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TEMPERING THE HARSH WINDS

Limiting the Remedy of an Account of Profits

An account of profits compels a fiduciary to disgorge unauthorised gains. While justified on the basis that no one should gain from their wrongdoing, the courts have acknowledged the harshness and inflexibility of this remedy. This article argues that the conflicting approaches adopted by the courts can be reconciled into a coherent framework by incorporating the common law two-stage framework of causation. It goes on to consider how this framework for causation can be operationalised in relation to an account of profits, so as to ensure that the remedy is applied in a manner that is both principled and just.

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I. Introduction

1 The equitable remedy of an account of profits compels a defaulting fiduciary to "disgorge unauthorised gains",[2] allowing the principal to "divest the fiduciary of the benefits he has obtained in breach of his duty".[3] While it is justified on the basis that "no one should be permitted to gain from his own wrongdoing",[4] the harshness and inflexibility of this profit-stripping remedy has been acknowledged by the courts, who have recognised that equity has historically been able to skilfully adapt remedies to meet the justice of the case, and that equity could thus operate to "[temper] the harsh wind to the shorn lamb".[5]

1 This author is thankful to Mathea Lim and Olive Lim for their capable assistance with an earlier version of this article, and to the anonymous reviewer for their helpful comments. This article is written in the author's personal capacity; all opinions expressed herein, errors and mistakes remain the author's alone.

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

3 Parker Hood, "What Is So Special About Being a Fiduciary" (2000) 4 Edinburgh L Rev 308 at 313.

4 *Murad v Al-Saraj* [2005] EWCA Civ 959 at [108].

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

2 However, it is not immediately clear how a fiduciary's liability to disgorge gains can be limited – the position at law has been described as "confusing and controversial … because no single explanation provides a principled answer to how a fiduciary may limit the extent of their liability".[6] Mitchell attributes this lack of certainty to the fact that while the rule against unauthorised gains has existed for several hundred years, it has been enforced far less often than the rules imposing compensatory liability for wrongdoing, and thus the rules determining an errant fiduciary's liability to disgorge gains are comparatively underdeveloped.[7] In this regard, this article argues that the seemingly conflicting approaches adopted by the courts can be reconciled and synthesised into a coherent analytical framework by incorporating the common law's two-stage framework of causation to govern the scope of an account of profits.

3 To this end, paras 7–18 consider the applicable principles of causation in respect of an account of profits. It summarises the existing position under Singapore law as laid out in *UVJ v UVH*,[8] considers alternative approaches and ultimately affirms the position of the Court of Appeal, which requires causation as an element in entitling an aggrieved principal to an account of profits.

4 Paras 19–49 address the issue of which party should bear the burden of showing causation, observing that this issue remains an open question in Singapore. It argues for the adoption of the burden-shifting approach espoused by the Court of Appeal in *Sim Poh Ping v Winsta Holding Pte Ltd*[9] ("*Winsta Holding*") in so far as such an approach is consistent with the rationale underlying an account of profits.

5 Thereafter, paras 50–82 advocate for the transplanting of the two-stage common law framework for causation to govern an account of profits. This framework operates in two distinct stages:

(a) Under the factual causation stage, the aggrieved principal must establish a breach of duty by the fiduciary and a loss sustained by the principal. A rebuttable presumption thereafter arises that the loss was caused by the fiduciary's breach of duty, shifting the burden to the fiduciary to rebut the presumption.

(b) Where factual causation is established, the second stage of legal causation empowers the courts to consider the extent to

6 Jesse Martino, "Limiting the Gain to Be Disgorged by Defaulting Fiduciaries: The (Ir)Relevance of Remoteness" (2023) 50 UW Austl L Rev 26 at 28.

7 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 328.

8 [2020] 2 SLR 336.

9 [2020] 1 SLR 1199.

which the legal responsibility for the principal's loss should be borne by the fiduciary, taking into account various principles including that of remoteness, good faith and unconscionability.

6 Finally, paras 83–87 conclude by affirming the importance of causation in limiting a fiduciary's liability to account for profits, and in ensuring that the remedy is applied in a manner that is both principled and just.

II. Position under Singapore law

7 The current position under Singapore law in relation to an account of profits is set out in *UVJ v UVH*.[10]

A. Facts in UVJ v UVH

8 *UVJ v UVH* centred around a dispute involving five siblings (two sisters and three brothers). The patriarch of the family passed away in 1997 and his estate was distributed in accordance with his will – each sibling received 10% and their mother received 50%. The brothers were appointed executors and trustees of the patriarch's will. When the mother passed away in 2015, the brothers were again named as executors, and the mother's estate was to be distributed among the siblings.

9 Part of the estates comprised shares in companies, of which the brothers were directors and shareholders in their own name. However, instead of distributing the shares in the companies to their sisters, the brothers used the estates' shares to approve their remuneration as directors, without the knowledge or consent of their sisters. The sisters subsequently brought a claim against the brothers, alleging that they had breached their fiduciary duties as executors of the estates. As part of these claims, the sisters sought an account of profits for their brothers' directors' remuneration. At first instance, the High Court held in favour of the claimant sisters and ordered the brothers to account for their profits from directors' remuneration and benefits-in-kind, totalling over $21m.[11]

B. Arguments and reasoning on appeal

10 The brothers appealed against these orders, arguing that causation was not established between their breaches of fiduciary duty and the profits they received, and asserting that their remuneration

10 [2020] 2 SLR 336.
11 *UVH v UVJ* [2020] 3 SLR 1329 at [47] and [50].

would have been the same even without the estates' shares. In reply, the sisters contended that it was not necessary to prove causation as the duty to account for unauthorised profits was a strict one.[12]

11 While the Court of Appeal upheld the High Court's finding that the brothers had breached their core fiduciary duties of loyalty and fidelity by intentionally failing to keep their sisters informed of their interests in the estates, the court ultimately allowed the brothers' appeal in relation to an account of profits. There, the Court of Appeal held that causation was a necessary element that had to be proven by an aggrieved principal:[13]

> … the profits sought to be disgorged via an account of profits *must be caused by the breaches of fiduciary duty*, whether this be that the trustee acted in conflict of interest or was guilty of some other breach. [emphasis added]

12 On application to the facts, the Court of Appeal found that causation had not been established, as the brothers were majority shareholders in the companies, and were entitled to use their shareholding to vote in the way they did. Thus, notwithstanding their breach of fiduciary duty, the brothers' (mis)use of the estates' shares did not make a difference to the passing of the impugned resolutions approving their remuneration as directors,[14] as the estates' shares were not instrumental in passing the resolutions for their remuneration.

