AN ACCOUNT OF ACCOUNTS

The equitable accounting rules are notorious for being ancient and technical, and hence hinder the development of the rules governing compensating claims against trustees. The present article seeks to overcome these difficulties by conducting a historical survey of the traditional accounting rules in order to identify their governing principle. It argues that equity acts on a principle different from common law, in that the purpose of accounting is to restore the beneficiaries or the trust fund, *as from the time when the trustee departed from his duty*, to the position they would have been in had the trustee performed his duty. This way, equity achieves exact justice so that the beneficiaries will not be kept out of their rights from the time when performance was due to the time when it is actually obtained. To do so, equity adopts the legal fiction of treating the unauthorised disbursement as having never been made and the property as having already been obtained. The article argues that this fundamental norm should also be applicable to equitable compensation, and proposes analysing this remedy on the basis of the duties breached, rather than the type of breach as in traditional accounting rules. It then uses this new framework to propose detailed remedial rules for various breaches of duty by the trustee.

Lusina **HO***
BA, BCL (Oxon);
Faculty of Law, The University of Hong Kong.

I. Introduction

1 Although no one doubts the availability of account as a redress for a breach of trust, many find it hard to fathom the traditional accounting rules. Couched in archaic terminology, they include, aside from account of profits: (a) common account of all sums actually received (whereby improper discharges may be falsified); and (b) surcharging of all sums which should, without wilful default, have been received but were not. It does not help that there is a dearth of judicial analysis in the earlier authorities, probably because accounts are taken by masters who do not render publicly accessible judgments.

* I am grateful to Elise Bant, Nicholas McBride and Richard Nolan for extensive comments on earlier drafts of the article. All faults remain mine.

2 Although some useful accounts of the accounting procedure have been provided in recent decisions such as *Meehan v Glazier Holdings Pty Ltd*,[1] *Agricultural Land Management Ltd v Jackson (No 2)*[2] ("*Agricultural Land Management*") and *Chng Weng Wah v Goh Bak Heng*,[3] the gap of knowledge continues to plague the development of personal remedies for breach of trust. The highest courts in Anglo-common law jurisdictions are quickly switching over to award equitable compensation – a relatively nascent remedy – even where traditional accounting was available.[4] In two controversial decisions, the adoption of this new label also coincided with treating the restoration of misapplied assets as compensatory, much to the dismay of their critics.[5] The critics argue that such liability involves substitutive performance analogous to the recovery of debt, as opposed to reparative compensation as in surcharging.[6] The debate hinges on the correct understanding of the nature and governing principle of the accounting rules as they gave root and foliage to the award of equitable compensation for breach of trust.

3 For this purpose, important insights can be obtained from a historical enquiry into the accounting rules, which shows that equity acts on a principle different from common law contracts or torts, namely that what ought to have been done is treated as having been done.[7] This guiding principle, of putting the trust, *as from the time when the trustee departed from his duty*, in the *legal* position it would have

1 [2002] NSWCA 22 at [13], *per* Giles JA.
2 [2014] WASC 102 at [338].
3 [2016] 2 SLR 464 at [38]–[39], *per* Chao Hick Tin JA.
4 *Target Holdings v Redferns* [1995] UKHL 10; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15; *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 61 (because of the trustee's unco-operative attitude, the court considered that accounting was probably futile); *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58.
5 *Target Holdings v Redferns* [1995] UKHL 10; *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58.
6 Charles Mitchell, "Stewardship of Property and Liability to Account" [2014] Conv 215 at 223–224; James Edelman, "An English Misturning with Equitable Compensation" in *Equitable Compensation and Disgorgement of Profits* (Simone Degeling & Jason Varuhas eds) (Oxford: Hart Publishing, 2017) (forthcoming) ch 5.
7 For detailed historical accounts of the accounting process, see William Searle Holdsworth, *A History of English Law* vol 6 (London: Methuen, Sweet & Maxwell, 1922) at pp 651–658; Joseph Story, *Commentaries on Equity Jurisprudence* (London: Maxwell, 6th Ed, 1853) at pp 606–609; Christopher C Langdell, "A Brief Survey of Equity Jurisdiction" (1889) 2 Harv L Rev 241; Edmund O Belsheim, "The Old Action of Account" (1932) 45 Harv L Rev 466; and Samuel Stoljar, "The Transformations of Account" (1964) 80 LQR 203. For recent literature, see Charles Mitchell & Stephen Watterson, "Remedies for Knowing Receipt" in *Constructive and Resulting Trusts* (Charles Mitchell ed) (Oxford: Hart Publishing, 2010) at p 115; Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214; and James Edelman & Steven Elliott, "Money Remedies" (2004) 18 Tru LI 116.

been in had the trustee performed his duty properly, governs both the falsification and surcharging processes. It holds the trustee liable *as if* he has performed his duty by treating him as having always held the misapplied assets and having obtained or invested in property he was supposed to:[8] put simply, the duty dictates the scope of the remedy. This principle encompasses both specific performance of the trustee's duty (falsification) and compensation for loss of expected benefits (surcharging). It focuses only on bringing the trust asset in question within the trust estate and is not concerned with any further harm beyond the particular asset in question or the trust estate, such as consequential losses.[9]

4 Furthermore, deterrence and prophylactic considerations also play a role in moderating the application of this governing principle. Where measuring the trustee's liability based on deemed performance does not provide an adequate disincentive from breach, such as when the trustee's breach has yielded more profits than if he had performed his duty, the falsification rules are rendered redundant by giving the beneficiary the option to adopt the unauthorised transaction and take its benefit. The trustee's culpability is also relevant in adjusting the level of the interest to be awarded.[10] These observations will be illustrated as the article examines the detailed rules pertaining to the common account and surcharging on the basis of wilful default. They provide the apparatus for appraising recent developments in equitable compensation.

II. The historical origin of equitable account

5 Legal historians have traced the birth of the common law action of account to as early as the 13th century, when the sophistication of the English feudal system reached a point where landlords commonly granted manors to bailiffs to look after the land on their behalf.[11] The bailiffs were accountable for rents and profits made from the land, but since they are allowed to deduct their general expenses, claims against bailiffs were always unliquidated and could not be brought as an action of debt, which did not lie for unliquidated claims. Account arose to fill

8 Joshua Getzler, "'As if' Accountability and Counterfactual Trust" (2011) 91 BULR 973; Walter Strachan, "Compensation for Breach of Trust" (1918) 34 LQR 168.

9 See Jamie Glister, "Breach of Trust and Consequential Loss" (2014) 8 J Eq 235 at 235–238.

10 *Jones v Foxall* (1852) 15 Beav 388 at 393; (1852) 51 ER 588 at 590; see also Robert Chambers, "Liability" in *Breach of Trust* (Peter Birks & Arianna Pretto eds) (Oxford: Hart Publishing, 2002) ch 1 at pp 23–24.

11 *Maitland: The Forms of Action at Common Law* (Alfred H Chaytor & William J Whittaker eds) (Cambridge: Cambridge University Press, 1909) Lecture V; Edmund O Belsheim, "The Old Action of Account" (1932) 45 Harv L Rev 466 at 469–470.

the gap.[12] The action was extended to parties who were authorised to possess and control property belonging to another, such as the guardian in socage, common receiver, partner and other agent.

6 But the accounting process at common law was tedious and cumbersome. The plaintiff needed to bring an action to show that the defendant owed an obligation to account. If the court accepted that the defendant should account, the sheriffs would commit the defendant to prison until satisfaction was made. In the meantime, the auditors would hear the account, which consisted of items of charge and discharge. Items of charge consisted of sums received by the defendant for which he was chargeable; items of discharge consisted of expenses incurred by him on the plaintiff's account, which were to be allowed by deducting them from the amount chargeable on the defendant. If the balance struck was in the plaintiff's favour but the defendant did not pay, the plaintiff had to bring a second action, this time in debt, to recover the amount.[13] But this is not all. Since the auditors did not have powers to compel discovery, the parties often had to go back to court to resolve factual and legal disputes along the way.

7 It was no wonder that between the 14th and 17th centuries the common law action gradually disappeared into oblivion. Courts of equity did not consider the common law action an adequate remedy and began to accept bills for an account based on a legal obligation.[14] Account in equity was similar to the common law process, with technicalities and multiplicity of proceedings removed, however. It also goes without saying that a trustee owes an obligation to account in virtue of his possession and control of funds to which the beneficiaries are entitled.[15]

8 Briefly, the equitable bill or suit proceeds as follows. If the court is satisfied with the defendant's obligation to render account, it will make a decree for general administration in the common form as of course and refer the matter to the master to take account. Before the master, the defendant is charged with his actual receipts, and if he seeks

12 James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge: Cambridge University Press, 1913) at p 116; (1372) YB 46 Ed III, p 9, pl 4; *Bishop v Eagle* (1795) 10 Mod 22; (1795) 88 ER 607.

13 James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge: Cambridge University Press, 1913) at pp 116 and 117; Christopher C Langdell, "A Brief Survey of Equity Jurisdiction" (1889) 2 Harv L Rev 241 at 252.

14 A party who has received the writ to account would rather submit to voluntary accounting and bring an action for debt on a stated account.

15 *Wynne v Humberstone* (1858) 27 Beav 421; (1858) 54 ER 165; Jairus Ware Perry, *A Treatise of the Law of Trusts and Trustees* vol 2 (Boston: Little Brown & Co, 2nd Ed, 1874) at para 822; Christopher C Langdell, "A Brief Survey of Equity Jurisdiction" (1889) 2 Harv L Rev 241 at 252 and 244–249.

to discharge himself by an improper disbursement, the master will disallow (or falsify) the discharge. If an amount actually received was omitted from the credit entry, such as when rents received were not reflected in the account, it will be surcharged.[16] The balance of the account will be struck on the basis that the disposed amount is still held by the trustee. The master then produces a report for the court, which issues a decree for payment of the debt by the defendant.[17]

9 Additionally, if the plaintiff has an equitable interest in the property held by the defendant, such as may arise where defendants act as trustees, personal representatives or mortgagees, he may surcharge funds that might, without the trustee's wilful default, have been received but were not received.[18] This account is not granted as of right, but the beneficiary must prove at least one instance of wilful default.[19] It must be pleaded in the original suit, unless the court permits it to be included in a supplementary bill. Upon proof of the wilful default at trial, the court may order a "roving commission", which is a general account of all acts of the trustee's management,[20] or just a specific account of the transaction in question. The master's findings on his enquiries are then considered by the court, which decrees a judgment upon the footing of wilful default.

