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THE APPROPRIATE REMEDY FOR BREACH OF CUSTODIAL FIDUCIARY DUTY

The Case for Orthodoxy

In 2020, the Court of Appeal set out a remedial classification of trustees' duties and provided definitive guidance on the remedial regime for the breach of non-custodial fiduciary duties. The appropriate remedial response to breaches of managerial stewardship duties is not controversial. On the other hand, the appropriate remedy for breach of custodial stewardship duties remains controversial in the Commonwealth with diverging authority and academic opinion. The position was further left open in *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199. This article argues that the orthodox approach of account and falsification should be preserved in Singapore law.

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I. Introduction

1 The law on remedies for breach of equitable duties in Singapore saw significant development in 2020. In two cases decided roughly a month apart, the Court of Appeal affirmed that but-for causation must be established for a claimant to obtain either equitable compensation for loss[2] or an account of profits[3] for breaches of non-custodial fiduciary duties.[4]

2 The Court of Appeal, however, left open whether but-for causation is similarly required in cases where the defendant breaches its custodial

1 The author is grateful to the anonymous referee for the many helpful comments. The views expressed in this article, and any errors, are the author's own.
2 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [238]–[239] and [254].
3 *UVJ v UVH* [2020] 2 SLR 336 at [98].
4 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [87].

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stewardship or custodial fiduciary duties.[5] These are situations where the defendant "misapplies trust assets",[6] *ie*, deals with them otherwise than solely in accordance with the terms of the trust.[7] For convenience, this article will refer to this duty as the "stewardship duty", the defendant as the "trustee" and the claimant as the "beneficiary" even though the duty extends to company directors. In contrast with the academic discussion on causation of loss for equitable compensation,[8] there has been less local academic commentary on the remedy for breach of the stewardship on this issue since *Sim Poh Ping v Winsta Holding Pte Ltd*[9] ("*Sim Poh Ping*"). This article seeks to fill that gap.

3 There are two competing schools of thought on this question. On the orthodox approach,[10] the quantum to be repaid either into the trust fund or directly to the beneficiaries is determined through the process of common accounting and falsification of unauthorised transactions. Causation of loss is therefore said to be not required[11] or of limited relevance under the orthodox approach.[12]

4 However, the UK adopted a different "causation approach" starting in *Target Holdings Ltd v Redferns*[13] ("*Target v Redferns*") and

5 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 ("*Sim Poh Ping*") at [122]. In *How Weng Fan v Sengkang Town Council* [2022] SGCA 72 ("*How Weng Fan*") at [178], the Court of Appeal stated the position more categorically citing its earlier tentative position in *Sim Poh Ping* at [115]. However, since that position was deliberately left open in *Sim Poh Ping* and did not form part of the argument in *How Weng Fan*, it is unlikely that the passage in *How Weng Fan* amounts to a final pronouncement on the issue.

6 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [100].

7 Charles Mitchell, "Stewardship of Property and Liability to Account" (2014) 3 Conv 215 at 216.

8 Both the development of this area of law from *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 and the merits of the hybrid causation rule developed therein have been the subject of extensive comment locally: see, *eg*, Christopher Hare & Vincent Ooi, *Singapore Trusts Law* (LexisNexis, 2021) ch 18, at paras 18-43–18-47; Ben Chester Cheong, "The Quintet of Cases on Breaches of Fiduciary Duties, Causation and Abuse of Process: Clarifications from the Court of Appeal in *Beyonics Asia Pacific Ltd v Goh Chan Peng* [2021] SGCA(I) 2" (2022) 34 SAcLJ 213; Jonathan Tian Heng Lee, "Recasting *Brickenden*: *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199" (2021) 33 SAcLJ 680; and Weiming Tan, "Unpacking the Enigma of Equitable Compensation for Breaches in Equity" (2022) 5 JBL 407.

9 [2020] 1 SLR 1199.

10 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [112].

11 Charles Mitchell, "Stewardship of Property and Liability to Account" (2014) 3 Conv 215 at 224.

12 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [115].

13 *Target Holdings Ltd v Redferns* [1996] AC 421.

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re-affirmed in *AIB Group (UK) plc v Mark Redler & Co Solicitors*[14] ("*AIB v Redler*"). Under this approach, trustees who breach their stewardship duties are only liable for losses that they have caused, *ie*, they are not liable for losses that the beneficiaries would have suffered even if the trustees had not breached their duties.

5 It is submitted that the orthodox approach should be retained in Singapore law over the causation approach. Part I of this article is this introduction. Part II defines the competing approaches and applies them to the facts of four cases, namely *Target v Redferns*, *Youyang Pty Ltd v Minter Ellison Morris Fletcher*[15] ("*Youyang v Minter*"), *AIB v Redler* and *Main v Giambrone & Law*[16] ("*Main v Giambrone*") (there being no local cases on point) in order to: (a) clarify the principles underlying the orthodox approach;[17] (b) reveal the latent complications in applying the causation approach; and (c) compare the results of the competing approaches. In Part III, this article argues that: (i) the criticisms of the orthodox approach as being "unduly harsh"[18] are misplaced; (ii) there are good reasons for maintaining the orthodox approach "as a matter of policy";[19] and (iii) that the causation approach is based on severe misconceptions that lead to confusion in application. Part IV concludes.

II. The competing approaches: Accounting for stewardsip *versus* compensation for loss

A. Introduction to the competing approaches

6 The orthodox approach begins from the uncontroversial position that the beneficiary is entitled to an account of the trustee's stewardship of all trust property as of right.[20] Where the beneficiary identifies unauthorised dealings with the trust property, the beneficiary is then entitled to falsify the particular transaction. The trustee is then treated as if he had expended his own resources for the unauthorised transaction. The result is a discrepancy between the balance in the falsified account and

14 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503.
15 [2003] HCA 15.
16 [2017] EWCA Civ 1193.
17 Lusina Ho, "Equitable Compensation on the Road to Damascus?" (2015) 131 LQR 213.
18 J D Heydon, M J Leeming & P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis, 5th Ed, 2015) ch 23, at para 23-210.
19 Andrew Burrows, "Limitations on Compensation" in *Commercial Remedies: Current Issues and Problems* (Andrew Burrows & Edwin Peel gen eds) (Oxford University Press, 2003) ch 4, at p 47.
20 Charles Mitchell, "Stewardship of Property and Liability to Account" (2014) 3 Conv 215 at 221.

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the assets actually still held on trust. The errant trustee is then ordered to restore the trust fund to the position as reflected in the falsified account, *ie*, the position if the trustee had acted strictly in accordance with the trust's terms. For this reason, the ultimate remedy is seen as substitutive[21] or restorative.[22]

7 In contrast, the causation approach begins with the so-called compensatory principle. It asks whether the beneficiary has suffered any loss, and whether that loss is caused by the trustee's misapplication of the trust property. As a result, where the beneficiary would suffer the same loss even if the trustee has not acted in breach,[23] the loss is not caused by the trustee's breach and is irrecoverable.

B. Applying the causation approach

8 To flesh out the contours of the causation approach, we start by revisiting its genesis in *Target v Redferns*. Target Holdings Ltd ("Target") had engaged solicitors, Redferns, to act for[24] it in a mortgage loan of around £1.7m against a property valued at £2m.[25] Of the sum advanced, £1.525m was to be used to purchase the property and pay certain insurance premiums.[26] Target then transferred £1.525m to Redferns.[27] The remaining amount was presumably disbursed directly by Target to the borrowers.

9 It was common ground that "Redferns had implied authority to pay the money to or to the order of [the borrowers] when the property had been conveyed to [the borrowers] and [the borrowers] had executed charges in Target's favour".[28] In breach of that implied authority, Redferns had paid out the entire sum of £1.525m to various parties including for its own fees and disbursements before the charges in favour of Target had been executed.[29] Redferns also had knowledge of the borrower's likely fraudulent scheme to inflate the loan amount by inflating the purchase price of the property by interposing Panther Ltd ("Panther") and Kohli & Co Ltd between the original vendor Mirage Properties Ltd ("Mirage")

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21 Charles Mitchell, "Stewardship of Property and Liability to Account" (2014) 3 Conv 215 at 223.
22 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [168], *per* Lord Millett.
23 *Target Holdings Ltd v Redferns* [1996] AC 421 at 428B.
24 *Target Holdings Ltd v Redferns* [1996] AC 421 at 428A.
25 *Target Holdings Ltd v Redferns* [1996] AC 421 at 429A.
26 *Target Holdings Ltd v Redferns* [1996] AC 421 at 428H–429A.
27 *Target Holdings Ltd v Redferns* [1996] AC 421 at 429A.
28 *Target Holdings Ltd v Redferns* [1996] AC 421 at 429B.
29 *Target Holdings Ltd v Redferns* [1996] AC 421 at 429C–429H.

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and the borrower.[30] The borrower later became insolvent and Target only recovered £500,000 when it realised its mortgage security.[31] Target commenced action to recover the entire shortfall of some £1.2m from Redferns and applied for summary judgment.

10 Target's case in its summary judgment application was that Redferns' disbursement of the sum of £1.525m in breach of the terms of the trust, *ie*, before obtaining charges over the property executed in Target's favour.[32] However, what complicated matters was that Redferns later obtained the charges before Target discovered that anything was amiss.[33]

11 Lord Browne-Wilkinson formulated and applied the causation approach in *Target v Redferns*. The essential steps in his Lordship's reasoning were deceptively simple:

> (a) There has to be some causal connection between the breach of trust and the loss to the trust estate for which "equitable compensation" is recoverable, and this connection is the requirement of but-for causation.[34]
>
> (b) If Redferns did not breach its instructions and the transaction had gone through, Target would have suffered the same loss of £1.2m.[35]
>
> (c) Redferns' breach therefore could not be the cause of Target's loss, unless the transaction would not have gone through without Redferns' premature release of the loan funds in breach of trust,[36] *ie*, the premature disbursement was necessary to enable the ultimate conveyance of the property from Mirage to Panther to the borrower.[37]
>
> (d) However, whether Panther had the funds to pay Mirage independently was a triable issue.
>
> (e) As a result, Target's application could not succeed.

