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Case Note

RECASTING *BRICKENDEN*

Sim Poh Ping v Winsta Holding Pte Ltd **[2020] 1 SLR 1199**

In an admirably comprehensive judgment, the Court of Appeal of Singapore in *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 has definitively recast the causation test for equitable compensation for non-custodial breaches of fiduciary duties – the burden is on the errant fiduciary to rebut the presumption that loss would not have been suffered but for his breach – in an apparent attempt to soften the perceived hard edges of the Privy Council's judgment in *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 ("*Brickenden*"). It will be argued, however, that had the court confronted the more fundamental issue of principle, namely whether fiduciary duties are *truly* proscriptive in Singapore, and accepted the orthodox position that they are, it would have appreciated that the failure to disclose is not a breach of fiduciary duty and the approach in *Brickenden* is in fact entirely consistent with principle and policy.

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I. Introduction

1 In an admirably comprehensive but somewhat protracted judgment, the Court of Appeal of Singapore in *Sim Poh Ping v Winsta Holding Pte Ltd*[1] had the opportunity to definitively address the tangled area of equitable compensation for non-custodial breaches of fiduciary duty, particularly the interpretation of the Privy Council's judgment in *Brickenden v London Loan & Savings Co*[2] ("*Brickenden*"). The complexity of this area of law is compounded by the fact that every single major common law jurisdiction has diverged in one way or another.

1 [2020] 1 SLR 1199. See also Jonathan Lee, "Equitable Compensation and *Brickenden*: Fiduciary Loyalty and Causation" *Trust & Trustees* (20 October 2020).
2 [1934] 3 DLR 465.

2 This note seeks to further disentangle some of the issues in this area in light of the Court of Appeal's decision. It will start by briefly outlining the factual background of the case.[3] This will be followed by a section illustrating how the nature of fiduciary duties is inextricably linked to the rules of causation.[4] Having clarified the interrelationship between the two, it will become apparent that *Brickenden* has not in fact created any exceptional causation rule. Rather, the language of the decision has obscured the fact that it was simply a matter of applying the correct counterfactual.[5] The note will then conclude by addressing the justifications put forward by the Court of Appeal in recasting *Brickenden* as placing the burden on the fiduciary to rebut a presumption that the loss would not have been sustained by the principal but for his breach.[6]

II. Factual background

3 The case concerns the familiar fact pattern of diversion of corporate opportunities by company directors. The group of companies ("the Winsta Group") is in the hospitality industry, running hostel and serviced apartment businesses. The "chief antagonists" are a trio of directors, who are all members of the Sim family ("the Sims"), consisting of the father, Sim Poh Ping, and the daughters, Lynn Sim and Joyce Sim. The allegations were that they had breached their fiduciary duties by diverting opportunities away from the Winsta Group to their own corporate vehicles or by entering into interested party transactions between the Winsta Group and these corporate vehicles ("the Corporate Defendants"). There were also claims against three other individuals who were said to have dishonestly assisted the Sims' breaches.[7]

4 The judge in *Winsta Holding Pte Ltd v Sim Poh Ping*[8] found that the Sims had committed a large number of breaches of fiduciary duties against the Winsta Group. Although liability was established, the judge determined that the burden fell on the Winsta companies to establish but-for causation, and rejected the *Brickenden* approach, which, in his view, places the burden on the wrongdoing fiduciaries to prove that their principals would have suffered the loss in any event. The Winsta Group faced great difficulties in proving but-for causation and had largely failed in their claims.[9] Appeals and cross-appeals concerning interconnected

3 See paras 3–5 below.
4 See paras 6–20 below.
5 See paras 21–24 below.
6 See paras 25–32 below.
7 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [6].
8 [2018] SGHC 239.
9 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [7].

questions of whether fiduciary duties have in fact been breached, the principles governing causation as well as quantum were brought.[10] As the substance of the court's judgment essentially concerns the first two issues, this note will likewise focus on the same.