C. Analysis

13 It is trite that a fiduciary's relationship with their principal is one that is built on the bedrock of a duty of loyalty from the former toward the latter. In Millett LJ's seminal judgment in *Bristol and West Building Society v Mothew*,[15] he observed that:

> The distinguishing obligation of a fiduciary is the obligation of loyalty … A fiduciary must act in good faith; *he must not make a profit out of his trust*; he must not place himself in a position where his duty and his interest may conflict … [emphasis added]

14 This passage crystallises the fundamental rules of fiduciary obligations, namely, the no-conflict and no-profit rules. While there exists substantial academic debate regarding the exact function of the

12 *UVJ v UVH* [2020] 2 SLR 336 at [76]–[77].
13 *UVJ v UVH* [2020] 2 SLR 336 at [98].
14 *UVJ v UVH* [2020] 2 SLR 336 at [108]–[110].
15 [1998] Ch 1.

fiduciary doctrine,[16] the Singapore courts have stated that the overarching principle is that "a man must not exploit the [fiduciary] relationship for his own benefit".[17] These rules recognise the relative vulnerability of the principal,[18] who is "at the mercy of the [fiduciary]",[19] and would likely lack the domain knowledge to effectively monitor the fiduciary. As Devonshire observes, the dynamics of a fiduciary's relationship to the principal is that the former usually enjoys a dominant position over the latter in terms of knowledge and information.[20] By virtue of the fiduciary's obligation of loyalty, they are held to a higher standard of conduct, and are liable to stronger consequences where they breach this standard.[21]

15 Where a fiduciary is deemed to have made an unauthorised profit, an account of profits operates to strip them of this profit, applying it towards the principal's benefit. This duty to account is triggered by the mere fact that an unauthorised profit has been earned, as this amounts to a breach of the no-profit rule.[22] It is crucial to recognise that an account of profits is not a punitive measure. Rather, it is a restitutionary measure which seeks to "remove the fruits of temptation",[23] and serves to protect the fiduciary relationship by disabling the fiduciary from keeping unauthorised gains for themselves,[24] thus deterring such misconduct.[25] As succinctly stated by Arden LJ in *Murad v Al-Saraj*[26] ("*Murad*"), "to provide an incentive to fiduciaries to resist the temptation to misconduct

16 Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 at 887.

17 *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [192].

18 James Edelman, "When Do Fiduciary Duties Arise?" (2010) 126 LQR 302 at 317.

19 *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41 at 97, *per* Mason J.

20 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 395.

21 Parker Hood, "What Is So Special About Being a Fiduciary" (2000) 4 Edinburgh L Rev 308 at 335.

22 Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 at 908.

23 Matthew Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121 LQR 452 at 463.

24 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 329. See also Irit Samet, "Guarding the Fiduciary's Conscience: A Justification of a Stringent Profit-Stripping Rule" (2008) 28(4) OJLS 763 at 767.

25 There have been criticisms of the deterrence rationale underlying an account of profits: see, *eg*, Craig Rotherham, "Deterrence as a Justification for Awarding Accounts of Profits" (2012) 32 OJLS 537. There are also different ways of characterising the remedy: see, *eg*, Lionel Smith, "Deterrence, Prophylaxis and Punishment in Fiduciary Obligations" (2013) 7 J Eq 87 at 99. However, given the limited remit of this article, these issues are regrettably not dealt with here.

26 [2005] EWCA Civ 959.

themselves, the law imposes exacting standards on fiduciaries and an extensive liability to account".[27]

16 Framed accordingly, the emphasis of an account of profits lies not in absolutely prohibiting a fiduciary from making a profit, but in protecting and affirming the relationship between a principal and a fiduciary. As Vann observes:[28]

> If the fiduciary makes full disclosure and obtains the principal's consent to what would otherwise be a breach, there is no disloyalty … The exception to the profits rule encourages trusting relationships, and allows for their continuance. *The fact that the fiduciary can make full disclosure and obtain consent after an unauthorised profit is made indicates the importance society places on enabling maintenance of such relationships.* [emphasis added]

17 Nevertheless, any such disclosure must be made *in fact*. Where a fiduciary has not in fact provided such disclosure and obtained the principal's consent, it is no defence for the fiduciary to claim that the principal would have authorised the impugned transaction had the fiduciary disclosed all material facts.[29] This rightly recognises that the wrong in such a situation stems not necessarily from the fiduciary's act of entering into the impugned transaction, but from the fiduciary's failure to uphold their duty of loyalty to the principal by properly disclosing this in the first instance.

18 Indeed, this is precisely why it has been noted that "[w]hat is critical, in a fiduciary relationship, is the undertaking by the fiduciary to prefer the interests of his principal to his own".[30] Seen in this light, the prohibition against unauthorised profits therefore represents merely a means to an end – namely, to uphold a primary facet of a fiduciary's relationship with their principal in so far as the former is expected to "[act] in his principal's interests by not acting against them"[31] – rather than an end in its own right. Given this rationale underlying the remedy of an account of profits, it is suggested that the operation of liability-

27 *Murad v Al-Saraj* [2005] EWCA Civ 959 at [74].

28 Vicki Vann, "Causation and Breach of Fiduciary Duty" [2006] Sing JLS 86 at 99. See also Parker Hood, "What Is So Special About Being a Fiduciary" (2000) 4 Edinburgh L Rev 308 at 311.

29 *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048 at [145]. The court's disregard of such hypothetical consent is also seen in *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134: see the analysis of this in Sirko Harder, "Is a Defaulting Fiduciary Exculpated by the Principal's Hypothetical Consent" (2008) 8 Oxford U Commw LJ 25 at 30.

30 Parker Hood, "What Is So Special About Being a Fiduciary" (2000) 4 Edinburgh L Rev 308 at 311.

31 Parker Hood, "What Is So Special About Being a Fiduciary" (2000) 4 Edinburgh L Rev 308 at 312.

control limits is not inconsistent with the fundamental objectives of this remedy.

III. Causation requirement and test for causation

19 To be clear, up until the issue of causation was clarified in *UVJ v UVH*, the authorities were far from unanimous on the extent to which principles of causation ought to operate within the context of an account of profits. There are in fact two key issues at play here: (a) whether the element causation should even be required; and (b) assuming some element of causation is required, the appropriate test for causation that should be adopted.

A. Requirement for causation

20 In relation to the first issue, there are various approaches towards this, including:

> (a) the harsh, causation-independent approach propounded by the court in *Murad*;[32]
>
> (b) the approach in *Industrial Development Consultants Ltd v Cooley*[33] *(as rationalised by the Court of Appeal in UVJ v UVH)*, where "some form of a causal element" must be found, but where "but for" causation is not strictly required;[34] and
>
> (c) the causation-dependent, proportionality-based approach propounded by the court in *Docker v Somes*,[35] where the court criticised the causation-independent disgorgement of profits as having "tendency to cripple the just power of [the] Court".[36]

21 This variety of conflicting, competing approaches was acknowledged by the court in *UVJ v UVH*, which ultimately held that causation was a necessary element that had to be proved.[37] With the benefit of hindsight, this must surely be correct, given that the element of causation is a critical component that allows the rationale underlying an account of profits to be upheld. To the extent that the decision in *Murad* is understood as a case which "would appear to support the proposition

32 *Murad v Al-Saraj* [2005] EWCA Civ 959 at [67].
33 [1972] 1 WLR 443.
34 *UVJ v UVH* [2020] 2 SLR 336 at [85].
35 (1834) 2 My & K 655 at 667–678.
36 *Docker v Somes* (1834) 2 My & K 655 at 667.
37 *UVJ v UVH* [2020] 2 SLR 336 at [98].

that causation is not necessary",[38] it is suggested that the English Court of Appeal there erred in their interpretation of *Regal (Hastings) Ltd v Gulliver*[39] ("*Regal Hastings*") and that case law does not in fact preclude a consideration of the element of causation.

22 In *Regal Hastings*, the House of Lords stated that:[40]

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on … such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff …

23 While the court in *Murad* suggested that it "may be appropriate for a higher court to revisit the rule on secret profits … to ensure that remedies are proportionate to the justice of the case",[41] the court ultimately held that the above statement of principle in *Regal Hastings* was binding authority supporting the proposition that an inquiry into causation was not necessary for an account of profits:[42]

> … it follows in my judgment from the Regal case that it is no defence for a fiduciary to say that he would have made the profit even if there had been no breach of fiduciary duty.