10 Alternatively, in answer to the suit, the trustee may plead in bar that the parties have already in writing stated and adjusted the account and struck the balance, that is, there has already been an account stated. At this point, the beneficiary is at liberty to falsify or surcharge the account stated by showing mistakes and omissions.[21] If he "shows an omission, for which credit ought to be, that is a surcharge; or if anything is inserted that is a wrong charge, … that is a falsification".[22]

11 In light of the above historical overview, it is worth mentioning that the final decree in the common account for payment of the balance

16 *Meehan v Glazier Holdings Pty Ltd* [2002] NSWCA 22 at [13].
17 Christopher C Langdell, "A Brief Survey of Equity Jurisdiction" (1889) 2 Harv L Rev 241 at 259.
18 Augustine Birrell, *The Duties and Liabilities of Trustees: Six Lectures* (London: MacMillan & Co Ltd, 1920) at p 147; *Re Tebbs* [1976] 1 WLR 924; [1976] 2 All ER 858; *Meehan v Glazier Holdings Pty Ltd* [2002] NSWCA 22 at [14].
19 *Job v Job* (1877) 6 Ch D 562.
20 *Re Stevens; Cooke v Stevens* [1897] 1 Ch 422 at 432–433, *per* North J.
21 *Vernon v Vaudrey* (1740) 2 Atk 119; (1740) 26 ER 474. If there has been fraud instead of mere mistakes and omissions, the whole account shall be opened.
22 *Pit v Cholmondeley* (1754) 2 Ves Sen 565 at 566; (1754) 38 ER 3601, *per* Lord Hardwicke; Joseph Story, *Commentaries on Equity Jurisprudence* (London: Maxwell, 6th Ed, 1853) at pp 605–607; Philip T Van Zile, *A Treatise on Equity Pleading and Practice* (Chicago: Callaghan & Co, 1904) at pp 210–212.

is indeed directly analogous to an action for debt.[23] It has been well established that in general a breach of trust creates a simple (equitable) debt.[24] If it were in the nature of an unliquidated damages claim, it would not have been possible under the earlier bankruptcy legislation to prove it in a petition for bankruptcy against the trustee.[25] It is this aspect of the claim that has led commentators to argue that considerations of causation, rules of remoteness and the like that are integral to the compensation enquiry are irrelevant to the account.[26] Nonetheless, the debt characterisation *per se* is not a sufficient ground for denying or supporting the causal inquiry. As the historical survey shows, the decree of equitable debt is made not only when the account is falsified, but also when it is surcharged and a causal link is required. This differs from the common law where a claim for debt necessarily excludes causal considerations, and hence a claim for compensation for breach of contract, which requires causal considerations, cannot be brought by way of debt. One cannot therefore infer from an action of equitable (as opposed to common law) debt that causal considerations must be excluded. Rather, insight about the relevance of the causal inquiry can be gained by attending to the underlying basis of falsification and surcharging as deemed performance of the trust.

III. Deemed performance of the trust

12 The historical inquiry reveals that equity acts upon a principle of its own, namely that what ought to have been done is treated as having been done. It assumes, for the purposes of the beneficiary's claim, that the trustee has performed his duty properly, and then puts him to that *legal* position. This involves treating misapplied funds as being still in the hands of the trustee, and an omitted investment as having been made at the proper time and its value having been credited

23 *Ex parte Adamson* (1878) 8 Ch D 807 at 819; *Ex parte Kelly & Co* (1879) 11 Ch D 306 at 311; *Ex parte Blencowe* (1865–1866) LR 1 Ch App 393. This should be distinguished from an unliquidated damages claim, which would not of itself be sufficient to support a petition for the trustee's bankruptcy. I thank Gummow NPJ for this point.

24 *Cox v Bateman* (1715) 2 Ves 19; (1715) 68 ER 13; *Vernon v Vaudrey* (1740) 2 Atk 119; (1740) 26 ER 474; *Lord Townshend v Windham* (1750) 2 Ves Sen 1; (1750) 28 ER 1; *Holland v Holland* (1869) LR 4 Ch 453; *Ex parte Blencowe* (1865–1866) LR 1 Ch App 393.

25 Before the amendment by s 90 of the English Bankruptcy Act 1861 (c 134), it was not possible for debts of non-traders to found a petition in bankruptcy: *Williams v Harding* (1866) LR 1 HL 9.

26 See n 1 above and in particular James Edelman, "An English Misturning with Equitable Compensation" in *Equitable Compensation and Disgorgement of Profits* (Simone Degeling & Jason Varuhas eds) (Oxford: Hart Publishing, 2017) (forthcoming) ch 5.

in the account,[27] and then adjusting the account accordingly. The trustee will then need to use his own resources to make up the shortfall. At first glance, this notion of a duty having already been performed when in fact it has not yet been performed may appear odd. However, since the goal of the accounting remedy is to restore the trust fund to the position it would have been in had the trustee performed, there needs to be a legal pinpoint to identify clearly the position that needs to be restored. The notion of deemed performance is a useful apparatus to provide such a pinpoint.

13 Commentators have analysed the falsification procedure as involving substitutive enforcement of the primary duty of the trustee.[28] It is submitted that one can go even further in two important aspects. First, the redress does not merely enforce the duty at the time of trial; it treats the duty as having already been performed at the earlier point when performance was due, just as the equity maxim "equity treats as done what ought to be done" says. Such an approach seeks to provide reparation that is as complete as possible by ensuring that the beneficiary will not be kept out of his right during the period between breach and actual performance. It is the same equitable thinking that informs the imposition of the constructive trust, which not only enforces the trustee's duty to transfer the property to the beneficiary at the time of judgment but also treats it as having already been transferred at the time of breach. This retroactive operation allows the beneficiary's right to relate back to the time when he ought to have obtained the beneficial title and hence defeat the title of a subsequent third party who is not a *bona fide* purchaser for value without notice. Such relating back crucially allows equity to achieve perfect justice. Secondly, the equitable principle of treating as done what ought to have been done is a kind of its own. It resembles contract law in looking to the legal position of the trustee's expected performance and not his position before the breach as in tort law. However, it differs from contract law in only compelling the trustee to perform what he ought to have done, that is, the retention of the trust fund or acquisition of trust property. It does not look at the beneficiary's overall financial position (including his consequential loss) and assess the plaintiff's compensation, and hence takes a different approach to common law on causation, remoteness and contributory negligence.

---

27 Walter Ashburner, *Principles of Equity* (London: Butterworths, 1902) at p 197; Walter Strachan, "Compensation for Breach of Trust" (1918) 34 LQR 168.

28 Charles Mitchell, "Stewardship of Property and Liability to Account" [2014] Conv 215; Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214; *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102.

14 Appreciation of this governing principle allows us better to understand the statement of Street J in *Re Dawson*,[29] that the aim of taking account is to put the parties in the position they would have been in had the trust been properly performed.[30] This statement is neither a slip of the pen nor an attempt to introduce a mandatory requirement of factual causation. The word "position" in the statement is ambiguous: it can mean the financial or legal position of the beneficiary. The former is typically captured by the compensatory principle in damages, which ascertains the detrimental consequence of the breach on the overall financial position of the plaintiff and puts him back, as far as money can, into this counter-factual financial situation. Since it is hard to tease out the effect of the breach amongst many contributing factors on a party's overall financial position, a causal enquiry is inevitable.

15 In contrast, a beneficiary's legal position refers to his legal entitlement to the trustee's performance of his duty. By compelling the trustee to perform the very duty he has promised, it logically entails that the plaintiff will be restored to the *legal* position he would have been in had the trust been performed.[31] Applying this principle to an improper payment of trust fund that should have been retained, the trustee is treated as having it still in his hands. Since his duty is a self-limiting one to not dispose of an amount of funds, what its value would have been if the trustee had retained it is constant. There is no need for any causal inquiry to establish the quantum of the replacement.

16 Where surcharging for an omission to invest is concerned, the trustee is liable on the footing that the investment was made at the proper time. Here, because of changing market conditions and the possibility of other forms of legitimate investment, the current value of the investment that would have been made at the proper time is variable, and most probably different from the original capital sum he ought to have invested. A causal inquiry is often necessary to ascertain the quantum of the award.[32] Significantly, this is not the same as assessment for damages, because only the value of the omitted investment and its income and profits are taken into account, not the consequential loss arising from the breach.

---

29 (1966) 2 NSWLR 211.

30 *Re Dawson* (1966) 2 NSWLR 211 at 216, *per* Street J; *Webb v Stenton* (1883) 11 QBD 518 at 530, *per* Fry J; James Hill, *Practical Treatise on the Law Relating to Trustees* (Philadelphia: T & J W Johnson, 1854) at p 522: "The court … endeavours as far as possible to replace the parties in the same situation as they would have been in, if no breach of trust had been committed."

31 For explanation of the ambiguity of the *Livingstone* principle at common law, see David Winterton, *Money Awards in Contract Law* (Oxford: Hart Publishing, 2015) ch 1.

32 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 61 at [170], *per* Millett NPJ.

17 The basis of redress as deemed performance not only is historically justified but also rests on sound policy reflecting the nature of the trust relationship.[33] What sets this relationship apart from those of contract or tort is the beneficiary's trust and confidence that the trust assets will be managed in his best interest. In order that the beneficiary will indeed trust the trustee, the law assures him that breaches are cured by positive performance of the trustee's duties, and not by remedies such as compensation for loss that transforms the beneficiary's right into an alternative, second-best right. From this governing principle equity has derived detailed rules of common account and surcharging on the basis of wilful default.

IV. Common account (falsification)

A. Measure of liability

18 Where the trustee has applied funds or disposed of trust property without authorisation, equity's remedies proceed on the footing that the assets have never left the trust. The common account for misapplied funds works in tandem with the constructive trust of wrongfully disposed property to put the beneficiary in the legal position it would have been in but for the breach. In relation to misapplied *funds*, the disbursement will be falsified as if the funds are still in the hands of the trustee. In relation to *property* other than funds, if the trust property is traceable, the trustee (and the party in possession) will be compelled by a constructive trust to re-convey the property to the trust.[34] If it is not traceable, the trustee will be required to purchase other property of equal value for the trust or pay a sum equal to the value of the trust property.[35] In all these cases, the trustee will need to further account for all interest and income received on the relevant asset.[36]

---

33 See Lord Reed's exhortation in *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [137] to develop remedies based on the characteristics of the particular obligation at issue rather than its historical origin. See also *New Zealand Guardian Trust Co Ltd* [1991] 1 NZLR 664 at 681.

34 *Mansell v Mansell* (1732) 2 P Wms 681; (1732) 24 ER 913; *Pye v Gorges* (1710) 1 P Wms 128; (1710) 24 ER 323, affirmed *sub nom Gorges v Pye* (1712) 7 Brown 221; (1712) 3 ER 144.

