NAVIGATING THE MAZE*

Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty

This article examines the main monetary remedies for breach of fiduciary duty under Singapore law: equitable compensation and account of profits. It focuses on the role as well as the operation of causation in these two monetary remedies for breach of fiduciary duty. It suggests that studying the account of profits and equitable compensation side-by-side illuminates the proper questions that should be asked. By considering the fundamental tenets of the fiduciary doctrine as well as recent case law developments, we argue that relevant considerations for crafting appropriate remedial principles include scope of duty, deterrence, proportional consequences and good faith. Part of our discussion also examines the structural differences in the analysis of the two remedies under current law, and attempts to rationalise the differences.

YIP Man
LLB (Hons) (National University of Singapore), BCL (Oxford); Advocate and Solicitor (Singapore); DS Lee Foundation Fellow; Assistant Professor, School of Law, Singapore Management University.

GOH Yihan
LLB (Hons) (National University of Singapore), LLM (Harvard); Advocate and Solicitor (Singapore); Associate Professor, School of Law, Singapore Management University.

I. Introduction

1 This article examines the main monetary remedies for breach of fiduciary duty under Singapore law: equitable compensation and account of profits. Both areas of law are in need of clarification, though for different reasons. The law on the account of profits appears stable and uncontroversial. There has not been an opportunity for the courts to consider more fully the proper limitations on the scope of account. However, the authorities that are on point suggest that the duty to account for profits follows almost as a matter of course from breach. In

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particular, causation between profits and breach is seemingly irrelevant for the errant fiduciary's liability. This article, however, cautions against an overly simplistic analysis. The law on equitable compensation for breach of fiduciary duty is, by contrast, a muddied terrain as a result of recent developments in Singapore and elsewhere. Yet, it may be that there is more orderliness to the apparent legal mess, as this article seeks to show.

2 Judicial clarification from the Singapore Court of Appeal is required but may take some time in arriving. This article seeks to contribute towards clarity of the law by proposing a way of navigating the legal maze. This article focuses on the role as well as operation of the causation concept in monetary remedies for breach of fiduciary duty. It suggests that a study of the account of profits and equitable compensation side-by-side, though unconventional, illuminates the proper questions that should be asked. By considering the fundamental tenets of the fiduciary doctrine as well as case law developments, we argue that relevant considerations for crafting appropriate remedial principles include scope of duty, deterrence, proportional consequences and good faith. How these considerations are to be prioritised and whether all of them should be taken on board may vary depending on jurisdictional prerogatives. In this article, we also highlight the structural differences in the analysis of the two remedies under current law and attempt to rationalise the differences.

3 By way of background, we consider in Part II[1] of this article the fundamental tenets of the fiduciary doctrine under Singapore law. This part of the discussion sets out the common basis upon which we examine and analyse the monetary remedies. We then turn to equitable compensation in Part III.[2] The first segment focuses on the local developments. The second segment highlights the possible directions that Singapore law may take in the future. In Part IV,[3] we consider the law on account of profits and its relationship with equitable allowance. The cases suggest that the duty to account for profits is strict, although a *bona fide* fiduciary may, in very exceptional circumstances, be entitled to an equitable allowance. We argue that the primary duty to account must be considered together with the jurisdiction to award allowance so as to have a clear picture of the remedial principles for account of profits. In particular, our analysis shows that the same factors underpinning equitable compensation are relevant for account of profits, though expressed differently. Given the similar underlying

1 See paras 4–20 below.
2 See paras 21–57 below.
3 See paras 58–86 below.

objectives and themes, we suggest issues that merit closer scrutiny for account of profits.

II. The fiduciary doctrine

4 This article argues that the fundamental tenets of the fiduciary doctrine are relevant to the crafting of appropriate remedial principles. The doctrine must be internally consistent, from the imposition of duty to the imposition of liability for breach. In this part, we highlight four core tenets of the doctrine under Singapore law.

A. A continuum of fiduciary relationships

5 Historically, courts identified fiduciary relationships based on status: some relationships are regarded as fiduciary *per se*.[4] Over time, fiduciary obligations have been imposed on parties who fall outside of the established categories based on the circumstances of each case[5] and even in commercial relationships.[6] Millett LJ's famous pronouncement in *Bristol & West Building Society v Mothew*[7] ("*Mothew*") provides guidance on when a relationship outside the status-based categories may be fiduciary in nature:[8]

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of the fiduciary is the obligation of loyalty.

6 In particular, courts, when dealing with cases falling outside of the established categories, look for elements of vulnerability and dependence within the relationship.[9] As such, whilst the trustee is the paradigmatic fiduciary,[10] it is clear that the kinds of relationships which

4 For example, trustee and beneficiary, director and company, solicitor and client, as well as agent and principal.

5 For example, employees: see *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163. See also James Edelman, "When Do Fiduciary Duties Arise?" (2010) 126 LQR 302.

6 See, for example, *Singapore River Cruises & Leisure Pte Ltd v Phun Teow Kie* [2000] 1 SLR(R) 22. *Cf* John D Davies, "Keeping Fiduciary Liability Within Acceptable Limits" [1998] Sing JLS 1.

7 [1998] Ch 1.

8 *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18.

9 *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 at [110]; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35 at [286], *per* Jacobson J.

10 There is some debate as to whether the fiduciary doctrine was developed by analogy with the trust principles or if it preceded and in fact furthered the development of the trust rules. See Peter Birks, "The Content of Fiduciary

(*cont'd on the next page*)

attract the application of the fiduciary obligations are diverse, and the categories are not closed.[11] Fiduciary relationships therefore fall on a continuum, with some closer to the traditional trust paradigm and others more removed. After all, not all fiduciaries owe custodial duties as a traditional trustee does and yet these fiduciaries can unilaterally exercise a power or discretion to affect the principal's interests,[12] thereby justifying the imposition of fiduciary duties. Moreover, it may be that fiduciary relationships arising in the commercial context are subject to different considerations from those arising in the non-commercial context.

7 Hence, one must not assume that every fiduciary owes the same duties as a trustee, or that trust principles, without appropriate modification, are exported in entirety for application in other fiduciary contexts. That being the case, there are fundamental obligations that set the fiduciary apart from other actors and it is to this aspect of the fiduciary doctrine we now turn.

B. Fiduciary obligations

8 In *Mothew*, Millett LJ said that the "distinguishing obligation of a fiduciary is the obligation of loyalty".[13] It is also well established that at the core of the fiduciary obligation of loyalty are two fundamental rules: the no-conflict and no-profit rules.[14] The *precise* boundary as well as the *exact* function of the fiduciary doctrine remain matters of debate.[15] But these matters need not vex us in the present discussion. There are two important points to note for the analysis to follow. First, it is clear

Obligations" (2000) 34 *Israel Law Review* 3 and *Swindle v Harrison* [1997] 4 All ER 705 at 734. *Cf* Joshua Getzler, "Rumford Market and the Genesis of Fiduciary Obligations" in *Mapping the Law: Essays in Memory of Peter Birks* (Andrew Burrows & Alan Rodger eds) (Oxford University Press, 2006) ch 31 at p 577.

11 *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93 at 110.

12 See *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 at [41].

13 *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18.

14 *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18. Millett LJ included within his non-exhaustive list of peculiarly fiduciary obligations the duty to act in good faith. *Cf* Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (Hart Publishing, 2011) at pp 40–44. See also *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [136].

15 Conaglen argues that the function of the fiduciary doctrine (being exhausted by the no-conflict and no-profit rules) is a subsidiary and prophylactic form of protection of non-fiduciary duties: to enhance the chance that the non-fiduciary duties are properly performed. See Matthew Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121 LQR 452. *Cf* Rebecca Lee, "In Search of the Nature and Function of Fiduciary Loyalty: Some Observations on Conaglen's Analysis" (2007) 27 OxJLS 327.

that the fiduciary obligations exist to prevent abuse of position by the fiduciary.[16]

9 Secondly, not all duties owed by a fiduciary are fiduciary duties. For instance, duties of care and skill are not regarded as such.[17] A distinction therefore needs to be drawn between the breach of a fiduciary duty and the breach of a non-fiduciary duty by a fiduciary because they attract different remedial consequences.[18]

10 Whilst the distinction is important, there is a close relationship between fiduciary and non-fiduciary duties. As mentioned above, whether fiduciary duties – arising from a relationship of trust and confidence – are to be imposed is dependent upon the scope and content of the non-fiduciary duties. Whilst a relationship of trust and confidence is presumed in status-based fiduciary relationships, the exercise of examining the alleged fiduciary's non-fiduciary duties is crucial for determining whether fiduciary duties have arisen on an *ad hoc* basis.[19] Moreover, whether there has been a breach of fiduciary duty is partly dependent upon the scope and content of non-fiduciary duties: whether there has been a conflict of *duty* and interests; whether the profits earned by the fiduciary are unauthorised; whether the profits were earned by the errant fiduciary in the execution of his duties as opposed to any other capacity[20] and so on.

C. Honesty and good faith: Centrality or culpability?

11 Yet, it is frequently recognised by the courts that parties to a contract can modify or completely exclude fiduciary duties from arising,[21] although the precise permissible limits and means of contracting out remain contentious.[22] One particular query concerns

16 *Bray v Ford* [1896] AC 44 at 51–52.

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

18 *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18; *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [274].

19 On whether employees owe fiduciary duties, the Singapore High Court said in *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [273] that:

> … [t]he scope and the content of the fiduciary duties that may arise from the employment must be accommodated within the terms of the employment contract and must not alter its intended operation.

20 *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 at [31].

21 See *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 97, *per* Mason J; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35.