24 However, it has been noted that Lord Russell's judgment merely addressed whether the profit "would or should otherwise have gone to the *plaintiff*"[43] [emphasis added], whereas in quantifying a defendant's liability to account, the causal inquiry is directed towards the defendant's breach and the *defendant's* ensuing gain.[44] Lord Russell's statement of principle should therefore not be understood as supporting the proposition that causation is not required in determining if an account of profits is justified. Indeed, this discrepancy in Arden LJ's reasoning was noted by the Court of Appeal in *UVJ v UVH*, which iterated that "the reason why a beneficiary's loss is irrelevant is that an account of profits, as a gains-based remedy, is concerned with the gain of the fiduciary".[45]

38 *UVJ v UVH* [2020] 2 SLR 336 at [86].
39 [1967] 2 AC 134.
40 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 144, *per* Lord Russell.
41 *Murad v Al-Saraj* [2005] EWCA Civ 959 at [83].
42 *Murad v Al-Saraj* [2005] EWCA Civ 959 at [67], *per* Arden LJ. See also *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461 at [47], *per* Morritt LJ.
43 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 144, *per* Lord Russell.
44 Rebecca Lee, "Causation and Account of Profits for Breach of Fiduciary Duty" [2006] Sing JLS 488 at 493.
45 *UVJ v UVH* [2020] 2 SLR 336 at [89].

25 The reasoning in *Regal Hastings* thus neither explains nor supports the proposition that causation between a fiduciary's gain and his breach of duty is irrelevant, and correspondingly, the element of causation is not precluded by case law. Indeed, by virtue of its definition, an account of profits requires accountability, in that it is confined only to gains attributable to the breach.[46]

26 In the UK, the courts have eschewed the causation approach.[47] Instead, a fiduciary's liability to account, as a matter of English law, depends on the scope of the fiduciary's duty. Thus, "the link of nexus does not need to be of a causal character [and it would be] sufficient if the profit arose within the scope of a defaulting fiduciary's conduct in breach of duty".[48] Indeed, the English courts have continuously stressed that the element of causation is one which "neither principle nor the authorities require".[49] The decision in *UVJ v UVH* merely represents the latest salvo in what Lord Briggs describes as an international battle regarding the role of causation.[50] Nevertheless, the position under Singapore law is that causation is required, and it is suggested that such an approach has much to commend it.

27 Going back to first principles, an account of profit is a gains-based remedy, under which it is possible, and indeed permissible, that the aggrieved principal stands to gain a windfall.[51] The basis for this strict disgorgement of profits stems from the prophylactic function of the remedy,[52] which advances the policy of equity even at the expense of a windfall to the wronged party.[53] Accordingly, the strict disgorgement of profits seeks to pre-emptively reduce the likelihood of a fiduciary's discretionary powers being exercised for improper reasons.[54]

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46 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 395.

47 *Gray v Global Energy Horizons Corp* [2020] EWCA Civ 1668.

48 *Gray v Global Energy Horizons Corp* [2020] EWCA Civ 1668 at [128].

49 *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461 at [47], *per* Morritt LJ.

50 Lord Briggs of Westbourne, "Loose Ends in Accounting for Profits" in *Equity Today: 150 Years After the Judicature Reforms* (Ben McFarlane & Steven Elliot eds) (Hart Publishing, 2023) at pp 113–116.

51 *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [16].

52 Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 LQR 472 at 474.

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

54 Lionel Smith, "Deterrence, Prophylaxis and Punishment in Fiduciary Obligations" (2013) 7 J Eq 87 at 99.

28 However, it is entirely *because* of this prophylactic function underpinning the remedy that the causation inquiry is necessary in limiting a defaulting fiduciary's liability to account. Given that the prophylactic function of an account of profits is predicated on protecting the fiduciary relationship, such a function would thus only be served where the fiduciary's unauthorised profit is causally linked to a breach of his or her fiduciary duties toward the principal. To establish a fiduciary's liability to account where there is no causal link between the fiduciary's breach of duties and the profit would be unjustifiable in principle, and would in fact undermine the utility of the remedy in affirming a fiduciary relationship. As the Court of Appeal in *UVJ v UVH* rightly noted:[55]

> To find otherwise would be for equity to become an unruly horse where any breach by a fiduciary can be used to recover a profit however unconnected the two may be, and even if the profits would have been earned by the fiduciary in the absence of the breach.

29 Accordingly, the requirement of causation is necessary as a principled means of qualifying the extent to which a fiduciary is required to account to their principal for profits made by the former.

B. Test for causation

30 While the Court of Appeal in *UVJ v UVH* made clear that the profits sought to be disgorged "must be caused by" the fiduciary's breach of duty,[56] it did not expressly enunciate the relevant standard in relation to the test for causation. The court merely noted that their previous decision of *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan*[57] was "suggestive of but-for causation", while also conceding that the authorities "do not go so far as to say but-for causation in the strict sense must be established".[58] To the extent that *UVJ v UVH* supports the "but for" standard of causation, this appears to be by implication rather than by any express statement from the court there.

31 Nevertheless, the Singapore courts since then have either cited *UVJ v UVH* for the proposition that the standard for causation in relation to an account of profits is the "but for" standard,[59] or have appeared to treat the "must be caused by" statement in *UVJ v UVH* as a workable

55 *UVJ v UVH* [2020] 2 SLR 336 at [98].
56 *UVJ v UVH* [2020] 2 SLR 336 at [98].
57 [2014] 1 SLR 847.
58 *UVJ v UVH* [2020] 2 SLR 336 at [84]–[85].
59 *Innovative Corp Pte Ltd v Ow Chun Ming* [2023] 3 SLR 1488 at [111].

test in its own right, *ie*, as a test which merely requires some element of causation.[60]

32 Assuming for the moment that *UVJ v UVH* indeed requires "but for" causation in the strict sense to be established, some have argued that such a test is inadequate. As argued by Lee:[61]

> … the 'but for' test asks whether the outcome would or might have been the same had things been otherwise. This situation is *ex hypothesi* non-existent, and thus answers for such counterfactual inquiries are inevitably conjectural. Although in the run-of-the-mill cases, the two questions (namely what happened and whether the outcome would or might have been the same respectively) will produce the same answer, the 'but for' test fails to ascertain the causally relevant condition in cases of potential multiple causes.

33 In this regard, Lee observes that the "but for" test may be of limited utility where there may exist multiple, equally plausible causes for the fiduciary's profit, and illustrates the deficiency of this standard with reference to the tort case of *Summers v Tice*,[62] where the plaintiff was shot at by two negligent hunters, and could not conclusively prove who had actually injured him in accordance with the "but for" standard. Having established the shortcomings of the "but for" test in such a situation, Lee goes onto consider the alternative approach of using a "common sense test", but criticises this as being "vague and unstable".[63]

34 In the place of these seemingly unsatisfactory approaches, Lee suggests adopting a "different approach based on probabilistic causation … to formalise the inherently nebulous 'common sense' approach".[64] Referring to the decision of *Fairchild v Glenhaven Funeral Services Ltd*,[65] Lee argues that: (a) such a probabilistic approach to causation represents a refinement of the "but for" test;[66] and (b) such an