35 *Mansell v Mansell* (1732) 2 P Wms 681; (1732) 24 ER 913; *Earl Powlett v Herbert* (1791) 1 Ves Jun 297; (1791) 30 ER 352; *Pocock v Reddington* (1801) 5 Ves 794 at 800; (1801) 31 ER 862 at 865; *French v Hobson* (1803) 9 Ves Jun 103; (1803) 32 ER 540; *Byrchall v Bradford* (1822) 6 Mad 235; (1822) 56 ER 108; *Fyler v Fyler* (1841) 3 Beav 550; (1841) 49 ER 216.

36 *Holmes v Dring* (1788) 2 Cox R 1; (1788) 122 ER 1; *Perkins v Baynton* (1784) 1 Bro CC 375; (1784) 14 ER 1187; *Ingle v Partridge* (1863) 32 Beav 661; (1863) 55 ER 260; *Meyer v Montriou* (1841) 4 Beav 343; (1841) 49 ER 372; *Futter v Jackson* (1843) 6 Beav 424; (1843) 49 ER 889.

19 These rules also apply if the funds or property are disposed of for consideration, say in an unauthorised sale or investment. But here, motivated by deterrence and prophylactic considerations, equity exerts its remedial arsenal to ensure that whatever happens to the investment, the beneficiaries will get the best of the outcome provided by the available remedies. For example, if a trustee speculates with the trust property in an unauthorised investment, the beneficiary may elect to falsify it and have the invested sum restored, or adopt the purchase and take the benefit of the investment, which he will usually do if it has gone up in value.[37] If the investment has already been realised, the beneficiary may also pocket the difference between the sum invested and the sum realised from the investment. Conversely, if stock has been sold improperly, the beneficiary may compel the trustee to restore the particular stock *in specie* if its value has gone up,[38] or elect to take the proceeds of sale with interest if its value has gone down.[39]

20 In both of these scenarios where the trustee's breach has led to a greater financial gain than if he has performed his duty, even measuring liability on the footing of deemed performance does not provide the best disincentive to breach. The court gives the beneficiary the option to adopt the wrongful transaction in order to prevent the trustee from taking an advantage by replacing the stock should its value go down and keeping it should its value go up so as to pocket the difference.[40] Technically, relief on the basis that the transaction has been adopted *ex post facto* is also an example of imposing liability on the footing of performance, but a more accurate and realistic analysis is to acknowledge the relevance of deterrence and prophylactic considerations in tweaking the rules. Furthermore, despite exhortations by the courts that the interest award only serves compensatory or restitutionary purposes, a higher interest rate beyond the default rate of 4% was decreed for breaches committed with fraudulent motives or gross negligence,[41] while

37 *Ex parte Watson* (1814) 2 V & B 414; (1814) 35 ER 378.

38 *Re Massingberd's Settlement* (1890) 63 LT 296. Apart from restoration *in specie*, the trustee may also be asked to restore the value of the property at the time of the decree, with the income that would have accrued from the property had it not been sold. See generally Stuart M Wright, "The Measure of the Trustee's Liability for Improper Investments" (1932) 80 U Penn L Rev 1105 at 1108.

39 *Bostock v Blakeney* (1789) 2 Bros CC 654; (1789) 29 ER 362; *Bate v Scales* (1802) 12 Ves Jun 402; (1802) 33 ER 152; *Vyse v Foster* (1872) LR 8 Ch 326 at 337.

40 *Bostock v Blakeney* (1789) 2 Bro CC 654; (1789) 29 ER 362; *Pocock v Reddington* (1801) 5 Ves 794 at 799; (1801) 31 ER 862 at 865 (trustee must "answer for [his unauthorised act], with what he may be supposed reasonably to have made; and if he made more, he must answer for that too").

41 *Treves v Townshend* (1783) 1 Bro CC 384; (1783) 28 ER 1191; *Hall v Hallet* (1784) 1 Cox 134; (1784) 29 ER 1096; *Jones v Foxhall* (1852) 15 Beav 388; (1852) 51 ER 588; *Imperial Mercantile Credit Association v Coleman* (1873) LR 8 HL 189.

at the opposite end, honest trustees might be relieved from past interest.[42]

B. Concurrent and intervening causes

21 In restoring the trust to the position of its legal entitlement, the court focuses only on the specific performance of the duty, namely having the fund intact in the trust. It is not concerned with the factual consequence arising from the performance, such as whether it would have been lost or a subsequent cause was more responsible for the loss. Thus, in *Cocker v Quayle*,[43] when a trustee who was authorised to advance a loan on security did so without taking any bond from the borrower, the court did not accept the trustee's argument that had he taken the bond, the same loss would have been sustained on the facts. Nor does the court consider arguments based on intervening causes, as it considers that the trustee should be "responsible for any future loss traceable to that first error"[44] of deviating from the trust.

22 This remedial focus on the performance of the duty is crucial to the trust relationship as it assures the beneficiaries that the trustee's duties will always be complied with, whether by the trustee or by operation of law. It ensures that the beneficiaries are immune from any risk of losses, but allows them to capture profits made from the misapplied trust property through the constructive trust. These remedies combine to turn the trustee into an insurer of the trust fund, while at the same time denying him any chance of profiting from it.

V. Surcharging on the basis of wilful default

23 Additionally, a trustee who neglects to get in property or make an investment will be surcharged for the property that could have been obtained had it not been for his wilful default. Here, the basis of deemed performance and the relevance of fault are also apparent. In the simplest case where he fails to get in money or stocks, he is surcharged for the relevant amount with interest, the actual stock with its intermediate dividends or the value of the stocks at the time they ought to have been recovered with interest. These rules are mirror reflections of those in falsification involving misapplied money and property.

---

42 *Attorney General v Caius College* (1837) 2 Keen 150; (1837) 48 ER 585; *Attorney General v Prettyman* (1841) 4 Beav 462; (1841) 49 ER 418.

43 (1830) 1 Russ & M 535; (1830) 39 ER 206.

44 *Fyler v Fyler* (1841) 3 Beav 550 at 567; (1841) 49 ER 216 at 223; *Caffrey v Darby* (1801) 6 Ves Jun 488; (1801) 31 ER 1159; *Kellaway v Johnson* (1842) 5 Beav 319 at 324; (1842) 49 ER 601 at 603 (trustees are "answer for any future loss, the root and cause of such loss being the original [misapplication]").

24 If the trustee omits to make an investment where he has the option to invest in other kinds of investment, he will be charged with the sum he ought to have invested with interest, but not on the footing of an investment in a stock, as he need not perform his duty by choosing this particular investment that has gone up in value.[45] However, if he flouts a specific direction to invest in a particular stock and retains the trust fund in his hand, the court will visit his conduct with greater severity by surcharging him with as much stock as the original capital sum could have purchased if he had invested in it at the proper time.[46] The court calibrates the remedy on the basis of *exact* deemed performance, namely that the particular stock has been acquired and is held in the trust. A less severe remedy, which is equally consistent with the basis of deemed performance, would have been to allow the trustee to account for the value of the stock at the proper time of investment. However, although this would make good the beneficiary's loss, the trustee will also be able to take the advantage of any appreciation in the value of the stock and merely account for its lesser price at the proper time. By compelling restoration of the particular stock, equity allows the beneficiary to take the full benefit of the fluctuation of the value of the stock. If the value of the stock has gone up by the time of the trial, he can claim the particular stock. If it has gone down, he can simply refrain from bringing a suit, whereby the original sum continues to stay in the trust fund, and he can escape from an unprofitable investment.

25 In light of this brief survey, it is submitted that surcharging on the footing of wilful default shares the same goal as falsification in so far as they both aim at restoring the beneficiaries to their legal entitlements to the trust estate by bringing the relevant trust property back into the trust estate. It differs from falsification by achieving this remedial goal through compensating the lost opportunity to acquire property. Because of this compensatory aim, surcharging on the footing of wilful default is "akin to the payment of damages"[47] on the expectation measure as in contract law. But the analogy should stop at this point, for unlike damages surcharging is not concerned with any further harm that may have been suffered by the trust estate beyond the property in question, such as consequential losses.[48] Now that the courts readily award equitable compensation even where traditional accounting rules are available, there is danger of losing sight of this distinction.

---

45 *Robinson v Robinson* (1851) 1 De G M & G 247 at 256; (1851) 42 ER 547 at 550; *Marsh v Hunter* (1822) 6 Madd 295; (1822) 56 ER 1103; *Shepherd v Mouls* (1845) 4 Hare 500 at 504; (1845) 67 ER 746 at 747.

46 *Byrchall v Bradford* (1822) 6 Mad 235; (1822) 56 ER 108; *Pride v Fooks* (1839–1840) 2 Beav 430; (1839–1840) 48 ER 1248.

47 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 61 at [170], *per* Millett NPJ.

48 Jamie Glister, "Breach of Trust and Consequential Loss" (2014) 8 J Eq 235.

VI. Equitable compensation

A. The emergence of equitable compensation

26 In the seminal decision of *Nocton v Lord Ashburton*[49] ("*Nocton*"), the phrase "equitable compensation" was adopted as a legal term to refer to the equitable monetary award granted for breach of a fiduciary duty without the taking of accounts.[50] Before *Nocton*, there has been an unsuccessful attempt to seek such a remedy in *Re Cape Breton Co*[51] and a successful one in *Leeds and Hanley Theatres of Varieties Ltd*,[52] albeit the courts in both cases used the terminology of damages. Vaughan Willams LJ, for example, thought it was "a remedy in the nature of damages".[53] The *Nocton* decision played an important historic role in containing the impact of *Derry v Peek*,[54] which seemed to suggest that liability for misrepresentations would only be imposed in cases of actual fraud. *Nocton* asserted the availability of equitable compensation against a *fiduciary*, as opposed to a trustee, for breach of a non-custodial fiduciary duty in the absence of fraud. The solicitor in this case advised his client to lend £65,000 to a third party and release part of a mortgage in a property investment without informing the client of the personal benefit he would derive from this release.[55]

27 The subsequent development of equitable compensation is characterised by three features. First, there are two usages of the term: one refers to the monetary award granted "in lieu of rescission"; the other is the loss-based remedy for an equitable wrong.[56] An example of the former can be found in *McKenzie v McDonald*,[57] where a fiduciary agent advised a widow to convey a farm to him at a substantial undervalue. In this context the purpose of equitable compensation is to

49 [1914] AC 932.

50 See Matthew Conaglen, "Equitable Compensation for Breach of Fiduciary Dealing Rules" (2003) 119 LQR 246; James Edelman, "*Nocton v Lord Ashburton* (1914)" in *Landmark Cases in Equity* (Charles Mitchell & Paul Mitchell eds) (Oxford: Hart Publishing, 2012) at p 494.

