysis in this article because there is a mutual understanding between the trustees and beneficiaries that the beneficiaries are investing on the basis of their ethical convictions. While the beneficiaries want to receive financial returns, they are also concerned with avoiding the feelings of distress which would arise from knowing they were doing something 'wrong' or inconsistent with their ethical convictions (I use 'distress' here consistently with its general legal meaning to refer to feelings of 'disappointment … upset [or] annoyance'[12] that may not necessarily amount to a 'recognised psychiatric illness').[13] The source of an individual's ethical convictions is their conscience — that is, their 'capacity … to sense or immediately discern' whether what they are doing 'is wrong, bad, [or] worthy of disapproval'.[14] There is, of course, significant jurisprudence and philosophy on the 'conscience', and whether the subject's sense of wrong is the product of subjective beliefs or objective moral truths. However, I do not wish to digress into that philosophical debate here. Instead, it suffices to say most scholars would agree that the conscience can 'generate[] tormented feelings in response to the recognition that [an individual has] done … something wrong' (regardless of whether what is wrong is subjective or objective).[15] That is the process Jane is going through — she has realised that her money has contributed to an industry she considers to be morally wrong, and her conscience has therefore been disturbed, causing feelings of distress.

The ethical fund is attractive to Jane because it promises her the distinct benefit of receiving financial returns in a manner that accords with her ethical convictions. Unlike funds which make a less onerous commitment (such as funds promising to merely consider social factors), the trustees of the ethical fund explicitly commit

12 Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 4th ed, 2019) 276.

13 Ibid 286, quoting *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 501 (Lord Hoffmann). See, eg, Burrows (n 12) ch 14; Sirko Harder, *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart Publishing, 2010) 87–9.

14 Thomas E Hill Jr, *Human Welfare and Moral Worth: Kantian Perspectives* (Clarendon Press, 2002) 278. Note that 'conscience' used in this sense should be distinguished from 'equity's conscience', which is discussed below.

15 Irit Samet, 'What Conscience Can Do for Equity' (2012) 3(1) *Jurisprudence* 13, 23.

to ensuring that the financial returns in the fund will be subject to the fund's ethical principles. Such ethical funds have been created largely in response to demand from ethical investors like Jane. The possibility of investing in a morally sound manner with a clear conscience is often a focus of their messaging to prospective beneficiaries. In that sense, avoiding distress is not merely an incidental benefit conferred onto beneficiaries of the fund. Rather, it is a substantial purpose for the fund's creation and the decision of beneficiaries to join the fund. In many cases, trustees encourage prospective beneficiaries to invest in the fund on the basis of their ethical convictions. As Part V will demonstrate, understanding the importance of the beneficiaries' desire to avoid distress to the overarching purpose of the fund provides a basis for justifying an award of equitable compensation. Part V also addresses concerns about 'unlimited' or 'indeterminate' liability which often accompany arguments in favour of compensating distress.[16]

C *A Note on Statutory Regimes*

Before proceeding, it is worth noting that ethical funds are generally also subject to statutory regimes (such as the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Corporations Act 2001* (Cth)). These statutory regimes include civil penalty regimes, as well as potential statutory causes of action for misleading and deceptive conduct.[17] However, to the extent that this paper is concerned with equity's jurisdiction to grant compensation, I do not digress into a discussion of the concurrent statutory jurisdiction to award remedies for unethical investments. While the statutory regime is undoubtedly an important dimension of a trustee's liability, the focus of this paper is on the doctrinal boundaries of equitable compensation, and to that extent, the analysis below is limited to those obligations and remedies available in equity.

III COMPENSATION FOR BREACH OF TRUST

Having clarified the scope of this article, I may now proceed with my analysis of the relevant remedial claims in equity. At the risk of stating the obvious, for equitable compensation to be available as a remedy, a party must first establish that some equitable obligation has been breached. In the context of ethical funds, there are various potential obligations that trustees may have breached through an unethical investment. However, the precise obligation said to have been breached is of significance to the question of whether compensation can be awarded for

16 See, eg, *Tame v New South Wales* (2002) 211 CLR 317, 382 [194] (Gummow and Kirby JJ). See also Des Butler, 'An Assessment of Competing Policy Considerations in Cases of Psychiatric Injury Resulting from Negligence' (2002) 10(1) *Torts Law Journal* 13, 28, 34–5; Elizabeth Macdonald, 'Contractual Damages for Mental Distress' (1994) 7(2) *Journal of Contract Law* 134, 149, quoting *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 369 (Brennan J).

17 Indeed, the Australian Securities and Investments Commission commenced civil penalty proceedings against various superannuation funds for 'greenwashing' in 2023: Sarah Court, 'Red Light for Greenwashing', *Australian Securities and Investments Commission* (Article, 7 November 2023) <https://asic.gov.au/about-asic/news-centre/articles/red-light-for-greenwashing/>.

distress. Equity's jurisdiction to grant compensation does not operate homogeneously. Instead, the jurisdiction to grant 'compensation' for breaches of trust is distinct from equity's inherent jurisdiction to grant compensation for breaches of general equitable obligations.[18] As this section demonstrates, the scope to remedy distress in response to a claim for breach of trust is limited.

If beneficiaries argued that by making unethical investments, the trustees exceeded the scope of their investment powers under the trust instrument, the trustees would be said to have breached their custodial obligations (that is, they would have engaged in a breach of trust). For breaches of trust, equity traditionally examines the state of the trust accounts to identify a deficit in the trust funds that needs to be restored through the payment of money.[19]

The jurisdiction to grant equitable compensation for a breach of trust has been subject to significant academic debate recently.[20] The focus of those debates has been on the relevance of 'but for' causation in claims where, historically, the court would have ordered an account of administration in common form or on a wilful default basis.[21] However, such debates are of limited assistance in determining whether distress can be remedied by equitable compensation. Regardless of the position one takes in the debates, the remedy for a breach of trust requires considering the *financial* state of the trust account to determine the amount by which that account must be reconstituted. Given distress is a non-financial harm, it will never appear as a 'deficit' in the trust funds.[22] Accordingly, the jurisdiction to award compensation for a breach of trust is not capable of remedying distress.

IV THE BEST INTERESTS DUTY — A GATEWAY TO COMPENSATION

The limited utility of compensation for breach of trust does not shut the proverbial door on the possibility of remedying distress through equitable compensation. As noted above, equity also possesses a more general inherent jurisdiction to grant

18 See generally Jamie Glister, 'Breach of Trust and Consequential Loss' (2014) 8(3) *Journal of Equity* 235, 238. See also Mitchell (n 1) 326–7, quoting *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 687 (Tipping J) and *Cassis v Kalfus [No 2]* [2004] NSWCA 315, [99] (Hodgson JA) ('*Cassis*'); Lusina Ho, 'An Account of Accounts' (2016) 28 (Special Issue) *Singapore Academy of Law Journal* 849, 873 [44].

19 See, eg, Ho (n 18) 852–3 [7]–[8].

20 See, eg, Matthew Conaglen, 'Equitable Compensation for Breach of Trust: Off *Target*' (2016) 40(1) *Melbourne University Law Review* 126 ('Equitable Compensation for Breach of Trust'); Ho (n 18); Edelman, 'An English Misturning with Equitable Compensation' (n 3); Nicholas A Tiverios and Clare McKay, 'Orthodoxy Lost: The (Ir)relevance of Causation in Quantifying Breach of Trust Claims' (2016) 90(4) *Australian Law Journal* 231; David Wright, 'Another Wrong Step: Equitable Compensation Following a Breach of Trust' (2015) 21(7) *Trusts and Trustees* 825.