5 In short, the Court of Appeal disagreed with the judge's rejection of the *Brickenden* approach. It held that whilst the principal bears the legal burden of establishing its claim, the legal burden of proof of showing that the loss would have been sustained by the principal even if the fiduciary had not breached his or her fiduciary duty falls on the fiduciary. In other words, the burden lies on the fiduciary to rebut the rebuttable presumption that the loss would not have been sustained by the principal had the fiduciary not breached his or her fiduciary duty.[11] Applying these principles to the facts, the court found that the Winsta Group would have suffered the pre-liquidation losses even if the Sims had not breached their duties,[12] but awarded equitable compensation for some of the post-liquidation losses.[13]

III. Nature of fiduciary duties and causation

6 Before addressing the substantive issue of causation, the court called for a careful distinction between the various types of equitable duties, and a more disciplined usage of the term "equitable compensation": it should only be used as referring to reparative remedy sought for non-custodial breaches of fiduciary duties.[14] This is to be welcomed, especially in light of the often cavalier attitude displayed by lawyers in pleading "equitable compensation" in their claims.

7 As for the "legally complex" question of the governing principles of equitable compensation for non-custodial breaches,[15] the court began its analysis by identifying three potential approaches to causation.[16] The first is inspired by *Brickenden*, which is said to stand for the proposition that causation is not relevant once a breach of fiduciary duty has been established. Instead, so long as the fiduciary's breach of duty was material to the loss, that is sufficient ("Approach 1").[17] The second is that the plaintiff must always establish but-for causation, which represents the current

10 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [57].
11 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [240] and [254].
12 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [259] and [266].
13 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [275], [279] and [286].
14 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [123]–[126].
15 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [10].
16 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [131].
17 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [84].

approach in the UK and possibly Australia ("Approach 2"). The third is a hybrid approach, which places the burden of disproving causation on the defaulting fiduciary, as adopted in Canada, New Zealand and Hong Kong ("Approach 3"). The court then embarked on a comprehensive and scholarly multi-jurisdictional review of the relevant authorities and academic commentaries.[18]

8 Impressive as it is, a logically prior question to all this discussion of causation should have been the identification of the relevant wrong or breach. All compensatory remedies seek to answer the question of what the plaintiff's position would have been had the wrong or breach not occurred. It necessarily calls for a counterfactual analysis. Equitable compensation is no exception, as the court itself recognised – it seeks to make good or "repair" the loss that the principal has suffered by reason of the breach of fiduciary duty.[19] It is therefore of central importance that the breach of fiduciary duty, which necessarily depends on the nature of fiduciary duty, is correctly and firstly identified, as that would dictate the counterfactual to be applied when assessing loss. The court, however, did not spill much ink on this issue or give it much consideration, as demonstrated by its somewhat unorthodox views on the nature of fiduciary duties.

9 The court accepted the trite proposition that the no-profit and no-conflict rules are core fiduciary duties, which it recognised as being proscriptive.[20] In so far as the no-conflict rule is concerned, the court stated *obiter* that it extends to a conflict between a third party and the principal's interests. As a result, on this alternative basis, the court regarded Sim Poh Ping as having breached the no-conflict rule by preferring the interests of the Corporate Defendants when he came to know of his daughters' actions but took no action to stop them, even though there was no evidence showing that Sim "personally had any interests in the Corporate Defendants to which opportunities had been diverted".[21] Had the court stopped here, it would have been clear that fiduciary duties are proscriptive in nature.