51 (1884) 26 Ch D 221 (Ch); (1885) 29 Ch D 795 (CA); *Sub nom Cavendish Benwick v Fenn* (1887) 12 App Cas 652 (HL).

52 [1902] 2 Ch 809.

53 *Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch 809 at 852. See also *Robinson v Abbott* (1893) 20 VLR 346 (monetary relief awarded as a substitute to rescission); *McKay's Case* (1875) 2 Ch D 1 at 8 (compensatory relief awarded for secret commission); and, post-*Nocton*, *McKenzie v McDonald* [1925] VLR 134.

54 (1889) LR 14 App Cas 337.

55 *Nocton v Lord Ashburton* [1914] AC 932 at 932–940.

56 *Bristol & West Building Society v Mothew* [1998] Ch 1 at 17, *per* Millett LJ; Richard Nolan, "Conflicts of Interest, Unjust Enrichment and Wrongdoing" in *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (William Cornish *et al* eds) (Hart Publishing 1998) ch 7 at p 114.

57 [1927] VLR 134.

place the plaintiff, as far as possible, in the same position as he was in before he entered into the disputed transaction with his fiduciary.[58] An example of the latter can be found in *Nocton* itself, where no property has been transferred between the plaintiff and the fiduciary. The principle governing the award was "to replace the property improperly acquired from the client [with interest], or to make compensation if he had lost it by acting in breach of a duty".[59] While this "measure of damages may not always be the same as in an action of deceit or for negligence", Viscount Haldane thought this was a question of form only in that case and affirmed the lower court's order that the solicitor make good and repay the client £65,000 with interest.[60]

28 Second, although the courts have had plenty of occasions to consider the causal link required for equitable compensation for breach of fiduciary duty, there is as yet no settled view. The ambivalent *dictum* of Lord Thankerton in *Brickenden v London Loans & Savings Co*[61] ("*Brickenden*") suggests a stringent test of causation, namely that once the breach and the loss are proven, the fiduciary is not allowed to lead evidence to show that the principal would have acted the same way and suffered the loss in any event.[62] Modern authorities, however, have adopted a range of tests for the requisite connection between the breach and the loss.[63]

29 Third, a tipping point occurred when the House of Lords in *Target Holdings v Redferns*[64] ("*Target Holdings*") used equitable compensation to describe the restorative monetary award for *breach of trust*. The term was not used in the two lower court decisions. Unfortunately, the switching of the label to equitable compensation also controversially coincided with the short-circuiting of the accounting process and assimilation of the but-for test adopted in damages. In *Target Holdings*, Lord Browne-Wilkinson considered the compensatory approach laid down in *Livingstone v Rawyards Coal Co*[65] of putting the claimant "in the same position as he would have been in if he had not sustained the wrong",[66] to be "applicable as much in equity as at common law".[67] His Lordship then proceeded directly from the breach

58 See *Robinson v Abbott* (1893) 20 VLR 346; *Palmisano v Hyman* (FCA) (30 March 1977); and *Tito v Waddell (No 2)* [1977] Ch 106.
59 *Nocton v Lord Ashburton* [1914] AC 932 at 956.
60 *Nocton v Lord Ashburton* [1914] AC 932 at 958.
61 [1934] 3 DLR 465.
62 *Brickenden v London Loans & Savings Co* [1934] 3 DLR 465 at 469. See also *Magnus v Queensland National Bank* (1888) 37 Ch D 466 at 472.
63 For detailed discussion on this point, see paras 36–42 and 44–51 below.
64 [1995] UKHL 10.
65 (1880) 5 App Cas 25.
66 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39, *per* Lord Blackburn.
67 *Target Holdings v Redferns* [1995] UKHL 10; [1996] AC 421 at 439.

to assessing whether, with the benefit of hindsight and common sense, the loss was caused by the breach. Despite protests to the contrary, the reasoning of *Target Holdings* was affirmed in *AIB Group (UK) plc v Mark Redler & Co*[68] ("*AIB Group*"). Lords Toulson and Reed were emphatic that the basic principle of relief applicable to all trusts was to put the beneficiary to the position it would have been in had there been no breach. From this uncontroversial principle,[69] however, their Lordships mistakenly assumed that the but-for test must apply to equitable compensation.[70] In contrast, the precept of restoration was not forgotten by the High Court of Australia in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*[71] ("*Youyang*") as it emphasised that a strict approach applied to misapplication of trust money as opposed to breaches of the duty of care.[72] The High Court distinguished *Target Holdings* on the basis that the beneficiary in *Youyang* had never obtained the intended security, and hence any argument based on its purported waiver of the security subsequent to the misapplication was misguided, as Youyang Pty Ltd might not have acceded to the waiver had it known that the security was defective. More recently, in *Agricultural Land Management*, Edelman J opined, albeit *obiter*, that causation should not be relevant in the order of equitable compensation for misapplied assets.[73] In order to negotiate a path for equitable compensation out of these divergent views it is necessary to combine insights from the historical inquiry above with the policies of the particular duty breached and the nature of the claim brought.[74]

B. Developing equitable compensation

(1) General principles of liability

30 Now that the engine for equitable compensation for breach of trust has been set in motion, the need to delineate its landscape has become more pressing. At this juncture, a few preliminary points are in order. First, it remains unclear whether equitable compensation is confined to commercial trusts. While Lords Toulson and Reed in *AIB Group*

---

68 [2014] UKSC 58.

69 *Dornford v Dornford* (1806) 12 Ves Jun 127; *Grayburn v Clarkson* (1868) 3 LR Ch App 605; *Devaynes v Robinson* (1857) 24 Beav 86. See also the cases referred to at n 30 above.

70 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [64] and [70], *per* Lord Toulson, and [134] and [140], *per* Lord Reed.

71 [2003] HCA 15.

72 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [38]–[44] and [66].

73 *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 at [338], applied in *Denis Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] NSWSC 851 at [23].

74 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [138], *per* Lord Reed.

emphasised that there was only one set of basic *rules* applicable to all trusts, and the commercial context is only relevant as a fact in *applying* the rules,[75] Lord Reed explicitly opined that the traditional accounting procedure would not apply to commercial trusts where the underlying commercial transaction has been completed and the trust is no longer subsisting.[76] In any event, both law lords did not see any difference in the basis of assessment between traditional accounting and equitable compensation, in that both are restorative and seek to put the trust fund in the position it would have been in but for the breach.[77] There is no reason to dispute these general observations.[78] They also provide a sound basis for developing the rules of equitable compensation, subject to the caveat that the restoration is to the counterfactual *legal* position, which can be achieved by specific performance or compensation for loss.

31 Second, unfortunately, their Lordships assume that restoration to the counterfactual position where the duty has been performed entails applying the but-for test.[79] For example, Lord Reed reasoned that, because "equitable compensation [was] to compensate", and further that "the concept of loss necessarily [involved] the concept of causation", the but-for test was applicable.[80]

32 Third, their Lordships were categorical that equitable compensation would not allow the beneficiary to recover loss that would have been suffered in any event.[81] Lord Reed spoke of the need for assessment of equitable compensation to reflect the characteristics of

---

75 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [70]–[71], *per* Lord Toulson, and [102] and [137], *per* Lord Reed.

76 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [91], [106] and [134].

77 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [70], *per* Lord Toulson, and [134], *per* Lord Reed.

78 For support of the same view, see John Dyson Heydon, Mark J Leeming & Peter G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (Sydney: LexisNexis Australia, 5th Ed, 2014) at para 23-170.

79 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 ("*AIB Group*") at [70], *per* Lord Toulson, and [136], *per* Lord Reed. For critique of the *AIB Group* decision, see Paul Davies, "Remedies for Breach of Trust" (2015) 78 MLR 681; Paul Davies, "Compensatory Remedies for Breach of Trust" (2016) 2(1) CJCCL 665; William Gummow, "Three Cases of Misapplication of a Solicitor's Trust Account" (2015) 41 *Australian Bar Review* 5; Rebecca Lee, "Substitutive Compensation for Breach of Trust: An Irrelevant Fairy Tale?" (2015) 9 J Eq 94; Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" (2016) 40 Melb LR 1; and Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" [2015] LMCLQ 118.

80 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [136], *per* Lord Reed. By the same token, the confusing language of causation in a strict sense should also be abandoned.

81 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [62], [64] and [71], *per* Lord Toulson, and [107]–[108] and [139], *per* Lord Reed.

the particular trust obligation in order to maintain coherence between equitable and common law remedies.[82] Lord Toulson explicitly pointed out that "the extent of equitable compensation [for a commercial trust] should be the same as if damages for breach of contract were sought at common law".[83] While there is much to be said for aligning the equitable remedies with their common law counterparts where the nature of the obligations concerned is the same, it is an entirely different proposition to cap liability on the basis of a "no better off" principle similar to tort law.[84] It is even more controversial that the remedy for a concurrent action in equity must be limited by the contractual regime.

33 Fourth, the accounting process inherently limits the recovery to assets placed under the trustee's management or which should have been obtained by him through proper management. Consequential losses are thus excluded. In contrast, consequential losses are not excluded from the concept of equitable compensation.[85] Without some remoteness rules to limit liability, equitable compensation can be the Trojan horse that brings with it unexpected and extensive liability.

34 With these observations firmly in mind, the following part will examine the appropriate remedial rules for the three main categories of duties identified in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*[86] ("*Bank of New Zealand*"). They include the duty to preserve trust property, the duty of care and the duty of loyalty. Needless to say, a particular breach may involve one or more of these duties, in which case the beneficiary would be free to seek judgment upon the duty that gives him the best recovery. As this part will show, a serious problem bedevilling this area of law is that judges often do not make distinctions about the specific duty at issue and simply apply, unreflectively, to one category the legal principles adopted in another. *AIB Group* is a good case on point.

---

82 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [138].
83 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [70].
84 For discussion of this principle, see Jane Stapleton, "Unnecessary Causes" (2013) 129 LQR 39 at 54–56.
85 Jamie Glister, "Breach of Trust and Consequential Loss" (2014) 8 J Eq 235 at 238 and 258.
86 [1999] 1 NZLR 664 at 687, *per* Tipping J, who refers to three categories of breaches; the categorisation has been endorsed in *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 61 at [75]–[83] and *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [59]–[60] and [132], but was criticised in John Dyson Heydon, Mark J Leeming & Peter G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (Sydney: LexisNexis Australia, 5th Ed, 2014) at para 23-570.