21 Conaglen, 'Equitable Compensation for Breach of Trust' (n 20) 128, 136–46.

22 Note that this is not to suggest that a claim for breach of trust would be entirely futile, but rather to recognise that remedies for a breach of trust would not generate compensation for distress.

compensation for breaches of equitable obligations. Accordingly, instead of seeking compensation for a breach of trust, beneficiaries could rely on the breach of some other equitable obligation as a 'gateway' to compensation.

The most forthcoming 'gateway obligation' beneficiaries could rely on is the trustee's duty to act in the best interests of the beneficiary. More specifically, beneficiaries could argue that by investing contrary to the agreed upon ethical screening process, the trustees have acted contrary to the beneficiaries' best interests. At first blush, that argument may seem bold. At least in the context of superannuation funds, the statutory incarnation of the best interests duty has recently been amended so that the duty is defined as the duty of the trustee to act in the best *financial* interests of a beneficiary.[23] Indeed, the wording of the statute aligns with the ordinary position under the general law, which requires trustees to maximise the financial returns from their investments without considering their views on social or political issues.[24]

However, it is suggested that while the best interests duty does require trustees to maximise the beneficiaries' financial interests, those financial interests need not be considered in a vacuum. Instead, the nature of the beneficiaries' 'financial interests' is shaped by the context of a fund. For ethical funds, a necessary feature of that context is the ethical commitments made by the trustees. The consequence of that context is that the relevant financial interests which the trustees must consider are not the beneficiaries' interest in gaining some financial benefit *simpliciter*. Rather, the beneficiaries' financial interest is to gain profits *from particular sources* — that is, those sources that fall *within* the fund's ethical parameters.

A *The Decision-Making Process Required by the Best Interests Duty*

The classic formulation[25] of the best interests duty under the general law was provided by Megarry V-C in *Cowan v Scargill* ('*Cowan*'):

> the duty of trustees [is] to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty of trustees towards their beneficiaries is paramount.[26]

23 *Superannuation Industry (Supervision) Act 1993* (Cth) ss 52(2)(c), 52A(2)(c) ('*SIS Act*').

24 *Harries v Church Commissioners for England* [1992] 1 WLR 1241, 1246; *Cowan v Scargill* [1985] Ch 270, 286–8 ('*Cowan*') (Megarry V-C).

25 Geraint W Thomas, 'The Duty of Trustees to Act in the "Best Interests" of Their Beneficiaries' (2008) 2(3) *Journal of Equity* 177, 178–9.

26 *Cowan* (n 24) 286–7.

Megarry V-C went on to explain that '[w]hen the purpose of the trust is to provide financial benefits for the beneficiaries … the best interests of the beneficiaries are normally their best financial interests'.[27]

To better understand this formulation of the best interests duty, it is useful to start with what it means for a trustee to 'exercise their powers'. Trustees are not granted freestanding powers to deal with trust property in their absolute discretion[28] — they must only exercise their powers in relation to trust property to fulfil their duties to the beneficiaries.[29] Therefore, a trustee would not be exercising their powers over trust property unless they were discharging some duty.[30] It follows that the best interests duty controls the exercise of a trustee's other duties.[31]

The fact that the best interests duty is always attached to the discharge of another duty seems to have led some commentators to conclude that no *separate* best interests duty exists. Such commentators have described the duty as merely akin to an 'equitable maxim',[32] or 'chimerical'.[33] There is at least some case law in support of this position. For example,[34] M Scott Donald points to cases which have described the best interests duty as a manifestation of the duty of loyalty,[35] to act for a proper purpose,[36] to act fairly,[37] and to act impartially.[38]

Respectfully, this article suggests the position that the best interests duty is simply a manifestation of other duties is erroneous. There is a distinction between a duty and the action that duty requires. While two duties may demand the same action, that does not render those duties identical. If those two duties describe distinct obligations that simply happen to demand the same action, the duties remain conceptually distinct.

27 Ibid 287.

28 See generally *Morice v Bishop of Durham* (1804) 9 Ves 399; 32 ER 656, 658–9 (Grant MR).

29 Thomas (n 25) 188.

30 Ibid.

31 Ibid 184–5, 188–9; Paul Collins, 'The Best Interests Duty and the Standard Care for Superannuation Trustees' (2014) 88(9) *Australian Law Journal* 632, 635–6.

32 David Pollard, 'The Short-Form "Best Interests Duty" — Mad, Bad and Dangerous to Know: Part 1' (2018) 32(2) *Trust Law International* 106, 131–2.

33 M Scott Donald, '"Best" Interests?' (2008) 2(3) *Journal of Equity* 245, 251 ('Best Interests').

34 Ibid 250–1.

35 Ibid 250, discussing *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Boveri Pty Ltd* [1999] 1 VR 144.

36 Donald, 'Best Interests' (n 33) 250, discussing *Edge v Pensions Ombudsman* [2000] Ch 602.

37 Donald, 'Best Interests' (n 33) 250–1, discussing *Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Ltd* (1989) 1 WAR 65, 92 (Pidgeon J).

38 Donald, 'Best Interests' (n 33) 251, discussing *Alexander Forbes Trustee Services Ltd v Jackson* [2004] EWHC 2448 (Ch).

Insofar as the best interests duty is attached to the discharge of other duties, the action it requires will always be the action also required by the proper performance of another duty. However, as the action/duty distinction makes clear, this does not mean those two duties are the same. The best interests duty controls the action a trustee takes when discharging some other duty.[39] Where there are multiple courses of action that could be followed in the discharge of some other duty, the best interests duty requires the trustee to select the *best* course of action by reference to the beneficiaries' interests. This explanation of the best interests duty accounts for some of the confusion around whether the duty is an *independent* duty per se. As Professor Geraint W Thomas suggests:

> The first question that a trustee must ask is *not*: 'is the duty to do X … consistent with my overriding duty to act in the best interests of my beneficiaries?' … Rather, the trustee should ask first: 'what duties must I perform and what powers do I have to enable me to do so?' It is in the *performance* of those specified duties that he must then observe the 'best interests duty'.[40]

The foregoing approach also explains the decision in *Cowan*.[41] Had the union-appointed trustees in that case asked themselves Thomas' questions, they would have started by recognising their obligation to ensure that there was enough money in the fund to satisfy the claims of present and future beneficiaries.[42] To meet that obligation, the trustees were equipped with a power of investment. In exercising that power, the trustees could adopt various types of investment policies, each of which may have allowed them to ensure that there was enough money in the fund. However, the trustees then needed to ask what the *best* course of action would be. Had they asked themselves that question (rather than asking themselves what was in the interests of the union from which they were nominated), they would not have adopted a policy prohibiting investments in certain sectors.[43]

B *Applying the Decision-Making Process to Investment Powers in Ethical Funds*

The question which follows from the above analysis is what the best interests duty requires of trustees of ethical funds when they are discharging their duty to invest. Applying the approach in Part IV(A) above, the trustees should begin by considering what precisely the nature of the beneficiaries' interests in the fund is that they must advance by exercising their power of investment.

There is no universal definition of a beneficiary's interest in a fund. Consistently with the High Court's comments regarding mutual funds in *CPT Custodian Pty Ltd*

39 Thomas (n 25) 184–5, 188–9; Collins (n 31) 635–6.

40 Thomas (n 25) 189 (emphasis in original).

41 *Cowan* (n 24).