12 In *Youyang v Minter*,[38] Youyang Pty Limited ("Youyang") entered into an agreement with EC Consolidated Capital Limited ("ECCCL")

30 *Target Holdings Ltd v Redferns* [1996] AC 421 at 429H.
31 *Target Holdings Ltd v Redferns* [1996] AC 421 at 430A.
32 *Target Holdings Ltd v Redferns* [1996] AC 421 at 430C.
33 *Target Holdings Ltd v Redferns* [1996] AC 421 at 429F.
34 *Target Holdings Ltd v Redferns* [1996] AC 421 at 434F.
35 *Target Holdings Ltd v Redferns* [1996] AC 421 at 431F.
36 *Target Holdings Ltd v Redferns* [1996] AC 421 at 431G.
37 *Target Holdings Ltd v Redferns* [1996] AC 421 at 432B.
38 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15.

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to subscribe for 5,000 ECCCL shares.[39] It paid A$500,000 to ECCCL's solicitors, Minter Ellison Morris Fletcher ("Minter"), to be held on trust for Youyang and applied in accordance with the terms of the subscription agreement.[40] Specifically,[41] the funds were to be released in two tranches – the first to ECCCL to obtain a ten-year bearer deposit certificate from a prime bank that would pay the bearer A$500,000 on maturity,[42] and the second tranche only after the said deposit certificate had been duly obtained.[43] The second tranche was to be used by ECCCL in its dealings on the international money markets to generate returns.[44]

13 In breach of trust, Minter released the first tranche of A$256,800 in exchange for a mere certificate of indebtedness by the bank to ECCCL, which provided Youyang with no security against any insolvency of ECCCL.[45] Minter also acted in breach of the terms of the trust by then releasing the second tranche of A$221,600 to ECCCL. The remaining A$21,600 was paid toward expenses.[46] ECCCL unfortunately failed and its shares became worthless. Youyang therefore sued Minter to have the trust fund restored.

14 The facts in *Youyang v Minter* are actually largely similar to *Target v Redferns*. The only material difference is that Minter never received the requisite bearer deposit certificates.

15 There is considerable academic debate about what approach the High Court of Australia (the "HCA") actually adopted in *Youyang v Minter*.[47] Leaving that debate to one side for now, if we were to apply the causation approach to *Youyang v Minter*'s facts:

(a) The question would be whether Youyang would have suffered the same loss but for Minter's breach of trust.

(b) If Minter had not breached the terms of its trust, and the transaction had gone through, Youyang would have been in possession of a bearer deposit certificate and 5,000 shares in ECCCL that turned out to be worthless.

39 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [7]–[10].
40 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [10].
41 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [19].
42 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [7] and [14].
43 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [19(d)].
44 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [8].
45 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [22].
46 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [20].
47 Contrast J D Heydon, M J Leeming & P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis, 5th Ed, 2015) ch 23, at para 23-180 with Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" [2016] 40 MULR 126 at 160–164.

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(c) Instead, Youyang had in its hands 5,000 worthless ECCCL shares and no bearer certificate at all.

(d) Youyang's losses that were caused by Minter's breach should therefore be the value of a bearer deposit certificate for A$500,000 that matures on 24 September 2003 at the date of judgment. Since the HCA made its decision on 3 April 2003, no pre-judgment interest ought to be payable on that principal sum of A$500,000.[48]

16 Unlike *Target v Redferns*, there was no question that ECCCL was able to complete the transaction even if Minter had not acted in breach of trust because no external parties had to be satisfied for the transaction to be completed.[49]

17 We turn next to *AIB v Redler*, another mortgage lending case. The borrowers in *AIB v Redler* had earlier borrowed from Barclays Bank plc ("Barclays") using the property as security. Barclays therefore had an existing first legal charge over the property securing debts of about £1.5m. AIB Group (UK) plc ("AIB") agreed to lend £3.3m to the borrowers in exchange for a first legal charge over the property.[50] This was against a valuation of £4.25m.[51]

18 Naturally, AIB required that Barclays' existing first legal charge be discharged and a new first legal charge to be executed in favour of AIB.[52] The balance loan proceeds less expenses would then be payable to the borrower.[53] Under terms which were incorporated into the retainer, Mark Redler & Co Solicitors ("Redler") was further required to hold the loan amount committed to it on trust for AIB "until completion", *ie*, when Redler received the executed charge from the borrowers and obtained

48 This is inconsistent with the actual orders made by the HCA for Minter to pay Youyang A$500,000 with interest from 24 September 1993 when Minter had disbursed the investment funds in breach of trust to the date of judgment: see *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at Order 2(d). See also Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" [2016] 40 MULR 126 at 163.

49 There was, however, a different question of whether Youyang would have proceeded with the transaction if it had known of Minter's breach in not obtaining a compliant bearer certificate of deposit: see *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 at [59]–[61]. The same sort of question could have arisen in *Target Holdings Ltd v Redferns* [1996] AC 421.

50 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [2]–[3].

51 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [2].

52 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [3].

53 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [5].

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from Barclays either a redemption certificate or from Barclays that it would redeem its pre-existing charge upon receiving full repayment.[54]

19 The borrowers duly executed what was intended to be a first legal charge in favour of AIB. However, due to Redler's negligence, it paid about £309,000 too little to Barclays and therefore released £309,000 too much to the borrowers.[55] Redler also released the funds without receiving either a redemption certificate or an undertaking from Barclays. As a result, there remained a debt of that £309,000 remaining due to Barclays, Barclays quite naturally refused to discharge their pre-existing first legal charge.[56] AIB therefore never obtained a first legal charge.

20 Subsequently, before the borrowers defaulted, Redler disclosed the error to AIB. AIB then carried out its own negotiations with Barclays, which led to Barclays consenting to AIB registering a second legal charge.[57] Later on, the borrowers defaulted and the property was sold by AIB for only £1.2m. AIB received around only £868,000 from the sale.[58] AIB sued Redler for the full amount of the loan less what was recovered from the sale.[59]

21 Applying the causation approach, Lord Toulson reasoned:[60]

(a) The beneficiary, AIB, was entitled to be compensated for any loss it would not have suffered but for Redler's breach.

(b) If Redler had properly performed the trust, AIB would have obtained a first legal charge that would have secured an additional £309,000. Thus, AIB would have obtained £309,000 more from a mortgagee's sale of its own, but no more.

(c) Redler was therefore only liable for £309,000.

22 AIB further argued, relying on *Target v Redferns*, that the underlying commercial transaction was not complete, and therefore that Redler could be required to restore the trust fund.[61] Lord Toulson rejected this argument because "as a commercial matter the transaction was executed or 'completed' when the loan moneys were released to

54 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [48].
55 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [5].
56 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [6].
57 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [6].
58 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [7].
59 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [8].
60 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [73].
61 This argument cites *Target Holdings Ltd v Redferns* [1996] AC 421 at 436D.

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the borrowers".[62] As we will see in Part IV.C. below, this adds a layer of artificiality to the causation approach.

23 Finally, in *Main v Giambrone*,[63] the eponymous firm,[64] Giambrone & Law ("Giambrone"), acted in underlying transactions for the sale of holiday homes under construction in southern Italy to UK investors. The developers were two Italian companies.[65] The developers appointed an Irish company, VFI Overseas Properties Real Estate Agent Ltd ("VFI"), as their real estate agents[66] and Giambrone "to collect in a fiduciary deposit on its own non-interest bearing deposit account the deposit and the commission due to the AGENT".[67] VFI's marketing efforts persuaded a large number of people to buy the apartments under construction.[68]

24 Upon notification from VFI of VFI's receipt of the initial deposits of €3,000 from the buyers, Giambrone sent the buyers retainer letters[69] and later a due diligence report.[70] In due course, Giambrone also sent the buyers a report on title and a preliminary contract.[71] Upon signing the preliminary contract, the buyers then paid deposits of €30,000 to €150,000 to Giambrone. Giambrone then wrote to the buyers confirming receipt of the deposits and their instructions to release the funds to the developers upon receipt of (a) a signed copy of the preliminary contract and (b) a bank loan guarantee in compliance with Italian decree 122/05,[72] *ie*, a guarantee for the sum of the purchase price of a property under construction from an entity registered under Art 107 of the Italian Consolidated Law on Banking and Credit (the "Italian CLBC") for the benefit of the buyer.[73]

25 However, Giambrone never received compliant guarantees from the developers. The guarantees received were defective because they were (a) issued by entities registered under Art 106 of the Italian CLBC and (b) tenured for one year rather than up to completion.[74] Giambrone

62 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [74].
63 *Main v Giambrone & Law* [2017] EWCA Civ 1193.
64 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [4].
65 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [6] and [15].
66 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [18].
67 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [18].
68 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [20].
69 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [21].
70 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [22].
71 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [23].
72 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [26].
73 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [7]–[8].
74 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [27].

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nevertheless released the deposit amounts to the developers, in breach of the terms of the trust.

26 Unfortunately, the planning permissions for the developments were suspended in Italy and all construction work stopped.[75] Eventually, the Italian Financial Police took possession of the entire development on suspicion of money laundering.[76] As a result, only a small number of units were ever completed and conveyed to the buyers.[77] Unsurprisingly, the disappointed buyers rescinded their purchase agreements but were unable to recover their deposits.[78] They therefore commenced action against Giambrone *inter alia* for breach of trust.[79]

27 On appeal, Giambrone argued that the judge erred in awarding equitable compensation because the buyers would have suffered the same loss even if they had obtained compliant guarantees.[80] This was because it was common ground that the suspension of planning permission and subsequent police seizure did not trigger the obligation of the guarantors to pay out, nor did the developers become insolvent.[81] Thus, if a vanilla causation approach were applied:

(a) The buyers were only entitled to recover losses that they would not have suffered but for Giambrone's breach of releasing their deposits to the developers before obtaining compliant guarantees.

(b) But even if Giambrone had obtained compliant guarantees before releasing the funds, the buyers would still not have obtained a single cent on those guarantees because there was still no obligation on the hypothetical guarantors registered under Art 107 of the Italian CLBC to pay out.

(c) Giambrone would then not be liable to pay any compensation.

28 Jackson LJ only avoided this outcome by distinguishing *Target v Redferns* and *AIB v Redler* on the grounds that the solicitors in *Target v Redferns* and *AIB v Redler* had duties to obtain the respective charges, but Giambrone only had an obligation to disburse funds when it received the

75 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [29].
76 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [30].
77 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [29].
78 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [30].
79 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [34(vii)].
80 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [41(i)].
81 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [47].