22 Paul Finn, "Fiduciary Reflections" (2014) 88 ALJ 127 at 142–143. *Cf* Andrew Eastwood & Luke Hastings, "A Response to Professor Finn's 'Fiduciary Reflections'" (2014) 88 ALJ 314.

whether parties can contract out of a fiduciary's duties to act honestly and in good faith.[23]

12 In the trust context, which is the paradigmatic fiduciary relationship, it was established in *Armitage v Nurse*[24] that the "irreducible core" of trustee obligations is the trustee's duty to "perform the trust honestly and in good faith for the benefit of the beneficiaries".[25] The duties of honesty and good faith are the minimum content of a trust relationship: contracting out of these duties would mean that the relationship ceases to be one. It also follows that a trust exemption clause that purports to exempt liability for breach of the "irreducible core" of trustee obligations is void.[26] It appears that the "irreducible core" of trustee obligations can be further reduced in a specialised commercial context, as suggested by *Citibank NA v MBIA Assurance SA*.[27] The decision has caused controversy for being inconsistent with trust principles.[28] But it may be explained on the exceptional facts of the case as arising in the context of debt securitisation.[29]

13 Nevertheless, as discussed above, not all fiduciary relationships are closely analogous to the trust paradigm. As such, it may be that the trustee's "irreducible core" of obligations is not directly applicable to all fiduciaries. But it remains important to consider the minimum content that is necessary to give substance to a fiduciary relationship. Quite apart from automatic exportation from the trust concept, it is strongly arguable that duties of honesty and good faith form the core and minimum content of a fiduciary relationship.[30] It is hard to imagine

23 *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35 at [280], *per* Jacobson J.

24 [1998] Ch 241.

25 *Armitage v Nurse* [1998] Ch 241 at 253–254; and endorsed by the High Court in *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [107]. Singapore law recognises that a trust exemption clause can be effective to relieve trustee's liability for breach of trust: see *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1998] 2 SLR(R) 576.

26 The crux of the appeal in *Armitage v Nurse* [1998] Ch 241 related to the permissible scope of a trust exemption clause under English law.

27 [2007] EWCA Civ 11; [2007] 1 All ER (Comm) 475.

28 See, for example, Alexander Trukhtanov, "The Irreducible Core of Trust Obligations" (2007) 123 LQR 342 and Graham Virgo, *The Principles of Equity & Trusts* (Oxford University Press, 2012) at p 549.

29 The role of a security trustee is markedly different to the role of a conventional trustee. The function of the security trustee is to enforce the collective enforcement of the noteholders' rights for the benefit of the note issuer. See an excellent discussion in Phillip Rawlings, "Reinforcing Collectivity: The Liability of Trustees and the Power of Investors in Finance Transactions" (2009) 23 TLI 14.

30 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Syd L Rev 389 at 394.

that the principle of single-minded loyalty does not require, at the minimum, honesty and good faith on the part of the fiduciary.

14 Significantly, the minimum content of the fiduciary relationship reflects the expectations that the relationship engenders.[31] It follows that the breach of these core duties is considered more egregious and therefore attracts more severe remedial consequences or more stringent remedial principles to effect strong deterrence. Conversely, the evidence of honesty and good faith in the breach of the fiduciary duty may justify more lenient treatment at the remedial stage.

15 Alternatively, honesty and good faith may be taken into account in remedial consequences as a matter of measuring the degree of blameworthiness, akin to the remedial principles that operate in tort law. The more blameworthy the conduct, such as dishonesty, the more stringent the principles for effecting strong deterrence. The less blameworthy the conduct, such as an innocent breach, the less stringent those principles are, as deterrence is less relevant in such cases. For example, as was held by the House of Lords in *Smith New Court Securities Ltd v Citibank NA*,[32] damages for the fraudulent misrepresentation (the tort of deceit) would include all losses that flowed directly from the entry into the contract in question, regardless of whether or not such loss was foreseeable. This is in contrast to negligent misrepresentation, where the remoteness rules are not as generous to the plaintiff.

D. Deterrence

16 Deterrence is an underlying theme of the fiduciary doctrine. Singapore courts generally adopt a very strict approach towards breach of fiduciary duty so as to remove any encouragement to fiduciaries to commit breach of duty. In *Ng Eng Ghee v Mamata Kapildev Dave*,[33] the Court of Appeal, in *obiter*, indicated a preference to follow the stricter test in determining conflict of interest as enunciated by the majority in *Boardman v Phipps*,[34] which requires only a *mere possibility* of conflict. This is notwithstanding that Lord Upjohn's "real sensible possibility" of conflict test – albeit a dissenting judgment in the case – has found favour with lower English courts subsequently.[35] A primary reason given by the Court of Appeal for such a strict approach is the need to

31 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Syd L Rev 389 at 394.
32 [1996] 3 WLR 1051.
33 [2009] 3 SLR(R) 109 at [142]–[145].
34 [1967] 2 AC 46.
35 See, for example, *Re Bhullar* [2003] BCC 711 at [272], *per* Parker LJ.

"extinguish all possibility of temptation and to deter fiduciaries who may be tempted to abuse their positions".[36]

17 As for the no-profits rule, the Court of Appeal has generally followed the traditional English approach:[37] a fiduciary may not, by the use of his position, earn a profit unless he has obtained the informed consent of the principal.[38] Breach of the no-profit rule is strict.[39] It does not depend on the *bona fides* of the fiduciary, whether the profit would or should otherwise have gone to the principal, whether the conduct benefited the principal, or whether the fiduciary is duty-bound to obtain the profit for the principal.[40]

18 Further, Singapore courts have long taken the view that strong deterrence is needed in cases involving bribery of public officials,[41] which justifies the imposition of an institutional constructive trust over bribes received by fiduciaries. More recently, in *Guy Neale v Nine Squares Pty Ltd*,[42] the Court of Appeal endorsed the decision by the UK Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC*[43] ("*FHR*"). It was held in *FHR* that an institutional constructive trust is available against bribes and secret commissions received by a fiduciary in breach of fiduciary duty.[44]

19 It will be seen in the discussion of equitable compensation and account of profits below[45] that Singapore courts similarly favour principles that enhance the deterrence of breach of fiduciary duty. It is not clear if fiduciaries will actually be deterred from breaching their

36 *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 at [143]. Other reasons offered by the court related to the general difficulty of determining the errant fiduciary's motives and detecting actual conflicts given that the fiduciary is often well placed to conceal them: at [144]–[145].

37 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

38 *Lim Suat Hua v Singapore HealthPartners Pte Ltd* [2012] 2 SLR 805 at [90].

39 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 145.

40 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 144–145.

41 *Sumitomo Bank v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 at [241]–[242], *per* Lai Kew Chai J. The decision was affirmed by the Singapore Court of Appeal in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312.

42 [2015] 1 SLR 1097 at [130]. Singapore law presently recognises a remedial constructive trust, see a general discussion in Man Yip, "Singapore's Remedial Constructive Trust: Lessons from Australia" (2014) 8 J Eq 77.

43 [2014] 3 WLR 535.

44 It should be noted that English law does not presently recognise a remedial constructive trust. See *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] 3 WLR 535 at [47].

45 See paras 21–86 below.

fiduciary duties by the adoption of stricter principles.[46] Indeed, Smith argues that the account of profits remedy, which merely forfeits the precise amount of the wrongful gains, is poorly designed to serve the deterrent function.[47] Notwithstanding this view, there is likely to be some general deterrent *effect*, even if not overwhelmingly so. Moreover, the adoption of strict principles sends a strong message that breach of fiduciary duty is repugnant in the eyes of Singapore law. Until such a time that the law is fully open to the idea of imposing punitive awards for breach of equitable obligations,[48] it may be that stringent principles are the best tools that equity has for deterring wrongdoing. But, as will be discussed below, the degree to which deterrence should feature in the remedial stage may differ depending on the circumstances of the case.

20 We now move on to consider the monetary remedies for breach of fiduciary duty, starting off by examining the law on equitable compensation.

III. Equitable compensation

21 Traditionally, under Singapore law, all losses can be claimed as equitable compensation against the errant fiduciary so long as they satisfy the simple "but for" causation test.[49] The common law principles of causation, foreseeability and remoteness were said to be inapplicable.[50] This approach has remained unchallenged until recently.[51] It is also

46 The effect of both specific and general deterrence has been doubted by commentators, though usually in the context of searching for an appropriate justification for awarding proprietary relief for breach of fiduciary duty. See, for example, Katy Barnett, "Distributive Justice and Proprietary Remedies over Bribes" (2015) 35 Legal Stud 302 at 305–306.

47 Lionel Smith, "Deterrence, Prophylaxis and Punishment in Fiduciary Obligations" (2013) 7 J Eq 87 at 92.

48 Punitive damages for breach of fiduciary duty is not available in New South Wales, Australia: see *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10; (2003) 197 ALR 626, noted in James Edelman, "A 'Fusion Fallacy' Fallacy?" (2003) 119 LQR 375. *Cf* punitive awards for equitable wrongs are available under New Zealand law: see, for example, *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (breach of confidence).

49 *Ohm Pacific Sdn Bhd v Ng Hwee Cheng Doreen* [1994] 2 SLR(R) 633 at [23]; *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [1999] 3 SLR(R) 1049; *John While Springs (S) Pte Ltd v Goh Sai Chuah Justin* [2004] 3 SLR(R) 596; *First Energy Pte Ltd v Creanovate Pte Ltd* [2007] 1 SLR(R) 1050 (the appeal did not revisit the principles for equitable compensation: *Creanovate Pte Ltd v First Energy Pte Ltd* [2007] 4 SLR(R) 780).

50 *First Energy Pte Ltd v Creanovate Pte Ltd* [2007] 1 SLR(R) 1050 at [85], *per* Andrew Ang J.

51 *Cf* Tan Sook Yee & Kelvin Low Fatt Kin, "Equity and Trust" (2004) 5 SAL Ann Rev 260 at 271, para 12.34.

interesting that this approach is consistent with the fiercely criticised[52] House of Lords' decision in *Target Holdings Ltd v Redferns*[53] ("*Target Holdings*"), though *Target Holdings* was not cited in these earlier local authorities.[54] Instead, *In re Dawson, Pattisson v Bathurst*[55] and *Re Dawson (deceased)*[56] ("*Re Dawson*") were relied upon by the High Court in the seminal case, *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin*[57] ("*Kumagai-Zenecon*").

22 However, it has been observed that *Re Dawson*, a case frequently cited for equitable compensation for breach of trust in the Commonwealth, has been interpreted variously.[58] The particularly obfuscating part of Street J's judgment is as follows:[59]

> The principles embodied in this approach do not appear to involve any inquiry into whether the loss was caused by or flowed from the breach. Rather the enquiry in each instance would appear to be whether the loss would have happened if there had been no breach.