(2) Duty to preserve the trust fund

35 The duty to preserve the trust fund is breached by misapplying trust property and traditionally remedied through the falsification mechanism by restoration *in specie* or in money.[87] The advent of equitable compensation means that there are now two ways forward. One is to adhere to the principles laid down in the traditional process of falsification, namely to specifically enforce the duty by compelling the trustee to replace the misapplied funds and, where restoration *in specie* is infeasible, order the payment of its equivalent value. Causation, remoteness, *novus actus interveniens* and consequential losses are inapposite in this context because the court is not ascertaining the detrimental financial consequences of the misconduct.[88] Such an approach is also consistent with the common law counterparts of debt and damages in lieu of specific performance, where causal considerations are, or at least should be, irrelevant.[89] Moreover, questions of the motive of the trustee and whether he was honest or fraudulent are also irrelevant to the availability or extent of the restorative award.[90] Of course, if the trustee intentionally misapplies trust assets, he may be additionally liable for breaching the duty of loyalty.

36 The opposite view is to recognise that a fundamental change has happened to the law, so that causation needs to be proven, or that there is now a defence of no-causation in misapplication cases.[91] The weight of authorities is in favour of the latter as many of the highest appellate courts in Anglo-common law jurisdictions have endorsed *Target*

87 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [51].

88 For judicial statements supporting this view, see *Cocker v Quayle* (1830) 1 Russ & M 535; (1830) 39 ER 206; *Grayburn v Clarkson* (1868) 3 LR Ch App 605; *Re Dawson* (1966) 2 NSWLR 211 at 216, *per* Street J; *Magnus v Queensland National Bank* (1888) 37 Ch D 466 at 472; *British America Elevator Co Ltd v Bank of British North America* [1919] AC 658; and *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 at [337], *per* Edelman J. For commentaries supporting this view, see Charles Mitchell, "Stewardship of Property and Liability to Account" [2014] Conv 215 at 223–224; Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at 226; and Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" [2015] LMCLQ 118.

89 For examples of money awards at common law that involve substitutive performance, see David Winterton, *Money Awards in Contract Law* (Oxford: Hart Publishing, 2015) ch 5.

90 *Smith v French* (1741) 2 Atk 243; *Grayburn v Clarkson* (1868) 3 LR Ch App 605; *Devaynes v Robinson* (1857) 24 Beav 86.

91 John Dyson Heydon, Mark J Leeming & Peter G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (Sydney: LexisNexis Australia, 5th Ed, 2014) at para 23-200.

Holdings.[92] However, *Youyang*'s position is ambivalent. On the one hand, the High Court of Australia awarded equitable compensation as restoration of the $500,000 misapplied by the law firm with interest, and remarked that the wrongful payment itself was "the *injuria* with which equity is concerned, not the [loss arising from] failure of the investment transaction".[93] On the other hand, the court applied *Target Holdings*, albeit distinguishing it on facts.[94]

37 It is submitted that there is a middle way solution to the two opposing positions. First, even supporters of the orthodox view recognise that in its full rigour, the falsification rules can operate harshly on a trustee who acted in good faith. Pursuant to these rules, the beneficiary may, on appropriate facts, transfer responsibility for inevitable loss to the trustee by seeking restoration from him, thus turning him into an insurer of the trust fund.[95] The draconian attitude of the traditional accounting rules reflects the rigid morals enforced in Victorian era, when trusteeship was typically taken up by honourable friends to preserve family assets for women and children, who were regarded as vulnerable. Transgressions were strongly dealt with:[96]

> … for the purpose of teaching [the trustee] that a dishonest act of [misappropriation] will not be passed over with impunity …, and for the purpose of teaching other trustees the same lesson.

In defence of this position, it may also be said that the trustee is being asked to do no more than fulfil the duty he has undertaken. Further, the beneficiary's complete confidence that a trust undertaking will be performed, whether by the trustee voluntarily or by operation of law, is the essence of the trust relationship. Nonetheless, in circumstances where the trustee has acted in good faith and the deviation has not exposed the trust fund to more risk than it already has, there is room to argue otherwise. An example of such a situation would be when a trustee instructed to deposit the trust fund in Bank *A* deposited it in Bank *B*, an equally if not more reputable bank, and both banks became

---

92 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58; *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 61; *Gilbert v Shanahan* [1996] 3 NZLR 528.

93 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [38]–[44] and [66].

94 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [49]–[50] and [63].

95 Charles Mitchell, "Stewardship of Property and Liability to Account" [2014] Conv 215; see also Walter Strachan, "Compensation for Breach of Trust" (1918) 34 LQR 168 at 169 and Mark Ascher, Austin Scott & William Fratcher, *Scott and Ascher on Trusts* vol 3 (Wolters Kluwers, 5th Ed, 2015) at para 205.1.

96 *Re Knowles* (1883) 52 LJ Ch 685 at 687. See the detailed discussion of the attitude of the Victorian courts on defaulting trustees in Chantal Stebbings, *The Private Trustee in Victorian England* (Cambridge: Cambridge University Press, 2002) at pp 169–175.

insolvent. It is possible to resort to statutory relief in these situations, as witnessed by an emerging trend in English authorities to smuggle concepts of causation (or connectedness to loss) through this backdoor.[97] However, it would be more beneficial to the development of the law to lay down principled exceptions than to leave it to *ad hoc* judicial discretion. As Frederic H Maugham remarked in his critique of the predecessor of s 61 of the English Trustee Act:[98]

> … [i]n effect, the section admits that the Law of Trusts is, not seldom, unjust; does not alter it, but permits judges to exercise a dubious prerogative of mercy … in cases which are left undefined.

38 Second, to address the injustice illustrated above, it is not necessary to recognise a *general* defence of no-causation. A dishonest and deliberate trustee may not deserve the protection of the defence.[99] Besides, if the lack of causation is due to the existence of a multiple sufficient cause such as the wrongdoing of a third party or an act of God, there is no policy justification for allowing the trustee to be exonerated from liability, and the defence may also leave the beneficiary without remedy. It is submitted that a narrower exception is called for. In this connection, the facts of *AIB Group* provide a good example calling for mitigation of the harshness of the falsification procedure. In this case, a solicitor acting as trustee of the loan amount mistakenly transferred £0.3m short of the £2.1m needed to redeem the first mortgage. The solicitor then transferred the remainder to the borrower, who subsequently defaulted. The plaintiff bank sought to recover the full value of the wrongful disbursement. There are a number of considerations that militated against that result. Although the wrongful disbursement was of £2.1m, the bulk of the loss was the direct result of the investment decision taken solely by the bank. In particular, the bank was arguably careless in taking wholly inadequate security in respect of its investment. Yet when the borrower defaulted and the amount recovered from sale fell far short of the loan amount, the bank did not bring an action for breach of contract, which would limit its recovery to £0.3m, being loss that would not have occurred but for the breach. Instead, the bank sought to improve its remedy by claiming the full amount disbursed on the basis of falsification, subject to the amount

97 See s 60 of the Singapore Trustees Act (Cap 337, 2005 Rev Ed), which is equivalent to s 61 of the English Trustees Act 2000 (c 29), and the evolving test of causation in a spate of recent authorities: *Lloyd's TSB Bank plc v Markandan & Uddin* [2012] EWCA 65; *Davidson Solicitors v Nationwide Building Society* [2012] EWCA Civ 1626; *Santander UK plc v RA Legal Solicitors* [2014] EWCA Civ 183.

98 Frederic H Maugham, "Excusable Breaches of Trust" (1898) 14 LQR 159, commenting on s 3 of the English Judicial Trustees Act 1896 (c 35).

99 Lord Toulson suggested that public policy considerations might justify not allowing fraudulent trustees to plead the defence of no-causation: *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [61].

recovered from the sale. The trustee-solicitor admitted liability for the mistaken amount but argued that the rest of the loss would have happened even if it had performed his duty. Clearly, the trustee was not seeking to shift responsibility to a third party who may be equally or more responsible for the loss. Rather, the settlor was seeking to shift the consequence of its unprofitable investment decision to the trustee who, in light of the settlor's primary role in its own predicament, should not be made responsible for the whole of the settlor's loss.

39 These considerations were subtly alluded to by Lord Toulson, who considered the example of a pickpocket in Pall Mall saying in defence that the victim would have been robbed in any event to be "far removed" from *AIB Group* where the bank took the risk of the borrower defaulting.[100] Lord Reed put it in more explicit terms, by remarking that AIB was seeking to make Redler "liable for the consequences of the hopeless inadequacy of the security accepted by AIB before Redler's involvement".[101] In a situation such as this, when the beneficiary's own careless conduct had contributed to the relevant loss, and the trustee acted in good faith and had not made any personal gains, there is much to be said for putting a cap on liability to the extent that recovery would render the beneficiary better off than if there had been no breach. There are two ways to justify such a cap. First, given the widely accepted analogy with specific performance advocated by commentators, the better ground for such a cap is to say that specific performance will not be available when a compensatory award is adequate.[102] This justification is preferable to introducing a defence of no-causation, because recovery is denied as a matter of policy consideration, and not due to a contentious finding of lack of causation.[103] Second, ultimately the remedy of account, like all equitable remedies, can be moulded to suit the facts of the case. As the High Court of Australia in *Warman International Ltd v Dwyer*[104] remarked, "[i]t is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts".[105] What was said about account of profits can be applied generally to compensatory claims against trustees; the task that remains is to develop guidelines on how to exercise this discretionary jurisdiction.

100 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [58].
101 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [140].
102 For support of this view, see *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [107], *per* Lord Reed; Walter Strachan, "Compensation for Breach of Trust" (1918) 34 LQR 168 at 169.
103 Jane Stapleton, "Unnecessary Causes" (2013) 129 LQR 39 at 58 *ff*.
104 [1995] HCA 18.
105 *Warman International Ltd v Dwyer* [1995] HCA 18 at [29].

(2) Duty of care

40 Two issues are crucial in setting the directions for developing equitable compensation for breach of the duty of care by trustees: first, whether the existing rules on causation and remoteness in the surcharging procedure should be preserved or replaced by common law rules; and second, whether the same rules should apply to breaches of the trustee's custodial as well as non-custodial duties.