42 Ibid 287, 292–3 (Megarry V-C).

43 Ibid 293 (Megarry V-C).

v Commissioner of State Revenue (Vic),[44] attempts to define the interests of beneficiaries by looking at the general characteristics of particular kinds of funds should be avoided. Instead, the focus should be on the fund's constituent documents, interpreted in light of the overarching purpose of the fund,[45] its factual context,[46] and the applicable statutory regime.[47] Those factors will reveal the scope of the trustee's undertaking and the attendant rights and privileges that form a beneficiary's interest in the fund.

In *Cowan*, Megarry V-C's discussion of *Evans v London Co-operative Society Ltd* ('*Evans*') implicitly acknowledged the relevance of the trust's governing rules in determining the beneficiaries' best interests.[48] In *Evans*, Brightman J held that, notwithstanding the default law of trusts, the rules of a pension fund could authorise trustees to provide loans to a certain party below market rate.[49] Similarly, in *Harries v Church Commissioners for England*, Nicholls V-C noted that a charitable trust's deed could authorise trustees to consider non-financial criteria, and that this position accorded with the decision in *Cowan*.[50]

The context-dependent nature of a beneficiary's interest explains why courts have not relied on a single, absolute criterion to adjudicate whether a decision is in the beneficiaries' best interests.[51] While the beneficiary's best interests will be objectively determined, that objective assessment turns on trust-specific factors, such as the prevailing circumstances of the fund at the time the decision was made.[52] Courts will then consider whether the trustee's decision was reasonably justifiable in light of the 'objectively' determined best interests.[53]

So far as ethical funds are concerned, it is unduly simplistic to characterise the beneficiaries' financial interests as merely to receive financial benefits. Instead, the nature of the beneficiaries' financial interest is shaped by the trustee's undertaking to invest ethically and the fund's overarching status as an ethical fund. The precise

44 (2005) 224 CLR 98, 109 [15] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ).

45 *Cowan* (n 24) 290 (Megarry V-C).

46 *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 270 [32] (French CJ, Gummow, Heydon, Crennan and Bell JJ).

47 *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1610–11 (Warner J).

48 *Cowan* (n 24) 291, discussing *Evans v London Co-operative Society Ltd* [1976] CLY 2059.

49 See above n 48.

50 [1992] 1 WLR 1241, 1247–8, 1250.

51 Collins (n 31) 634. See also Daniel Mendoza-Jones, 'Superannuation Trustees: Governance, Best Interests, Conflicts of Interests and the Proposed Reforms' (2012) 30(5) *Company and Securities Law Journal* 297, 301.

52 *Australian Prudential Regulation Authority v Kelaher* (2019) 138 ACSR 459, 483 [64]–[65] (Jagot J).

53 Ibid; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, 884 (Knox J); *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260, 1270 (Dillon LJ).

nature of that financial interest is to derive financial benefits *from ethical sources*.[54] Importantly, the trustee must still seek to deliver financial benefits to the beneficiaries — they cannot, for example, make donations to an ethical charity that generates no profits. However, in determining what the 'best' profit-generating option is, trustees are constrained by the purpose of the fund, and therefore the negative screening requirements. Put another way, the fund's ethical parameters and the requirement to deliver financial benefits to the beneficiaries should not be separated from one another — they operate together to form the beneficiaries' financial interest in the fund. That financial interest is actively undermined when the trustee disregards the fund's ethical parameters. Therefore, by investing unethically, the trustee cannot be said to have acted in the best interests of the beneficiaries.

V EQUITY'S 'INHERENT' JURISDICTION TO COMPENSATE

Having dealt with the anterior requirement of a breach of equitable obligation, we may now turn to the question of whether equitable compensation can embrace non-pecuniary losses, such as distress. This section begins by canvassing two Australian breach of confidence cases where equitable compensation has been awarded for distress — *Giller v Procopets*[55] and *Wilson v Ferguson* ('*Wilson*').[56] Those cases have been criticised for relying on the mere absence of other appropriate remedies as a justification for awarding compensation (rather than providing a sound reason in principle why distress is compensable in equity).[57] However, I suggest that the award of compensation in those cases is consistent with the principles underlying equity's inherent jurisdiction to award compensation. To identify those principles, this section uses a bottom-up, inductive approach, examining various earlier cases on equitable compensation. It is suggested that for a particular loss to fall within the ambit of equitable compensation, it must be sufficiently connected to the subject matter of the equitable obligation said to have been breached. In determining whether the loss suffered is *sufficiently* connected to the equitable obligation, courts will consider what equity's conscience has to say about the nature and purpose of the particular obligation in light of the relationship between the parties.

54 Although in some cases beneficiaries may lack a specific proprietary interest in the assets of the fund (see, eg, *Fouche v Superannuation Fund Board* (1952) 88 CLR 609, 640 (Dixon, McTiernan and Fullagar JJ) ('*Fouche*')), their 'interests' will still include a right to have the fund properly administered: *Kennon v Spry* (2008) 238 CLR 366, 393–4 [75] (French CJ); *Fouche* (n 54) 640–1 (Dixon, McTiernan and Fullagar JJ). The proper administration of the fund requires trustees to act in accordance with their undertaking and give effect to the fund's financial screens.

55 *Giller* (n 4).

56 *Wilson* (n 4).

57 Turner (n 9) 273.

A *Breach of Confidence Cases*

The two breach of confidence cases mentioned above involved the dissemination of 'revenge pornography', where equity's inherent jurisdiction to grant compensation was invoked to redress the distress suffered by plaintiffs outside of a commercial context.

In *Giller*, the Victorian Court of Appeal unanimously awarded monetary compensation for 'mere' mental distress.[58] Much of the academic discussion of the case has focused on the Court's holding that damages were available under the Victorian equivalent of *Lord Cairns' Act*.[59] However, the Court also held that compensation under equity's inherent jurisdiction was available for 'mere' distress.[60] To arrive at that conclusion, the Court observed that ordinarily injunctive relief would be awarded to prevent the plaintiffs from suffering distress as a result of a prospective breach of confidence.[61] To be entitled to injunctive relief, the plaintiff would not have been required to demonstrate potential financial loss or recognised psychiatric injury. Rather, as distress and embarrassment would have been within the parties' contemplation as a result of a breach of confidence, the 'balance of convenience' test for injunctive relief would be satisfied.[62] However, in this case the images had already been disseminated and therefore injunctive relief was of limited use. In those circumstances, the Court reasoned that it would be 'anomalous' if no compensation were available for the predictable distress and embarrassment caused by the breach.[63]

In *Wilson*, the Supreme Court of Western Australia followed *Giller* to award compensation for mental distress.[64] As in *Giller*, Mitchell J considered the ineffectiveness of injunctive relief to redress the losses suffered by the beneficiaries. His Honour noted that technological advancements have led to a dramatic increase in the speed with which information may be disseminated globally.[65] Accordingly, if the court were limited to injunctive relief, the obligation of confidence may be entirely unenforceable in many cases.[66] Thus, granting equitable compensation engaged the 'cardinal principle' of equity recognised in

58 *Giller* (n 4) 50 [223] (Ashley JA), 106 [446] (Neave JA, Maxwell P agreeing at 5 [1]).