23 Although Street J's quote above was not explicitly cited in *Kumagai-Zenecon*, it is clear that the principles laid down in *Kumagai-Zenecon* interpreted the quote to mean "the fiduciary can escape liability only if he can demonstrate that the loss or suffering would have happened even if there [had] been no breach".[60] In assessing the defendant's liability for equitable compensation, the court in *Kumagai-Zenecon* determined the "proximate and effective cause" of the plaintiff's loss.[61] In the later decision of *John While Springs (S) Pte Ltd v Goh Sai Chuah Justin*,[62] the High Court commented that *Kumagai-Zenecon* "made it plain" that the plaintiffs must prove that their losses were

52 *Cf* Andrew Burrows, "We Do This at Common Law and That in Equity" (2002) 22 OxJLS 1 at 10–11.

53 [1996] AC 421.

54 *Target Holdings Ltd v Redferns* [1996] AC 421 was referred to in *John While Springs (S) Pte Ltd v Goh Sai Chuah Justin* [2004] 3 SLR(R) 596 at [6] for the point that in respect of equitable compensation for breach of fiduciary duty, "the detailed rules of evidence between the common law and equity were different, [but] the fundamental principles of the burden of proof remained the same".

55 [1915] 1 Ch 626.

56 [1966] 2 NSWR 211.

57 [1999] 3 SLR(R) 1049 at [35]–[36].

58 Jamie Glister, "Equitable Compensation" in *Fault Lines in Equity* (Jamie Glister & Pauline Ridge eds) (Hart Publishing, 2012) ch 7 at p 144.

59 *Re Dawson (deceased)* [1966] 2 NSWR 211 at 215.

60 *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [1999] 3 SLR(R) 1049 at [35]. The propositions were not challenged on appeal: see *Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd* [2000] 2 SLR(R) 689.

61 *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [1999] 3 SLR(R) 1049 at [40].

62 [2004] 3 SLR(R) 596.

caused by or linked to the defendant's breach of fiduciary duty.[63] In Singapore, therefore, *Re Dawson* had been interpreted to have laid down the rule that loss must be shown to have been caused by the breach of duty.[64] It is noteworthy that this was also the interpretation adopted by the House of Lords in *Target Holdings*.

A. Recent Singapore developments

24 More recently, Singapore's courts have reconsidered the "but-for" causation approach. In *Then Khek Khoon v Arjun Permanand Samtani*[65] ("*Then Khek Khoon (2012)*") the first local case to cite *Target Holdings* for the "but-for" causation approach,[66] Quentin Loh J doubted that "a simplistic 'but-for' test fits all cases in assessing the amount of equitable compensation".[67] He questioned if concurrent or intervening causes, or reasonableness in quantum are completely irrelevant to the determination of equitable compensation.[68] He further noted the non-uniform developments in other common law jurisdictions.[69] Notwithstanding these strong doubts,[70] the interlocutory application before Loh J did not require a conclusive resolution of these difficult matters.[71]

25 An opportunity for fuller review arose before the High Court in *Quality Assurance Management Asia Pte Ltd v Zhang Qing*[72] ("*Quality Assurance*"). In that case, Zhang, a senior employee, breached his fiduciary duties to the company by setting up a rival company and using the company's business opportunities, time and revenue-generating equipment to earn profits. Zhang conceded owing fiduciary duties to

63 *John While Springs (S) Pte Ltd v Goh Sai Chuah Justin* [2004] 3 SLR(R) 596 at [5].

64 *Cf* Jamie Glister, "Equitable Compensation" in *Fault Lines in Equity* (Jamie Glister & Pauline Ridge eds) (Hart Publishing, 2012) ch 7 at pp 144–147. Glister forcefully argues that *Re Dawson (deceased)* [1966] 2 NSWR 211 should be more restrictively interpreted as standing for the principle of restoring a trust to the position before the breach. In Glister's view, it should "only ever apply to breaches of trust or other custodial fiduciary relations that involve the misapplication of trust property (and perhaps not to all of them)".

65 [2012] 2 SLR 451.

66 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [52].

67 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [54]. See also Jane Stapleton, "Unnecessary Causes" (2013) 129 LQR 39. Stapleton argues that private law should admit a causation test that is wider than the "but-for" test and substantiates her thesis by primary reference to claims in torts of negligence.

68 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [58].

69 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [51]–[68].

70 Quentin Loh J caveated that the outcomes arrived at in these earlier cases were correct. See *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [64] and [67].

71 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [68].

72 [2013] 3 SLR 631.

the company.[73] Our discussion focuses on the company's claim for equitable compensation for breach of fiduciary duty,[74] in particular, the court's analysis of the appropriate causation concept.

26 Before the High Court, on appeal from the assistant registrar's assessment, Vinodh Coomaraswamy JC (as his Honour then was) observed that equitable compensation started off as a remedy for breach of trust in English law and was later made available for a breach of fiduciary duty by any fiduciary.[75] In this connection, he identified two key distinctions between equitable compensation and common law damages.

27 First, unlike the common law which presumes the wrongdoer and the innocent party to be equal and independent, equity considers that the innocent party, who depends on the wrongdoer to act in its best interests, is "especially vulnerable" to the latter's breach of duty.[76] As such, whilst the common law protects the wrongdoer by qualifying its liability based on concepts of causation, foreseeability and remoteness, equity generally favours the innocent party over the wrongdoer. Common law and equity therefore have different remedial objectives: the former seeks to compensate for loss whilst the latter seeks to deter breach of fiduciary duty through stringent principles.[77] By way of example, Coomaraswamy JC referred to the principle enunciated in *Brickenden v London Loan & Savings Co* ("the *Brickenden* rule").[78] According to the *Brickenden* rule, the errant fiduciary would be liable for loss in some way connected to his breach, even if the breach merely set the occasion for the loss but did not cause it.[79]

28 The second distinction between equitable compensation and common law damages is that the former is characterised as "an equitable debt", which is analogous to the concept of a common law debt that

73 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [26].

74 The company elected to pursue a claim for compensation, as opposed to an account of profits.

75 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [35].

76 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [37]–[38].

77 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [39]–[41].

78 [1934] 3 DLR 465. The *Brickenden* rule was first mentioned in local jurisprudence by Quentin Loh J in *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [60]–[62], in the course of describing the developments in other jurisdictions. See also a discussion in Tan Ruo Yu, "Causation in Equitable Compensation: The *Brickenden* Rule in Singapore" (2014) 26 SAcLJ 724.

79 Jamie Glister, "Breach of Fiduciary Duty: *Brickenden* Lives On" (2011) 5 J Eq 59 at 66.

enforces the performance of a *primary* obligation.[80] But an award of common law damages is a secondary obligation arising from the breach. Where a debt is claimed – at law or in equity – common law principles of limitations do not apply. This observation warrants fuller analysis.

29 It is not clear why Coomaraswamy JC considered that he was bound to apply the *Brickenden* rule in the first place when previous authorities had consistently applied the "but-for" causation approach. In any event, Coomaraswamy JC was not satisfied that the *Brickenden* rule should apply in all contexts.[81] He noted that fiduciary relationships are of many kinds, and not all are closely analogous to the trust paradigm in which the principles of equitable compensation were first developed. He also considered that moral culpability ought to be relevant for determining liability for equitable compensation.

30 Without conclusively deciding on its precise scope of operation, Coomaraswamy JC said that the *Brickenden* rule would only apply to a fiduciary falling within one of the *well-established* categories and where he has committed a *culpable* breach of a core fiduciary obligation,[82] though it was not explained what constitutes a "core fiduciary obligation". On the facts, the *Brickenden* rule was applicable because Zhang was a senior employee and he had committed a "conscious, deliberate and flagrant" breach of "all aspects of the duty of loyalty".[83]

31 Vinodh Coomaraswamy J (as his Honour had then become) developed the remedial regime further in the subsequent case, *Then Khek Koon v Arjun Permanand Samtani*[84] ("*Then Khek Koon (2013)*"). In that case, five subsidiary proprietors claimed for equitable compensation against two members of the collective sale committee for the latter's breaches of duties.[85] The subsidiary proprietors had incurred considerable legal costs in objecting (successfully) to the collective sale of the relevant strata title development. The Court of Appeal awarded the subsidiary proprietors costs on a standard rather than indemnity

80 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [50].

81 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [52].

82 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [56].

83 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [57].

84 [2014] 1 SLR 245. This was the continuation of the collective sale saga in respect of Horizon Towers. The earlier Court of Appeal decision in *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 had determined, amongst other matters, that a collective sale committee owes fiduciary duties to the subsidiary proprietors.

85 See *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109.

basis as sought by the subsidiary proprietors.[86] The subsidiary proprietors then sued the same two members of the collective sale committee for breach of fiduciary duties, seeking to recover compensation equivalent to the difference between the costs awarded by the Court of Appeal and the actual legal costs incurred.

32 Anchoring on *Quality Assurance*, Coomaraswamy J distinguished between three types of cases where different assessment rules would apply.[87] First, following *Mothew*,[88] the common law doctrines of foreseeability, causation and remoteness are applicable in respect of a fiduciary's liability for the breach of his *non-fiduciary* duties of skill and care. Secondly, the *Brickenden* rule applies where a fiduciary is in one of the well-established categories of fiduciary relationships and has committed a culpable breach of his "core duties of honesty and fidelity", that is, he is liable to pay equitable compensation even where "but-for" causation is not satisfied. Finally, the "but-for" causation test enunciated by Lord Browne-Wilkinson in *Target Holdings* applies in cases where the fiduciary falls in one of the well-established categories but loss is caused by an innocent breach of his fiduciary duties.

33 Applied to the facts, it was held that the sale committee members' liability to pay equitable compensation was subject to the *Target Holdings* "but-for" causation approach. This is because a collective sale committee's fiduciary relationship with the subsidiary proprietors is a "novel" one.[89] It was further held that the committee members' breach of fiduciary duties did not cause the subsidiary proprietors' loss because they would have incurred the legal costs in any event, as the proceedings to block the collective sale proceeded solely from their desire to keep their homes. The court also considered it contrary to the principle of finality to revisit an issue that had been decided by the Court of Appeal.

34 The subsidiary proprietors appealed[90] but it was dismissed by the Court of Appeal simply on the basis that if they were not entitled to the claimed amount as costs in the first place, the same cannot be

86 *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 4 SLR(R) 155.

87 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [108].

88 *Bristol & West Building Society v Mothew* [1998] Ch 1 at 16–17, *per* Millett LJ.