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Italian decree-compliant guarantees.[82] As a result, the relevant duty on Giambrone's part was recast as one to hold on to the funds indefinitely.[83]

29 What is puzzling is why the "content" of the "relevant obligation" was different in *Main v Giambrone* (to release funds only upon receipt of compliant guarantees) in contrast with those in *Target v Redferns* (to release funds only upon receipt of executed charges) or *AIB v Redler* (to release funds only upon receipt of a first legal charge).

C. The orthodox approach

30 How would the orthodox approach have been applied to the same cases?

31 The correct account for *Target v Redferns* is the matter of some controversy, but the weight of academic opinion favours the following account:[84]

(a) Redferns' disbursement of funds before receiving the executed charges was an unauthorised application of trust moneys.

(b) Target was therefore entitled to falsify the disbursement, with the result that the entire £1.525m was to be treated as if it were still in Target's client account.

(c) If Redferns had sought an account and falsified it at the time of disbursement, Redferns would have been entitled to have the entire amount restored to the client account.

(d) Redferns then received the required charges on behalf of Target, something they remained authorised to do at that time.[85] As a result, the authorised receipt of the executed charges had to be reflected in the account and the receipt cannot be falsified.

(e) At the same time, Target cannot expect Redferns to receive the executed charges without disbursing the entire

82 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [61].
83 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [62].
84 P J Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at 227; Matthew Conaglen, "Explaining *Target Holdings v Redferns*" (2010) 4 J Eq 288 at 290–291; Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 414.
85 Matthew Conaglen, "Explaining *Target Holdings v Redferns*" (2010) 4 J Eq 288 at 290. Going further, Redferns were under an obligation to obtain those charges, which they eventually performed.

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£1.525m. Target is therefore compelled to accept an account as if the sum had been disbursed after receipt of the charges.

(f) This does not involve any ratification of the unauthorised disbursement.[86] Instead, the account turns on the inability of Target to deny the authorised receipt of the charges, and in consequence being unable to deny the disbursement necessary to obtain the charges.

(g) One way of reflecting this in the account itself is with a notional restoration right after the breach, and a second notional disbursement when the charges were received, but this is not strictly necessary. One could equally say that the end state of the account is unimpeachable, subject to the residual issue of the time value of money if Redferns' client account was interest bearing.

32 The key difference between the facts in *Target v Redferns* and *Youyang v Minter* is that Minter never received a bearer deposit certificate from a prime bank, nor could it point to some other authorised actions that could "offset"[87] the result of its breach on the final balance of the trust account. The account for *Youyang v Minter* would therefore be:[88]

(a) It was a breach of trust for Minter to disburse either tranche of the A$500,000 because it had not at the time received a bearer deposit certificate.

(b) At the time of disbursement, Youyang would have been entitled to obtain a common account and falsify the disbursements.

(c) Further, there was no asset received by Minter on behalf of Youyang for the former to even potentially disavow. The certificate of deposit issued by the bank was in favour of ECCCL and conferred no rights on Youyang.

(d) There were no further developments on the facts that affected the account in any way.

(e) Youyang therefore remained entitled to falsify the entire disbursement. The amount therefore had to be treated as if it remained in Minter's client account bearing interest from 24 September 1993 to the date of judgment, consistent with the HCA's orders and not with the causation approach.[89]

86 *Cf*, James Edelman, "Money Awards of the Cost of Performance" (2010) 4 J Eq 122.
87 Matthew Conaglen, "Explaining *Target Holdings v Redferns*" (2010) 4 J Eq 288 at 294.
88 Matthew Conaglen, "Explaining *Target Holdings v Redferns*" (2010) 4 J Eq 288 at 294.
89 Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" [2016] 40 MULR 126 at 163.

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33 The correct account for *AIB v Redler* is also the subject of academic debate. Like in *Youyang v Minter*, Redler never obtained a first legal charge. However, AIB separately negotiated with Barclays for their consent to register its charge as a second legal charge. The account should therefore be as follows:[90]

(a) By the time the case reached the Supreme Court of the United Kingdom, the analysis had to proceed on the basis that the disbursement of the entire £3.3m was in breach of trust in two ways:

(i) Redler did not obtain either a discharge of Barclays' charge or an undertaking from Barclays that it would do so before releasing the loan funds; and

(ii) Redler had paid £309,000 too much to the borrowers.

(b) At the time when Redler received the charge executed by the borrower and paid the moneys out to Barclays and the borrowers, it was a mere equitable charge. This was not what Redler was authorised to obtain. As a result, at this stage, AIB could have falsified the entries in the account showing the payments and the receipt of the equitable charge.

(c) However, by the time the account came to be taken, AIB had negotiated with Barclays to have their later charge registered as a second legal charge and received their share of the proceeds of the mortgage sale pursuant to that second charge.

(d) Having done the opposite of disclaiming any benefit from the second charge, AIB could hardly be heard to argue that it should be left out of the account. Once the second charge is included in the account, AIB would no longer be entitled to disallow the payment of £1.2m to Barclays that acquired the charge.

(e) As a result, all AIB was by then entitled to recover was the difference in value between the second legal charge it in fact held and that of the notional first legal charge it would have held

90 Lord Millett, "*AIB v Redler*: Case Comment" (2018) 32(1) Tru LI 44 at 48–49; Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 414–415. Conaglen's competing account omits AIB's subsequent adoption of the equitable charge and conversion into a second legal charge with Barclays' consent, relying instead on AIB's actions as a waiver or ratification: Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" [2016] 40 MULR 126 at 157–159. There is, however, no reason why the equitable charge vanishes from the account altogether.

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in the absence of any breach of trust. This would have been the £309,000 still owing to Barclays that Barclays recovered in the mortgagee's sale.

34 Finally, the account for *Main v Giambrone* is effectively identical to the one for *Youyang v Minter*. Giambrone's duty was to deal with the deposits held on trust as directed or otherwise authorised by the terms of the trust. The account should have been as follows:[91]

(a) In breach of trust, Giambrone released the deposits without receiving Italian decree-compliant guarantees.

(b) At the time of payment out, the buyers were entitled to falsify the payments and obtain a reconstitution of the trust fund.

(c) At no subsequent time did Giambrone obtain compliant guarantees.

(d) Nor had the buyers done anything to adopt the guarantees.

(e) The final state of the account therefore contained a shortfall of the entire amount paid out, which Giambrone had to pay to the buyers.

35 Three conclusions can then be drawn from a comparison of the competing approaches above. First, for the cases of *Target v Redferns* and *AIB v Redler*, both approaches would yield the same outcome. There is therefore no basis for asserting that the orthodox approach is "unduly harsh".[92] Second, in *Main v Giambrone*, the causation approach would not have led to desirable results without strained distinctions being drawn. Third, in *Youyang v Minter*, it is not clear at all how the causation approach could lead to a desirable result. With these preliminary observations in mind, we turn to why there are strong policy reasons for preferring the orthodox approach.[93]

III. The importance of orthodoxy

36 There are three reasons why the orthodox approach is preferable as a matter of principle and policy. First, the orthodox approach, through

91 Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 416.

92 *Cf*, J D Heydon, M J Leeming & P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis, 5th Ed, 2015) ch 23, at para 23-210.

93 *Cf*, Andrew Burrows, "Limitations on Compensation" in *Commercial Remedies: Current Issues and Problems* (Andrew Burrows & Edwin Peel gen eds) (Oxford University Press, 2003) ch 4, at p 47.

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the mechanism of account and falsification, maintains equity's approach of directly enforcing the trustee's stewardship duty. Second, the causation approach is based on a taxonomical error of conflating a trustee's primary duty of stewardship which is directly enforced through the primary obligation to account, with other types of obligations which are enforced through the interposition of a legal wrong. This led to conflations of the enforcement of the stewardship duty with (a) the general enforcement of contractual obligations and (b) the enforcement of a trustee's fiduciary duty of loyalty. Third, only the orthodox approach meets equity's concern that the terms of the trust are fully performed either *in specie* or by payment of money in lieu of performance. In line with this interest, the orthodox approach also more precisely directs our attention to the terms of the trust reflecting what the trustee is authorised and further obliged to do.

A. The orthodox approach maintains the direct enforcement of a trustee's stewardship duty

37 It is often said that a breach of a primary duty gives rise to a secondary duty to pay compensation, such as in Lord Diplock's *dictum* that the infringement of the promisee's primary right to have a contractual promise performed leads to his secondary right to damages.[94] The causation approach adopts the same view of the beneficiary's right that is the corollary to the trustee's stewardship duty.

38 This seemingly simple statement, however, conceals the interposition of a legal wrong or breach of duty between the primary right and the secondary right. This interposition does not take place for all legal remedies. In particular, the trustee's stewardship duty has always been directly enforced through the trustee's obligation to account which a beneficiary is entitled to enforce without showing that the trustee has committed a wrong.[95]

39 It is not surprising that this interposition is often overlooked given its prevalence in common law causes of action. Tort law seeks to balance the recognised rights or interests of members of a community by recognising legal wrongs called "torts", when one member goes too far in pursuing his own interests at the expense of others' interests. Thus, in the tort of negligence, when there is sufficient legal proximity, one person owes a duty to another to take due care to avoid causing that other person

94 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848 to 850.
95 *Foo Jee Seng v Foo Jhee Tuang* [2012] 4 SLR 339 at [87].

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harm. Where he fails to do so, he is said to have breached his duty of care. A secondary right to damages then arises from that legal wrong.[96]

40 A similar interposition takes place when contractual promises are not kept. The promisee's primary right to have the promise kept arises out of the act of agreement. Where the promisor fails to perform, the law of contract then recognises a legal wrong and the promisor is said to have committed a breach of contract. A secondary right to damages then again arises from that legal wrong.

41 It is precisely this interposition of the idea that the tortfeasor or promisor has committed a legal wrong that makes it logical to ask what harm that wrong has caused the claimant when we consider what remedy is appropriate for correcting that wrong. As a result, if the loss would have materialised anyway because of external events such as a subsequent *force majeure* event[97] or because the promisee would not have been able to perform, thereby giving the promisor a right to terminate the contract,[98] then the promisee has suffered no loss because of the promisor's wrong.