60 *3D Infosystems Pte Ltd v Voon South Shiong* [2024] SGHC 237 at [23].
61 Rebecca Lee, "Establishing Factual and Legal Causation in a Fiduciary's Liability to Account for Profits" (2006) 36 Hong Kong LJ 443 at 449.
62 (1948) 33 Cal 2d 80.
63 Rebecca Lee, "Establishing Factual and Legal Causation in a Fiduciary's Liability to Account for Profits" (2006) 36 Hong Kong LJ 443 at 451.
64 Rebecca Lee, "Establishing Factual and Legal Causation in a Fiduciary's Liability to Account for Profits" (2006) 36 Hong Kong LJ 443 at 452.
65 [2003] 1 AC 32.
66 Rebecca Lee, "Establishing Factual and Legal Causation in a Fiduciary's Liability to Account for Profits" (2006) 36 Hong Kong LJ 443 at 452. See also Rebecca Lee, "Causation and Account of Profits for Breach of Fiduciary Duty" [2006] Sing JLS 488 at 500.

approach is consistent with the development of causation in equity as well as the objective of fiduciary law.[67]

35 While Lee's observations regarding the shortcomings of the "but for" test are justified, it is suggested that Lee's approach should not be adopted for three key reasons. First, Lee's suggestion overlooks the various legal controversies generated by *Fairchild v Glenhaven*, which numerous courts have tried to limit in the time since[68] – such an approach would open a Pandora's box within this factual causation inquiry, creating more questions than answers. It bears iterating that the court in *Barker v Corus (UK) plc*[69] expressly cautioned that:

> [s]uch an extension [of the probabilistic approach to causation] would lead to great uncertainty … [t]he principle must … be restricted to mesothelioma induced by inhalation of asbestos fibres, and other conditions having the same distinctive aetiology and prognosis.

36 Second, to the extent that Lee suggests that a "quantitative approach to causation" may be preferable, it should be borne in mind that the ultimate aim of this causation inquiry is to determine whether a fiduciary's breach of duty was the effective cause of their unauthorised profit "in accordance with scientific or objective notions of physical sequence".[70] It is notable that the probabilistic approach to causation suggested by Lee appears in tort jurisprudence, where the process of scientific enquiry might, at the very least, be able to provide some rough quantification of probabilities in relation to the agent through which the harm is caused. For example, scientific analysis might be able to provide a rough probabilistic estimate of the extent to which exposure to asbestos fibres in a workplace over a given period of time might contribute to the contracting of mesothelioma.

37 On the other hand, fiduciary duties and the making of an unauthorised profit cannot be said to be tied to one another through an agent or mechanism which is readily susceptible to the rigours of scientific analysis. This is because the main agent of harm in such cases is the fiduciary themself, whose impugned conduct constitutes the very "harm" toward the relationship. Where it is accepted that the peculiarities of human nature are less receptive to the rigours of scientific analysis, a probabilistic approach to causation would thus not be helpful in this context.

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67 Rebecca Lee, "Establishing Factual and Legal Causation in a Fiduciary's Liability to Account for Profits" (2006) 36 Hong Kong LJ 443 at 454.

68 See, *eg*, *Barker v Corus (UK) plc* [2006] 2 AC 572 and *Gregg v Scott* [2005] 2 AC 176.

69 [2006] 2 AC 572 at [114].

70 *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [52].

38 Finally, and most importantly, it is suggested that a practical solution to this problem already exists, namely the reversal of the burden of proof under the "but for" test. Lee's reliance on tort law to criticise the "but for" test leaves out a similar case in which this reversal was permitted. In *Cook v Lewis*,[71] the plaintiff was similarly shot at by two negligent hunters and was unable to prove which shot caused his injury. There, the court reversed the burden of proof, holding both defendants equally liable for the plaintiff's injury unless they could disprove their liability.

39 In this regard, if Lee's real issue with the "but for" test is that knowledge (or lack thereof) in relation to causality might pose an obstacle to the imputing of liability on a fiduciary,[72] it should be noted that this same issue was considered by the court in *Gregg v Scott*,[73] and the court there observed that "[e]verything is determined by causality. What we lack is knowledge and the law deals with lack of knowledge by the concept of the burden of proof."[74]

40 This article suggests that a reversing of the burden of proof is entirely appropriate in upholding the principles underlying a fiduciary relationship, while mitigating the shortcomings of either a strict "but for" test, or Lee's probabilistic approach to causation. Effectively, maintaining the "but for" test in form while permitting a reversal of the burden of proof would be consistent with the broad conceptual understanding that the fiduciary's breach is merely required to be "one cause of the gain", and need not be the only cause nor the predominant cause.[75] While the court in *UVJ v UVH* expressly left open the question of which party should bear the burden of proof with regard to causation,[76] the reversing of the burden of proof was endorsed by the Court of Appeal in *Winsta Holding*,[77] albeit in the context of equitable compensation.

41 In *Winsta Holding*, one of the issues before the Court of Appeal was the relevant causation principles governing equitable compensation for breaches of fiduciary duties – *ie*, whether causation was required to be proved and if so, *how* causation should be proven. The Court of Appeal

71 [1951] 1 SCR 830.
72 Rebecca Wing Chi Lee, "Establishing Factual and Legal Causation in a Fiduciary's Liability to Account for Profits" (2006) 36 Hong Kong LJ 443 at 449–450.
73 [2005] 2 AC 176.
74 *Gregg v Scott* [2005] 2 AC 176 at [79].
75 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 332.
76 *UVJ v UVH* [2020] 2 SLR 336 at [98].
77 [2020] 1 SLR 1199.

observed that there were at least three possible approaches to the role of causation.[78]

42 Having considered the relative merits of each approach, the Court of Appeal held that a burden-shifting approach should be adopted, so as to "[reverse] the burden of proof inasmuch as the defendant will have to prove that the damage suffered by the plaintiff would have occurred in any event".[79] The court reasoned that this approach "[did] not eschew the need for a causation test, and at the same time … [gave] legal effect to the stringent duties placed on fiduciaries and the corresponding need to deter fiduciaries from breaching their duties".[80] Moreover, the Court of Appeal also observed that such a burden-shifting approach had an added practical benefit, namely that a fiduciary would often be in a better position to know how the loss in question was caused (or not caused).[81]

43 Pursuant to this approach:[82]

(a) the claimant-principal must prove, on a balance of probabilities, a breach of duties by the fiduciary and establish the loss sustained by the principal;

(b) upon proof of the elements in (a), a rebuttable presumption arises that the loss suffered by principal was caused by the fiduciary's breach of duty, and the legal burden of proof would be on the fiduciary to rebut the presumption, by proving that the principal would have suffered the loss regardless of whether the fiduciary had breached their duty; and

(c) where a fiduciary was able to prove that the loss would have been suffered by the principal regardless of whether the former had breached their duty, causation would not be established, and no equitable compensation could be claimed in respect of that loss.

44 While the causation principles laid down in *Winsta Holding* are, strictly speaking, only applicable in respect of equitable compensation, it is suggested that the reasoning underpinning the Court of Appeal's approach there applies with equal force in relation to an account of profits. As the court noted, strong policy considerations militated in favour of its adopting of the burden-shifting approach, namely the special relationship

78 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [88]–[92].
79 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [92].
80 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [240].
81 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [248].
82 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [254].

between a fiduciary and their principal. The Court of Appeal in *Winsta Holding* summarised this relationship as follows:[83]

> The relationship between the wrongdoing fiduciary and the innocent principal is not one where both occupy equal footing, but rather one of ***dependence*** by the principal on the fiduciary. The principal relies on the fiduciary to act in his or her best interests, and is especially vulnerable to the fiduciary's breach of duty. Indeed, the High Court in *Kumagai-Zenecon* (HC) ([136] *supra*) has observed that a fiduciary owes his or her principal 'the highest standard [of duty] known to the law' (at [13]). [emphasis in original]

45 The reasoning underpinning the burden-shifting approach in the context of equitable compensation is entirely consistent with the rationale underlying an account of profits, in so far as it operates to "[give] legal effect to the stringent duties placed on fiduciaries and the corresponding need to deter fiduciaries from breaching their duties",[84] and "hold the fiduciary to and vindicate the high duty owed to the plaintiff".[85] Accordingly, it is suggested that the court's reasoning in *Winsta Holding* should be persuasive in interpreting the balance to be struck under the causation inquiry for an account of profits, since it addresses both the prophylactic and deterrent aims of this remedy.