89 Although Vinodh Coomaraswamy J's categorisation did not directly address a fiduciary relationship that does not fall within well-established categories, his holding suggests that the liability of fiduciary not falling within the well-established categories and who did not commit a culpable breach would be subject to the "but-for" causation test. What is less clear is whether the *Brickenden* rule or the "but-for" causation test applies in a case where the fiduciary relationship does not fall within the well-established categories but the errant fiduciary committed a deliberate breach of his core duties.

90 *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496.

recovered by mounting a different cause of action.[91] The court did not comment on the correctness of Coomaraswamy J's approach on equitable compensation for breach of fiduciary duty, but merely noted that this is "an unsettled area of law within the Commonwealth and was the subject of much academic debate".[92] Nonetheless, the court highlighted various academic commentaries,[93] as well as the UK Supreme Court's landmark ruling in *AIB Group (UK) plc v Mark Redler & Co Solicitors*[94] ("*AIB*") as relevant jurisprudence for future consideration.

35 The position under Singapore law appears open at this point. The traditional "but-for" test of causation seems simple and certain.[95] It does not distinguish between the different types of fiduciary relationships nor does it take into account the moral culpability of the breach. It accords with the general understanding of compensation at law: to make good losses *caused* by the breach, though unattenuated by common law limitations.

36 Coomaraswamy J's categorisation approach, on the other hand, seeks to pay greater heed to the distinctions between equity and common law. This is consistent with the general non-fusionist attitude of Singapore's courts.[96] Importantly, Coomaraswamy J identified that equitable compensation is to be analogised to a debt at law,[97] which enforces a primary obligation. As the discussion below will show, the label "equitable compensation" conceals two kinds of awards: one which is the equitable counterpart of a common law debt, and the other which resembles common law damages. Such a distinction has yet to be considered in local jurisprudence.

37 In working out the causation concept for equitable compensation, Coomaraswamy J took into account three factors: first,

91 *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 at [11].
92 *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 at [9].
93 *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 at [10].
94 [2014] 3 WLR 1367, noted in Lusina Ho, "Equitable Compensation on the Road to Damascus?" (2015) 131 LQR 213.
95 *Cf* Elise Bant, "Causation and Scope of Liability in Unjust Enrichment" [2009] RLR 17. Bant, through a close scrutiny of unjust enrichment cases, argues that the "but for" test is not the most appropriate causation test where "decision causation" cases are concerned.
96 Yip Man, "Equity and Trusts – Dreaming and Building a Singapore Equitable Jurisdiction" in *The Development of Singapore Law: Twenty Years of the Application of English Law Act* (Goh Yihan & Paul Tan eds) (Academy Publishing, 2015) ch 12.
97 Justice Edelman, "An English Misturning with Equitable Compensation" UNSW Australia Colloquium on Equitable Compensation and Disgorgement of Profit (7–8 August 2015), available at <http://www.fedcourt.gov.au/publications/judges-speeches/justice-edelman/edelman-j-201508> (accessed 27 March 2016).

the type of fiduciary relationship matters. Well-established fiduciary relationships are subject to stringent equitable principles. Novel fiduciary relationships are not. Such a distinction appears to be based on the assumption that novel fiduciary relationships are further removed from the trust paradigm.[98] Second, the type of duty matters. Consistent with *Mothew*, breaches of peculiarly fiduciary duties attract different remedial consequences from breaches of non-fiduciary duties. Finally, moral culpability matters. A deliberate breach, as compared to an innocent breach, is to be subject to more stringent principles. Underlying these considerations, particularly the last one, is the idea that the policy objective of deterrence is not to be pursued rigorously and to the same extent in all situations.[99]

38 Overall, Coomaraswamy J's proposed framework, as compared to the "but-for" causation approach, seeks to better reflect the fundamental tenets of the fiduciary doctrine. However, in crafting an appropriate causation approach, the court should also consider more deeply the historical development of equitable compensation and landmark rulings from other common law jurisdictions, in particular, the decision of *AIB* as highlighted by the Court of Appeal.

B. Traditional accounting rules and custodial fiduciaries

39 Any examination of equitable compensation must begin with breach of trust, the context in which the rules were first developed. Equitable compensation for breach of trust is traditionally derived from the application of equitable accounting rules: common account and an account on the basis of "wilful default".[100] These rules are developed upon and for the purpose of enforcing a trustee's duty to account for his stewardship. They are procedural because an account is "the first step in a process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good".[101] An account may be sought without proving a breach. But the rules are also substantive because the manner in which an account is taken affects the assessment of equitable compensation.[102]

98 One may, however, disagree with such an assumption. That a fiduciary relationship is well established does not necessarily mean that it is more trust-like. For example, an agent is a well-established fiduciary but an agent is not in every case a custodial fiduciary. See also discussion at para 45 below.

99 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [43].

100 See an excellent discussion in Lord Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214.

101 *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368 at [168], *per* Millett NPJ.

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

40 A common account is typically sought in cases of misapplication of property. This involves the *falsification* of the account, that is to say, any wrongful disbursement is disallowed. The trustee is liable to make good the resulting shortfall in the trust estate. The objective of the common account is to provide the money equivalent of the performance of the obligation. It is not concerned with losses; causation is thus irrelevant.

41 The taking of account on the basis of wilful default involves the *surcharging* of the account. "Wilful default" in this context refers to a lack of care and prudence.[103] Equitable compensation is awarded to make good losses caused by the trustee's negligent management. It follows that causation is relevant for accounting on the basis of wilful default.

42 Elliott developed the label "substitutive" compensation to describe the award that is derived from the taking of common account and the label "reparative" compensation to describe the award that is derived from the taking of account on the basis of wilful default.[104] It is clear that substitutive compensation is analogous to a debt at law and reparative compensation is more akin to common law damages.

43 However, the equitable accounting rules fell into disuse historically, owing to two developments. First, split trials became more infrequent for cases concerning the taking of account on the basis of wilful default.[105] When issues of liability and quantum were examined in the same hearing, the parties' attention was intensely focused on the issue of liability (whether the defendant was accountable), as opposed to the issue of quantification (the manner of accounting). Secondly, in the 20th century, the language of "equitable compensation" gained popularity and replaced the equitable account, which led to the traditional rules becoming obscured.[106]

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103 The label has been misunderstood to mean deliberate wrongdoing: see *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368 at [121]–[122], noted in Lusina Ho & Rebecca Lee, "Reparative Compensation for Deliberate Breaches of Trust" (2014) 130 LQR 542 at 544.

104 See Steven Elliott, "Compensation Claims against Trustees" (DPhil thesis, University of Oxford, 2002).

105 Justice Edelman (extra-judicially), "An English Misturning with Equitable Compensation" UNSW Australia colloquium on equitable compensation and disgorgement of profit (7–8 August 2015), available at <http://www.fedcourt.gov.au/publications/judges-speeches/justice-edelman/edelman-j-201508> (accessed 15 February 2016).

106 Justice Edelman (extra-judicially), "An English Misturning with Equitable Compensation" UNSW Australia colloquium on equitable compensation and disgorgement of profit (7–8 August 2015), available at <http://www.fedcourt.

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44 Indeed, in *Target Holdings*, a case concerning a breach of trust arising in the commercial setting, there was no reference to the traditional accounting rules. The focus was on whether the loss was caused by the breach.[107] Whilst commentators agree with the outcome in *Target Holdings*, they disagree with the reasoning.[108] They point out that the breach of trust in *Target Holdings* concerned misapplication of trust funds – the case should thus have been analysed as a case of substitutive compensation and causation ought not to have been relevant.[109]

45 The primary obligation to account for one's stewardship is not only relevant to breach of trust. It is said to be central to all custodial fiduciary relationships, of which the trust is the archetype. An award of substitutive compensation is thus available against a custodial fiduciary in breach of his custodial duties. An example would be misapplication of company assets by a director.[110] On the traditional account, therefore, it is clear that the remedial principles differ depending on the type of fiduciary relationship and the duties that are breached: trust and custodial fiduciary relationships (trust-like relationships) are subject to the trust principles for assessing equitable compensation.

46 Three matters, however, remain uncertain. First, where a reparative compensation award is sought, courts have yet to decide on the appropriate causation test.[111] One possible approach, as Elliott advocates, is to develop the criteria by differentiating between intentional and unintentional breaches of trust, in harmony with tortious wrongs.[112] He proposed that unintentional and judicious breaches are subject to the requirement of reasonable foreseeability, whereas losses arising from intentional disloyalty are not limited by the same criterion and are generally recoverable if they are a direct result of the breach. But others disagree with an approach that partly aligns with

gov.au/publications/judges-speeches/justice-edelman/edelman-j-201508> (accessed 15 February 2016).

107 *Target Holdings Ltd v Redferns* [1996] 1 AC 421 at 428. *Cf Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712 at [105], *per* Robert Walker LJ.

108 See, for example, Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214; James Edelman, "Money Awards of the Cost of Performance" (2010) 4 J Eq 122; and Jamie Glister, "Equitable Compensation" in *Fault Lines in Equity* (Jamie Glister & Pauline Ridge eds) (Hart Publishing, 2012) at pp 148–151.

109 *Cf Youyang v Minter Ellison Morris Fletcher* [2003] HCA 15.

110 *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 at [344]; Jamie Glister, "Equitable Compensation" in *Fault Lines in Equity* (Jamie Glister & Pauline Ridge eds) (Hart Publishing, 2012).

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

112 Steven Elliott, "Remoteness Criteria in Equity" (2002) 65 MLR 588 at 597.

the common law approach, on account of the "unique foundations and goals of equity".[113]

47 Second, it is not always easy to determine the cases that should attract the application of the accounting rules. After all, breaches of fiduciary duty are articulated in terms of breach of the no-conflict rule or no-profit rule, as opposed to misapplication of property or negligent management. The potential for confusion increases when we stray beyond directors who are considered to be the most closely analogous to the trustees given their duty to manage the company's assets. Consider the case of a senior employee who is found to have breached the no-conflict rule by causing the company to enter into a contract with another company that he also owed duties to, and this contract resulted in the first company paying a higher rate to the second company.[114] Is the senior employee a custodial fiduciary and in breach of his custodial duty in such circumstances?[115] Even where a director is concerned, courts do not always resolve the cases by reference to the accounting rules.[116] In a case of a breach of fiduciary duty resulting in the misapplication of company funds, what is the wrongdoing against which remedial principles are targeted – the breach of the no-conflict rule or the misapplication of funds? It may be argued that the wrongdoing is disloyalty, and it does not matter what the underlying circumstances or consequences are for further distinctions to be made.