42 Yet, even the law of contract does not always interpose the wrong of breach of contract in fashioning a remedy for a failure to perform.[99] In the case of an unpaid contractual debt, the obligation to pay the agreed sum is directly enforced. The promisor is not ordered to pay damages to be assessed at the agreed amount. The same approach applies to an action for the price of goods sold and delivered, and to actions for insurance pay-outs under a policy.[100]

43 This point is perhaps best illustrated with liquidated damages clauses. The purpose of liquidated damages clauses is to avoid the complications and costs involved in the assessment of damages. This purpose is achieved by treating the amount of liquidated damages as a debt due once the condition(s) for payment, usually a failure in performance, is met. Liquidated damages clauses serve their purpose by giving rise to a debt that can be directly enforced. It would be circular, and indeed defeat the purpose of liquidated damages clauses, if the failure to make the payment of the agreed sum could only be remedied by interposing the extra step of recognising the failure to make payment as a legal wrong.

96 Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] 26 WALR 1 at 10.
97 *Golden Strait Corp v Nippon Yusen Kubishka Kaisha* [2007] 2 AC 353.
98 *Flame SA v Glory Wealth Shipping Pte Ltd* [2014] QB 1080 at [81].
99 By contrast, it appears that the law of torts always adopts the route of a tortious duty, breach of that duty as a legal wrong, and damages as the remedy for that breach.
100 Sale of Goods Act 1979 (2020 Rev Ed) s 49.

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44 Turning to trusts, what the orthodox approach preserves is a fundamental tenet that the trustee's stewardship duty is directly enforced. The very circumstance of stewardship gives rise to the trustee's duty to account. Hence, the beneficiary is entitled to an account in common form as of right.[101] In rendering the account, the burden is on the trustee to justify every dealing with the trust property.[102] Falsification, in reality, involves (a) the beneficiary demanding a justification for a particular transaction as of right and (b) the trustee being unable to provide a justification to the satisfaction of the court, leading to that transaction being disallowed.[103] Once the outlays and corresponding receipts for that transaction are disallowed, there will be a shortfall between the balance of the corrected account and what is actually in the trust fund. The trustee is then required to restore the property paid out either *in specie* or in money terms, either back into the trust fund if the trust has yet to be fully administered or directly to the beneficiaries if the trust has come to an end.

45 The core notion of direct enforcement of the trustee's stewardship duty is that enforcement is not predicated on the legal recognition of any wrongdoing by the trustee. The enforcement begins without consideration of whether the trustee has breached any duties. Instead, the foundation is the beneficiary's entitlement to a common account as of right. Throughout the process, the beneficiary is never required to show that the trustee has committed any wrong. The shortfall arises because the trustee cannot show that a transaction was entered into in accordance with the terms of the trust. Whether that inability also results in a legal wrong arising is irrelevant. Finally, the obligation to restore also does not depend on the existence of a legal wrong. In other words, the whole of the orthodox approach flows from the beneficiary's entitlement to a common account as of right. There is no need in this analysis for the language of wrongs and loss resulting from a wrong.[104] It is for this reason that the order to restore *in specie* or in money terms, whether by payment into the trust fund or to the beneficiaries directly, is treated as an equitable

101 *Lalwani Shalini Gobind v Lalwani Ashok Bherumal* [2017] SGHC 90 at [26].

102 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2022] SGCA(I) 9 at [24]–[25].

103 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2022] SGCA(I) 9, *eg*, at [43].

104 This is not to say that the unauthorised application of trust property cannot also be recognised as a legal wrong, from which the beneficiary has a secondary right to compensation for loss. A beneficiary may wish to make this claim instead of seeking a restorative order where there are consequential losses he wishes to claim: J E Penner, "Distinguishing Fiduciary, Trust and Accounting Relationships" (2014) 8 J Eq 202 at 226. Nonetheless, where the beneficiary merely wishes to obtain an order to restore trust property that has been misapplied, the beneficiary need not assert a wrong.

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debt[105] or structurally similar to a buyer's liability under a contract for sale of goods where his liability to pay the contract price lies outside the remedial regime for wrongs.[106]

B. The orthodox approach avoids conflating unauthorised applications of trust property with breaches of other obligations

46 Lord Browne-Wilkinson's implicit concern in *Target v Redferns* that remedies should not differ just because of the historical separation of the administration of law and equity is a valid one.[107] However, where there are substantial differences between the primary rights infringed, there is no reason to assume that the secondary rights that follow should nonetheless be the same. With respect, it appears that because his Lordship overlooked the difference between direct and indirect enforcement of primary rights from the outset,[108] this led to two reasoning errors. First, his Lordship erroneously drew an analogy between unauthorised applications of trust property with general breach of contract instead of with breach of instructions in contracts of agency in particular. Second, his Lordship conflated a trustee's failure to meet his stewardship duty with his fiduciary duty of loyalty in his reliance on McLachlin J's opinion in *Canson Enterprises Ltd v Boughton & Company*[109] ("*Canson v Boughton*").

IV. Analogy to wrong contractual remedy

47 The key plank underlying the causation approach is the asserted universality of the so-called compensatory principle, particularly for breaches of contract.[110]

48 That plank, however, turns out to be an ocular illusion. The assumption that the compensatory principle applies universally is false, even without considering the existence of common law accounting

105 Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" [2016] 40 MULR 126 at 141, citing *Re Collie, ex parte Adamson* (1878) 8 ChD 807 at 819.
106 Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] 26 WALR 1 at 43.
107 *McGregor on Damages* (James Edelman ed) (Sweet & Maxwell, 21st Ed, 2021) ch 1, at para 1-106.
108 *Target Holdings Ltd v Redferns* [1996] AC 421 at 432F, describing liability for the misapplication of trust property as "fault-based".
109 [1991] 3 SCR 534.
110 *Target Holdings Ltd v Redferns* [1996] AC 421 at 432E; *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [65].

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relationships.[111] The cases of a seller suing for the purchase price or a lender suing for a debt owed were covered earlier.[112] Other examples are claims that historically were pursued in *indebitatus assumpsit* rather than *special assumpsit*.[113] The claims are based on the contractual obligation undertaken rather than the wrong of breach, and hence are regarded as actions in debt rather than in damages.[114] Thus, in a contract for the sale of goods or provision of services, if the seller fails to provide the goods or the services altogether, the buyer who has paid is entitled to terminate the contract and demand return of the purchase price paid on the basis of total failure of consideration. It is no defence for the party in breach to say that the buyer would have lost the money even if the selling party had delivered, *ie*, that the buyer had made a bad bargain.[115]

49 This is lucidly illustrated by *Wilkinson v Lloyd*.[116] In that case, a buyer paid for shares but the seller failed to deliver because he did not obtain the company's approval for the share transfer by the delivery date. The value of the shares had fallen in the meantime. The buyer was nevertheless entitled a refund of the full purchase price. Yet, if the seller had performed by obtaining the approvals, the buyer only would have had in hand shares that were worth less than the purchase price.

50 Further, as alluded to above, accounting relationships are not limited to trust relationships. They also arise at common law, with agents and collection agents in particular being the best example.[117] The solicitors in both *Target v Redferns* and *AIB v Redler* were similarly agents of their client lenders. Yet, where agents act in breach of their instructions, their principals are similarly not restricted to claiming compensatory damages against the agents.

51 Instead, where agents such as solicitors release funds without authority, the principals or clients are *prima facie* entitled to disown the release of funds.[118] This right is subject to only two limitations – first,

111 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 126.
112 See para 42 above.
113 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 126.
114 *Bartoline Ltd v Royal & Sun Alliance Insurance Plc* [2007] 1 All ER (Comm) 1043 at [77].
115 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 126.
116 (1845) 7 QB 27.
117 J E Penner, "Distinguishing Fiduciary, Trust and Accounting Relationships" (2014) 8 J Eq 202 at 216.
118 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 119.

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the agent may be able to cure the breach before the principal finds out and intervenes, which explains the outcome in *Target v Redferns*.[119] On the other hand, if the principals intervene promptly before the agent is able to cure the breach, they would be entitled to a refund of the whole sum paid out;[120] and second, the principals have to elect for this remedy generally by choosing to terminate the authority of the agent.[121]

52 Where the client principals are entitled to disown the disbursement and thus to a refund of the sum advanced, it would be irrelevant that they had overvalued their security.[122] They are entitled to treat the amount paid out as having been paid out from the agent solicitor's own funds.[123] This is illustrated by the chequing case of *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*[124] ("*Barclays v Simms*").

53 The question in *Barclays v Simms* was whether a mistaken payment made by the drawee's bank on a countermanded cheque presented by the payee's bank was recoverable from the payee. The underlying transaction was a construction contract between builders and a housing association.[125] When the architects for the building contract issued an interim certificate certifying that £24,000 was payable to the builders,[126] the association drew a cheque for that amount on its account with its bank, Barclays Bank Ltd ("Barclays"), on Monday.[127] The association then sent the cheque to the builders by post.[128] On Tuesday, the builders' bank, National Westminster Bank Ltd ("National Westminster"), appointed receivers over its assets pursuant to a floating charge.[129] On Thursday, the association gave Barclays instructions to stop payment on the cheque, which Barclays acknowledged.[130] The cheque was received by the receiver and his assistant paid in the cheque at the builders' bank, National Westminster, with a direction that the cheque be

119 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 122.
120 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 119.
121 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 128.
122 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 119.
123 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 119.
124 [1908] QB 677.
125 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 683D.
126 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 684C.
127 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 684D.
128 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 684F.
129 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 684D.
130 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 684E.

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specially cleared.[131] Either late on the same Thursday or early on Friday, Barclays received a special presentation of the cheque from National Westminster and Barclays.[132] The paying official overlooked the earlier stop instruction and the cheque was paid.[133]

54 Whether Barclays was entitled to recover the payment to the builders on the grounds of mistake depended on whether the payment was made for good consideration such as a discharge of a debt owed by the association to the builders.[134] This in turn depended on whether the bank had authority to discharge that obligation. Robert Goff J held that it did not.[135]

55 In such situations, the bank is *prima facie* entitled to recover the mistaken payment subject to the change of position defence.[136] More importantly for our purposes, as and when its customer calls for an account, the bank is not entitled to debit the payment from the customer's account and on withdrawal has to pay the balance without deducting the amount of the countermanded cheque to the customer as payment of a debt.

56 It is submitted that the solicitors in the cases of *Target v Redferns* and *AIB v Redler* are in an identical situation to Barclays in *Barclays v Simms* even without the intervention of trust law. The solicitors had *prima facie* paid away money held in their client accounts without authority to do so. They would therefore similarly not be allowed to debit the client accounts for those sums. When the sums held in the client accounts are demanded, they would have to give an account without the payment and make payment of that adjusted balance as a debt to their clients.