46 It bears iterating that the court in *UVJ v UVH* had in fact considered the framework for causation as laid down in *Winsta Holding*, and had stated that:[86]

> … courts routinely have to consider the question of what might have happened but for a wrongful act – this is not an unfamiliar question to most areas of law. The recent judgment of *Winsta* ([28] *supra*) in fact held at [240] and [254(c)] that no equitable compensation for non-custodial breaches of fiduciary duty can be claimed in respect of loss which the fiduciary can show would have been sustained in spite of the breach. *If this investigation can be carried out in situations involving equitable compensation, there is no reason why it cannot be similarly done for an account of profits*. [emphasis added]

47 Perhaps, then, it can be said that the court in *UVJ v UVH* had favourably considered the possibility of importing *Winsta Holding*'s burden-shifting approach, though in the interests of not wanting to go further than necessary in their judgment, the court thus opted not

83 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [246].
84 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [240].
85 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [247].
86 *UVJ v UVH* [2020] 2 SLR 336 at [88]. *Cf*, Clarke LJ's observation in *Murad v Al-Saraj* [2005] EWCA Civ 959 at [137] that compensation and restitution do not follow the same principles: "I do not think that the correct approach to the taking of the account is to be determined by reference to the principles relevant to the test of causation in respect of equitable compensation for loss."

to expressly affirm the *Winsta Holding* approach. However, given the common overlap in policy considerations, and the court's recognition that the *Winsta Holding* approach is largely compatible with an account of profits, it is suggested that this burden-shifting approach should rightly be adopted for the causation enquiry in relation to an account of profits.

48 Adopting this here, where the principal is able to prove on a balance of probabilities that the fiduciary has breached his or her fiduciary duty, and that the fiduciary has obtained a profit, a rebuttable presumption that the fiduciary's profit would not have been made *but for* the fact that he or she breached his or her fiduciary duty would arise, and the legal burden of proof would lie on the impugned fiduciary to rebut this presumption.

49 Such an approach, while tilting the inquiry liberally in favour of the principal, preserves the critical inquiry into causation to exculpate an innocent fiduciary, and effectively manages the tension between deterrence and prophylaxis on one hand, and fairness and principle on the other. It is also apposite to note that, *per* the court in *Winsta Holding*, this burden-shifting approach merely deals with the *evidential* burden of proof rather than the *legal* burden of proof, and is therefore entirely consistent with s 103(2) of the Evidence Act,[87] in so far as the legal burden of establishing the elements of their claim still falls on the aggrieved claimant-principal.[88]

IV. Overarching framework of causation: lessons from common law

A. Applicability of two-stage common law framework for causation

50 The above discussion merely considers the issue of *factual* causation, but does not address the subsequent and equally pertinent issue of *legal* causation, to which this article now turns to consider.

51 Under common law, where the first stage of factual causation is established, the second stage of legal causation seeks to determine the extent to which legal responsibility should be attributed to the defendant. As Mitchell observes, the approach to causation taken by English private law comprises two sets of rules, one of which is concerned with causation,

87 *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 at [240].
88 Evidence Act 1893 (2020 Rev Ed) s 103(2).

and the other with the attribution of legal responsibility.[89] Put another way, the first stage of factual causation is meant to verify a causal link between the wrongful act and the gain of the errant fiduciary, and where this link is established, the second stage of *legal* causation introduces a different rubric of considerations to shape the damages in a fashion to match the justice of the case.[90]

52 To be clear, it is widely understood that the principles underlying common law and equitable remedies are different – while the common law protects the wrongdoer by qualifying their liability based on concepts of causation, foreseeability and remoteness, equity generally favours the innocent party over the wrongdoer.[91] While it is acknowledged that these principles should not be lightly conflated,[92] this article contends that the principles of causation applicable under common law, which typically correspond with compensatory remedies, are not necessarily inconsistent with an account of profits.

53 In relation to an account of profits, the courts have distinguished between compensatory claims (and the language of "wrong-doing")[93] and restitutionary claims (and the language of "disabling" a fiduciary from making unauthorised profits).[94] Nevertheless, Mitchell astutely observes that "[one possible] way of explaining the fiduciary's liability is to say that she commits a wrong when she makes a gain in breach of her duty", and that "this is now how many courts analyse fiduciary liability to account for unauthorised gains".[95] Giglio similarly argues that:[96]

> … whether there has been a loss to the claimant is irrelevant in determining whether the claimant is entitled to restitution of the wrongful gain … *What matters is that something wrong was done to secure the gain … The existence of*

89 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 327.

90 Francesco Giglio, "Restitution for Wrongs: A Structural Analysis" (2007) 20 Can J L & Jurisprudence 5 at 21.

91 Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 at 895.

92 It has however been argued by some that this distinction may be a matter of policy rather than principle, and that no satisfactory argument has been raised to explain their mutually exclusive relationship: see Francesco Giglio, "Restitution for Wrongs: A Structural Analysis" (2007) 20 Can J L & Jurisprudence 5 at 32–33.

93 *Murad v Al-Saraj* [2005] EWCA Civ 959 at [108].

94 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 329.

95 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 330–331.

96 Francesco Giglio, "Restitution for Wrongs: A Structural Analysis" (2007) 20 Can J L & Jurisprudence 5 at 20–21.

> *the wrong, of which the claimant is the victim, together with the existence of the wrongdoer's gain suffices.* [emphasis added]

54 The making of an unauthorised profit by the fiduciary is thus the wrong that must be corrected, as the fiduciary's conduct is detrimental to the principal by placing the latter "in the position of a sufferer from an injustice, which is independent of any compensable loss concretely sustained".[97] Put another way, the entire basis of the account of profits is that there is a wrong characterised by the defendant's enrichment as a consequence of the perpetration of the wrong, notwithstanding that the claimant has not suffered any quantifiable loss.[98]

55 The merits of such a distinction were considered by the English Court of Appeal in *Gwembe Valley Development Co Ltd v Koshy*,[99] where the court stated that the maintaining of such a distinction was an "unnecessary complication" as, regardless of whether an account of profits is framed as a disabling mechanism preventing the fiduciary from keeping unauthorised gains, or as a remedy to correcting wrongdoing by the fiduciary, "all such incidents are aspects of the fiduciary's primary obligation of loyalty".[100] Thus, while an aggrieved claimant-principal might not have suffered "loss" in the sense of a compensable, quantifiable sum, they have nevertheless suffered "detriment", in that they have been placed in a disadvantageous situation as a consequence of the fiduciary's conduct. By identifying the principal as the sufferer of the fiduciary's impugned conduct, the concept of "detriment" qualifies the parties to the claim,[101] while the existence of the fiduciary relationship operates as a normative ground justifying the disgorgement of the fiduciary's wrongful benefit to the principal.

56 Consequently, this suggests that the language and principles of wrong-based liability can be used in respect of an account of profits, and that, crucially, the use of such principles does not in any case not deny the alternative framing of the claim in the "language of disability".[102]

97 Francesco Giglio, "Restitution for Wrongs: A Structural Analysis" (2007) 20 Can J L & Jurisprudence 5 at 24.

98 Francesco Giglio, "Restitution for Wrongs: A Structural Analysis" (2007) 20 Can J L & Jurisprudence 5 at 34.

99 [2003] EWCA Civ 1048.