48 Relatedly, it may be queried: How is an assessment for reparative compensation by way of surcharging of account different from an assessment for equitable compensation that bypasses the surcharging of account? Glister points out that the trustee's duty to

113 *Youyang v Minter Ellison Morris Fletcher* [2003] HCA 15 at [39]. For this reason, the High Court of Australia doubted (in *obiter*) that negligent trustees should be able to benefit from the application of common law principles of remoteness in the determination of extent of their liability.

114 *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 266.

115 In *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 266 ("*Hasler*"), Barrett and Gleeson JJA analysed the case as simply concerning equitable compensation for breach of fiduciary duty, without reference to the accounting rules. Leeming JA, on the other hand, thought that (see *Hasler* at [152]):

> … this would appear to accord with the position under the traditional form of account, because the findings would warrant a surcharge for wilful default for the Almad mark-up following the misapplication of Optus funds.

Whilst the mark-up might be considered a disbursement of company funds, the case involved no more than an employee who had the authority to enter into contracts on behalf of the company – essentially, a case of agency. It should not have triggered the application of accounting rules as this was not a case of breach of custodial duty.

116 See *BigTinCan Pty Ltd v Ramsay* [2014] NSWCA 324. *Cf Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102.

account is limited to the assets under his management,[117] thereby imposing a limitation on the extent to which the court is able to take into account the claimant's economic position in awarding reparative compensation. As such, he suggests that if the accounting basis is removed, this will "remove the inherent restriction" on the recovery of consequential loss.[118] There are, however, no cases that affirmatively demonstrate the difference in quantum.

C. AIB *decision: Rejecting traditional accounting rules*

49 Even more interestingly, in *AIB*, the UK Supreme Court rejected outright the application of the accounting principles even in breach of trust cases. In that case, the defendant solicitors acted in a remortgage transaction in which AIB Group ("AIB") was advancing £3.3m to finance the borrowers' business, in exchange for a security over their home which was valued at £4.5m and subject to a pre-existing mortgage in favour of Barclays Bank for a £1.5m loan. The defendant solicitors were instructed by AIB to redeem the Barclays Bank mortgage out of the loan moneys before completion and to obtain a first mortgage over the property. Funds were accordingly transferred to the solicitors who held it on trust for AIB. Notwithstanding having been instructed on the total redemption figure, owing to subsequent miscommunication, the solicitors transferred to Barclays Bank a figure that was approximately £309,000 short of the total redemption figure. The balance funds were remitted to the borrowers. On account of the shortfall, Barclays Bank refused to release its charge. The borrowers also failed to return the extra £309,000. Having been informed of the error, AIB negotiated with Barclays Bank and ultimately obtained a second charge over the property.

50 The borrowers subsequently defaulted, and the property was sold for only £1.2m. After paying off the £309,000 that was due to Barclays Bank, AIB only obtained £867,697. The appeal before the Supreme Court concerned the sole issue of assessment of equitable compensation for breach of trust.[119] AIB contended that the solicitors were liable for approximately £2.5m, which was the difference between the loan and the amount it ultimately recovered. The solicitors argued that AIB was only entitled to £275,000, which was the loss it suffered by comparison with what it would have received had they fully carried out

117 See also *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 at [409], *per* Edelman J.

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

119 AIB Group brought actions for breach of trust, breach of fiduciary duty, breach of contract and negligence.

AIB's instructions. The Supreme Court unanimously found in favour of the defendant solicitors.

51 The Supreme Court endorsed *Target Holdings* whole-heartedly. Lord Toulson was highly critical of the alternative and more popular substitutive award account of the outcome in *Target Holdings*, considering it to be a legal "fairy tale".[120] He stressed that "[m]onetary compensation whether classified as restitutive or reparative, is intended to make good a loss".[121] He emphasised that a commercial trust differs materially from a family trust because the former arises from a contract which "defines the parameters of the trust".[122] Lord Toulson further commented that:[123]

> … in circumstances such as those in *Target Holdings* the extent of equitable compensation should be the same as if damages for breach of contract were sought at common law.

52 Lord Toulson's reasoning was clearly forged upon a distinction drawn between the commercial and non-commercial context.[124] In the commercial context, Lord Toulson's analysis accords primacy to contract in the governance of the parties' relationship. This is not entirely consistent with Lord Browne-Wilkinson's commercial and non-commercial distinction in *Target Holdings*: the trigger for the distinction is different. Lord Browne-Wilkinson had held that, unlike a family trust, a party in a commercial trust is not entitled to the reconstitution of the trust fund once the underlying commercial transaction has been *completed*. The underlying rationale of reconstitution is that "no one beneficiary is entitled to the trust property and the need to compensate all beneficiaries for the trust"[125] – a basis that is irrelevant for a commercial bare trust in cases like *Target Holdings* and *AIB*. But it is imperative to note that the transaction in *Target Holdings* was "completed" because the sought-for security was obtained, albeit belatedly. The same was, however, not achieved in *AIB*: a different security was executed. Lord Toulson nevertheless said that a transaction

120 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 at [69].

121 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 at [73]. *Cf Agricultural Land Management v Jackson (No 2)* [2014] WASC 102 at [344], *per* Edelman J. Edelman J explained that the kind of loss which substitutive compensation seeks to redress is the loss of having the trust being performed in an authorised manner; the loss which reparative compensation seeks to redress is the loss of trust funds, a concept of loss which has its counterpart in common law.

122 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 at [70]–[71].

123 *AIB Group (UK) plc v Mark Redler & Co* [2014] 3 WLR 1367 at [70]–[71].

124 See *Purrunsing v A'Court & Co* [2016] EWHC 81 at [42].

125 *Target Holdings Ltd v Redferns* [1996] AC 421 at 434–436. *Cf Youyang v Minter Ellison Morris Fletcher* [2003] HCA 15 at [49]. The High Court of Australia disagreed that different remedial principles should apply depending on the context.

was "completed" when the loan moneys was released to the borrowers even though the objective of the transaction had yet to be or was not ultimately achieved.[126] Lord Toulson's analysis is steeped in commercial pragmatism – there is no need for reconstitution of the trust fund if the compensation could be paid directly to AIB.

53 In contrast, Lord Reed's analysis proceeded from the vantage point of examining the consistency and justifiable differences between common law and equity.[127] His reasoning did not depend upon a distinction to be drawn between commercial and traditional trusts,[128] although he did affirm that a trust which is part of the machinery for the performance of a contract is of relevance in determining the loss occasioned by a breach of trust.[129] This is because Lord Reed interpreted Lord Browne-Wilkinson's distinction between commercial and traditional trusts to result in a difference in the procedure of payment as opposed to the quantum of payment.[130] Lord Reed considered the suggestion that a beneficiary could recover more than he has in fact lost by reason of the breach to be preposterous and unprincipled.[131]

54 Controversially,[132] *AIB* was an outright rejection of the traditional accounting rules in the commercial context.[133] On Lord Toulson's judgment, it may be that the accounting rules remain relevant and applicable for traditional trusts. On Lord Reed's analysis, however, there is scope to argue that the accounting rules are now obsolete for breach of trust, whether arising in the commercial or traditional context. Interestingly, *AIB* appears to be the equitable counterpart of *Bunge SA v Nidera BV*,[134] a contract case in which the UK Supreme Court unreservedly affirmed the compensatory principle, that is, the innocent party is only entitled to compensation for losses actually suffered.[135] The recent affirmation of the compensatory

126 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 at [74].
127 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 at [78]–[89] and [136]–[138].
128 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 at [102].
129 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 at [137].
130 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 at [108].
131 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 at [107].
132 See Hon William Gummow AC, "Three Cases of Misapplication of a Solicitor's Trust Account" (2015) 41 Aust Bar Rev 5.
133 Perhaps the Supreme Court was trying to avoid the draconian result of making the solicitors insurers against losses arising from market downturn. On appeal, it was unchallenged that the misapplication related to £2.5m instead of £309,000. Had the Supreme Court upheld substitutive compensation, the solicitors would be liable to pay £2.5m.
134 [2015] UKSC 43; [2015] 3 All ER 1082.
135 A strictly compensatory analysis of the common law remedies is, however, incorrect. See Justice Edelman, "An English Misturning with Equitable Compensation" UNSW Australia Colloquium on Equitable Compensation and

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principle in contract law might have eclipsed the important fact that debt at common law continues to exist. It may also be that the *AIB* decision appeals to the hard core contractarian pragmatics for a different reason: certainty in commercial cases. Indeed, how the equitable accounting process operates is not entirely clear.[136] Part of the confusion and complexity arises from issues of characterisation and the precise degrees of permissibility for waiver and substitution of alternative benefits. *AIB* is a case that stands between *Target Holdings*, where the sought-for security was ultimately obtained, and *Youyang*, where the sought-for security was not obtained and nothing else was obtained. In *AIB*, by contrast, there was an alternative benefit, in the form of a second charge, which was procured in pursuance to AIB's own negotiations with Barclays Bank. But if one were to adopt a contractual compensation analysis, the answer is rather straightforward: the second charge could be seen as a reasonable step of mitigation undertaken by AIB and which must be taken into account in assessing compensation for loss.

D. Reflections

55 Where should Singapore law go from here? There are at least three possibilities. The first is simply to broadly follow Coomaraswamy J's approach in *Then Khek Koon (2013)* with some refinements. This approach reflects the core tenets of the fiduciary doctrine. The second is to follow the traditional accounting approach which applies accounting rules in cases of breach of trust and breach of custodial duties by custodial fiduciaries. Such an approach reflects the core tenets of the trust doctrine, but some uncertainties, as raised above, await clarification. The third is to depart from tradition and follow the *AIB* approach,[137] but Singapore courts must decide whether the accounting rules are abrogated in all cases of breach of trust or only in commercial

Disgorgement of Profit (7–8 August 2015), available at <http://www.fedcourt.gov.au/publications/judges-speeches/justice-edelman/edelman-j-201508> (accessed 27 March 2016).