59 Ibid 101–3 [425]–[431] (Neave JA). See, eg, Heydon, Leeming and Turner (n 2) 881–3 [24-085]; Katy Barnett, 'Lord Cairns' Act and Statutory Interpretation: Give the Court an Inch, They'll Take a Mile' in Prue Vines and M Scott Donald (eds), *Statutory Interpretation in Private Law* (Federation Press, 2019) 207; Katy Barnett and Michael Bryan, 'Lord Cairns's Act: A Case Study in the Unintended Consequences of Legislation' (2015) 9(2) *Journal of Equity* 150.

60 *Giller* (n 4) 32 [145]–[148] (Ashley JA), 100 [422]–[424] (Neave JA).

61 Ibid 32 [145], [150] (Ashley JA), 100 [423] (Neave JA).

62 Ibid 32 [150] (Ashley JA).

63 Ibid.

64 *Wilson* (n 4) [82]–[85] (Mitchell J).

65 Ibid [80].

66 Ibid [82].

Warman International Ltd v Dwyer,[67] that remedies 'must be fashioned to fit the nature of the case and the particular facts'.[68] The obligation of confidence in *Wilson* was imposed to protect the privacy of the plaintiff, a violation of which was likely to cause mental distress.[69] Therefore, extending equitable compensation to mental distress was an appropriate development of an established principle.[70]

B *The Need for a 'Bottom-Up' Approach*

As is apparent from the aforementioned examination of *Giller* and *Wilson*, the lack of another appropriate remedy to redress the loss suffered by the plaintiffs played a significant role in the courts' reasoning. Therefore, while those cases are useful examples of equity not being closed off to compensating for distress, it remains necessary to identify a positive principled justification for the compensation awarded in those cases that can also be applied to the core scenario of this article.

Speaking extrajudicially, Sir Owen Dixon suggested that the technique for the judicial development of the law is to 'extend … accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions'.[71] In *Harris v Digital Pulse Pty Ltd* ('*Harris*'), Spigelman CJ stated that an inductive approach was to be preferred to top-down reasoning, whereby one identifies a principle 'at a high level of abstraction, from which is derived a rule of particular application'.[72]

Inductive reasoning requires starting with an analysis of existing case law on equitable compensation to identify a method of reasoning which may then be incrementally expanded to a novel scenario.[73] However, that process is complicated in the case of equitable compensation because of the numerous contexts in which the term 'equitable compensation' has been used.[74] Accordingly, there is some difficulty in pinning down the precise circumstances and basis on which courts are awarding equitable compensation in a given case.

67 (1995) 182 CLR 544, 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

68 *Wilson* (n 4) [82], citing ibid.

69 *Wilson* (n 4) [58].

70 Ibid [83].

71 Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29(9) *Australian Law Journal* 468, 472.

72 (2003) 56 NSWLR 298, 305 [12]–[13] ('*Harris*').

73 See generally, Justice Keith Mason, 'What Is Wrong with Top-Down Legal Reasoning?' (2004) 78(9) *Australian Law Journal* 574, 577, discussing Richard A Posner, 'Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59(1) *University of Chicago Law Review* 433, 433.

74 Ward (n 1) 65–6.

C *Applying the Inductive Approach to Equitable Compensation*

Equity's inherent jurisdiction to grant compensation for breaches of equitable obligations has been described in numerous cases.[75] Many of those cases describe the jurisdiction as one that is enlivened upon the breach of a 'fiduciary duty'.[76] If 'fiduciary duty' is used in those cases exclusively to describe proscriptive duties imposed on a fiduciary,[77] the principles in those cases would be inapplicable to the core scenario considered by this paper. The best interests obligation requires trustees to take some positive action and is therefore a 'prescriptive' rather than 'proscriptive' duty.[78] Therefore, before turning to the principle that underlies an award of equitable compensation, it is necessary to determine whether the cases are describing a common jurisdiction to award compensation for breaches of all equitable obligations, or whether some distinction is being drawn on the basis of proscriptive and prescriptive duties.

1 *Is the Jurisdiction Limited to 'Fiduciary Duties'?*

The cases which describe equity's jurisdiction to grant compensation as one for a 'breach of fiduciary duty' generally cite *Nocton v Lord Ashburton* ('*Nocton*')[79] as authority for that proposition.[80] However, there is some debate over the exact

75 See generally *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 109 (Mason J); *Nagle v Lavender* [2002] NSWSC 611, [90] (Campbell J); *Markwell Bros Pty Ltd v CPN Diesels (Qld) Pty Ltd* [1983] 2 Qd R 508, 523 (Thomas J); *Terrace Counsellors Pty Ltd v Arnold* [2002] WASC 90, [7] (Master Bredmeyer); *Hill v Rose* [1990] VR 129, 143–4 (Tadgell J).

76 See, eg, *Cassis* (n 18) [99] (Hodgson JA); *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1, 20 [96]–[97] (Besanko J) ('*Blackmagic*'); *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187, [721] (Sheller, Beazley and Stein JJA); *Bailey v Namol Pty Ltd* (1994) 53 FCR 102, 109 (Burchett, Gummow and O'Loughlin JJ) ('*Bailey*').

77 *Breen v Williams* (1996) 186 CLR 71, 93–4 (Dawson and Toohey JJ), 113 (Gaudron and McHugh JJ) ('*Breen*').

78 See generally JC Campbell, 'Some Aspects of the Civil Liability Arising from Breach of Duty by a Superannuation Trustee' (2017) 44(1) *Australian Bar Review* 24, 62; Justice Fabian Gleeson, 'Proscriptive and Prescriptive Duties: Is the Distinction Helpful and Sustainable, and if So, What Are the Practical Consequences?' (Speech, Supreme Court Corporate and Commercial Law Conference, 15 November 2017) 18 [62]–[64].

79 [1914] AC 932.

80 See, eg, *Bailey* (n 76) 109 (Burchett, Gummow and O'Loughlin JJ); *Blackmagic* (n 76) 20 [97] (Besanko J); *Blythe v Northwood* [2005] NSWCA 221, [108]–[112] (Mason P), discussing *Wendt v Northwood* [2004] NSWSC 23, [59]–[60] (Shaw J); *Nutectime International Pty Ltd v Timentel Pty Ltd* (2011) 85 ACSR 570, 587 [133] (Giles JA, Handley and Tobias AJJA); *Shum Yip Properties Development Ltd v Chatswood Investment & Development Co Pty Ltd* (2002) 166 FLR 451, 456–7 [244] (Austin J); *Aequitas Ltd v AEFC* (2001) 19 ACLC 1006, 1089 [442] (Austin J).

nature of the breach the Court was remedying in *Nocton*.[81] While some commentators have suggested that the case involved a breach of 'true' fiduciary duty,[82] it is suggested that the better view seems to be that the case was concerned with a breach of the equitable duty of care, skill and diligence.[83]

The impugned conduct in *Nocton* was advice given by a solicitor to his client,[84] which was negligent, but also related to a transaction in which the solicitor had a concealed interest.[85] Therefore, the facts could potentially have given rise to claims for negligence, actual fraud (that is, *Derry v Peek* liability) or a breach of fiduciary duty arising from conflicts of interests.[86] The cause of action in common law negligence was barred by the statute of limitations.[87] Additionally, following *Derry v Peek*,[88] the cause of action for 'actual fraud' required proof of dishonesty which had not been established.[89]

The disagreement over what the case decided likely flows from the fact that the Court could have imposed liability on the solicitor based on his conflict of interest.[90] However, in light of Jenkins KC's submissions,[91] Viscount Haldane LC focused on equity's jurisdiction to impose liability for negligence instead. His Lordship reasoned that while ordinarily a claim of mere negligence was demurrable for want of equity, in this case, the negligent conduct arose in the context of a fiduciary relationship.[92] That was sufficient to enliven equity's jurisdiction to scrutinise the solicitor's conduct. Although Viscount Haldane LC referred to a breach of 'fiduciary duty', his Lordship's use of 'fiduciary duty' should be understood as a loose reference to the equitable obligations owed by a

81 See, eg, Frederick Pollock, '*Nocton v Lord Ashburton*' (1915) 31(1) *Law Quarterly Review* 93; Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010) 223–5 ('*Fiduciary Loyalty*'); James Edelman, '*Nocton v Lord Ashburton* (1914)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 473 ('*Nocton v Ashburton* (1914)'); Joshua Getzler, 'Equitable Compensation and the Regulation of Fiduciary Relationships' in Peter Birks and Francis Rose (eds), *Restitution and Equity: Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000) vol 1, 235.