100 *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048 at [108].

101 Francesco Giglio, "Restitution for Wrongs: A Structural Analysis" (2007) 20 Can J L & Jurisprudence 5 at 25.

102 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 331.

57 The utility of the two-stage common law approach to causation is further supported by Devonshire's argument that the process of accounting is itself dualistic, and that a clear distinction exists between the exercise of quantifying profits flowing from the breach, and the task of determining the amount that should ultimately be disgorged as the net gain.[103] The latter operates differently from the former in that it is "not tethered to the strict standards by which the substantive duty is judged", and thus here the courts are free to distinguish between profits obtained from a cynical misapplication of trust property and gains obtained from less culpable forms of wrongdoing.[104]

B. Legal causation: causal and non-causal grounds

58 In relation to the issue of legal causation, academics have sought to differentiate between causal and non-causal grounds,[105] both of which act cumulatively in limiting a defendant's degree of responsibility under the legal causation inquiry.

(1) Causal grounds

59 This category of factors assesses the existence of *novus actus interveniens* which may break the chain of causation, or events which are too remotely connected with the outcome.[106] The doctrine of remoteness has been strongly advocated for by prominent academics, who argue that directly addressing such considerations enables a court to "explicitly focus directly on the substantive normative arguments about responsibility under the relevant cause of action".[107] Here, it is suggested that an open recognition of the rules of remoteness would allow for greater transparency and clarity regarding the court's reasoning.

60 Moreover, a recognition of such considerations is not inconsistent with the reasoning that has already been adopted by the courts. In *Warman International Ltd v Dwyer*[108] ("*Warman*"), the defendant was found liable for a breach of his fiduciary duties towards the plaintiff. On appeal, the

103 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 389.
104 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 410.
105 Rebecca Lee, "Causation and Account of Profits for Breach of Fiduciary Duty" [2006] Sing JLS 488 at 501.
106 Rebecca Lee, "Causation and Account of Profits for Breach of Fiduciary Duty" [2006] Sing JLS 488 at 501.
107 Jane Stapleton, "Cause-in-Fact and the Scope of Liability for Consequences" (2003) 119 LQR 388 at 421.
108 (1995) 182 CLR 544.

Australian High Court limited the appropriate period for an account of the defendant's profits to two years. While this decision is frequently cited for the proposition that the courts wield a large discretion over such equitable remedies,[109] it has been persuasively argued that the case could also be understood in terms of part of the profit claimed being too remote or beyond the scope of Dwyer's fiduciary duty.[110] Mitchell also highlights the Hong Kong case of *Kao Lee & Yip v Koo Hoi Yan*,[111] where the court cited *Warman* in support of the proposition that "there comes a point when the profits of the relevant business are so remote from the breach of the fiduciary duty that it would simply be unfair to force the fiduciary to continue to account".[112]

61 Further, as See argues, the well-established practice of awarding equitable allowances to honest fiduciaries for contributing their time, skill and effort could similarly be understood as an application of the remoteness rule.[113] As an illustration of this, it has been argued that the decision of *Boardman v Phipps*,[114] where the House of Lords disgorged the solicitor's gains subject to a liberal allowance for his work and skill,[115] could be rationalised via the remoteness rule, wherein the defaulting fiduciary's work and skill might be causally relevant to the profit, thereby warranting "the extent of legal responsibility [to be] mitigated by crediting an allowance to the fiduciary".[116]

62 Accordingly, an outright recognition of these principles of remoteness and other causal grounds by the court would not be inconsistent with existing practice, and would empower the courts to better rationalise their decision-making processes in quantifying a defaulting fiduciary's liability to account.

63 For completeness, it is noted that there may be doubts regarding the introduction of common law limitation doctrines, given the Singapore Court of Appeal's decision in *Credit Suisse Trust Ltd v Ivanishvili, Bidzina*.[117] There, the court held that the scope of duty principle and the concept

109 Vicki Vann, "Causation and Breach of Fiduciary Duty" [2006] Sing JLS 86 at 93–94.
110 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 338.
111 [2003] 3 HKLRD 296. See also Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 338–339.
112 *Kao Lee & Yip v Koo Hoi Yan* [2003] 3 HKLRD 296 at [143].
113 Alvin W-L See, "Unauthorised Fiduciary Gains and the Constructive Trust" (2016) 28 SAcLJ 1014 at 1027.
114 [1967] 2 AC 46.
115 *Boardman v Phipps* [1967] 2 AC 46 at 104, *per* Lord Cohen.
116 Rebecca Lee, "Causation and Account of Profits for Breach of Fiduciary Duty" [2006] Sing JLS 488 at 502.
117 [2024] 2 SLR 164.

of contributory negligence were not applicable in relation to breaches of fiduciary duty.[118] Respectfully, it is suggested that the decision should not be understood as a blanket prohibition against the transplanting of common law doctrines into equity. There, the applicability of the scope of duty principle was rejected because it was "concerned only with breaches of the tortious duty of care and [did] not apply to breaches of fiduciary duties".[119] Similarly, the concept of contributory negligence was rejected because it entailed a "balancing of interests" that was inconsistent with the "special vulnerability" of a principal.[120] Rightly construed, this decision does not strictly prohibit the transplantation of common law concepts and principles; rather, it simply affirms that any attempt to introduce such concepts and principles *must* ultimately remain sensitive to the unique considerations within the area of law which the relevant concept or principle is intended to be introduced to.

64 This article has previously argued that the prophylactic function of an account of profits can only be meaningfully served where the fiduciary's unauthorised profit is causally linked to a breach of his or her fiduciary duties toward the principal. In this connection, the remoteness principle, unlike the concept of contributory negligence, is not concerned with the balancing of interests. Instead, it is focused on verifying the overall coherence of the chain of causation, and is thus consistent with the courts' stated desire to prevent equity from becoming "an unruly horse".[121]

(2) Non-causal grounds

65 Aside from the formal principles of law such as the remoteness doctrine, it is suggested that the role played by legal policy in shaping the decision of the courts should also be openly acknowledged under this legal causation inquiry. This would permit the court to flesh out their value judgment on the proper "allocation of risks, the purpose of the legal rules, or the equities between the parties".[122]

66 It is acknowledged that such a proposal is not without its detractors. In particular, Devonshire argues that any decision by the courts regarding the legal attribution of unauthorised profits must be understood in terms of causation and not equitable discretion – this is because it would be "an unprincipled response to the expectation of

118 *Credit Suisse Trust Ltd v Ivanishvili, Bidzina* [2024] 2 SLR 164 at [66]–[68].
119 *Credit Suisse Trust Ltd v Ivanishvili, Bidzina* [2024] 2 SLR 164 at [66].
120 *Credit Suisse Trust Ltd v Ivanishvili, Bidzina* [2024] 2 SLR 164 at [68].
121 *UVJ v UVH* [2020] 2 SLR 336 at [98].
122 Rebecca Lee, "Causation and Account of Profits for Breach of Fiduciary Duty" [2006] Sing JLS 488 at 502–503.

probity associated with fiduciary duty".[123] Thus, Devonshire argues that "[t]he most that can be said is that in some cases it is unfair to make the fiduciary accountable for gains because their connection to the wrongdoing is so tenuous".[124]

67 In a similar vein, it has been argued that the courts should not be permitted a "free-floating discretion [to allow] wayward fiduciaries to participate in causally-connected profits", and that such an approach would "significantly lessen equity's ability to deter fiduciary gains".[125]

68 With respect, it is suggested that these arguments are effectively rendered moot, given that courts have *already* recognised that there are other factors which are capable of influencing the court's determination on the scope of an account of profits, some of which may not necessarily relate to the causative link between the fiduciary's conduct and the unauthorised profit.