136 Lusina Ho, "Equitable Compensation on the Road to Damascus?" (2015) 131 LQR 213. Even on the facts of *Target Holdings Ltd v Redferns* [1996] 1 AC 421 where the common understanding is that it could be explained by way of falsification of account, academics differed as to the precise operation of the process. See James Edelman, "Money Awards of the Cost of Performance" (2010) 4 J Eq 122 at 128–130. *Cf* Matthew Conaglen, "Explaining *Target Holdings v Redferns*" (2010) 4 J Eq 288.

137 In the later English High Court decision of *Various Claimants v Giambrone & Law* [2015] EWHC 1946 (see Appendix 3 (Supplemental Judgment) at [7]), Foskett J found it difficult to articulate the combined effect of *Target Holdings Ltd v Redferns* [1996] 1 AC 421 and *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 (which unreservedly affirmed *Target Holdings*), as the judgments are "extensive and, in some respects, complex".

trust cases. If the former, it would follow that equitable compensation for breach of fiduciary duty is concerned with making good losses caused by the breach. If the latter, the further query is whether the accounting rules remain also relevant for fiduciary relationships arising from the non-commercial context.

56 Presently, under Singapore law, there are hints of applying the accounting principles for breach of trust cases,[138] although an occasion for fully considering the substantive aspects of the principles has yet to arise. Difficult conceptual and theoretical questions must be grappled with: (a) what is the narrative for the local trust law and local fiduciary law; (b) is custodianship important and justifies separate treatment; and (c) does the fiduciary doctrine retain its unique equitable foundation and therefore to be distinguished from contractual principles?

57 It is with these questions relating to equitable compensation in mind that we now turn to consider account of profits, also derived from the trustee's primary obligation to account for his stewardship and later exported for application in non-trustee fiduciary contexts. We shall see that the Singapore courts, unlike their approach in relation to equitable compensation, apply a "strict" approach without general regard to the specific facts of the case, save for the exceptional availability of equitable allowance. In particular, there appears to be no investigation as to causation, much less differentiating the assessment principles based on the type of breach or fiduciary. In Part IV, we examine the principles relating to account of profits under Singapore law and suggest that the differences between equitable compensation and account of profits are not as disparate as at first sight appear. We will also consider areas that should be clarified and possibly reformed in the future.

IV. Account of profits

A. The traditional view

58 It is trite law that a defaulting fiduciary is required to disgorge unauthorised profits.[139] The remedial objective is to prevent fiduciaries from coming into any (potential or actual) conflict between their duties

138 See *Cheong Soh Chin v Eng Chiet Shoong* [2015] SGHC 173 at [40]–[42] and *Chng Weng Wah v Goh Bak Heng* [2016] 2 SLR 464 at [20]–[24] (on whether the defendant is under a duty to give a full account).

139 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Syd L Rev 389. Because Singapore law derives much of its content in this area from the English position, this part commences with a brief discussion of the English approach in this area of law. See generally James Penner, "Distinguishing Fiduciary, Trust, and Accounting Relationships" (2014) 8 J Eq 202.

and personal interests.[140] Disgorgement may be effected by way of a constructive trust or the personal remedy of an account of profits. The former is available if the relevant assets remain identifiable,[141] which is particularly significant where the errant fiduciary is insolvent. Our focus in this section is on the personal remedy of account. But it is important to note that the broad purpose underlying the account of profits and the constructive trust is the same and to that extent, cases on constructive trust will be drawn upon in our analysis.

59 Just as the imposition of a constructive trust is traditionally regarded as "strict",[142] so too is the duty to account. The genesis of this "strictness" is *Keech v Sandford*,[143] where the trustee's renewal of the lease (in his own name) originally held on trust for an infant was found to be in breach of fiduciary duty and the lease was determined by the court to be held on trust for the infant.[144] Lord King in *Keech v Sandford* explained that it is "very proper that the rule should be strictly pursued, and not in the least relaxed", lest there be dire consequences.[145] This developed into a general principle that fiduciaries cannot profit personally from their position.

60 The duty to account is triggered by the mere fact that unauthorised profits have been earned, as this gives rise to a breach of the no-profit rule.[146] There is no need to prove that there is a potential or actual conflict of duty and interests. The court does not investigate into the motives or *bona fides* of the fiduciary, nor does it consider whether the profits would have otherwise gone to the principal, because these are matters that are generally difficult to ascertain and are usually solely

140 Alastair Hudson, *Equity and Trusts* (London: Routledge, 8th Ed, 2015) at p 598.

141 Alastair Hudson, *Equity and Trusts* (London: Routledge, 8th Ed, 2015) at p 611. Hudson considers that a constructive trust is the primary remedy for effecting the duty to account for profits earned in breach of fiduciary duty; the account is a secondary remedy.

142 More recently, the English Court of Appeal reconsidered the "strictness" of the law in imposing a constructive trust as a remedy for breach of fiduciary duty in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453, suggesting that a distinction should be made between cases involving abuse of property and cases involving mere abuse of position. However, the position has since been overruled by the UK Supreme Court in *FHR European Ventures LLP v Mankarious* [2013] 3 WLR 466. See generally Alvin W-L See, "Unauthorised Fiduciary Gains and the Constructive Trust" (2016) 28 SAcLJ 1014.

143 (1726) Sel Cas Ch 61.

144 While the authority of *Keech v Sandford* (1726) Sel Cas Ch 61 for this proposition has been doubted, it remains beyond doubt now that unauthorised profits are held on constructive trust for the beneficiary: see Andrew Hicks, "The Remedial Principle in *Keech v Sandford* Reconsidered" (2010) 69 Camb LJ 287.

145 *Keech v Sandford* (1726) Sel Cas Ch 61 at 62.

146 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 144–145, *per* Lord Roskill.

within the knowledge of the wrongdoer.[147] Even if the principal could never have obtained the benefit in question, the liability to account arises so long as the benefit was obtained by reason of the fiduciary's position.[148] The fiduciary's liability to account remains, even if he could prove that informed consent would have been given by the principal had he asked.[149]

61 The absolute strictness of the duty to account for unauthorised profits is clearly underlined by the objective of deterrence.[150] The only concession to that strictness is the exceptional availability of an award of equitable allowance. In *Boardman v Phipps*, the House of Lords awarded the fiduciary equitable allowance on a "liberal scale" for his effort and skill in exploiting a business opportunity that he came by because of his fiduciary position, which profited the beneficiaries. The award was made because the fiduciary had breached his duty in good faith. Nevertheless, the award contradicts the strictness of the primary duty to account, but it has been explained that equitable allowance should only be ordered where "it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees".[151]

62 In this part of the discussion, we seek to enhance our understanding of account of profits by studying the interrelationship of deterrence, causation, as well as honesty and good faith. We shall show, as with equitable compensation, that these are considerations undergirding the gain-based remedy. But unlike equitable compensation, these considerations are expressed differently within the analytical framework.

147 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 154, *per* Lord Wright.

148 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Boardman v Phipps* [1967] 2 AC 46.

149 *Murad v Al Saraj* [2005] EWCA Civ 959.

150 *Cf* Lionel Smith, "Deterrence, Prophylaxis and Punishment in Fiduciary Obligations" (2013) 7 J Eq 87 and Lionel Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another" (2014) 130 LQR 608 at 627–628. Smith challenges the convention of explaining the no-profit rule on the basis of prophylaxis or deterrence. Instead, he explains the no-profit rule as a rule of attribution: "it attributes everything in the sphere of fiduciary management to the beneficiary", for the simple reason that the fiduciary has undertaken to *act for and on behalf of* the principal. Smith's account of the rule is one that is independent from the no-conflict rule and not activated by wrongdoing. However, Smith's account is not without difficulties: see Man Yip, "Singapore's Remedial Constructive Trust: Lessons from Australia?" (2014) 8 J Eq 77 at 103–104 and James E Penner, "Distinguishing Fiduciary, Trust, and Accounting Relationships" (2014) 8 J Eq 202 at 230–233.

151 *Guinness plc v Saunders* [1990] 2 AC 663 at 700–701, *per* Lord Goff.

B. Singapore developments

63 The Court of Appeal recently examined the principles for account of profits and equitable allowance in *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan*[152] ("*Mona Computer*"), an appeal on assessment. In the original trial concerning liability,[153] the appellant, who was a computer software company, had sued the respondent, who was an employee of the appellant, for breach of fiduciary duties. The High Court found that the employee had breached his fiduciary duties when he diverted contracts to his own rival company ("MN"). It thus ordered the employee to account for any profits he personally made from the diverted contracts.[154] At the assessment stage, the assistant registrar found that the account should include the employee's share of the net profit that MN had made from the diverted contracts, and also the commission due to him by MN. However, the assistant registrar did not include the director's fees and salary that MN paid to the employee.

64 The High Court overruled the assistant registrar's decision. The court found that the employee was entitled to keep the commission paid to him by MN because, had the contracts remained with the principal company, the latter would have had to pay the employee the commission anyway. The High Court was of the view that the company would enjoy an unexpected windfall if the employee were made to account for that commission.

65 The Court of Appeal allowed the company's appeal. Notably, on appeal, the employee also raised the issue of whether he was entitled to an equitable allowance for his effort in generating MN's profits. It may be useful to consider the Court of Appeal's decision along three issues,[155] namely, (a) whether there are any limitations on the scope of account, in particular, whether causation has a role; (b) whether equitable allowance should be used liberally to compensate the breaching fiduciary's effort and skill; and – underlying both of these issues – (c) whether there should be, broadly speaking, a relaxation of equity's traditionally strict approach to the accountability of benefits and if so, in what manner.

152 [2014] 1 SLR 847.

153 *Mona Computer Systems (S) Pte Ltd v Chandran Meenakumari* [2011] 1 SLR 310.

154 *Mona Computer Systems (S) Pte Ltd v Chandran Meenakumari* [2011] 1 SLR 310 at [22].

155 See, *eg*, Mitchell McInnes, "Account of Profits for Breach of Fiduciary Duty" (2006) 122 LQR 11 at 12–13.

(1) Limitations on the scope of account?

66 There are two approaches to account of profits, as explained by Upjohn J in *In re Javies (decd)*:[156]

> One approach, more favourable to the fiduciary, is that he should be held liable to account as constructive trustee not of the entire business but of the particular benefits which flowed to him in breach of his duty. Another approach, less favourable to the fiduciary, is that he should be held accountable for the entire business and its profits, due allowance being made for the time, energy, skill, and financial contribution that he has expended or made.