10 However, the court went on to say that the *duty to act in good faith* is also a core fiduciary duty,[22] citing Millett LJ's observations in *Bristol and West Building Society v Mothew*[23] ("*Mothew*") in support. Whilst the court did not elaborate further, this tends to suggest that a fiduciary

18 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [132]–[237].
19 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [125].
20 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [253].
21 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [65]–[68].
22 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [253].
23 [1998] Ch 1 at 18A–18C.

duty can in certain circumstances be prescriptive in that the fiduciary is to *positively* act in good faith *vis-à-vis* the principal. Nevertheless, it is doubtful, to say the least, whether Millett LJ had intended those remarks to be read as giving rise to a free-standing and actionable fiduciary duty as opposed to an overarching guiding principle (or what the court calls the "foundation of the fiduciary relationship").[24]

11 This is because fiduciary duties have traditionally and generally been understood as fundamentally proscriptive in nature – it tells the fiduciary what he must not do. It does not tell him what he ought to do.[25] Indeed, contrary to what appears in the report, the judgment of *Attorney General v Blake*[26] ("*Blake*") was in fact jointly written by Lord Woolf and Millett LJ, as revealed in the latter's memoir.[27] As such, Millett LJ must have been acutely aware of what he has written and intended to convey in *Mothew* at the time of his judgment in *Blake*. The two judgments ought to be read consistently. Moreover, it is elementary that not all duties owed by a fiduciary are necessarily fiduciary in nature. Duties of good faith are not peculiar to fiduciaries and ought for that reason to be classified in some manner other than as a fiduciary duty.[28] The court's recognition of a fiduciary duty of good faith seems at odds with these established principles.

12 In addition, a free-standing fiduciary duty of "good faith" leads to at least three problems. The first and main problem lies in its open-endedness. What are the justifications for such an expansion? How are the boundaries of "good faith" to be delineated in the fiduciary context, as opposed to the non-fiduciary context? How does "good faith" interact with the overarching principle of "single-minded loyalty"? These are fundamental questions, yet none has been directly addressed by the court. A proscriptive fiduciary doctrine, on the other hand, provides certainty and is well entrenched – as long as the fiduciary steers clear of conflict and secret profit, in the eyes of the law, he has discharged his duty of single-minded or undivided loyalty, and has acted in the interest of his principal to the exclusion of his own.

13 Relatedly, the open-endedness of "good faith" means that a fiduciary may effectively end up undertaking a far more onerous obligation than envisaged or agreed upon initially. In that sense, it appears

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24 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [253].

25 *Snell's Equity* (John McGhee QC & Steven Elliot QC gen eds) (Sweet & Maxwell, 34th Ed, 2020) at para 7-011; *Attorney General v Blake* [1998] Ch 439 at 455.

26 [1998] Ch 439.

27 Peter Millett, *As in Memory Long* (WSH Publishing, 2015) at p 159.

28 *Snell's Equity* (John McGhee QC & Steven Elliot QC gen eds) (Sweet & Maxwell, 34th Ed, 2020) at para 7-010.

inconsistent with the court's earlier recognition that fiduciary duties are manifestations of *voluntary* undertakings.[29]

14 The third problem is that it gives rise to multiple possible counterfactuals without any guidance on how one is to choose between them. For instance, on these facts, the counterfactual may be the position the Winsta Group would have been in had it obtained the diverted corporate opportunities.[30] Alternatively, it may be where the Winsta Group would have been had the Sims refrained from diverting those corporate opportunities. Further alternatively, it may simply be where the Winsta Group would have been had the Sims disclosed their interest. The diverse range of options allows ample room for manipulation, which risks injustice.

15 Therefore, the better view is that despite the widely held belief that non-disclosure of material facts by a fiduciary is itself a breach of fiduciary duty, the non-disclosure is in truth a red herring. Fiduciaries are not generally obliged to make full disclosure and seek consent. The failure to do something that one is not obliged to do does not amount to a civil wrong. Rather, the fiduciary's fundamental obligation is to *desist* from acting in a way that involves a conflict between duty and interest – disclosure and consent merely provide a mechanism by which the fiduciary can avoid liability if he wishes to act in such a situation.[31]

16 Notwithstanding the above, there have been a number of Singapore decisions which tend to suggest that fiduciary duties may in some cases be prescriptive. The collective effect of those decisions is that although there is no free-standing duty of disclosure, a failure to disclose relevant information in certain circumstances could amount to breach of fiduciary duty since it is founded on the duty of loyalty. Nevertheless, closer scrutiny of these decisions would have revealed that, first, none of them has considered the question of counterfactuals in depth; and secondly, they have all been careful in stating that there is no free-standing fiduciary duty of disclosure. This eschews the possibility of a prescriptive fiduciary duty to disclose.