82 See, eg, Chief Justice RS French, 'Equitable Compensation' (Speech, Judicial Colloquium, 23 September 2015) 11–12; Mitchell (n 1) 319; Getzler (n 81) 236.

83 Conaglen, '*Fiduciary Loyalty*' (n 81) 223–5; Edelman, '*Nocton v Ashburton* (1914)' (n 81) 492–4.

84 *Nocton* (n 8) 944 (Viscount Haldane LC).

85 Edelman, '*Nocton v Lord Ashburton* (1914)' (n 81) 473–4.

86 Ibid 477.

87 *Nocton* (n 8) 958 (Viscount Haldane LC).

88 (1889) 14 App Cas 337, 374 (Lord Herschell).

89 *Nocton* (n 8) 944–5 (Viscount Haldane LC).

90 Edelman, '*Nocton v Lord Ashburton* (1914)' (n 81) 483–4, 493; Conaglen, *Fiduciary Loyalty* (n 81) 224.

91 *Nocton* (n 8) 943 (Jenkins KC) (during argument).

92 Ibid 956.

person in their capacity as a fiduciary.[93] His Lordship was not just concerned with proscriptive duties but with any duty enforceable by 'a Court of conscience'.[94] Thus, *Nocton* should be treated as authority for the proposition that equitable compensation is available for any breach of an equitable obligation (rather than merely proscriptive fiduciary duties).

The subsequent judicial treatment of *Nocton* seems to support this position. In *Robinson v The National Bank of Scotland Ltd*, Viscount Haldane explained in obiter that *Nocton* was a case that dealt with the duty of care that arises in fiduciary relationships.[95] In Australia, a similar view was expressed in *Hawkins v Clayton*[96] and *Giannarelli v Wraith*,[97] where the High Court considered *Nocton* to be a case concerning a breach of an equitable duty of care. In *O'Halloran v R T Thomas & Family Pty Ltd* ('*O'Halloran*'), a case concerning compensation for a breach of fiduciary duty, Spigelman CJ described the *Nocton* jurisdiction as being available for breaches of 'equitable obligation[s]'.[98] His Honour seems to have made a conscious decision to use the broader term 'equitable obligation' instead of 'fiduciary duty', as later in the judgment, his Honour specifically discussed the distinctions between true fiduciary duties and other equitable obligations.[99]

Based on *Nocton* and its subsequent interpretation,[100] it seems that there is a common inherent jurisdiction to grant equitable compensation, which is engaged wherever a defendant has breached an equitable obligation.[101] While the jurisdiction includes breaches of proscriptive fiduciary duties, it is not limited to such breaches.[102] Indeed, in *Harris*, Spigelman CJ cited *Nocton* as authority for equity's wide jurisdiction to award compensation for the infringement of rights that had been exclusively recognised in Chancery prior to the *Judicature Acts*.[103] His Honour observed that 'equitable compensation has become a torrent' and that

93 Edelman, '*Nocton v Lord Ashburton* (1914)' (n 81) 488–9.

94 *Nocton* (n 8) 954.

95 1916 SC (HL) 154, 157, cited in Edelman, '*Nocton v Lord Ashburton* (1914)' (n 81) 493–4 and Matthew Conaglen, *Fiduciary Loyalty* (n 81) 224.

96 (1988) 164 CLR 539, 574 (Deane J), citing *Nocton* (n 8) 956 (Viscount Haldane LC).

97 (1988) 165 CLR 543, 592 (Dawson J), citing *Nocton* (n 8).

98 *O'Halloran* (n 2) 272, citing *Nocton* (n 8) 952 (Viscount Haldane LC).

99 *O'Halloran* (n 2) 274, citing *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, 293–4 (Mason, Deane and Dawson JJ), *Mills v Mills* (1938) 60 CLR 150, 185–6 (Dixon J) and *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 237–9 (Ipp J).

100 Conaglen, *Fiduciary Loyalty* (n 81) 224, discussing *Nocton* (n 8).

101 See Khun (n 9) 199.

102 See, eg, *Anthony v Morton* [2018] NSWSC 1884, [515] (Ward CJ in Eq); *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 816 (McLelland J), reasoning not overturned on appeal; *Smith Kline* (n 2) 83 (Gummow J); *Oates v Consolidated Capital Services Ltd* (2009) 233 FLR 283, 331 [224] (Campbell JA) ('*Oates*'), quoting *O'Halloran* (n 2) 272–3 (Spigelman CJ).

103 *Harris* (n 72) 322 [124], discussing *Nocton* (n 8).

remedy has been 'awarded for a wide variety of infractions of fiduciary and other "equitable" duties'.[104]

2 *The Guiding Principle — A Connection to the 'Subject Matter'*

Having established that a breach of any equitable obligation engages the court's jurisdiction to grant compensation, I may now turn to the principles on which that compensation is granted. In *O'Halloran*, Spigelman CJ stated that the object of equitable compensation was to 'restore persons who have suffered loss to the position in which they would have been if there had been no breach of the equitable obligation'.[105] That formulation has been adopted in numerous subsequent cases.[106] In *Beach Petroleum NL v Kennedy*, the New South Wales Court of Appeal considered the restorative nature of compensation as requiring a 'causal link' between the loss suffered and the obligation breached.[107] In *ABN AMRO Bank NV v Bathurst Regional Council*, the Full Court of the Federal Court held that '[w]hat constitutes an adequate or sufficient connection' between the breach of duty and the loss suffered 'is not predetermined or formulaic'.[108] Rather, as was emphasised in *O'Halloran*[109] and subsequently *Nicholls v Michael Wilson & Partners Ltd*,[110] the court will consider the purpose of the equitable obligation that has purportedly been breached. As Joshua Getzler observes, in considering the purpose of the equitable obligation, the court exercises a normative judgment as to whether the loss suffered is sufficiently connected to the duty breached such that equitable compensation may be awarded.[111]

The foregoing analysis would suggest that to make a legitimate argument for compensation, beneficiaries would need to establish that the distress they suffered was 'sufficiently connected' with the trustee's breach of equitable obligation. As the authors of *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* suggest, no 'explicit principle' prevents equitable compensation from vindicating

104 *Harris* (n 72) 322 [124].

105 *O'Halloran* (n 2) 272 (citations omitted).

106 See, eg, *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 347–8 [187] (Finn, Stone and Perram JJ); *Oates* (n 102) 331 [224] (Campbell JA); *Ramsay v BigTinCan Pty Ltd* (2014) 101 ACSR 415, 436–7 [119] (Gleeson JA); *Switzerland Insurance Australia Ltd v McCann* [1999] NSWCA 310, [81] (Mason P, Stein and Giles JJA); *Watson v Ebsworth & Ebsworth* (2010) 31 VR 123, 173 [161] (Neave, Mandie and Hansen JJA).