67 The Court of Appeal in *Mona Computer* clearly preferred the stricter approach, citing *Regal (Hastings) Ltd v Gulliver*[157] and *Industrial Development Consultants Ltd v Cooley*.[158] It reversed the High Court's decision not to include the commission as part of the account of profits, emphasising that an account of profits is a gains-based remedy that is concerned with the *disgorgement* of unauthorised profits – it is not concerned with the restitution or compensation of the principal.[159] There is no investigation into what might have happened had there been no breach so as to determine the relevant deductions to be made.[160] Accordingly, the remedy envisages that the principal may gain a "windfall".[161] The only question is whether the profit earned could be attributed to the breach of duty.

68 Applied to the facts of the case, the Court of Appeal held that it was irrelevant that the company would likely have paid the employee the same amount of commission had the employee remained in the company's employment and not breached his fiduciary duties. Instead, because the commission earned by the employee from MN was derived from the profits that MN earned from the diverted contracts, it was connected to the profits to be accounted.[162] Furthermore, although neither party pursued the point on appeal, the Court of Appeal also noted that the employee should have to account for the director's fees received from MN. This is because the funding for those fees was

156 [1958] 1 WLR 815 at 820. See also Denis S K Ong, "Breach of Fiduciary Duty: The Alternative Remedies" (1999) 11 Bond L Rev 336 at 346.
157 [1967] 2 AC 134.
158 [1972] 1 WLR 443.
159 *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [13].
160 *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [18].
161 *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [16].
162 *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [18].

derived from profits earned from the diverted contracts that were obtained as a result of the employee's breach of fiduciary duties.

(2) Equitable allowance

69 In *Mona Computer*, in support of his claim for an award of equitable allowance, the employee cited *Boardman v Phipps*[163] ("*Boardman*") and *Paul A Davies (Aust) Pty Ltd v Davies (No 2)*[164] ("*Davies*"). The Court of Appeal, however, rejected the claim and said that the authorities could be distinguished.

70 According to the Court of Appeal, *Boardman* concerned a very "different situation" as the fiduciaries there (including Boardman) had purchased shares in *good faith* in their personal capacities.[165] While finding that the fiduciaries had to account to the trust the profits derived in breach of their duties, the English High Court granted the fiduciaries "an allowance for their work and skill".[166] In doing so, it held that it would otherwise be "inequitable" for the trust to retain the profits without paying anything for the fiduciaries' risk and skill in obtaining those profits in the first place.[167] The House of Lords ultimately upheld the English High Court's decision.[168] As for *Davies*, while the Court of Appeal acknowledged that the case was "somewhat more generous to the directors", it also thought that it involved "slightly different considerations".[169] In *Davies*, the directors had purchased personal property using a *mixture* of their company's money and also borrowed money on their personal guarantees. The New South Wales Court of Appeal held that a constructive trust arose over the *entirety* of the appreciated value of the property. However, the court then granted an allowance to the directors for their effort and expertise expended on improving the price of the property.[170] The basis of the court's decision was that the directors "were not guilty of conscious wrongdoing".[171]

163 [1964] 1 WLR 993.
164 [1982] 8 ACLR 1.
165 *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [20]. *Cf Warman International Ltd v Dwyer* (1994–1995) 182 CLR 544; (1995) 128 ALR 201 ("*Warman*"). In *Warman*, the leading Australian authority on equitable allowance, the High Court of Australia ordered an account of profits subject to allowances for the errant fiduciary's skill, effort and resources, even though the fiduciary was in *deliberate* breach of his fiduciary duties.
166 *Boardman v Phipps* [1964] 1 WLR 993 at 1018.
167 *Boardman v Phipps* [1964] 1 WLR 993 at 1018.
168 *Boardman v Phipps* [1967] 2 AC 46 at 104.
169 *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [21].
170 *Paul A Davies (Aust) Pty Ltd v Davies (No 2)* [1983] 8 ACLR 1 at 8.
171 *Paul A Davies (Aust) Pty Ltd v Davies (No 2)* [1983] 8 ACLR 1 at 8.

71 The Court of Appeal emphasised that "the power to grant an allowance to a fiduciary in breach should be exercised sparingly in order not to encourage fiduciaries to act in breach of their duties".[172] Thus, any allowance for skill and work is only awarded exceptionally.[173] Relevantly, the Court of Appeal regarded the fiduciary's good faith as a "hugely relevant consideration" in the exercise of the power[174] but it is not the sole criterion. It must also be shown that the fiduciary has expended skill, effort and/or resources in generating the profits. At present, it is uncertain if there are any further criteria under Singapore law.

72 On the facts of *Mona Computer*, the Court of Appeal accorded credence to the fact that the liability to account concerned sums wholly attributable to the employee's breach of his fiduciary duties. After all, the employee diverted existing contracts with the principal, not potential opportunities that he had to develop in order for the profits to be earned. As such, the employee was not entitled to an equitable allowance from the profits derived from the diverted contracts. Moreover, the employee had clearly acted in bad faith by setting up a rival company while being the key employee of the company.[175]

(3) No scope for relaxing the strict approach?

73 *Mona Computer* demonstrates that under Singapore law, the primary duty to account is unyieldingly stringent, with no concern for causation or good faith on the part of the errant fiduciary. Those concerns are addressed within the narrow and exceptional jurisdiction to award an allowance. It seems that Singapore law would be disinclined against a relaxation of the strict approach. Yet, it may be argued that *Mona Computer* was not the proper case for consideration of any relaxation given that the facts concerned neither a fiduciary who breached his duty in good faith nor one who contributed by way of his own skill, effort or other resources towards the generation of the unauthorised profits. It was a case that called for a straightforward application of the traditional approach. But there are cases that do not. For this reason, we suggest below some points that merit fuller consideration in future disputes.

172 *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [23].

173 *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [24].

174 *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [26].

175 *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [27]–[28].

C. Points for future consideration

(1) Limitations on the primary duty to account

74 An inherent limitation of the fiduciary's primary liability to account is the scope of his duty of loyalty.[176] In *Warman International Ltd v Dwyer*,[177] the High Court of Australia said: "Ordinarily a fiduciary will be ordered to render an account of the profits made within the scope and ambit of his duty."[178] It is obvious that a fiduciary should only be liable to account "for a profit or benefit if it was obtained … by reason of his taking advantage of [an] opportunity or knowledge derived from his fiduciary position".[179] This limitation is generally integrated into the anterior question of whether there is a breach of fiduciary duty and does not normally warrant independent analysis. Conceptually, the analysis is focused on whether the profit is *attributable* to the breach of duty. The primary duty to account is not otherwise dependent on any notion of causation.[180] We shall return to the relevance of causation momentarily.

75 Under Australian law, there is some suggestion that "unconscionability" may be a limitation. Deane J commented in *Kak Loui Chan v Zacharia*[181] that:[182]

> [T]he liability to account for a personal benefit or gain obtained or received by use or by reason of fiduciary position, opportunity or knowledge will not arise in circumstances where it would be unconscientious to assert it or in which, for example, there is no possible conflict between personal interest and fiduciary duty and it is plainly in the interests of the person to whom the fiduciary duty is owed that the fiduciary obtain for himself rights or benefits.

This may be no more than saying that the profits (implicitly) fall within the scope of the arrangement between the principal and the fiduciary, thereby negativing any breach of fiduciary duty in the first place. Alternatively, it may be that the account must be fashioned in

176 *Murad v Al-Saraj* [2005] EWCA Civ 959 at [57]; *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908 at [109].
177 (1994–1995) 182 CLR 544.
178 *Warman International Ltd v Dwyer* (1994–1995) 182 CLR 544 at 559; (1995) 128 ALR 201 at 210.
179 *Warman International Ltd v Dwyer* (1994–1995) 182 CLR 544 at 557; (1995) 128 ALR 201 at 209.
180 *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908 at [96] and [109].
181 (1984) 154 CLR 178.
182 *Kak Loui Chan v Zacharia* (1984) 154 CLR 178 at 204–205, cited in *Warman International Ltd v Dwyer* [1995] 128 ALR 201 at 210.

accordance with the type of fiduciary relations,[183] consistent with the *Then Khek Koon (2013)* approach in respect of equitable compensation. On either interpretation, it is important that the basis for differentiation is articulated clearly, instead of being shrouded by the label "unconscionability". Finally, the account of profits, being an equitable remedy, may be defeated by defences such as "estoppel, laches, acquiescence and delay".[184]

(2) The limits of the jurisdiction to award equitable allowance and its interplay with the scope of account

76 It is important to consider the principles relating to the primary duty to account and the discretionary jurisdiction to award equitable allowance together because the latter mitigates the strictness of the former. But there is first a need to determine the scope of the court's jurisdiction to award an allowance. Under Singapore law, good faith is a significant consideration. Good faith, as a threshold requirement, diminishes the contradiction between an allowance and the deterrent effect of the strictness of the account. After all, deterrence is less relevant against a fiduciary who breached his duty in good faith believing that he was acting in the best interests of the principal. Conversely, deterrence is most needed in cases of deliberate breaches. But what is less clear is what amounts to good faith for the purpose of claiming equitable allowance. Surely it is not enough to show that the fiduciary intended to benefit the principal and that the principal did benefit from the breach. This would not encourage the strict observance of fiduciary duties. Moreover, the proper way for a fiduciary to earn from his position is to seek informed consent from the principal, instead of breaching his duty with the hope of being awarded an allowance from the profits made. In *Boardman v Phipps*, informed consent could not be obtained because one of the trustees was senile.[185]

77 Further, the allowance is granted on account of the fiduciary's effort, skill and resources. The requirement of effort, skill and resources conceals the limited role of causation in the remedial regime. Indeed, the award of allowance acknowledges that part of the profits is attributable to the fiduciary's effort, skill and resources. The court may assess the award by way of a percentage of the total net profits earned, though there is no rule that it must do so. Causation has a limited role because an equitable allowance is not available where profits are earned

183 See also *Coomber v Coomber* [1911] 1 Ch 723 at 728 (on courts interfering and setting aside acts).

184 *Warman International Ltd v Dwyer* (1994–1995) 182 CLR 544 at 559; (1995) 128 ALR 201 at 210.