57 The disallowance from debiting the customer or client's account with an unauthorised payment is identical to the falsification of accounts in equity under the orthodox approach. In equity, the disallowance is also described in the context of unauthorised investments as treating the purchase of assets "as if these investments had not been made, or had been made for his own benefit out of his own monies".[137] Similarly, the bank's unauthorised payment is treated as a payment of its own moneys,

131 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 684F.
132 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 684G.
133 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 684G.
134 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 695C.
135 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 699G–699H.
136 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1908] QB 677 at 700D.
137 *Knott v Cottee* (1852) 16 Beav 77 at 79–80.

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and the solicitors' disbursements are treated as disbursements of their own funds as well.

58 Thus, in both agency relationships and in trusteeship, the accounting party is under a strict duty to adhere to the terms of the relationship conferring them authority to deal with property that is committed to them by another[138] because they have impliedly volunteered for it.[139] They are in both cases required to render an account, and any attempted debit of the principal's account with them for an unauthorised disbursement is disallowed, such that they have to return the funds committed to them without that disbursement.

59 However, because there is a shortfall between the amount that ought to be refunded and how much is actually in the fund, the accounting party in having to return the fund whole has to reconstitute[140] or restore the fund. In doing so, he is not paying compensation for loss caused by any wrong, and therefore not attempting to put the principal or beneficiary in the position he would have been in had there been no wrong.[141]

60 All this is further illustrated by *Magnus v Queensland National Bank*.[142] The case concerned a claim by certain trustees against the Queensland National Bank. The trustees held certain stock of the London, Brighton and South Coast Railway (the "Brighton stock") on trust for the benefit of the Countess D'Avigdor and her children (the "D'Avigdor trust"). There was probably a fraudulent scheme by one of the trustees, Bartle Goldsmid ("Goldsmid"), to misappropriate that stock. Goldsmid also acted as the trust's stock broker, and he persuaded his fellow trustees to sell the Brighton stock to invest in North-Eastern stock instead. All three trustees then executed a deed of transfer for the Brighton stock in favour of officers of the bank. The deed of transfer was, however, presented to and accepted by the bank as security for a loan to Goldsmid. In other words, the Brighton stock was initially mortgaged to the bank, and on the face of the deed the mortgagors were all three trustees. In other words, the equity of redemption was owned by all three trustees and not Goldsmid alone.

138 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 119.

139 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 122.

140 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 126.

141 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 127.

142 *Magnus v Queensland National Bank* (1888) 37 ChD 466.

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61 It is trite law that although legal title to the Brighton stock passed to the bank by the deed of transfer, equity treats the trustees as still holding on to the beneficial interest in the stock along with other rights that make up the equity of redemption.[143] In other words, the bank is treated as holding the stock on trust for the trustees of the D'Avigdor trust, subject to their rights as mortgagees.

62 It follows that once Goldsmid repaid the loan in full, there was nothing left but a bare trust under which the bank was obliged to reconvey the Brighton stock to the trustees. Unfortunately, upon repayment, the bank transferred the stock to third party buyers at the direction of Goldsmid and allowed Goldsmid to receive the sales proceeds. This was, as is apparent, a breach of the bank's stewardship duty. Hence, Cotton LJ said that the bank was liable to *account* for the money that they had got for the stock.[144]

63 Goldsmid then used the sales proceeds to buy North-Eastern stock in his own name. He later sold the latter stock in 1883 and absconded with the sales proceeds in 1885. In the meantime, Goldsmid had rendered accounts to his fellow trustees in 1882 and 1884 representing that the North-Eastern stock was held for the trust as he had proposed.

64 One of the defences the bank raised was that the negligence of the other two trustees was the real cause of the loss.[145] The argument made was that even if the bank had duly returned the stock or its sales proceeds into the hands of all the trustees, Goldsmid would have defrauded the trust in some other way, with the result that the same loss would be suffered anyway.[146] The argument was unanimously rejected on the basis that a subsequent wrong by Goldsmid or a third party was irrelevant.

65 Cotton LJ's reasoning tracks the nature of the bank's stewardship duty as trustee of the Brighton stock in favour of the trustees of the D'Avigdor trust most closely. What Goldsmid or a third party may have successfully done in the future was irrelevant because, as trustees of a bare trust, their sole authority on the terms of the trust was to pay the sales proceeds to the trustees of the D'Avigdor trust or someone authorised by them. Any other action would have been unauthorised, and they would be answerable on an account "just as if the money was still in their hands".[147]

143 Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 4th Ed, 2019) at para 18.20.

144 *Magnus v Queensland National Bank* (1888) 37 ChD 466 at 474.

145 *Magnus v Queensland National Bank* (1888) 37 ChD 466 at 477.

146 *Magnus v Queensland National Bank* (1888) 37 ChD 466 at 473, where Lord Halsbury LC had "very little doubt" that this was the case.

147 *Magnus v Queensland National Bank* (1888) 37 ChD 466 at 477.

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Hence, as Lord Halsbury LC said, the court is "not at liberty to speculate whether the same result might not have followed whether the bank had been guilty of that default or not".[148] The trustee, in this case the bank, would still have the sales proceeds in hand if it had performed according to the terms of the trust. The fact that the D'Avigdor trustees had lost the sales proceeds due to some other event even if the bank had properly returned the funds to them is, as Bowen LJ said, an "ocular illusion"[149] because the inquiry is into whether trust property was "lost" in the sense that there was an unauthorised disbursement rather than whether the beneficiaries have suffered loss as a result of a wrong. Hence the "loss" of property occurs as soon as there is an unauthorised disbursement,[150] and the fact that the same financial loss would have been occasioned by the wrong of another in the adjoining street to Pall Mall is irrelevant.[151]

66 There is therefore nothing particularly arcane or austere about the orthodox approach.[152] Instead, the English courts in *Target v Redferns* and *AIB v Redler* had simply proceeded from the wrong starting analogy and reached the wrong destination.

V. Misuse of *Canson Enterprises Ltd v Boughton & Company*

67 The second way in which overlooking the difference between direct and indirect enforcement of primary rights leads to error is in Lord Browne-Wilkinson's[153] and Lord Toulson's[154] reliance on *Canson v Boughton*, which conflates the remedial response to a "breach" of a trustee's stewardship duty with a trustee's fiduciary duty of loyalty.

68 Essentially, as with most breaches of contract and torts, when a trustee fails to meet his or her fiduciary duties, there is the interposition of a wrong or breach of duty, which then leads to a remedial response. In other words, the *only* way in which equity remedies such a failure is through the interposition of a legal wrong. On the other hand, as we have seen, the primary response to a failure to meet the stewardship duty is

148 *Magnus v Queensland National Bank* (1888) 37 ChD 466 at 472–473.
149 *Magnus v Queensland National Bank* (1888) 37 ChD 466 at 479.
150 *Magnus v Queensland National Bank* (1888) 37 ChD 466 at 479.
151 *Magnus v Queensland National Bank* (1888) 37 ChD 466 at 480; while the later third party wrong will break the chain of causation in a tort claim as an intentional and unforeseeable act: see Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) ch 7, at paras 07.077–07.079.
152 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 129.
153 *Target Holdings Ltd v Redferns* [1996] AC 421 at 438.
154 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [66].

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simply enforced via the right to account, which does not involve any wrong by the trustee.

69 In other words, the stewardship duty and the fiduciary duty are distinct, even though they often coincide in the relationship between trustee and beneficiary. Indeed, for the trust relationship, there are three overlapping sub-relationships: (a) the fiduciary relationship where the trustee is empowered to make decisions in the best interests of the beneficiary by exercising independent judgment; (b) the trust property relationship where the trustee holds legal title to the trust property while the beneficiaries hold the equitable title, and the benefits of that equitable title therefore depend on the trustee exercising his powers in accordance with his duties; and (c) the accounting relationship that arises because the trustee acts economically for the benefit of the beneficiaries.[155]

70 The stewardship duty, in this sense, is therefore an overlap of the trust property relationship and accounting relationships because the trustee "controls property that she must administer and apply for the benefit of another, to whom she must account for what she does with the property".[156] Even then, the stewardship duty is distinct from the fiduciary duty.[157] Of course, an unauthorised use of trust property can also be disloyal, but that only means that there are violations of two duties in one action.[158] Again, since the content of the duties are different, there should be no basis for presuming that the remedial responses for non-fulfilment would be the same. Indeed, contrary to what Lord Browne-Wilkinson said,[159] the remedy for the former is not even fault-based.

71 With this disambiguation of trustees' duties, *Canson v Boughton* can be examined more closely to interrogate the alleged consensus[160] arising from McLachlin J's judgment. The claim in *Canson v Boughton* concerned a breach of a solicitor's non-custodial fiduciary duty. In that case, Canson Enterprises Ltd ("Canson") and Peregrine Ventures Inc ("Peregrine") agreed to purchase and develop a piece of property as a joint venture.[161] The original owners of the land were the Hendersons.[162] This

155 J E Penner, "Distinguishing Fiduciary, Trust and Accounting Relationships" (2014) 8 J Eq 202 at 203–211.
156 Charles Mitchell, "Stewardship of Property and Liability to Account" (2014) 3 Conv 215 at 215.
157 Charles Mitchell, "Stewardship of Property and Liability to Account" (2014) 3 Conv 215 at 216–217.
158 Charles Mitchell, "Stewardship of Property and Liability to Account" (2014) 3 Conv 215 at 216–217.
159 *Target Holdings Ltd v Redferns* [1996] AC 421 at 432G.
160 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [133].
161 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 534h.
162 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 535a.