107 (1999) 48 NSWLR 1, 94 [450] (Spigelman CJ, Sheller and Stein JJA).

108 (2014) 224 FCR 1, 216 [1090] (Jacobson, Gilmour and Gordon JJ).

109 *O'Halloran* (n 2) 275 (Spigelman CJ).

110 [2012] NSWCA 383, [172] (Sackville AJA).

111 Getzler (n 81) 245, citing *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191, 212–22 (Lord Hoffmann).

purely personal interests.[112] Rather, personal interests simply have not traditionally been the 'subject matter' of trusts and fiduciary obligations in Australia.[113]

To determine the 'subject matter' of an equitable obligation, one must normatively consider why that obligation is being enforced to begin with — ie, what the purpose of the obligation is. The source of equitable obligations is the standard of conduct expected by 'equity's conscience',[114] which is occasionally described as a nebulous concept.[115] At least partly, that is due to the concept's complex historical development and the variety of circumstances in which it has been invoked.[116] Rather than delving into the ecclesiastical origins of equity's conscience,[117] for the present purpose it suffices to consider how equity's conscience is invoked in modernity. Modern equity seeks to relieve a suitor's 'properly formed and instructed conscience'.[118] Used in this sense, 'conscience' does not refer to the subjective conscience of any individual. Rather, the use of 'properly formed and instructed' refers to an objective conscience — one which responds to the demands of justice, determined by reference to established principles developed by courts of equity over time.[119]

The Court in *Jenyns v Public Curator (Qld)* noted that the invocation of equitable doctrines on the basis of equity's conscience 'calls for a precise examination of the particular facts, [and] a scrutiny of the exact relations established between the parties'.[120] It follows that the purpose of a particular equitable obligation turns on the circumstances of a case. It cannot be described in general or universal terms that are abstracted from the particular dispute that falls to be resolved by the courts of equity. Instead, '[a] court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case'.[121]

112 Heydon, Leeming and Turner (n 2) 866–7 [23-605].

113 Ibid.

114 See, eg, Rohan Havelock, 'Conscience and Unconscionability in Modern Equity' (2015) 9(1) *Journal of Equity* 1, 4; Khun (n 9) 194.

115 See, eg, Dennis R Klinck, 'The Nebulous Equitable Duty of Conscience' (2005) 31 *Queen's Law Journal* 206.

116 Ibid 212–16; Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience and Unjust Enrichment' (1999) 23(1) *Melbourne University Law Review* 1; Sinéad Agnew, 'The Meaning and Significance of Conscience in Private Law' (2018) 77(3) *Cambridge Law Journal* 479; Mike Macnair, 'Equity and Conscience' (2007) 27(4) *Oxford Journal of Legal Studies* 659.

117 See PA Keane, 'The 2009 WA Lee Lecture in Equity: The Conscience of Equity' (2010) 10(1) *QUT Law and Justice Journal* 106, 109–11; Timothy AO Endicott, 'The Conscience of the King: Christopher St German and Thomas More and the Development of English Equity' (1989) 47(2) *University of Toronto Faculty of Law Review* 549, 553.

118 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 227 [45] (Gleeson CJ).

119 Richard Hedlund, 'Conscience and Unconscionability in English Equity' (PhD Thesis, University of York, 2016) 105, discussing ibid.

120 (1953) 90 CLR 113, 118 (Dixon CJ, McTiernan and Kitto JJ).

121 Ibid 119, quoting *The Juliana* (1822) 2 Dods 504, 521; 165 ER 1560, 1567 (Lord Stowell).

3 *Applying the 'Connection to Subject Matter' Test*

The process described above of considering the purpose of an equitable obligation can also be relied on to justify the awards of compensation for distress in *Giller* and *Wilson*. It was necessary for the court to consider the circumstances in which the purportedly confidential information was communicated and obtained.[122] As Dennis R Klinck suggests, the limited purpose for which the information has been communicated then determines the boundaries of the obligation of confidence equity's conscience will impose on the defendant.[123] In *Giller* and *Wilson*, the plaintiffs communicated intimate images solely for the defendants' use or enjoyment. In light of those circumstances, the purpose with which equity's conscience imposed an obligation of confidence was to protect the plaintiffs' privacy.[124] A natural consequence of a breach of that privacy was the distress caused to the plaintiffs. Accordingly, non-economic 'personal rights' were the subject matter of the obligation of conscience and could be rightly vindicated by equitable compensation.

A similar approach should be taken when determining whether the non-pecuniary interests of the beneficiaries of ethical funds can be vindicated by equitable compensation. The argument advanced here is not that the circumstances of beneficiaries in ethical funds are identical to those of the plaintiffs in *Giller* and *Wilson*. Nor is it to say that the non-pecuniary interests of those beneficiaries and the plaintiffs in *Giller* and *Wilson* are the same (notwithstanding the use of the broad label of 'distress'). Rather, it is to say that a similar method of reasoning can lead to the conclusion that distress is compensable in the commercial context with which this article is concerned.

We can start by considering the relationship between the parties, which per the analysis above informs the purpose of the best interests duty in the particular circumstances of ethical funds. The relationship between trustees and beneficiaries is shaped by the nature and scope of the trustees' undertaking.[125] In ethical funds that includes an undertaking to make investments within the strict ethical parameters of the fund. The trustees are aware of the beneficiaries' concern over the ethical nature of the investments being made — that is the very purpose of the fund. In other words, they are aware of the fact that at least some beneficiaries will have a particular interest in deriving financial benefits solely from ethical sources. As was noted in Part II, the beneficiaries' concern over ethical investments flows

122 See, eg, *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414, 437 (Deane J).

123 Klinck (n 115) 237. See also Hedlund (n 119) 157–8.

124 Campbell (n 78) 62.

125 See generally *Elovalis v Elovalis* [2008] WASCA 141, [66] (Buss JA); James Edelman, 'The Importance of the Fiduciary Undertaking' (Paper, Conference on Fiduciary Law, University of New South Wales, 22 March 2013) 8, citing *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323, [362] (Beech J); Ying Khai Liew and Charles Mitchell, 'The Creation of Express Trusts' (2017) 11(2) *Journal of Equity* 133, 145; Tatiana Cutts, 'The Nature of "Equitable Property": A Functional Analysis' (2012) 6(1) *Journal of Equity* 44, 54.

from a desire to avoid moral perturbation or distress. The beneficiaries have reposed their trust and confidence in the trustees to advance this interest and avoid entering transactions that would cause them unwanted distress.[126] Thus, distress is not some incidental aspect of the beneficiaries' loss. Rather, it is yoked to the very purpose of the obligation of conscience equity is imposing through the best interests duty.[127] It follows that the avoidance of distress is an interest that is 'sufficiently connected' to the best interests duty such that an award of compensation for distress is justifiable in principle.

D *Outstanding Objections*

The analysis above demonstrates why there is a sound doctrinal justification for awarding equitable compensation where trustees make unethical investments. However, before turning to the question of how compensation may be quantified, it is worthwhile addressing two outstanding objections to my argument.