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29 *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [194]; see also James Edelman, "When Do Fiduciary Duties Arise?" (2010) 126 LQR 302; *Alberta v Elder Advocates of Alberta Society* [2011] 2 SCR 261 at [30]–[32].

30 *Eg*, those mentioned in *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [29]–[31].

31 See, *eg*, *Maguire v Makaronis* (1997) 188 CLR 449 at 467; J D Heydon, Mark Leeming & Peter Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th Ed, 2015) at para 23-460.

17 The first of these decisions is *Griffin Travel Pte Ltd v Nagender Rao Chilkuri*,[32] in which Chan Seng Onn J adopted Lewison LJ's reasoning in *Jeremy Michael Ranson v Customer Systems plc*[33] (itself relying on Arden LJ's judgment in *Item Software v Fassihi*[34] ("*Item Software*")) and concluded that the while the directors did not owe free-standing duties of disclosure to the plaintiff, it is very different from saying that a failure to disclose is never a breach of fiduciary duty. Rather, it is founded on the director's duty "to act in what he in good faith considers to be the best interests of his company".[35]

18 However, these English cases concerning a director's duty to disclose hardly support the recognition of a prescriptive fiduciary duty. *Item Software* itself concerned a director's failure to disclose the fact that he had set up his own company in competition with that of which he is a director. The non-disclosure clearly relates to that earlier conflict of duty and interest. In other words, the wrong had already taken place when he began setting up his own company. This is consistent with Arden LJ's conclusion that a fiduciary does not owe a separate and independent duty to disclose his own misconduct.[36] It clearly does not follow that fiduciary duties are therefore prescriptive because it begs the question of whether the duty to disclose should be classified as a fiduciary duty and thus whether the non-disclosure should be treated as the reference point for applying the counterfactual in the first place. In so far as this question is concerned, the English cases are unequivocal in stating that it is not and should not.

19 The same may be said about the subsequent Singapore cases. For example, in *Clearlab SG Pte Ltd v Ting Chong Chai*,[37] the breach related to the failure to disclose the existence of the competitor that the defendant wrongfully assisted by using Clearlab SG Pte Ltd's confidential information.[38] The wrong had already occurred when he had wrongfully assisted the competitor, thereby placing himself in a position of conflict. More recently, in *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd*,[39] Wong's failure to disclose to the company, Centre for Laser and Aesthetic Medicine Pte Ltd ("CLAM"), that her husband, Goh, was diverting patients to his own clinic was contingent upon her placing herself in conflict in the first place, that is, in not

32 [2014] SGHC 205.
33 [2012] EWCA Civ 841 at [52].
34 [2004] EWCA Civ 1244 at [41].
35 *Griffin Travel Pte Ltd v Nagender Rao Chilkuri* [2014] SGHC 205 at [51].
36 *Item Software v Fassihi* [2004] EWCA Civ 1244 at [41].
37 [2015] 1 SLR 163.
38 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [281].
39 [2018] 1 SLR 180.

stopping Goh from diverting patients from CLAM.[40] The relevant breach was therefore not, as the court accepted upon the parties' concession, her failure to report Goh's actions to CLAM.[41]

20 If the failure to disclose only amounts to a breach of fiduciary duty because it is an expression of or is founded on a breach of duty of loyalty, the former is necessarily dependent on the existence of the latter. In other words, the court is not really concerned with what would have happened had disclosure been made, but what would have happened had the fiduciary not placed himself in a position which would have given rise to the need to disclose. Indeed, this echoes the view taken by Liu in his case comment of the High Court's judgment in *Winsta Holding*,[42] itself building on Conaglen's illuminating analysis.[43] However, Liu went further in suggesting that the counterfactual of what would have happened if the fiduciary had not acted is already the default and there are no compelling reasons to depart from that default position. For the reasons set out above,[44] this note respectfully agrees with the argument.