41 As to the first issue, although the formula for surcharging for wilful default is to recover property that would have been obtained but for the trustee's neglect, the beneficiary is not required to prove negligence or causation positively. Earlier decisions on uncollected debts by executors show that the beneficiary only needs to prove that the debt was owed and that the executor took no step to get it in. The burden then shifts to the executor to show why he did not get it in. It might be a justification for him to prove that had he tried, the debt could not have been recovered because say the debtor was bankrupt, but until "that is proved, the law assumes the fact to be the other way".[106] In other words, upon the beneficiary's assertion of the trustee's inaction, the court presumes the breach and the existence of the loss, unless the trustee negates causation by showing that he has not been negligent or that the loss was inevitable. Yet these authorities were not applied, let alone considered, in *Nestle v National Westminster Bank plc*,[107] where Dillon LJ held that the beneficiary bore the onus of proving that she had suffered loss arising from the trustee's failure to diversify the investment portfolio. Instead, his Lordship applied the test laid down in tort law without much reflection on the distinction between trusts and torts.[108] In any event, the Australian High Court in *Maguire v Makaronis*[109] went further than the earlier trust authorities to presume as against a wrongdoing trustee the quantum of loss in the absence of direct evidence. The trustee is liable for all direct loss, but issues of remoteness and foreseeability are irrelevant, as is the fact that the immediate cause of the loss was due to the wrongdoing of a third party.[110] In contrast, the

106 *Stiles v Guy* (1848) 16 Sim 230 at 232; (1848) 60 ER 861 at 862; *In re Brogden* (1888) 38 Ch D 546 at 567, applying Lord Cottenham LC in *Clough v Bond* (1838) 3 My and Cr 490; *In re Stevens* [1898] 1 Ch 162 at 172; *National Trustees Executors and Agency Co of Australia Ltd v Dwyer* (1940) 63 CLR 1 at 22.

107 [1992] EWCA Civ 12; [1993] 1 WLR 1260.

108 *Hotson v East Berkshire Area Health Authority* [1987] 1 AC 750; *Wilsher v Essex Area Health Authority* [1988] 1 AC 1074.

109 (1997) 188 CLR 449.

110 *Caffrey v Darby* (1801) 6 Ves 488; *Clough v Bond* (1838) 3 My and Cr 490; *In re Dawson decd; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211; *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2)* [1980] Ch 515; *Hill v Rose* [1990] VR 125; *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262; *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1.

plaintiff of an action in common law negligence for personal injury needs to show that the breach was a *necessary* cause of the injury.[111] The causal link required in negligent misrepresentation claims is less stringent; the plaintiff needs only to show that misstatement is *a* cause of the injury, in that it is a factor that has contributed to the plaintiff's decision-making.[112] The defendant is also only liable for the kind of damage that lies within the scope of the defendant's duty to protect the plaintiff from,[113] and where the loss is reasonably foreseeable[114] and not attributable to a supervening event.[115] Where breach of contract is concerned, the plaintiff must generally show that but for the breach, the loss would not have happened, albeit it is ultimately a question of fact to be decided by common sense. For example, to rescind a contract for duress, misrepresentation or undue influence, the causal link is satisfied by showing that the defendant's conduct or misstatement is a factor of the plaintiff's decision to enter into the contract.[116] The defendant is only liable for loss that lies within the reasonable contemplation of the parties[117] and is not caused by intervening causes.[118]

---

111 See generally *Clerk & Lindsell on Torts* (Mark Simpson, Michael Jones & Anthony Dugdale eds) (London: Thomas Reuters, 21st Ed, 2014) at paras 2-09–2-20; *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428.

112 *JEB Fasteners Ltd v Mark Bloom & Co* [1981] 3 All ER 289; *Bristol & West Building Society v Mothew* [1998] Ch 1; Jane Stapleton, "Unnecessary Causes" (2013) 129 LQR 39 at 45. For the difference between the two tests, see James Edelman & Elise Bant, *Unjust Enrichment* (Oxford: Hart Publishing, 2016) at pp 189–194. See also Elise Bant, "Causation and Scope of Liability in Unjust Enrichment" [2009] RLR 60.

113 *Caparo Industries v Dickman* [1990] 2 AC 605; *South Australia Asset Management Corp v York Montague Ltd* [1996] UKHL 10. See the "no better principle" proposed in Jane Stapleton, "Unnecessary Causes" (2013) 129 LQR 39 at 58 *ff*, which can overlap with the scope of duty analysis in the contractual context.

114 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388 at 422–423, *per* Viscount Simond; *Bradford v Robinson Rentals Ltd* [1967] 1 WLR 337; [1967] 1 All ER 267.

115 *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292; *Nichols v Marsland* (1876) 2 Ex D 1; *Scott v Shepherd* (1773) 3 Wils KB 40; (1773) 95 ER 525; *McKew v Holland & Hannan Ltd* [1970] SC(HL) 20; [1969] 3 All ER 1621; *Jobling v Associated Dairies Ltd* [1982] AC 794; *King v Sussex Ambulance NHS Trust* [2002] EWCA Civ 953.

116 Edwin Peel, *Treitel on the Law of Contract* (London: Sweet & Maxwell, 14th Ed, 2015) at para 20-095 *ff*; *Barton v Armstrong* [1973] UKPC 27; [1976] AC 104; *Edgington v Fitzmaurice* (1885) 29 Ch D 459; *UCB Corporate Services v Williams* [2002] EWCA Civ 555.

117 *Hadley v Baxendale* (1854) 9 Exch 341: "reasonable contemplation" has been interpreted to mean that the loss is in the ordinary course of things or that even if it is extraordinary, the defendant has knowledge of special circumstances which enable a reasonable man to foresee such loss. Furthermore, if the application of such a test leads to unquantifiable, unpredictable, uncontrollable consequence or is contrary to market expectations, the court will ask if the defendant has assumed responsibility over the loss (*Transfield Shipping v Mercator Shipping* [2009] 1 AC 61).

118 *Lambert v Lewis* [1982] AC 225; *Well-Blundell v Stephens* [1920] AC 956.

42 In *Bristol & West Building Society v Mothew*,[119] Lord Millett opined that there is no difference in substance between the equitable and common law rules for compensating the breach of a duty of care. His Lordship called for applying the common law rules of causation, remoteness of damage and measure of damage for negligence by analogy to breaches of the equitable duty of care.[120] This bold proposition has received mixed academic responses.[121] It was endorsed by Ribeiro PJ in *Libertarian Investments Ltd v Hall*[122] ("*Libertarian Investments*") (albeit Millett NPJ did not express an opinion on this point), but it was doubted *obiter* in *Youyang*, on the ground that the trustee should abide by the highest moral standards.[123]

43 It is submitted that at least in relation to negligent breaches of custodial duties, there are strong grounds for maintaining the traditional equitable approach of reversing the burden of proof. The trustee as manager of the property is in possession of the relevant information and hence better suited to bear the burden of proving the lack of connection between the breach and the loss. Moreover, McLachlin J's exhortation in *Canson Enterprises Ltd v Boughton & Co*[124] ("*Canson Enterprises*") about the unique foundation of the fiduciary relationship, namely that one party pledges to act in the best interest of another so as to relieve the other from the burden of having to look after his own self-interest, also holds true in the present context.[125] The core of the trustee undertaking is to manage the trust property in the best interest of the beneficiary. To inspire the beneficiary's confidence in the trustee's discharge of his duty, equity should not allocate the burden of proof in such a way that requires the beneficiary to constantly check on the trustee and maintain records of the latter's dealing of the trust property lest there be future litigation against him. Reversing the onus of proof will relieve him from such a burden to look after his own interest and "enforce the trust which is at [equity's] heart".[126] Borrowing

119 [1988] Ch 1.

120 *Bristol & West Building Society v Mothew* [1988] Ch 1 at 17, endorsing *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 687. See also Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at 226.

121 See, in support, Steven Elliott, "Remoteness Criteria in Equity" (2002) 65 MLR 588, but strong critique in John Dyson Heydon, "Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Sydney: Lawbook Co, 2005) at p 207.

122 (2013) 16 HKCFAR 681 at [77] and [90].

123 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [39].

124 [1991] 3 SCR 534.

125 *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 552.

126 *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 552.

the language of McLachlin J in *Canson Enterprises*, the High Court in *Youyang* said as follows:[127]

> [T]here must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts 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.

44 Once equitable compensation is available for trustee negligence generally, it will embrace a whole range of non-custodial situations outside the limited scope of traditional accounting.[128] The trustee may have given negligent advice, failed to express opposition against an unprofitable investment,[129] or failed to alert the beneficiary of the risks of an existing investment.[130] Moving then to the second issue as to whether the same (traditional) rules should apply to non-custodial breaches, it is submitted that in so far as the breach of a non-custodial duty does not involve a breach of the duty of loyalty or duties to act in a representative role for the beneficiary, the rationale of protecting the trust does not apply and the analogy with the common law rules is justified. This will also promote coherence with the common law remedies and avoid attempts by litigants to undercut common law rules by bringing an action in equity.[131] The point is well illustrated by *Bank of New Zealand*. The beneficiary claimed that due to the trustee's negligence in monitoring and reporting unauthorised transfers by a third party, it lost the opportunity to withdraw from an investment and thus suffered loss on the investment. The court rightly held that the loss was too remote. Support for this approach can also be found in *Permanent Building Society v Wheeler*,[132] where the Supreme Court of Western Australia held that the test of causation in common law negligence applies to breach of an equitable duty of care by a company director. Amongst the justifications provided by Ipp J, who delivered the judgment of the court, were that considerations of difficulties of proof

127 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [39]. *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 was also endorsed by Lord Reed in *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [83].

128 I thank Elise Bant for this observation.

129 *Permanent Building Society v Wheeler* (1994) 14 ACSR 109; (1994) 11 WAR 187.

130 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664.

131 Examples of the courts' attempt to stop "claim shopping" can be found in the English mortgage fraud cases against solicitors: *Bristol & West Building Society v Mothew* [1988] Ch 1 at 17; Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at 217; *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361 at 362.

132 (1994) 14 ACSR 109.

and moral blameworthiness found in breach of fiduciary duty do not apply to negligent breaches.[133] The considerations are very different, however, if there is an intentional breach of the duty of care for the trustee's own benefit or in order to prefer another party's interest, as this will amount to a breach of fiduciary duty.

(3) Duty of loyalty

45 Liability for breach of the trustee's duty of loyalty *per se* is an uncharted territory in the traditional accounting process, for it has never been a relevant consideration in falsification or surcharging. If a trustee misapplies trust property disloyally, such as when he misappropriates it for his own use, it is difficult to see how the computation of equitable compensation should differ from the traditional falsification rules or their modern renditions under the label of equitable compensation, as restoration of the misapplied amount already entails strict performance of the trustee's duty to act in the best interest of the beneficiary. In the same vein, if he refrains from making an investment in order to acquire it for himself,[134] the surcharging rules will apply. The presence of bad faith or disloyalty is relevant only in attracting a more severe interest award. As Lord Walker remarked in *Bairstow v Queens Moat Houses plc*:[135]

> … a more satisfactory dividing line is not that between the traditional trust and the commercial trust, but between a breach of fiduciary duty in the wrongful disbursement of funds of which the fiduciary has this sort of trustee-like stewardship and a breach of fiduciary duty of a different character.