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joint venture was proposed by Treit Land Consultants Inc ("Treit"), which would earn a known 15% commission on the profits of the development venture.[163] Treit, however, earned a further secret profit from the sale.[164] It inserted Sun-Mark Development Corporation ("Sun-Mark") into the transaction to buy the land from the Hendersons for C$410,000 and then flip the land to Canson and Peregrine for C$525,000, earning a secret profit of C$115,000. Peregrine was party to this scheme.[165]

72 The claim for breach of fiduciary duty was against the law firm Boughton & Co because the particular solicitor, Ralph R Wollen ("Wollen"), acted for both Canson and Sun-Mark. Wollen therefore knew of the interposition of Sun-Mark but did not disclose this to Canson. He further paid the secret profits of C$115,000 to Sun-Mark without disclosing this to Canson.[166]

73 Canson ultimately suffered loss because the pile supporting the warehouse that was being built on the land began to sink[167] due to the negligence of the soil engineers and the piling company.[168] As a result of the piling company's inability to pay the damages awarded, that claim was settled for a lesser sum,[169] which was paid.[170] The engineers were unable to pay at all.[171] Ultimately, the mortgagees of the land foreclosed the land against Canson and Peregrine,[172] leaving a shortfall in recovery of some C$800,000 for Canson.[173]

74 What is immediately apparent from even this cursory examination of the facts is that the issue in *Canson v Boughton* was *not* about stewardship of property in any sense. The solicitors at no point held the land on trust for Canson. Nor did Lord Browne-Wilkinson in *Target v Redferns* or Lord Toulson argue that in *AIB v Redler* the remedies for breach of non-custodial fiduciary and custodial stewardship duties ought to be the same.[174] The rules were therefore transplanted on a conflation of

163 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 534i.
164 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 534i–535a.
165 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 534i–535a.
166 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 535b–535f.
167 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 535g.
168 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 535h.
169 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 535i.
170 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 535j.
171 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 535i.
172 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 535j.
173 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 536a.
174 The closest Lord Browne-Wilkinson comes is the false assertion that liability is fault-based in both cases: see *Target Holdings Ltd v Redferns* [1996] AC 421 at 432G.

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fiduciary and stewardship duties,[175] ignoring the absence of the need to interpose a wrong when enforcing the stewardship duty.

75 Further, the majority judgment of La Forest J in *Canson v Boughton* expressly preferred the orthodox approach in cases of breaches of the stewardship duty,[176] a view McLachlin J expressed no disagreement with. Her disagreement instead as with the application of common law damages principles to breaches of non-custodial fiduciary duties. Indeed, a careful reading of Canson shows that the Supreme Court of Canada was unanimous[177] that the concern of equity in where there has been a breach of the stewardship duty "is that [the property] be restored to the *cestui que trust* or if that cannot be done to afford compensation for what the object would be worth".[178]

76 It is therefore with respect extraordinarily difficult to see how McLachlin J's oft-cited opinion in *Canson v Boughton* lends any support to the causation approach developed in *Target v Redferns* and *AIB v Redler*. There is therefore little foundation in authority to support it.

VI. Breach of stewardship duty secondarily a wrong

77 Although the stewardship duty has historically been and should continue to *primarily* be enforced directly, it does not follow that a breach of that duty cannot further be characterised as a legal wrong that then forms the basis of a right to compensation.[179] Where the beneficiary has the right to inconsistent remedies, he has a right of election[180] that is generally unfettered as against the defaulting trustee.[181]

78 Part of the angst arising out of the facts of *Target v Redferns* and *AIB v Redler* was the possibility that the orthodox approach might allow the beneficiary clients a greater recovery on the orthodox approach compared to the causation approach. Although that is not true on the

175 Paul S Davies, "Compensatory Remedies for Breach of Trust" (2016) 2(1) CJCCL 65 at 80.
176 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 578c–578g.
177 Paul S Davies, "Compensatory Remedies for Breach of Trust" (2016) 2(1) CJCCL 65 at 79.
178 *Canson Enterprises Ltd v Boughton & Company* [1991] 3 SCR 534 at 578f.
179 Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] 26 WALR 1 at 47.
180 As is the case between equitable compensation and account of profits for breaches of non-custodial fiduciary duties: see *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 521.
181 As is the case with tracing through a mixed fund: see *Re Hallett's Estate* (1880) 13 ChD 696 and *Re Oatway* [1903] 2 Ch 356.

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facts of those cases, the substitutive remedy that results can be more generous than equitable compensation because it can sometimes allow a beneficiary to "recover" a wrongful disbursement even if a loss would have been suffered anyway.

79 Thus, in *Cocker v Quayle*,[182] a marriage settlement allowed the trustees to advance moneys to the beneficiary's husband only if he gave a bond for the credit. They lent to the husband without obtaining a bond. The husband defaulted and went bankrupt. The bond would not have given priority in bankruptcy. It was however treated as irrelevant that the same loss would have occurred had the trustees complied with the trust deed. The trustees remained liable to restore the loan amount to the trust fund.

80 There are, however, situations where the substitutive remedy potentially yields a *lower* level of recovery as compared to equitable compensation because it arguably extends to allowing recovery for consequential losses.[183]

81 Take for instance a scenario where the trustees misapplied trust funds by distributing them to beneficiary A rather than beneficiary B, contrary to the terms of the trust. The substitutive remedy would involve a simple refund of the amount wrongly distributed. But suppose it was common knowledge, perhaps because all parties were part of the same family, that beneficiary A intended to invest the sum he was entitled to in a business venture, and that the venture has turned out to be profitable. Beneficiary A would then certainly be motivated to claim this loss of profit as a consequential loss in addition to the sum he had not received. Finally, reconstitution and compensation for consequential loss may not always be inconsistent remedies such that the beneficiary ought to be put to an election.[184]

182 (1830) 1 Russ & M 535.

183 Jamie Glister, "Breach of Trust and Consequential Loss" (2014) 8 J Eq 235 at 239; David Hayton, "Unique Rules for the Unique Institution, The Trust" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Thomson Reuters, 2005) at p 279 and pp 304–306. It should be noted that, contrary to Lord Toulson's views in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [71], Hayton's views expressly preserve the beneficiary's right to the substitutive remedy and lend no support to the causation approach.

184 Weiming Tan, "Unpacking the Enigma of Equitable Compensation for Breaches in Equity" (2022) 5 JBL 407 at 418.

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A. *Rationales for direct enforcement of stewardship duty*

82 In the preceding sub-sections, it was argued that the reasoning in support of the causation approach was based on a conflation of approaches to the enforcement of primary obligations in general and a conflation of trustees' obligations in particular, which swept the fundamental notion of the direct enforcement of a trustee's stewardship duty under the carpet.

83 In this final sub-section, four rationales for orthodox approach are advanced. First, a duty to account, whether at common law or in equity, has been *consistently* directly enforced and any resultant shortfall recovered as a debt from its inception in medieval common law in the 1200s. The normative force of any argument seeking to overturn some 800 years of consistent judicial practice must necessarily be substantial. Second, this 800 year-long judicial practice expresses trust law's unique interest that a trustee's stewardship duty is fully performed. Third, an understanding of equity's performance interest rightly focuses our attention on the terms of the trust in the falsification of account entries. This readily resolves the various difficulties in drawing up the accounts in *Target v Redferns*, *AIB v Redler*, *Youyang v Minter* and *Main v Giambrone*, as well as in one thornier situation raised by Lusina Ho. Fourth, the orthodox approach does away with the thorny distinction between complete and incomplete transactions drawn in *Target v Redferns* that has proved to be vexing in application.

VII. Account, shortfall and debt: A consistent practice

84 It appears that the duty to account was first developed in the early 1200s under medieval common law[185] as part of English feudal law.[186] The medieval paradigm accounting relationship was that between a manorial lord and his bailiff, forming part of the personal bond of fealty between them.[187] Under this relationship, manorial lords granted manors to bailiffs to look after the land on their behalf, and the bailiffs were accountable for rents and profits made less expenses.[188] This was, as is apparent, an early prototype of stewardship.

185 Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 at para 5; A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section II, Sub-Section III.
186 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 976.
187 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 976.
188 Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 at para 5.

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85 The mechanism of accounting was developed to address problems of sub-standard stewardship.[189] The bailiff was expected to run the business of land ownership honestly and actively – his account of his stewardship could therefore be surcharged for rent he failed to collect or crops that he failed to raise. More pertinent to our discussion, his account could also be falsified – meaning that wrongful disbursements were cancelled and missing assets had to be restored.[190] The combination of these surcharges and falsifications therefore maintained the assets of the "farm" committed to the bailiff's stewardship at the correct level.[191] The shortfall to be restored was recovered by an action in debt.[192]

86 The procedure for obtaining a substantive remedy under medieval common law was however quite cumbersome. The claimant had to begin with an action for the defendant to account[193] that was enforced by imprisoning the defendant until he gave that account.[194] The account was given to auditors[195] who did not have powers to resolve disputes over surcharge and falsification. Those disputes had to be referred back to court.[196] The final balance on the account then gave rise to a debt – the account itself was the source of liability.[197] The claimant then had to commence a second action in debt to recover the amount owing.[198] The procedural inefficiencies eventually led to a transition from accounting at common law to accounting in equity before the Chancery courts when the Chancery courts began to accept bills of account based on obligations owed at common law.[199]

87 It is important at this stage to explain the medieval action in debt. That requires a short summary of a system of enforcing promises which had grown up around an action known as the action of assumpsit

189 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 977.
190 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 977.
191 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 977. The language of today's trust fund derives from "farm" or "*fundus*" in Latin.
192 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section II, Sub-Section III(g).
193 Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 at para 6.
194 Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 at para 6.
195 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section II, Sub-Section III(g).
196 Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 at para 6.
197 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section II, Sub-Section III(g).
198 Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 at para 6.
199 Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 at para 7.

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because it differs markedly from the modern law of contract.[200] Medieval common law drew a distinction between actions in covenant, which were claims for unliquidated damages resulting from breaches of promises, and actions in debt. The action in covenant could only be used in the case of formal agreements under seal.[201] The action in debt, on the other hand, could be used both for formal debts called a "bond" or "obligation",[202] and debts on informal transactions called "contracts".[203] Bonds were often used to enforce informal promises through a complex system of formal bonds defeasible on performance of some other promise.[204] The action in debt to recover the shortfall arising from an account is one such "contract".[205] Others include a seller's action for the price of goods sold[206] and arrears of rent due on a lease for years.[207]

88 It is also important to appreciate the nature of this debt that arose on an account under medieval common law. Medieval common law did not have a neat division of the concepts of property and obligation that we have today.[208] The result is that a debt as conceived by medieval lawyers was always something more than a mere promise. It had certain characteristics that modern lawyers would recognise as proprietary.

89 The medieval action in debt was conceptually based on the defendant holding on to a thing, being fungible money, which in some sense belonged to the claimant.[209] This is seen in the early forms for an action in debt, with medieval common law being a formulaic system where a claim's validity depended on whether the complaint could fit within a recognised form. For instance, when Glanvill wrote on the new writ procedure sometime in the late 1180s, his forms did not differentiate

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200 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section I.
201 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section I.
202 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section II.
203 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section III.
204 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section II.
205 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section III(g).
206 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section III(d)(i).
207 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section III(e).
208 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 976.
209 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section II.