1 *Cases Suggesting Distress Cannot Be Compensated*

Contrary to the principle I have derived above, some may point to scepticism of equity's jurisdiction to remedy personal losses in the existing case law. Two prominent cases that come to mind are *Breen v Williams* ('*Breen*')[128] and *Paramasivam v Flynn* ('*Paramasivam*').[129]

Breen can be dealt with rather swiftly. The case concerned the question of whether a doctor owed a fiduciary obligation to a former patient to grant access to medical records. However, the Court found that the doctor had given no undertaking to act as the patient's representative and could not identify any basis on which the doctor could be treated as the patient's fiduciary vis-a-vis the medical records.[130] Accordingly, the case was concerned with the nature of equitable obligations owed by a doctor to their patients rather than the category of interest which equitable remedies could vindicate.

In *Paramasivam*, the Court explicitly stated that equitable doctrines have traditionally only protected economic interests.[131] However, the Court noted that the claim was not being rejected simply because it related to a novel category of loss.[132] Instead, the relevant claim was one for harms arising from sexual assault,

126 *Re Locker's Settlement Trusts; Meachem v Sachs* [1978] 1 All ER 216, 219 (Goulding J); Nuncio D'Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) 94 [2.139]; Klinck (n 115) 238.

127 See generally *O'Halloran* (n 2); *Brueckner v The Satellite Group (Ultimo) Pty Ltd (rec and mgr apptd)* [2002] NSWSC 378, [123], [131] (Campbell J).

128 *Breen* (n 77).

129 (1998) 90 FCR 489 ('*Paramasivam*'). See generally Campbell (n 78) 62.

130 *Breen* (n 77) 110 (Gaudron and McHugh JJ).

131 *Paramasivam* (n 129) 504 (Miles, Lehane and Weinberg JJ).

132 Ibid 505 (Miles, Lehane and Weinberg JJ).

which the Court believed was adequately regulated by the law of torts such that equitable intervention was unnecessary.[133]

Unlike in *Paramasivam*, there is no settled or intuitive common law jurisdiction that would be more appropriate in remedying a beneficiary's distress. One option could be to consider bringing a claim in contract, where in certain exceptional circumstances, damages for distress have been awarded.[134] However, the existence of a contract between beneficiaries and trustees is itself the subject of some controversy. There appears to be competing authority as to whether sufficient consideration flows from a trustee to the beneficiaries.[135] In *Tooheys Ltd v Commissioner of Stamp Duties (NSW)*, the trustees' agreement to administer trust property upon the terms of the trust did not constitute adequate 'consideration' for a contract to be formed.[136] However, in *Cook v Benson* ('*Cook*'), the High Court held that the trustee of a superannuation fund provided sufficient consideration in the form of benefits supported by a set of life insurance policies to which the beneficiaries would have become entitled.[137]

As Donald notes, even if *Cook* is followed and a contract is found to exist, it does not necessarily mean that the scope of that contract extends to the rights enjoyed by beneficiaries qua members of the fund.[138] For example, courts may limit the scope of the purported contract to the acquisition of member rights and leave the enforcement of member rights to the trust deed.[139] Additionally, beneficiaries may struggle to base contractual claims on commitments to making ethical investments included in the fund's promotional materials (such as a product disclosure statement), given courts have previously construed such statements as 'descriptive rather than promissory' in nature.[140] Only after clearing those hurdles would beneficiaries be able to arrive at the question of whether their contracts fall within the exceptional circumstances referred to above, where damages for distress are available under contract. It should be noted that the suggestion here is not that a claim in contract would necessarily be impossible. Rather, it is to suggest that in

133 Ibid.

134 See, eg, *Jarvis v Swans Tours Ltd* [1973] QB 233, 237–8 (Lord Denning MR) ('*Jarvis*'); *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 362–3 (Mason CJ) ('*Baltic Shipping*'); *Farley v Skinner* [2002] 2 AC 732, 746–8 [17]–[20] (Lord Steyn) ('*Farley*'). Compare the general position against awarding damages for disappointment, injured feelings, etc: *Addis v Gramophone Co Ltd* [1909] AC 488, 491 (Lord Loreburn LC).

135 M Scott Donald, 'Parallel Streams: The Roles of Contract, Trust, Tort and Statute in Superannuation Funds and Managed Investment Schemes' (2020) 14(2) *Journal of Equity* 151, 164–6 ('Parallel Streams'), discussing *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 ('*Tooheys*') and *Cook v Benson* (2003) 214 CLR 370 ('*Cook*').

136 *Tooheys* (n 135) 616 (Dixon CJ).

137 *Cook* (n 135) 382–3 [33]–[36] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

138 Donald, 'Parallel Streams' (n 135) 166.

139 Ibid, discussing *Basis Capital Funds Management Ltd v BT Portfolio Services Ltd* (2008) 219 FLR 157, 180 [113] (Austin J).

140 Donald, 'Parallel Streams' (n 135) 167, quoting *Gunns Finance Pty Ltd (recs and mgrs apptd) (in liq) v Sithiravel* [2016] NSWSC 1543, [179] (Robb J).

light of the obstacles raised above, the case of ethical funds cannot be analogised to the circumstances in *Paramasivam*, where there was a clear and established common law remedy.

2 *Indeterminacy of Liability*

The second objection that may be raised, which often accompanies arguments in favour of compensating distress, is that there is a risk of imposing indeterminate liability on trustees. A pertinent difference between the circumstances of *Giller* and *Wilson*, and ethical funds, is that the former cases only involve two parties whereas trustees are dealing with a large class of existing and prospective beneficiaries. Accordingly, distinct policy concerns may arise regarding the potential indeterminacy of liability being imposed on trustees of ethical funds.

While there is limited authority on the indeterminacy of liability in equity, some guidance may be taken from the common law (notwithstanding the distinctions in how the two fields impose liability on defendants).[141] In tort cases, courts have noted that the concern underlying the indeterminacy of liability is over unfairly imposing unpredictable or open-ended liability on defendants.[142] However, in the context of ethical funds, beneficiaries could argue that the balance of fairness weighs against trustees. Liability for distress is not some unpredictable imposition on the trustees. Rather, as I have shown above, it flows from the very nature of their *voluntary* undertaking to invest ethically. By virtue of that voluntary undertaking, trustees are well-positioned to predict that distress would ensue from unethical investments. The mere fact that the class of potential claimants is large will not render liability 'indeterminate'.[143] In that sense, similarities may be drawn with the aforementioned contract cases, where plaintiffs have successfully recovered damages for disappointment.[144] The rationale in those cases has been that in some instances, the provision of a pleasurable amenity is a major feature of the contract.[145] In those limited circumstances, compensation for the disappointment that naturally follows the loss of the pleasurable amenity should be awarded.[146] Just as the floodgates have not been opened under the common law, so too can concerns of indeterminate liability be alleviated in equity. Compensation is reserved for the limited circumstances in which the subject matter of the equitable obligation was the avoidance of distress.

141 See *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 500 [39] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ) ('*Youyang*').

142 Des Butler, 'An Assessment of Competing Policy Considerations in Cases of Psychiatric Injury Resulting from Negligence' (2002) 10(1) *Torts Law Journal* 13, 34, citing Jane Stapleton, 'Duty of Care Factors: A Selection from Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, 1988) 59, 66.

143 See generally *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 221 [107] (McHugh J).

144 *Jarvis* (n 134); *Baltic Shipping* (n 134); *Farley* (n 134).

145 *Jarvis* (n 134) 238 (Lord Denning MR); *Baltic Shipping* (n 134) 363–6 (Mason CJ); *Farley* (n 134) 746–8 [17]–[20] (Lord Steyn).