IV. The myth of *Brickenden*

21 If, according to the orthodox position, the fiduciary doctrine is proscriptive, the wrong or the breach committed by the fiduciary would be the fact that he has placed himself in a position of conflict or has taken a secret profit. The relevant counterfactual seeks to place the principal in the position he would have been in had the fiduciary not put himself in conflict or taken a secret profit. It is not concerned with what the principal's position would have been had disclosure been made.

22 Bearing the above in mind, *Brickenden* can now be addressed. The factual background of *Brickenden* is relatively complicated but for present purposes, the court's summary will suffice, which stated that it concerned the defendant solicitor's failure to disclose his own conflicting interest in a transaction.[45] From the way the court proceeded to analyse the case, it must have regarded the non-disclosure to be the relevant

40 *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd* [2018] 1 SLR 180 at [75].

41 *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd* [2018] 1 SLR 180 at [76].

42 Nicholas Liu Sheng, "Equitable Compensation and the *Brickenden* 'Rule' after *Winsta Holding Pte Ltd and another v Sim Poh Ping and others*" *Singapore Law Gazette* (April 2019).

43 Matthew Conaglen, "*Brickenden*" in *Equitable Compensation and Disgorgement of Profits* (Simone Degeling & Jason Varuhas eds) (Hart Publishing, 2017).

44 See paras 11–19 above.

45 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [132].

breach of fiduciary duty. However, from the court's own summary, it is apparent that the real mischief of the solicitor's conduct was not his non-disclosure, but the fact that he placed himself in a position of conflict in the first place – he sought to gain personally from the finance company granting the loan to the Biggs couple. This, it is argued, was the only relevant breach of fiduciary duty.

23 In other words, *Brickenden* in reality stands for two much more narrow propositions. First, non-disclosure of material facts by a fiduciary may in certain circumstances be an extension or "offshoot" of a prior breach of fiduciary duty, for example, an existing conflict of interest. Secondly, the court is precluded from considering what the principal would have done had the fiduciary disclosed those facts. However, and importantly, it does not then follow that courts *should* treat the non-disclosure as the reference point for the applicable counterfactual. The relevant counterfactual remains what would have happened had the fiduciary not placed himself in conflict in the first place, and nothing in Lord Thankerton's speech indicated otherwise.

24 This then explains why it does not matter whether the disclosure of a material fact would have made a difference to the principal's decision to proceed because the relevant breach is the conflict, whereas the non-disclosure is merely an extension or expression of that prior instance of disloyalty. Lord Thankerton, having had the benefit of submissions from counsel and the collective wisdom of his four other distinguished brethren, could not have intended to contradict himself by firstly identifying the relevant breach as the non-disclosure, then disregarding the counterfactual of what would have happened had there been disclosure. Read in this way, *Brickenden* is simply *not* authority for the sweeping proposition that causation is irrelevant once a breach of fiduciary duty has been established.

V. Rebuttable presumption of causation

25 Notwithstanding the overly broad interpretation of *Brickenden*, the court's ultimate conclusion on the causation principles brings Singapore law in line with the positions in Canada, New Zealand and Hong Kong. The question is whether this position is justifiable.

26 The court started by rejecting the two extreme positions. Approach 1 was rejected on the basis that it denudes the requirement of causation of any real substance, and exposes the wrongdoing fiduciary to too great a degree of liability to compensate the principal. It is overly generous to the principal and (potentially at least) overly punishes

the wrongdoing fiduciary.[46] Approach 2, on the other hand, is said to have failed to give sufficient regard to the unique position occupied by fiduciaries and the need to ensure that fiduciaries conduct themselves "at a level higher than that trodden by the crowd".[47]