69 More to the point, to the extent that the above critiques suggest that a broader discretion is detrimental to the effectiveness of an account of profits, it should be stressed that the functioning of restitutionary remedies such as an account of profits in fact hinges on broad notions of fairness and justice. As Giglio observes:[126]

> As regards restitution for wrongs, the enrichment obtained by the agent through his wrongful behaviour is an entitlement of the victim because the wrong creates a legal relationship between the claimant as the sufferer and the defendant as the doer of the injustice, because the violation of the right is specifically detrimental to the victim, and *because it would be unjust if the agent could benefit from wrongful gains*. The relational quality of restitutionary justice requires that the question of who is entitled to gain from the wrongful act involves a choice in favour either of the victim or of the agent … *By awarding restitutionary damages, the legal system chooses the victim as being more deserving than the agent*. [emphasis added]

70 It should be noted that in *Murad*, Clarke LJ held in his dissenting judgment that under the appropriate circumstances, the courts should depart from the usual causation rules, and that this was justified on

123 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 401.

124 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 401.

125 Mitchell McInnes, "Account of Profits for Breach of Fiduciary Duty" (2006) 122 LQR 11 at 15, cited in Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 335.

126 Francesco Giglio, "Restitution for Wrongs: A Structural Analysis" (2007) 20 Can J L & Jurisprudence 5 at 26.

the facts of the case because "given the resources provided by [the defendant], it would be *inequitable* not to allow him some share of the profits"[127] [emphasis added]. In *Boardman v Phipps*,[128] the English High Court granted the fiduciaries an equitable allowance on the basis that it would otherwise be "inequitable" for the fiduciaries to not be paid for the risk they incurred and their skill in obtaining the profits,[129] and this finding was eventually upheld by the House of Lords.[130] Moreover, just as *Warman* has been rationalised as a case enlivening the principles of remoteness, it could equally be argued that the case was decided as a matter of fairness on the particular facts.[131]

71 Other courts have also espoused the need to adhere to principles of fairness,[132] and to avoid "unconscientious" outcomes.[133] Further, as Giglio argues, the basis for the award of an account of profits is that "it would be *unjust* if the wrongdoer could go scot-free with his wrongful gains; and it is granted to the victim because any wrongful behaviour is detrimental to the sufferer of the injustice"[134] [emphasis added].

72 The operation of such broader, non-causal considerations has been acknowledged to influence the attribution of legal responsibility via causal grounds. In this regard, Edelman has argued that dishonest fiduciaries should be subject to a rule that all direct gains are recoverable, regardless of whether they are a foreseeable consequence of the breach.[135] This appears to have been applied by the courts, where the perceived severity of the fiduciary's breach of duty influences the rule of remoteness applied by the court in defining a fiduciary's measure of accountability.[136] For example, in *CMS Dolphin Ltd v Simonet*,[137] where the fiduciary's breach of duty was wilful and deliberate, the court there held him liable for both the value of the diverted business opportunities, as well as for

127 *Murad v Al-Saraj* [2005] EWCA Civ 959 at [160].
128 [1964] 1 WLR 993.
129 *Boardman v Phipps* [1964] 1 WLR 993 at 1018, *per* Wilberforce J.
130 *Boardman v Phipps* [1967] 2 AC 46 at 104, *per* Lord Cohen.
131 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 567; Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 400.
132 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 567.
133 *Kak Loui Chan v Zacharia* (1984) 154 CLR 178 at 204.
134 Francesco Giglio, "Restitution for Wrongs: A Structural Analysis" (2007) 20 Can J L & Jurisprudence 5 at 34.
135 James Edelman, *Gain-Based Damages* (Hart Publishing, 2022) at p 108, cited in Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 337.
136 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 398.
137 [2002] BCC 600.

the benefit obtained via trading with the proceeds of his wrongdoing.[138] Thus, where there has been an egregious breach of fiduciary duties, it is seen that the courts are willing to adopt a more expansive view of causally related gains.[139] That this takes place as a matter of fact lends credence to the idea that such responses, which resist any formal measure of accountability, are ultimately "more morally driven than principled".[140]

73 Such an approach, in turn, is philosophically consistent with perceptions of equity as an *in personam*, conscience-based jurisdiction.[141] Where this is accepted, Devonshire's suggestion for any decision by the courts to be understood in terms of causation and not equitable discretion would seem strange in so far as it advocates for the courts to actively *avoid* such discretionary calls, when in fact such a discretion is arguably an essential constituent ingredient inherent to this remedy. The existence of such a discretion is therefore not only consistent with, but is in fact necessary for, the effective operation of an account of profits. Notably, it would allow the courts to cater for special circumstances where necessary, such as where the scope of the fiduciary's duty of loyalty is not particularly broad, or where it might be unconscionable to disgorge the full amount of the unauthorised profits from the fiduciary.[142]

74 Coupling the above approach with the rationale underlying the remedy of an account of profit (*ie*, to protect and affirm the fiduciary relationship), it is suggested that the existence of good faith by the fiduciary should be considered by the court under this second stage of the causation analysis. This is because if the remedy of an account of profits ultimately seeks to prophylactically ensure the loyalty of a fiduciary towards his principal, then this prophylactic function would effectively be rendered nugatory where the fiduciary genuinely acts in good faith, in so far as there is no defect in the relationship that necessitates correction via a strict account of profits.[143] The presence of good faith, where established, would arguably render the breach of fiduciary duty a mere

138 *CMS Dolphin Ltd v Simonet* [2002] BCC 600 at [140]–[141].
139 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 395.
140 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 396–397.
141 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 397.
142 Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 at 914.
143 Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 at 915.

technical breach, and should accordingly operate to limit the extent of the fiduciary's liability to account.

75 Similarly, a fiduciary's claim for an equitable allowance – a reimbursement for their expenses incurred in obtaining profits – should be looked at in a more positive light where the gains are made from the fiduciary's independent activities and without recourse to trust property.[144] As Mitchell argues, while the rule against unauthorised profits is strictly applied, "there are good reasons for thinking that in some circumstances the courts should relax their traditional severity".[145]

C. Test for legal causation

76 Given that there are a number of factors that go toward ascertaining the extent of a fiduciary's liability,[146] it is unrealistic to provide a determinative test for legal causation. As Mitchell observes, "all remoteness tests are ultimately arbitrary and one must draw the line somewhere",[147] and this criticism arguably extends to all legal causation-based tests in so far as they are grounded in policy rather than logic. As See notes, the question of legal causation is not dictated by logic, but is instead policy-driven with the aim of insulating a defendant from the risk of never-ending liability.[148] Indeed, where it is accepted that the issue of attributing legal responsibility is ultimately a policy-driven process, the courts should be permitted to relax or even disapply these rules where appropriate.

77 Concomitantly, it is recognised that this represents an opportunity for the courts to engage in policy analysis by openly articulating the considerations which influence their reasoning on a case-by-case basis. As Mitchell notes, the courts have not always carefully explained how they have distinguished between the gains for which a fiduciary must

144 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 407. See also Jesse Martino, "Limiting the Gain to Be Disgorged by Defaulting Fiduciaries: The (Ir)Relevance of Remoteness" (2023) 50 UW Austl L Rev 26 at 52, where Martino suggests that the rules of remoteness should operate when a breach does not involve the misuse of trust property.