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between writs of money debts and writs of detinue claiming chattels.[210] To his mind, the claim in detinue was a claim for a chattel debt. Further, even when medieval lawyers drew distinctions between debt and detinue, the point of difference was that the coins claimed in debt were fungible goods whereas the goods claimed in detinue were specific. A debt, as medieval lawyers understood it, "was originally conceived of, not as a contract, in the modern sense, that is a promise, but as a grant".[211]

90 Further, being a "petitory" claim, *ie*, a claim based on a demand or *petit* for what is due, an action in debt was procedurally distinct from a claim based on a complaint or *queritur* that the claimant has been the victim of some wrong.[212] In other words, from the beginning, an action in debt (arising at the end of the accounting process) was a claim for what was granted and therefore belonged to the claimant and not for compensation for loss resulting from a broken promise to do anything. The vice, if there needed to be one, was in the withholding of the money from its rightful owner.[213]

91 Chronologically, with this medieval common law background came the Magna Carta of 1215 and the Statute of Marlborough of 1267 which codified accounting duties owed by guardians to infants over estates.[214] The ecclesiastical courts also enforced accounting duties owed by executors of estates to the beneficiaries of those estates during that time.[215]

92 Thus, by the time the Chancery courts came to take accounts in equity for both common law and equitable duties to account, there was a rich practice to draw from.[216] Equity's acknowledgment that what was payable at the end of the accounting process is an equitable debt akin to

210 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section II, Sub-Section I.

211 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section II, Sub-Section I, citing James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge University Press, 1913) at p 150.

212 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section II, Sub-Section I.

213 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1987) Part I, Section II, Sub Section I.

214 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 979.

215 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 979.

216 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 980.

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a common law debt[217] was in fact no analogy at all, much less a flawed analogy.[218]

93 The shortfall that needs to be restored was from its inception a debt at common law. The only "analogy" at play is of equity with the common law – that the shortfall that becomes a debt is now enforced by an order to restore *in specie* or with money's worth. Debt by any other name is still a debt, just like how arrears of rent have been recoverable as a debt from medieval times to today.[219] The direct enforcement of such shortfalls as a debt was further maintained even after the ascendancy of the action in assumpsit with the distinction between *indebitatus assumpsit* and *special assumpsit*.[220]

94 In alignment with its consistent character as a debt, the obligation is therefore directly enforced and is not concerned with compensation for loss, as is the case with contractual debts.[221]

95 Thus, from the time there have been accounting duties, shortfalls arising from the accounting process have *always* been directly enforced as debt obligations.

VIII. Equity's interest in full performance of stewardship duties

96 As seen in the previous section, both duties to account and shortfalls arising out of the account rendered have been directly enforced in England (with the latter as a debt) for as long as there have been accounting relationships until *Target v Redferns*, where the orthodox approach was displaced by the causation approach without its merits being so much as mentioned.

97 Yet, the interests protected by equity's direct enforcement of the stewardship duty differ in fundamental nature[222] from the interests

217 *McGregor on Damages* (James Edelman ed) (Sweet & Maxwell, 21st Ed, 2021) ch 1, at para 1-021.
218 *Cf*, Sarah Worthington, "Four Questions for Fiduciaries" (2018) 32(1) Tru L I 22 at 41.
219 *Jervis v Harris* [1996] Ch 195.
220 Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) LMCLQ 119 at 126.
221 *McGregor on Damages* (James Edelman ed) (Sweet & Maxwell, 21st Ed, 2021) ch 1, at para 1-105.
222 Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 402.

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protected by the law of contract or the law of torts,[223] and not merely due to an accident of legal history. As a result, the primary means of addressing any failure to perform is through direct enforcement, rather than through compensation of loss arising from a wrong.

98 The interest protected by the stewardship duty has been described by commentators as a performance interest – an interest in ensuring that the stewardship duty is always fully performed which permeates the field of trust law:

(a) From its creation, an express trust must have certainty of subject matter and the certainty of objects in order to be substantively valid because the court itself may be called upon to administer the trust *in extremis*, and the court must be able to determine what needs to be done from terms of the trust.[224]

(b) In the course of the trustees' administration of the trust, even before any allegation that there is a failure of the stewardship duty, the trustees can apply to court for a determination of the legality of a proposed transaction.[225]

(c) The trustees may even surrender their discretion to the court,[226] leaving it to the court to decide what transaction should be entered into.

(d) In more familiar situations, after a transaction has been entered into, trustees can apply to court for approval of the transaction. In the same vein, that propriety can be challenged by the beneficiaries.[227]

(e) In rarer circumstances, and in part a throwback to accounting in the medieval era, the beneficiaries have a right to seek an official audit of the trustees' accounts by the Public Trustee.[228]

223 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 686–687, *per* Tipping J, cited in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [59], *per* Lord Toulson.

224 *Morice v Bishop of Durham* (1805) 10 Ves Jr 522 at 539–540, cited in Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 403 and 410–411.

225 Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 405.

226 Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 405.

227 Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 405.

228 Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 408.

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(f) The court has power to remove and replace trustees[229] as a common remedy where trustees are in default.[230]

(g) Finally, as alluded to earlier, the court can take over the administration of the trust entirely.

99 Thus, the court's powers throughout the lifetime of a trust are designed to ensure that the trust is actually performed in accordance with its terms.[231] Not only does equity treat as done what ought to have been done, it goes further to ensure that it is in fact done. The duty to account and the obligation to restore any shortfall is based on this same design feature – the restoration is substitutive performance of the trust in money terms.[232] None of the remedies, including that of account,[233] are concerned with whether the beneficiaries have suffered loss or with compensation thereof.

100 Equity's policy rationale for formulating this unique performance interest is rooted in the notion that the trustee has been entrusted with the trust property to deal with it *only* in accordance with the terms of the trust, and that entrustment is in such a manner that leaves the beneficiaries particularly vulnerable to any excess of authority by the trustee. That vulnerability exists regardless of whether the trust in question is a traditional or commercial trust. The issue is not one of bargaining power and what the terms of the trust are. It arises from the simple reality that the trustees hold legal title to the trust property and are able to deal with the property on that basis.

101 The different policy approaches and resulting suite of remedies puts pressure on the fiduciary to eschew efficient breach and instead serve the principal with loyalty.[234] In the context of the stewardship duty, it pressures the trustee to adhere strictly to the terms of the trust in a manner that does not apply to breach of contract situations.

229 Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 408.
230 Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 408.
231 Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 411.
232 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 975.
233 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 978.
234 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 975.

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102 Thus, there is a difference between the notion of the beneficiary being put in a position where the trust has been performed and the principle in *Robinson v Harman*[235] that the innocent party is to be put in the same position as where the contract breaker had performed the contract. Ho and Nolan frame this contrast as that between a full performance interest in the case of trusts in contrast with the mere protection from foreseeable financial consequences of non-performance.[236]

103 Where a seller agrees to sell goods to a buyer, contract law nevertheless allows that seller to enter into another contract to sell the same goods to a third party at a higher price. The unpaid seller would generally only be liable for the difference between the contract and market price of the goods at the time of delivery.[237] And if the market price has fallen by the time of delivery, the seller is not even liable at all.

104 On the other hand, where a trustee holds goods on trust for a beneficiary, the trustee is not entitled to act in breach of trust and sell the goods to a third party for his own benefit, pocketing the proceeds, only to restore the amount of goods after the price of the goods has fallen. He would be accountable for the initial sales proceeds at the election of the beneficiaries.

105 The differing remedial approach is fundamental to the functioning of trusts. The key feature of a trust is not just the conferral of discretions, but the very holding of property for the benefit of another. The holding of legal title gives the trustees the ability to deal with the property in a manner not in accordance with the terms of the trust and to the detriment of the beneficiaries. The different remedial structures based on the performance interest alter the incentives of trustees against exploiting such opportunities even where beneficiaries suffer reduced or no loss so that this power and further discretions can be conferred without beneficiaries (or the court) having to closely monitor operational decisions.[238]

106 Thus, contrary to what Professor Burrows suggested, there is indeed a strong policy rationale for treating remedies for breach of the stewardship duty differently.

235 (1848) 1 Ex 850 at 855.
236 Lusina Ho & Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 at 419–420.
237 Sale of Goods Act 1979 (2020 Rev Ed) s 51(3).
238 Joshua Getzler, "'As If' Accountability and Counterfactual Trust" (2011) 91(3) BULR 973 at 975.

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IX. Focus on terms of trust in drawing up account

107 Vindicating the performance interest through the mechanism of account and restoration also has the benefit of focusing the law's inquiry on what the terms of the trust authorise or require. This focus provides a lodestar in determining whether entries should be falsified or not, addressing a legitimate concern that there is a paucity of authority on the process of account and falsification, making the subject rather esoteric.[239]

108 Grounding the falsification analysis on what the trustee is (or remains) authorised to do explains how the account in *Target v Redferns* should have been ultimately drawn up.[240] The initial disbursement of £1.525m was indeed unauthorised and could be falsified. However, the beneficiaries had yet to discover the breach and did not call for an account at that time. The trustees subsequently took receipt of the required charges, which was something they remained authorised to do. The resulting entry in the accounts showing receipt of the charges therefore could not be falsified. Yet, the disbursement of the £1.525m remained the *quid pro quo* for the charges, and could no longer be falsified. Put another way, the clients could not object to the disbursement by which the authorised charges were obtained.[241] The correct account should therefore show a receipt of the charges and the disbursement, which it did. Compared to the account given, there was therefore no shortfall to be restored.

109 It also provides a principled basis for reaching the outcomes in *Youyang v Minter* and *Main v Giambrone* without resorting to the mental gymnastics of treating the underlying transactions as complete.

110 Again, the disbursement of funds was unauthorised because Minter had not received a bearer deposit certificate. It received another document which conferred no rights on the beneficiaries, something it was also not authorised to do. Thus, both the disbursement entry and the receipt entry could be falsified by the beneficiaries. While Minter likely remained authorised to receive the bearer deposit certificates, it never did. Therefore, the correct account would have shown both the disbursement and receipt entries disallowed, leaving the entire disbursed sum in the balance and resulting in a shortfall as compared with the rendered account.

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239 Lusina Ho, "Equitable Compensation on the Road to Damascus?" (2015) 131 LQR 213 at 216.