46 Where the disloyalty does not involve the custodial duty or loss to the trust property, the accounting rules are inapplicable. Examples of such breaches include breach of the duty not to compete with the trust, to refrain from conflicts of interest and duties, or to make disclosure of a conflict of interest. As compared to carelessness in breaching non-custodial duties, policy considerations of deterrence and the moral blameworthiness of the fiduciary militate in favour of more extensive liability, which may also differ depending on whether the breach was committed in good faith or deliberately.

47 Tipping J in *Bank of New Zealand* suggested applying the approach outlined in *Gilbert v Shanahan*,[136] which concerned breach of

133 *Permanent Building Society v Wheeler* (1994) 14 ACSR 109 at pp 165–168; (1994) 11 WAR 187 at 243–248.

134 The facts of *Keech v Sandford* [1726] Sel Cas 1 King 61 provides an example of this situation.

135 [2001] 2 BCLC 531 at [53].

136 [1998] 3 NZLR 528.

the duty of loyalty by non-custodial fiduciaries.[137] This suggestion was endorsed in *Libertarian Investments*.[138] To examine this proposal properly, it is submitted that three aspects of the remedial rules, namely causation, remoteness, and intervening causes, as well as the relevance of dishonesty to each of them, need to be considered respectively.

(a) Causation

48 The test of causation for breach of non-custodial fiduciary duty centres around the interpretation of Lord Thankerton's difficult *dictum* in *Brickenden*. His Lordship put the test in absolute terms, that once the principal has proven the breach, such as the fiduciary's failure to disclose a conflict of interest, and the principal's entry into the relevant transaction, the fiduciary "cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction", and any such speculation is irrelevant.[139] There is an emerging consensus in Canada[140] and New Zealand[141] that treats his Lordship as saying that the court would not investigate or speculate what the beneficiary would have otherwise done, but it was still open to the fiduciary to lead evidence to show the lack of but-for causation. The highest courts in England and Australia have not had the chance to address this issue. Thus far, the lower courts in England have taken the least stringent approach in giving the plaintiff the burden to prove causation. In *Swindle v Harrison*,[142] a borrower sued his solicitor, who had represented her in the purchase of a hotel premises, for extending her a bridging loan without disclosing the profits he made from the loan transaction. The solicitor argued that had he performed his duty (of disclosing his secret profit), the borrower would have accepted the loan in any event as she desperately needed the financing.[143] Although each of the

137 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 687; *Gilbert v Shanahan* [1998] 3 NZLR 528.

138 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [75]–[83].

139 *Brickenden v London Loan Savings Co* [1934] 3 DLR 465 at 469.

140 *Jacks v Davis* (1982) 141 DLR (3d) 355; *Commerce Capital Trust Co v Berk* (1989) 68 OR (2d) 257; *Hodgkinson v Simms* [1994] 3 SCR 377; *ICR Brokerage Inc v Crescent Restaurants Ltd* (2010) 322 DLR (4th) 480.

141 *Witten-Hannah v Davis* [1995] 2 NZLR 141; *Haira v Burbery Mortgage Finance & Savings Ltd* [1995] 3 NZLR 396; *Everist v McEvedy* [1996] 3 NZLR 348; *Gilbert v Shanahan* [1998] 3 NZLR 528; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664; *Amaltal Corp Ltd v Maruha Corp* [2007] 3 NZLR 192; *Premium Real Estate Ltd v Stevens* [2009] NZSC 15.

142 [1997] 4 All ER 705.

143 *Swindle v Harrison* [1997] 4 All ER 705, applied in *Nationwide Building Society v Balmer Radmore* [1999] PNLR 606 at 671–672. See also *Longstaff v Birtles* [2002] 1 WLR 470; *DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy* [2004] 1 BCLC 131; *Také Ltd v BSM Marketing Ltd* [2009] EWCA 45; and *Bank of Ireland v Jaffery* [2012] EWHC 1377. See Charles Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 CLP 307 at 328–331.

three judges gave different reasons, they were unanimous in rejecting the borrower's argument, which was based on *Brickenden*, and emphasised that the borrower would have gone ahead with the purchase even if the solicitor had not committed a breach. Mummery LJ, and arguably also Hobhouse LJ, applied *Target Holdings*, which in turn approved the oft-cited passage of McLachlin J in *Canson Enterprises*, that the loss must, applying common sense and hindsight, flow from the breach.[144] The position in Australia is unclear. Recent authorities have increasingly adopted the approach in Canada and New Zealand and allowed the fiduciary to escape liability by arguing that even if there was no breach of fiduciary duty, the beneficiary has entered into the transaction and suffered the same loss.[145] Some have gone further to require the beneficiary to prove but-for causation.[146]

49 Thus far, the authorities in Anglo-common law jurisdictions have confined themselves to three options with regard to the causal requirement: (a) giving the burden of proving but-for causation to the plaintiff; (b) shifting the burden of proof to the fiduciary; and (c) not requiring proof of causation while also not allowing the fiduciary to disprove it. There is much to be said for considering options beyond these variations on the same theme, and casting the net of recovery for disloyalty wider than that embraced by but-for causation. The but-for test allows the trustee to escape liability by the fortuity of another sufficient cause. This can undermine the deterrence and prophylactic goals of the duty of loyalty, especially for a paid professional trustee who is more morally blameworthy than a lay gratuitous trustee.[147] While the issue as to the requisite test deserves fuller treatment on another occasion, a few preliminary thoughts may be ventured.

50 The question of causation is ultimately a question of fact to determine whether there is a sufficient link between the breach and the loss. The but-for test may be a good rule of thumb, but a test that only

144 *Swindle v Harrison* [1997] 4 All ER 705 at 733–734, *per* Mummery LJ, and 728, *per* Hobhouse LJ.

145 *Stewart v Layton* (1992) 111 ALR 687; *Breach Petroleum NL v Abbott Tout Russell Kennedy* [1999] NSWCA 408 at [429]; see Jamie Glister, "Equitable Compensation" in *Fault Lines in Equity* (Jamie Glister & Pauline Ridge eds) (Oxford: Hart Publishing, 2012) ch 7; Matthew Conaglen, "*Brickenden*" in *Equitable Compensation and Disgorgement of Profits* (Simone Degeling & Jason Varuhas eds) (Oxford: Hart Publishing, 2017) (forthcoming) ch 6; and John Dyson Heydon, Mark J Leeming & Peter G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (Sydney: LexisNexis Australia, 5th Ed, 2014) at paras 23-455–23-500.

146 *White v Illawarra Mutual Building Society Ltd* [2002] NSWCA 164; *Dominic v Riz* [2009] NSWCA 216; *Simpson v Donnybrook Properties Pty Ltd* [2010] NSWCA 229; *Watson v Ebsworth & Ebsworth* [2010] VSCA 335.

147 Deborah D DeMott, "Causation in the Fiduciary Realm" (2011) 91 BULR 851.

requires the breach to be a factor of the loss – or a slightly less stringent test of the breach being a not immaterial contribution to the loss[148] – will fit better with the prophylactic goals of a trust relationship. It will also help overcome the beneficiary's difficulties in proving the causal link in a trust relationship where information is held by the trustee. The burden may then shift to the trustee to show that the breach played no part at all – or played an immaterial part – in bringing about the loss.

51 The "a factor" test has also been widely adopted in decision-making cases in tort and restitution.[149] For example, in relation to the tort of deceit, the UK Supreme Court in *Hayward v Zurich Insurance plc*[150] clarified that the causation test is whether the plaintiff was influenced by the misstatement. Significantly, his Lordship expressly stated that the causal link is established even if the statement is but "an inducing cause" and not the "sole cause",[151] and, citing the High Court of Australia's decision of *Gould v Vaggelas*,[152] that "even if [the representation plays] only a minor part … in contributing to the course of action taken a causal connection will exist".[153] Under such a test, it is possible that a plaintiff who did not believe in the statement was nonetheless influenced by it to enter into the relevant transaction, as the question of influence is ultimately a question of fact.[154] Accordingly, the UK Supreme Court held that an employee who exaggerated his work injury to the insurer in order to obtain a better settlement had induced the insurer, even though the latter was aware of the possibility of exaggeration before entering the settlement.

148 Support for this test can be found in a similar test laid down by Briggs LJ in *Santander UK plc v RA Legal Solicitors* [2014] EWCA Civ 183 at [28], albeit for the purpose of identifying trustee conduct that qualifies for consideration under s 61 of the English Trustee Act 2000 (c 29). His Honour ruled out conduct that is "completely irrelevant or immaterial to the loss", or does not increase the risk of the loss.

149 For support of this test in restitutionary claims, see James Edelman & Elise Bant, *Unjust Enrichment* (Oxford: Hart Publishing, 2016) at pp 189–194.

150 [2016] UKSC 48.

151 *Hayward v Zurich Insurance plc* [2016] UKSC 48 at [33]. The court further held that a plaintiff who did not believe in the statement was nonetheless influenced by it to enter into the relevant transaction.

152 (1984) 157 CLR 215.

153 *Gould v Vaggelas* (1984) 157 CLR 215; *Hayward v Zurich Insurance plc* [2016] UKSC 48 at [33].

154 *Hayward v Zurich Insurance plc* [2016] UKSC 48 at [32]. See Ken R Handley, "Causation in Misrepresentation" (2015) 131 LQR 275.

52 As to the burden of proving inducement, Lord Clarke endorsed the following statement of *Chitty on Contracts*:[155]

> Once it is proved that a false statement was made which is 'material' in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement, and the inference is particularly strong where the misrepresentation was fraudulent.

Thus, the plaintiff only needs to show in a temporal sequence that a material representation has been made and he entered into the relevant transaction. A strong presumption of fact will arise that that he was influenced by the statement. Moreover, where there is fraud it will be very difficult to rebut the presumption, albeit Lord Clarke did not further decide whether the evidence rebutting the presumption needs to be that the misrepresentation played "no part at all", did not play a "determinative part" or did not play a "real and substantial part".[156] Significantly, his Lordship further approved the approach in *Downs v Chappell*[157] and *Sharland v Sharland*[158] that the defendant would not be allowed to deny the materiality of the statement or that it played a causative part in inducement.[159]

53 It is submitted that there is much to be said for adopting the "a factor" test for breaches of fiduciary duty and shifting the burden of proving the absence of causation to the defaulting trustee. Thus far, there is no direct authority on the causal requirement for deliberate disloyalty by a trustee, except for the ambiguous observation of Evans LJ in *Swindle v Harrison* that *Brickenden* (in its stringent form) applied where there is the "equitable equivalent of fraud".[160] After a review of the three judgments in *Swindle v Harrison*, Blackburne J in *Nationwide Building Society v Balmer Radmore*[161] considered that the (modified) *Brickenden* test applied to breaches of fiduciary duty *other than* fraud, thus lending indirect support for applying the stringent *Brickenden* test to fraudulent fiduciaries.[162] Lord Walker in *Bairstow v Queens Moat Houses plc*[163] ("*Bairstow*") also briefly hinted that a greater sum of

155 *Chitty on Contracts* vol 1 (Hugh Beale ed) (London: Sweet & Maxwell, 32nd Ed, 2015) at para 7-040; *Hayward v Zurich Insurance plc* [2016] UKSC 48 at [34].