145 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 339.

146 Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 at 919–920.

147 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 337.

148 Alvin W-L See, "Unauthorised Fiduciary Gains and the Constructive Trust" (2016) 28 SAcLJ 1014 at 1026.

account and the gains which they can keep.[149] It has thus been suggested that greater effort should be made in formulating these aspects of a court's reasoning with more precision.[150] Indeed, it is crucial that regardless of how the court ultimately chooses to exercise its discretion, the court's basis for differentiating between cases should be articulated clearly,[151] instead of being shrouded in a fog of uncertainty.

D. Merits of two-stage common law framework for causation

78 To iterate, a sizeable section of this article has been dedicated to exploring why a requirement for causation must exist in order for liability under an account of profits to attach to an errant fiduciary, and considering how the two-stage approach to causation under common law can be meaningfully transplanted and operationalised in relation to an account of profits. While it is acknowledged that the inflexibility of the no-profit rule is capable of being, and indeed has traditionally been, tempered by the court's jurisdiction to make an award of allowance, it is respectfully suggested that such an approach is insufficient for two key reasons. First, the foregoing discussion has observed that the courts have in fact used different approaches to round out the rough edges of an account of profits – in this light, it would be artificial to shoehorn these intentional deviations into the traditional approach merely for the purposes of conceptual neatness. To this end, it is argued that the two-stage framework achieves a delicate blend of form and substance by providing a coherent structure to guide the court's reasoning, while also remaining capable of recognising different approaches to the same problem.

79 Second, it is suggested that the traditional approach is potentially under-inclusive. It has previously been observed that the precise basis for an equitable allowance remains unclear, in that it could be rationalised as a means of recognising the work and skill of an errant fiduciary,[152] but could just as easily be explained through the principle of remoteness.[153] Moreover, the extent to which the existence of good faith impacts the award of an equitable allowance, or the scope of such an allowance, is

149 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 332.

150 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 398.

151 Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 at 915.

152 *Boardman v Phipps* [1967] 2 AC 46 at 104, *per* Lord Cohen.

153 Alvin W-L See, "Unauthorised Fiduciary Gains and the Constructive Trust" (2016) 28 SAcLJ 1014 at 1027

also not clear. The two-stage framework thus offers a key practical benefit, namely, that regardless of how the courts ultimately choose to frame an equitable allowance, the framework would remain capable of accommodating a consideration of alternative bases through which the liability of a fiduciary ought rightly to be circumscribed.

80 Relatedly, it is also noted that some academic commentary has questioned whether a single-stage approach to the analysis would be preferable.[154] In response, it is suggested that the structuring of the causation inquiry into two stages, as posited within this article, would ensure that the courts' discretion is a "structured discretion", where decisions are shaped by principles which can meaningfully and usefully be expressed in the language of causation and remoteness,[155] and where the exercise of such discretion is confined within a clearly defined process. Put another way, while causation and remoteness rules serve the same ultimate function in limiting legal responsibility, the latter is far more malleable as a policy-driven set of rules. Confining the court's discretion to the second stage of legal causation and remoteness, while maintaining the same rule of factual causation in all cases, would therefore provide some desirable structure to the court's exercise of its discretion.

81 Such an approach arguably strikes a balance between form and substance, representing a principled framework which allows fairness and justice to be effected by the court. As Mitchell helpfully summarises:[156]

> … a better approach is to say that the courts applied the standard causation test, but moderated its effect by using a remoteness rule … Arguably, this way of understanding the cases is preferable for two reasons: first, the simplicity and clarity of the causation rules will be preserved if we can say that every case is governed by a single rule; and secondly, conceptualising the question whether a fiduciary should ever keep causally connected gains as a remoteness issue will help the courts to focus on the substantive normative reasons why this might be an appropriate outcome.

82 To suggestions that conferring on the court such a broad discretion in the second stage of the inquiry may risk undermining the fiduciary relationship, it is suggested that allowing the court to tailor the contours of an account of profits to suit the justice of the case would in fact promote accountability. This is because to the extent that the fiduciary is

154 Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 at 917.

155 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 332.

156 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 336.

granted a reprieve from the original quantum of the disgorgement, it is incumbent on the fiduciary to satisfy the courts that such relevant facts exist to justify the exercise of the court's discretion. The ultimate burden of establishing that the fiduciary has acted in an appropriate manner would continue to lie on the fiduciary, and thus the rationale for an account of profits would not be undermined. In any case, any risk posed to fiduciary relationships can be mitigated by the courts setting a higher threshold to invoke their discretion, such as where good cause can be established, so as to ensure that the court's discretion is only exercised "sparingly" in meritorious cases.[157]

V. Conclusion

83 Summarily, this article has considered how the scope of an account of profits can and should be limited to better uphold its purpose in affirming fiduciary relationships. It has: (a) argued in favour of the burden-shifting approach to factual causation as laid down in *Winsta Holding*; (b) suggested that the common law framework for causation, which more frequently deals with compensatory claims, is not inconsistent with the restitutionary aims of an account of profits; and (c) provided a tentative framework through which liability-control limits for the remedy of an account of profits can be operationalised via the common law causation framework to complement its underlying rationale.

84 Notwithstanding the acknowledged risk that the two-stage approach suggested within this article might enable the courts to conceal the real reasons for their decisions,[158] this article argues that such a framework remains viable. Requiring decisions to be passed through the funnel of this framework would permit cogent policy-based reasoning, such as those in respect of honesty, good faith and equity, to be distilled in the course of the second stage of this framework. There would therefore be space for the policy considerations of the courts to be explicitly recognised and weighed rather than cloaked in the obscurity of "discretion".

85 Moreover, the transplanting of the common law framework for causation to govern an account of profits would arguably go some way in ameliorating concerns that equity lacks the kind of rules which the common law is able to provide, the latter of which is well-suited to

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

158 Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 at 918.

upholding the certainty and security of commercial transactions.[159] As noted by Devonshire:[160]

> [T]he role of limiting principles in defining the scope of an account of profits has received less analytical attention than the corresponding rules for compensation. The latter is more nuanced in recognising that concepts of fiduciary duty must be responsive to social and economic change and shifts in personal and commercial morality.

86 To be clear, such a transplantation would not be without its own problems. For example, Lord Briggs observes that where the principles of causation and remoteness are applied to an equitable account of profits, there is a risk of double-counting that must be guarded against.[161] Nevertheless, it is suggested that the posited framework helps to synthesise the established principles governing compensation with an account of profits, and does so in a way that is neither repugnant to nor inconsistent with the fundamental rationale underlying the latter.

87 Given the broad continuum of fiduciary relationships and the virtual infinitude of factual scenarios, it is clear that the issue of accountability in relation to an account of profits is a highly context-sensitive query.[162] It is thus vital that remedies are carefully calibrated by the court on a case-by-case basis to reflect a variety of factors, including the culpability of the fiduciary, the nature of the relationship and the obligations which have been breached.[163] It is only through such detailed adjustments and calibration that the principles of equity, and its remedies, can continue evolving to remain relevant amidst the changing world around us.

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159 Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214, cited in Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 392.

160 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 402.

161 Lord Briggs of Westbourne, "Loose Ends in Accounting for Profits" in *Equity Today: 150 Years After the Judicature Reforms* (Ben McFarlane & Steven Elliot eds) (Hart Publishing, 2023) at pp 113–116.

162 Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 397.

163 Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 at 920. See also Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 at 409.