146 *Jarvis* (n 134) 238 (Lord Denning MR); *Baltic Shipping* (n 134) 363–6 (Mason CJ); *Farley* (n 132) 746–8 [17]–[20] (Lord Steyn).

VI QUANTIFYING COMPENSATION

A question that follows from my argument in favour of granting compensation for the beneficiaries' distress is how that compensation may be calculated. The approach to monetarily quantifying non-economic losses may warrant an independent paper of its own.[147] Accordingly, the purpose of this section is to simply sketch the general principles relevant to assessing compensation for non-economic loss.

A *General Observations*

Before proceeding with a substantive discussion of the calculus for compensation, two general observations should be made. First, the fact that the loss is difficult to quantify should not restrict beneficiaries from recovering their losses.[148] In *Hasler v Singtel Optus Pty Ltd*, Leeming JA noted that difficulties in estimating a 'plaintiff's loss' would not 'stand in the way of [equity granting] a judgment'.[149] While the purpose of equitable compensation is restorative (as discussed above),[150] mathematical precision is not required — instead courts may arrive intuitively at a sum that achieves substantial restoration.[151] Such an approach has also been taken towards damages for misleading or deceptive conduct, where courts have been willing to assess damages as best they can with the evidence before them.[152]

Second, the willingness of courts to estimate the quantum of compensation will not relieve beneficiaries of their evidential burden to demonstrate that losses have actually been suffered.[153] However, the precision with which loss must be demonstrated is that which is reasonably permitted by the subject matter of the claim.[154]

147 See, eg, Zlatin Zlatev, 'Quantification of Damages for Non-Pecuniary Losses Deriving from Breach of Contract' (2020) 40(4) *Legal Studies* 548; Kenneth Yin, 'Damages for Breaches of Discrimination Law: The Contemporary Australian Jurisprudence and Practice' (2018) 46(3) *Australian Bar Review* 333.

148 See, eg, Khun (n 9) 201.

149 (2014) 87 NSWLR 609, 640 [147].

150 *O'Halloran* (n 2) 272 (Spigelman CJ), citing *Nocton* (n 8) 952 (Viscount Haldane LC).

151 *Re Cheal Industries Pty Ltd; Fitzpatrick v Cheal* [2012] NSWSC 595, [44] (Ward J), quoting *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 138 (Toohey J) ('*Amann*'), quoting *Jones v Schiffmann* (1971) 124 CLR 303, 308 (Menzies J); *Bennett v Horgan* (Supreme Court of New South Wales, Bryson J, 3 June 1994) 19.

152 *Advanced Building Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd* (2001) 52 IPR 305, 322 [58] (Hill J).

153 *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 77 ALJR 768, 774 [37] (Hayne J) ('*Placer*'), citing *Amann* (n 151) 80, 83–4 (Mason CJ and Dawson J), 138 (Toohey J), 153 (Gaudron J), 161 (McHugh J) and *Ratcliffe v Evans* [1892] 2 QB 524.

154 *Placer* (n 153).

B *Comparative Approach*

One approach to calculating compensation may be to draw comparisons with cases in other contexts where damages have been awarded for distress in order to achieve a sense of 'external consistency'.[155] Damages for distress have been awarded in cases involving nuisance,[156] breaches of certain kinds of contracts,[157] defamation[158] and discrimination.[159] Therefore, there is a significant body of case law that quantifies the various degrees of distress that claimants have suffered over the years. Drawing on those cases, courts could formulate a 'scale' of loss suffered by claimants in previous cases and place the matter before them on that scale.[160]

This approach was adopted by Neave JA in *Giller*.[161] Her Honour considered the sum of damages awarded for varying degrees of distress in other general law and statutory contexts (eg, defamation).[162] From there, her Honour appeared to create a rough scale of damages, and situate the loss suffered by the plaintiff on that scale. For example, her Honour reasoned that an award of $250,000, the maximum award of damages for non-economic loss in defamation cases,[163] would be excessive.[164] Instead, by comparing the quantum of damages awarded in invasion of privacy cases in other jurisdictions, her Honour found an award of $40,000 to be more appropriate.[165]

So far as equitable compensation is concerned, courts would need to be cautious in drawing comparisons to the common law. Notably, punitive damages, which are often included in the quantum of damages at common law, are generally not available in equity.[166] Additionally, in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*, the Court noted that there is a real question as to 'whether the unique foundation and goals of equity' would 'warrant any assimilation … with the

155 Burrows (n 12) 288.

156 See, eg, *Broken Hill City Council v Tiziani* (1997) 93 LGERA 113.

157 *Baltic Shipping* (n 134) 362 (Mason CJ).

158 See, eg, *Nationwide News Pty Ltd v Rush* (2020) 380 ALR 432.

159 See, eg, *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217.

160 See also *Williams v Nugara* [2021] VSC 331, [51]–[60] (Matthews AsJ), discussing *Newman v Financial Wisdom Ltd* (2004) 183 FLR 164.

161 *Giller* (n 4) 105–6 [443]–[446], discussing *Grosse v Purvis* [2003] QDC 151, [475] (Skoein SJ) ('*Grosse*') and *Doe v Australian Broadcasting Corporation* [2007] VCC 281, [186] (Hampel J) ('*Doe*').

162 *Giller* (n 4) 105 [445].

163 Ibid 105 [444], discussing *Defamation Act 2005* (Vic) s 35.

164 *Giller* (n 4) 106 [446].

165 Ibid 105–6 [445]–[446], discussing *Grosse* (n 161) [475] (Skoein SJ) and *Doe* (n 161) [186] (Hampel J).

166 *Harris* (n 72) 410–13 [423]–[433] (Heydon JA). See *Vyse v Foster* (1872) LR 8 Ch App 309, 333 (James LJ).

measure of compensatory damages in tort and contract'.[167] However, my argument does not relate to those aspects of 'assimilation' — I simply wish to note that established principles are yet to emerge regarding the quantification of distress in equity. In those circumstances, equity may take guidance from the common law's general approach to monetarily quantifying the extent of the loss suffered by a party.

There are certainly other approaches the courts may take in quantifying non-economic losses.[168] However, the purpose of this section is simply to demonstrate that the task is not impossible, and certainly should not form a barrier to developing remedies for the distress suffered by beneficiaries of ethical investment funds. The courts should give effect to equitable compensation's restorative function as best they can rather than leaving beneficiaries 'high and dry' over difficulties in determining a precise figure.

VII CONCLUSION

While there are undoubtedly other means of redressing profit-generating unethical investments, such as statutory remedies[169] or civil penalties,[170] this article has elucidated the doctrinal flexibility of equitable compensation. It has argued that contrary to traditional conceptions of equitable compensation, the remedy is capable of extending to non-financial losses. To make that argument, it has explored equity's inherent jurisdiction to grant compensation for breaches of general equitable obligations. It has explained why that jurisdiction turns on a 'causal link' between the loss suffered and the obligation breached, rather than the category of loss itself. In the example of ethical superannuation funds, that causal link is created by the trustee's undertaking to invest ethically, binding their conscience to the beneficiaries' distress.

167 *Youyang* (n 141) 500 [39] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

168 See, eg, *Northern Territory v Griffiths* (2019) 269 CLR 1, 103–10 [213]–[237] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

169 Such as for misleading and deceptive conduct under the *Australian Securities and Investments Commission Act 2001* (Cth) pt 2 div 2 sub-divs G–GA.

170 *SIS Act* (n 23) ss 54B(1)–(3), 193(aa)–(ab).