27 Instead, the court adopted Approach 3, which is said to balance the need for a causation test on the one hand, with the recognition of the stringent duties placed on fiduciaries and the need for deterrence on the other. Under this approach, the principal bears the legal burden of establishing its claim, but the legal burden of proof of showing that the loss would have been sustained by the principal even if the fiduciary had not breached his or her fiduciary duty falls on the fiduciary. It is for the fiduciary to rebut the rebuttable presumption that the loss would not have been sustained by the principal had the fiduciary not breached his or her fiduciary duty.[48]

28 Various reasons were provided in support, the first being Singapore authorities.[49] Nevertheless, as the highest appellate court in the jurisdiction, the assistance which may be rendered by authorities of lower courts is limited. More fundamental and principled reasons are needed. The court then sought support in policy considerations. It said that Approach 3 strikes the appropriate balance between the interests of the principal and the interests of the fiduciary by ensuring fiduciaries do not abuse the power given to them, and also ensuring that fiduciaries are not tempted or distracted from acting in the best interests of their principals.[50] Whilst this may provide a reason for having more stringent rules than breach of contract or tort, it does not explain why one should not go further and have that "narrow escape route" cut off, especially when the core no-conflict rule is said to be fundamentally concerned with securing the *utmost protection* of the beneficiary.[51] Put simply, it provides a reason for the rules to be harsher, but does not elaborate on *how* harsh.

29 Finally, the court regards Approach 3 as being in accord with practicality since the fiduciary is usually in a better position to know how the loss was caused (or not caused).[52] Again, this may well be true but in civil cases, where the standard of proof is merely that of a balance of probabilities, a shift in legal burden is unlikely to make any difference

46 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [238].
47 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [239].
48 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [240].
49 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [241]–[243].
50 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [244]–[247].
51 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [71].
52 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [248].

in practice. No conscientious lawyer would advise a principal to simply sit back and leave it to the errant fiduciary to disprove causation; he or she would rather advise him to dig out any relevant evidence which strengthens the causal connection between the loss and the fiduciary's breach.

30 The court also addressed the three limiting principles to the *Brickenden* rule which the High Court has developed in the past, namely that *Brickenden* only applies to "(a) a fiduciary who is in one of the well-established categories of fiduciary relationships; (b) who commits a culpable breach; and (c) who breaches an obligation which stands at the very core of the fiduciary relationship" [emphasis in original omitted].[53] In short, requirements (a) and (b) were both rejected as being inconsistent with the burden-shifting approach, whereas (c) was expanded to include the duty to act in good faith, which had already been addressed above.

VI. Conclusion

31 The court has hoped that its judgment will throw some light on this muddled area of law and bring about some much-needed clarity.[54] It has certainly succeeded in both laying down authoritative principles on causation and contributing substantially to an ongoing inter-jurisdictional dialogue on the issue. The extensive references to academic commentaries are particularly encouraging; as Lord Goff has poignantly described, the legal academic and the judge are on a "shared search for principle".[55]

32 Nonetheless, despite the extensive citations, the judgment would have benefited from a more nuanced and focused analysis of the relationship between the nature of fiduciary duties and rules of causation. Recasting *Brickenden* as giving rise to a rebuttable presumption, as the court has done, in order to reflect policy considerations and keep pace with the rest of the common law world is one solution. But a more sustainable and defensible solution lies perhaps in a revisit to first principles. Indeed, the authors of *Property and Trust Law in Singapore*[56] have called for the court to clarify whether fiduciary duties are proscriptive or prescriptive

53 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [249].
54 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [130].
55 Lord Goff, "The Search for Principle" in *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (William Swadling & Gareth Jones eds) (Oxford University Press, 2000) at p 329.
56 Alvin See, Yip Man & Goh Yihan, *Property and Trust Law in Singapore* (Kluwer Law, 2018).

in Singapore.[57] The present case simply accentuates the problems flowing from this ambiguity. It is hoped that if another opportunity arises, the court will squarely address this important and foundational issue in rather more detail.

57 Alvin See, Yip Man & Goh Yihan, *Property and Trust Law in Singapore* (Kluwer Law, 2018) at para 1198.