240 See para 31 above.

241 P J Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at 227.

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111 The falsified account in *Main v Giambrone* would equally have been drawn up on the basis that the disbursement of the deposits and the receipt of the non-conforming guarantees were both unauthorised and would be disallowed, leaving a balance with the deposits notionally still intact.

112 This approach also resolves the thorny hypothetical posed by Lusina Ho in 2016, where a trust deed directed the trustees to deposit trust funds in bank A, but the trustees deposited the funds in bank B which they judged as more secure, and both banks became insolvent and unable to repay any of their creditors.[242] The key to drawing up the account in this situation is the terms of the trust, where the settlor directs the trustees to deposit funds in bank A. Hence, the correct account would require both the falsification of the entry showing a deposit in bank B and an additional entry showing a deposit with bank A. Since bank A also became insolvent, the balance of the corrected account would also be zero, and there would be no shortfall.

113 The lesson to be learnt from *AIB v Redler*,[243] on the other hand, does not directly relate to focusing on the terms of the trust. Focusing on the terms of the trust alone would show that Redler was not authorised to disburse the funds in the manner that it did, nor was it authorised to take receipt of an equitable charge in favour of AIB. Yet, what the correct account should show is not the equitable charge but the second legal charge that AIB obtained for itself with the unauthorised disbursement as the *quid pro quo*. If anything, the account in AIB involves a retraction from the account in *Target v Redferns* because the issue was no longer about authority conferred on Redler by the terms of the trust to deal with trust property. It became one about AIB's own actions for its own benefit. Where those actions are built on an earlier unauthorised disbursement as *quid pro quo*, AIB can no longer seek to falsify the disbursement.

114 The stewardship duty is about dealing with trust property *only* in an authorised manner. The direct enforcement of that duty through the process of account and falsification should rightly focus on whether the trustees' dealings are authorised (or in rare cases, whether the trustees have acted as directed). Drawing up the corrected account in this manner provides a principled basis for reaching just outcomes.

115 The alternative is to draw unprincipled distinctions that are difficult to apply.

242 Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 at para 37.
243 See para 36 above.

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X. Unauthorised disposal, but underlying transaction complete

116 In order to explain why a client is entitled to restoration of an unauthorised disbursement of client moneys in some situations but not others, Lord Browne-Wilkinson introduced the concept of whether the underlying commercial transaction is complete as the dividing line.[244] However, the distinction is indefensible both in principle and in practice.

117 Lord Browne-Wilkinson's argument for this distinction relies on distinguishing bare trusts used for commercial purposes from traditional trusts.[245] In his Lordship's view, reconstitution was only required for traditional trusts because there was no one beneficiary entitled to the entire trust property, unlike trusts over client moneys.[246] Somehow, the distinction then means that the compensatory principle is not violated by an order for reconstitution for traditional trusts, preserving the alleged centrality of the principle.[247]

118 None of the above propositions can withstand scrutiny. First, the distinction between bare and traditional trusts is difficult to draw. The term "bare trust" itself continues to elude definition because the obligations of a trustee of that type continue to depend on the terms and context of the trust rather than its label[248] for all trusts, not just bare trusts. The distinction is therefore in principle unsatisfactory,[249] and forms a shaky foundation for a further distinction.

119 Second, the fact that the trust is used as part of a commercial transaction and thus for commercial purposes cannot make a difference. There is simply no reason to suppose that the outcome in a situation where trustees of a family settlement validly exercising a power of investment provide a loan to be secured by a mortgage, but (a) they lent on the basis of an overvaluation of the property; (b) the conveyancing solicitors they engaged disbursed the loan funds before obtaining the executed mortgage deeds; and (c) the solicitors later obtained the mortgaged deeds, that the outcome would be any different from that in *Target v Redferns*.[250] Similarly, if the solicitors never obtain the mortgage deeds, the outcome would be no different from *Youyang v Minter*.

244 *Target Holdings Ltd v Redferns* [1996] AC 421 at 436B.
245 *Target Holdings Ltd v Redferns* [1996] AC 421 at 436A–436B.
246 *Target Holdings Ltd v Redferns* [1996] AC 421 at 436E.
247 *Target Holdings Ltd v Redferns* [1996] AC 421 at 436C.
248 *Serious Fraud Office v Litigation Capital Limited* [2022] EWHC 3053 (Comm) at [26].
249 Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th Ed, 2020) ch 1, at para 1-028.
250 P J Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at 224.

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120 Third, the compensatory principle itself was imported into the analysis without a license as demonstrated in Part III.B. above.

121 Finally, the order for reconstitution at the end of the accounting process has never been necessarily one to re-open the trust account and replace the funds in that account, even after the trust has come to an end. The trustee's duty to account for his past stewardship continues even after the trust itself has come to an end. The shortfall thrown up by the account need not be restored into a re-opened trust account. That is just mechanics.[251] The account can and should be notionally restored, the beneficiaries' various entitlements worked out, and the shortfalls to each beneficiary can be paid directly to that beneficiary. The argument is a straw man.

122 Moreover, this distinction between complete and incomplete transactions leads to an awkward inconsistency in the law. Whether there has been a misapplication of trust property is determined on a strict approach to the terms of the trust. Thus, there was a breach in *Target v Redferns* even though the charges were subsequently obtained. At the same time, there is an odd leniency in the exception to escape liability when whether the transaction is complete or not falls to be determined.[252]

123 The distinction between complete and incomplete transactions is therefore an unprincipled creature birthed to address a problem created by an unprincipled approach.

124 The distinction is also uncertain in application. Contrast the cases of *Target v Redferns* and *AIB v Redler* with *Main v Giambrone* and *Knight v Haynes Duffell Kentish & Co*[253] ("*Knight v Haynes*").

125 In *AIB v Redler*, Lord Toulson considered the transaction there to have been completed when the funds were disbursed and a lender–borrower relationship created between the funder and the purchaser,[254] even though Redler never obtained the required first legal charge over the property. It must follow that the transaction in *Target v Redferns* was completed at the time of disbursement of funds to the borrower as well, even though the charges had not (yet) been obtained by Redferns.

251 Lord Millett, "*AIB v Redler*: Case Comment" (2018) 32(1) Tru LI 44 at 47.
252 Lusina Ho, "Equitable Compensation on the Road to Damascus?" (2015) 131 LQR 213 at 216.
253 [2003] EWCA Civ 223.
254 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [74].

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126 In *Main v Giambrone*, Giambrone disbursed the funds to the developers without first receiving the compliant guarantees. Applying the reasoning in *AIB v Redler*, the transaction should have been completed at the time of disbursement. Yet Jackson LJ, applying both *Target v Redferns* and *AIB v Redler*, reached the opposite conclusion. This his Lordship did by distinguishing Giambrone's role as one of merely receiving the compliant guarantees, *versus* Redferns' and Redler's duties to their lender clients in obtaining the requisite charges[255] so that Giambrone's duty could be recast as one of holding on to the funds indefinitely.[256] Yet, in the case of *AIB v Redler*, Redler, having not obtained the requisite charge, would equally have been under a duty to hold on to the funds indefinitely.

127 The claim in *Knight v Haynes* was for Haynes Duffell, Kentish & Co's ("HDK") professional negligence due to want of prosecution of an improper disbursement claim against Linnels leading to that claim being struck out. Whether the client suffered any loss depended on whether Linnels was liable to pay the client anything for the improper disbursement. What had happened was that Linnels had paid away client moneys before the conditions for disbursement and receipt of the assignment of a trademark, were met. However, the trade mark was actually worthless. Hence, even if Linnels had obtained the assignment, the client would have been in the same financial position at the end of the day. Applying *Target v Redferns*'s causation approach, Linnels would not be liable to pay any compensation to the client unless the transaction was incomplete. HDK's negligence would in turn have caused the client no loss either, and the negligence claim should have been struck out.

128 Applying Lord Toulson's reasoning in *AIB v Redler*, the transaction would be complete commercially upon disbursement of the trust funds and Linnels would not be liable for any loss. Nor would HDK's negligence have caused any loss. However, Aldous LJ in *Knight v Haynes* held that the transaction was not complete apparently because "[t]he breach was the payment"[257] even though that was his Lordship's first reason for rejecting HDK's arguments rather than his Lordship's second reason which was that the transaction was not complete.[258]

129 It is therefore difficult to shrug off the impression that the distinction between complete and incomplete transactions in practice has no principled basis, and the concept is moulded by the English courts to do what is perceived to be justice in each particular case.

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255 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [61].
256 *Main v Giambrone & Law* [2017] EWCA Civ 1193 at [62].
257 *Knight v Haynes Duffell Kentish & Co* [2003] EWCA Civ 223 at [39].
258 *Knight v Haynes Duffell Kentish & Co* [2003] EWCA Civ 223 at [38].

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130 Singapore law is therefore better off eschewing this unprincipled and uncertain distinction by retaining the orthodox approach.

XI. Conclusion

131 But-for causation rules developed in the law of contract reflect particular policy rationales. Those rationales should not be imported to the law of trusts without a consideration of whether those policy rationales are shared.[259] That requires a consideration of what the policy rationales for orthodox equitable remedies are. Unfortunately, this analysis was never carried out in *Target v Redferns* and *AIB v Redler*.

132 The close examination undertaken in this article reveals that:

(a) The orthodox approach, properly understood and applied, does not lead to harsh outcomes.

(b) The causation approach is based on subsuming enforcement of the stewardship duty within the indirect enforcement model of breach leading to compensation for loss caused without justification, and conflating stewardship and loyalty duties.

(c) There is, however, a longstanding practice of directly enforcing stewardship duties through the mechanism of accounting leading to shortfalls recovered as debts, which is itself based on a peculiar performance interest.

(d) The content of this performance interest flows from the terms of the trust which define what the trustee is authorised and/or required to do, which in turn inform the process of drawing up the falsified or "as if" accounts.

(e) There is therefore a special policy rationale for direct enforcement of the stewardship duty that allows accounts to be drawn up in a principled manner.

(f) The causation approach sweeps away nearly 800 years of precedent and practice based on principle without explaining why those principles or precedents no longer apply.

(g) Finally, the causation approach introduces its own inconsistencies and fine distinctions into the law.

259 In other words, an import license is required: P J Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at 215.

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133 It is therefore suggested that the orthodox approach ought to be retained in Singapore law because it achieves fair outcomes in a principled manner and avoids conflating different principles or drawing fine distinctions.

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