156 *Hayward v Zurich Insurance plc* [2016] UKSC 48 at [36].

157 [1997] 1 WLR 426.

158 [2015] 3 WLR 2070.

159 *Hayward v Zurich Insurance plc* [2016] UKSC 48 at [37]–[38], citing *Downs v Chappell* [1997] 1 WLR 426 at 433D–433E and *Sharland v Sharland* [2015] 3 WLR 2070.

160 *Swindle v Harrison* [1997] 4 All ER 705 at 716–717.

161 [1999] PNLR 606.

162 *Nationwide Building Society v Balmer Radmor* [1999] PNLR 606 at 671–672.

163 [2001] 2 BCLC 531.

equitable compensation can be awarded for a deliberate and dishonest breach of fiduciary duty.[164] In light of these observations and the approach in deceit, the court may be more ready to infer causation with respect to a dishonest trustee who not only practices deception but also abuses the trust that has been placed in him. Furthermore, the evidence necessary to rebut the presumption of inducement or causation by a dishonest trustee could be more stringent, in that he needs to show that his breach played no part at all in the action taken by the beneficiary.

(b) Remoteness

54 Turning to the remoteness rule for both innocent and deliberate disloyalty of the trustee, there are considerable judicial statements suggesting that remoteness and foreseeability do not apply.[165] Putting aside that some of these statements may not have drawn a clear distinction from substitutive performance,[166] there still is overwhelming support in the authorities that irrespective of whether the trustee or fiduciary acted in good faith or dishonestly, he is liable for all loss that flows directly from the breach, whether they are reasonably foreseeable or not. This is the same remoteness rule as that in the tort of deceit.[167]

55 *Libertarian Investments* provides an apt illustration. In this case, a trustee dishonestly appropriated £5m entrusted to him to acquire shares, as a result of which the beneficiary missed the opportunity to on-sell the shares for the attractive price of nearly £19m. Ribeiro PJ held that the deliberate breach justified imposing a strict measure of liability, and applied the *Canson Enterprises* rule that the trustee was liable for loss which, applying common sense and hindsight, flowed from the breach. His Honour made it clear that the common law rules of foreseeability and remoteness did not apply, albeit on the facts the loss of the £19m was not too remote in any event.[168]

164 *Bairstow v Queens Moat Houses plc* [2001] 2 BCLC 531 at [54].

165 *Maguire v Makaronis* (1997) 188 CLR 449; *Hill v Rose* [1990] VR 125; *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262; *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534; *Hodgkinson v Simms* [1994] 3 SCR 377; *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 61; *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58.

166 Steven Elliott, "Remoteness Criteria in Equity" (2002) 65 MLR 588 at 589–591; Charles Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 CLP 307 at 331–334.

167 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, approved in *Smith New Court Securities v Citibank NA* [1997] AC 254; see also *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778.

168 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 61 at [96], citing *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 556, *per* McLachlin J.

56 Similarly, in *Hodgkinson v Simms*,[169] which deals with a non-custodial fiduciary rather than trustee, an accountant on whom the beneficiary relied for financial advice suggested an investment without disclosing his personal interest in it. When the investment was lost, the court held that the defendant should be liable for all loss arising from the investment, and rejected an argument that the proximate cause of the loss was a market failure.

57 More recently, albeit in *obiter* remarks, Lord Reed in *AIB Group* drew a distinction between the respective measures of compensation for negligence and breach of fiduciary as follows:[170]

> In the case of a breach of fiduciary duty, as in deceit, there was no need to look to the consequences to judge the reasonableness of the actions. A breach of fiduciary duty was a wrong in itself, regardless of whether a loss could be foreseen.

His Lordship explained that since negligence involves the failure to take reasonable care to guard against reasonably foreseeable risks, the tortfeasor's liability is rightly limited to losses that are reasonably foreseeable. For a person who intentionally deceives another, "foreseeability does not enter into the wrongfulness of the defendant's conduct, and there is no reason why it should limit the extent of his responsibility".[171] This echoes Ipp J's remark in *Permanent Building Society v Wheeler*, that the "fundamental distinction" between dishonest breaches of fiduciary obligations and honest but careless breaches of mere equitable obligations justifies adopting more stringent rules in the case of the former breaches.[172] It is submitted that breach of fiduciary duty shares the same policy consideration as deceit, not least for a dishonest trustee but also for one who breaches the fiduciary duty in good faith. After all, his fiduciary undertaking is to act in the best interest of the beneficiary and not just to protect the latter from reasonably foreseeable losses.

58 In light of these considerations, while a trustee who carelessly breaches a non-custodial duty is only liable for loss that is reasonably foreseeable, one who breaches his non-custodial fiduciary duty, whether dishonestly or in good faith, should be liable for all direct loss flowing from the breach, and not be limited by a remoteness test of reasonable foresight.

169 [1994] 3 SCR 377.
170 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [86].
171 *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58 at [92].
172 *Permanent Building Society v Wheeler* (1994) 14 ACSR 109 at 166.

(c) Intervening causes

59 Although the traditional accounting rules are replete with statements that the trustee is liable even if the immediate cause of the loss is due to the wrongdoing of a third party,[173] these observations are made in the context of the trustee's custodial duty. In this context, it is fair to hold him liable for the lost trust property, even if his breach is but a cause and not the proximate cause, for it is his duty to guard against *any* loss to the trust property.

60 These considerations are not applicable to a breach of a non-custodial fiduciary duty, where the approach of *Canson Enterprises* is preferred. In *Canson Enterprises*, a solicitor who acted for the plaintiff in the purchase of land and failed to disclose a prior sale that might have artificially raised the price of the land was held not liable for subsequent loss caused by negligent construction work that rendered the warehouses built on the land unfit for purpose. McLachlin J held that the fiduciary should only be liable for loss that, with common sense and hindsight, flows from the breach, thus allowing liability to be cut back by intervening causes.[174] This rightly draws the balance between upholding the trust and not making a fiduciary answerable for consequences beyond his control or fiduciary undertaking.[175]

(d) Brief summary

61 The proposals put forward in this part may be summarised as follows. As a starting point, one may ask which of the three broad types of duties is breached, *viz* the duty to preserve the trust fund, the duty of care and the duty of loyalty. First, in relation to the duty to preserve the trust fund, equitable compensation should be based on the traditional accounting rules of falsification, albeit a narrow exception should be introduced, such that when the loss arose from the beneficiary's own careless conduct, and the trustee acted in good faith and has not made any personal gains, the trustee is not liable to the extent that recovery would render the beneficiary better off than if there had been no breach.

62 Secondly, in relation to the duty of care, a distinction should be drawn between custodial and non-custodial duties. Equitable compensation for breaching the former negligently should shift the

173 *Fyler v Fyler* (1841) 3 Beav 550 at 567; (1841) 49 ER 216 at 223; *Caffrey v Darby* (1801) 6 Ves Jun 488; (1801) 31 ER 1159; *Kellaway v Johnson* (1842) 5 Beav 319 at 324; (1842) 49 ER 601 at 603.

174 *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, endorsed in *Swindle v Harrison* [1997] 4 All ER 705.

175 For justification of the doctrine of *novus actus interveniens*, see *Rouse v Squires* [1973] 1 QB 889 at 898 and *Wright v Lodge* [1993] RTR 123; [1993] 4 All ER 299.

burden of proving lack of causation to the trustee, who should be liable for all direct loss that would not have occurred, remoteness and intervening causes being irrelevant. However, equitable compensation for the latter can be assimilated to the rules for common law negligence, so that the beneficiary needs to prove but-for causation, and the trustee is liable for losses that are reasonably foreseeable and not due to an intervening cause.

63 Thirdly, in relation to breach of fiduciary duty, it is also relevant whether the disloyalty involves a breach of custodial duty or not. If it involves a breach of custodial duty, the traditional approaches already provide adequate remedies. If it involves a breach of non-custodial duty, the beneficiary only needs to show that the breach was a factor of the loss for the court to draw the inference of causation; the burden then shifts to the trustee to prove the contrary. If the breach was committed dishonestly, the courts will be more likely to infer causation, and the trustee will not be allowed to speculate what the beneficiary would have done had there been no misrepresentation. Whether he is dishonest or not, the trustee should be made liable for all direct losses arising from the breach. Foreseeability and remoteness are irrelevant, albeit liability will be cut back by intervening causes.

VII. Conclusion

64 The antiquity and technicality of the equitable accounting process has often shrouded the unique method adopted by equity to provide relief for breach, namely to treat as having been done what ought to have been done.[176] In modern terminology, this is to put the trust into the *legal* position it would have been in had there been no breach. This position of deemed performance allows the beneficiary's right to relate back to the time when performance was due, in order to achieve perfect justice in fulfilling the beneficiary's interest in the expected performance of the trustee's duty. It crucially provides the comparator by which restoration of the trust fund should be effected. Such an approach encompasses both the specific performance of the trustee's duty to preserve the trust fund (falsification) and compensation for loss to the trust estate arising from his lack of care or disloyalty (surcharging). These two forms of account combine with the constructive trust to provide the best possible remedy to the beneficiary in all eventualities of the breach. Since the point of the institution of trust is to entitle the beneficiary to trust the trustee, recovery on the basis of deemed performance crucially assures the beneficiaries that the trust

176 Christopher Langdell, "A Brief Survey of Equity Jurisdiction" (1888) 1 Harv L Rev 355 at 359.

undertaking will always be observed, whether by the trustee's due performance or by way of remedial orders.

65 This article has argued that these insights should be borne in mind in developing equitable compensation for breach of trust, in order that the developing rules will not only cohere with the common law but also continue to maintain the integrity of the trust relationship as the traditional accounting rules have done. Accordingly, the award of "equitable compensation" for misapplication should be based on replacement and not compensation. Since the trustee's duty is a self-limiting one to not dispose an amount of trust assets, the quantum of replacement is obvious and does not require any causal inquiry. When a trustee breaches the duty of care or of loyalty, recovery is indeed based on compensation, albeit only of the trust estate and not consequential losses. The remedial rules for compensating loss arising from such breaches should be a function of the nature of the duty breached bearing in mind the prophylactic nature of the duty of loyalty, the moral blameworthiness of the trustee and the common law rules for equivalent breaches.