185 Michael Bryan, "*Boardman v Phipps* (1967)" in *Landmark Cases in Equity* (Charles Mitchell & Paul Mitchell eds) (Hart Publishing, 2012) at p 582.

by reason of mere good fortune. There is no reason an allowance cannot be awarded in cases where the fiduciary has invested his own resources in the form of property, for instance, profits were generated from the investment of a mixture of the fiduciary's money and the principal's money. What is less clear is a case where the fiduciary has used the principal's money solely in generating the profits though he has invested his own effort and skill in the process. Should abuse of property cases be distinguished from abuse of opportunity cases?[186] Does it depend on whether the fiduciary is a custodial fiduciary and misapplication of property is thus a breach of its core duty? It may be that in a great number of these cases, the award of allowance is unavailable for the simple reason that the breach was deliberate. But the court cannot shy away from properly considering the factors that are relevant to the exercise of the discretion to award an allowance.

78 Part of the exercise would require an examination of the conceptual basis of the power to award equitable allowance. Birks explained the award of allowance on the basis of counter-restitution.[187] A plaintiff claiming restitution for unjust enrichment must not be left unjustly enriched at the expense of the defendant as a result of succeeding on his claim: counter-restitution is thus required. It is assumed that the defence of counter-restitution is equally applicable to restitution for wrongs.[188] However, in *Re Berkely Applegate (Investment Consultants) Ltd*,[189] the English High Court explained the power to award allowance on the basis that "he who seeks equity must do equity".[190] On such an analysis, the power rests on broader principles of justice and, if so, it is possible to admit a greater range of factors than possible under a counter-restitution analysis.

79 It is apparent from the above discussion that factors which courts refuse to take into account under the anterior stage of determining the scope of account are considered at the posterior stage of determining the availability of equitable allowance. The interplay between the two stages must not be missed. The "strictness" of the scope of account is mitigated and therefore related to the scope of the jurisdiction to award allowance. The greater the range of factors under the second stage, the wider the jurisdiction to award equitable allowance, in turn rendering the account of profits less "strict".

186 *Warman International Ltd v Dwyer* (1994–1995) 182 CLR 544 at 560–561; (1995) 128 ALR 201 at 211–212.

187 Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, 1989) at p 420.

188 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at pp 696–697.

189 [1989] 1 Ch 32.

190 *Re Berkely Applegate (Investment Consultants) Ltd* [1989] 1 Ch 32 at 36–37.

(3) Framework of analysis: Two-stage approach or one-stage approach?

80 This brings us to a related point to ponder: whether a two-stage framework of analysis should be replaced by a single-stage approach of conferring upon the courts a broad equitable discretion to apportion the profits between the fiduciary and beneficiary. The main practical difference between these approaches is the burden of proof. Under the two-stage analysis, the legal burden is on the beneficiary to establish the claim for an account. However, if the fiduciary seeks an award of equitable allowance, he bears the burden to establish such a claim,[191] which enhances the deterrent effect of the account. It can also directly lessen the reputational cost of a finding that there has been a breach of fiduciary duty.[192]

81 Recent cases have not departed from the two-stage approach, but have questioned its continued application. In *Murad v Al-Saraj*, Arden LJ, like Lord Upjohn in *Boardman v Phipps*, suggested that equity "has been able skilfully to adapt remedies against defaulting trustees or fiduciaries so as to meet the justice of the case".[193] The implication of the statement, as Arden LJ illustrated by reference to *Shaw v Holland*,[194] is that "a court of equity will fix the measure of damages against a defaulting but innocent trustee more leniently than it would otherwise have done".[195] Jonathan Parker LJ wondered whether "commercial conduct which in 1874 was thought to imperil the safety of mankind [must] necessarily be regarded nowadays with the same depth of concern",[196] and Clarke LJ also considered that "the time has come when the court should revisit the inflexible rule of equity".[197] These sentiments point towards a one-stage approach that directly addresses factors such as causation and honesty and allows the courts to apportion the profits between the principal and fiduciary accordingly.

191 *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 at [321], *per* Heydon JA; *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [28].

192 Michael Bryan, "*Boardman v Phipps* (1967)" in *Landmark Cases in Equity* (Charles Mitchell & Paul Mitchell eds) (Hart Publishing, 2012) at p 609.

193 *Murad v Al-Saraj* [2005] EWCA Civ 959 at [81].

194 [1900] 2 Ch 305.

195 *Murad v Al Saraj* [2005] EWCA Civ 959 at [81]. In particular, Arden LJ pointed out (at [83]) that that modern courts, equipped with extensive powers under the UK Civil Procedure Rules to direct that information be given of a party's case, are well equipped to conduct hypothetical inquiries necessary to "ensure that remedies are proportionate to the justice of [each] case".

196 *Murad v Al Saraj* [2005] EWCA Civ 959 at [121].

197 *Murad v Al Saraj* [2005] EWCA Civ 959 at [158].

82 Yet another example of the courts' desire for flexibility is the case of *Foster v Bryant*.[198] The defendant co-director was forced to resign by his company, controlled by his fellow co-director. After he had tendered his resignation but before he left the company, a client discussed with him the possibility of working with them after his resignation took effect. When the defendant joined the client afterwards, the company sued him for failing to direct the corporate opportunity to it. It was argued that he should be made to account for any profits made out of this opportunity. Rix LJ held that the defendant was not so liable because he had already resigned and played no active role in the company. More broadly, he distinguished the case from existing authorities as the latter concerned fiduciaries who actively took advantage of their principals.

83 There are nevertheless forceful arguments *against* moving towards a more flexible approach, one that may be achieved by way of a single-stage "fact-sensitive" framework. First, the adoption of a "fact-sensitive" approach would render uncertain the primary liability to account for profits (as well as the imposition of a constructive trust).[199] The likely uncertainty would diminish the strong deterrent effect of the remedy. Secondly, the strictness of the duty to account is mitigated by the discretionary award of equitable allowance.[200] Thirdly, the legal burden under a single-stage framework rests entirely on the beneficiary to establish the scope of the fiduciary's liability, which not only reduces the deterrent effect but also places an unfair burden on the principal to prove matters that are usually within the knowledge and control of the fiduciary. Unlike common law, equity generally favours the innocent party over the wrongdoer. Finally, a single-stage "fact-sensitive" analysis has the potential of fudging the relevance and priority of the different factors.[201]

84 Nevertheless, it must be acknowledged that the two-stage framework of analysis suffers from some weaknesses. First, the two-stage approach better enables the courts to conceal the real reasons for reducing the scope of account through the language of equitable allowance and discretion. A single-stage approach would force the courts to explicitly articulate the factors informing the exercise of discretion, such as causation, honesty and good faith *etc*.

85 Secondly, a two-stage framework causes some degree of incoherence within the remedial regime for account of profits. The duty

198 [2007] Bus LR 1565.

199 Alastair Hudson, *Equity and Trusts* (London: Routledge, 8th Ed, 2015) at p 619.

200 Alastair Hudson, *Equity and Trusts* (London: Routledge, 8th Ed, 2015) at p 619.

201 For instance, is good faith a threshold requirement or merely a factor to be taken into account in the exercise?

to account is not as strict as courts often represent it to be, in light of the availability of equitable allowance that considers factors irrelevant to the first stage. Moreover, on occasions, the courts have utilised equitable allowance as a "backdoor" method of ensuring that the justice of the case is met. For example, in *O'Sullivan v Management Agency and Music Ltd*,[202] the plaintiff, a young and inexperienced singer/songwriter, was enticed by the third defendant to enter into several agreements without the benefit of independent advice. These agreements were found to be in restraint of trade and unenforceable. The third defendant was also found to have been in a fiduciary relationship with the plaintiff, and had breached his duties. It was ordered that an account of the profits be taken of the five defendants of all profits made out of the plaintiff's copyrights and recordings. However, despite the fact that "moral blame does lie upon the defendants", an allowance was ordered because the work carried out by the defendants undoubtedly contributed to the plaintiff's success.[203] Dunn LJ did not think that equity requires a narrow approach and regarded it as significant that the plaintiff only achieved success after meeting the third defendant. He regarded as important that in assessing the advantage gained by the wrongdoer, the court will look at the whole situation in the round.[204] Fox LJ also thought that it went too far to say that the profits must "simply be given up".[205] However, this approach is not easily reconcilable with the emphasis that many cases have placed on the need for good faith.[206]

86 Finally, the argument that the errant fiduciary should bear the burden of proof in respect of matters that lie within his or her knowledge and control is not particularly persuasive when we turn to consider the framework for equitable compensation laid down by the High Court in *Then Khek Koon (2013)*. It does not appear that the court is concerned that a principal claiming equitable compensation will find difficulty in proving motives on the part of the fiduciary. In any event, the defendant bears the "evidential" burden of proof.

V. Conclusion

87 In the final analysis, there is a certain conceptual symmetry between the two remedies of compensation and account of profits. A number of relevant factors that go towards ascertaining the extent of liability are common. For example, the culpability of the fiduciary has

202 [1985] QB 428.
203 *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 at 458.
204 *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 at 458.
205 *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 at 466.
206 *Cf Warman International Ltd v Dwyer* (1994–1995) 182 CLR 544; (1995) 128 ALR 201. See n 165 above.

featured prominently in equitable compensation. Although it has not featured quite as explicitly in the account of profits, it finds expression through the courts' decision whether or not to award equitable allowance: the more culpable the fiduciary was, the less likely he would receive a liberal allowance. The deterrent effect of the remedy is another related and common factor. In both equitable compensation and account of profits, the courts have consistently emphasised the need for strong deterrence against breaches of fiduciary duties. This, however, finds expression differently in each of these remedies.

88 This article has tried to show the importance of recognising these underlying common factors. So long as there is a continuum of fiduciary relationships, it will be important for the courts to adjust the remedies granted to reflect the culpability of the fiduciary. Just as equity must deter, it too must not over-punish. Rather than mask their consideration of specific factors in such adjustment under the vague notion of "strictness", the courts should explicitly acknowledge the precise factors that they have considered.

89 The Singapore courts may wish explicitly and more fully to consider the underlying common factors when revisiting the principles for equitable compensation and account of profits in the future. It is through such a critical analysis that the remedial legal maze can be safely navigated. Importantly, this is not merely an academic exercise because these remedies may be sought as alternative remedies. The principal is entitled to elect between them, and the choice is often determined by the quantum. Clarity in principles is thus necessary for the plaintiff to make the most advantageous choice.