Is There Really an ‘Alternative’?

The Conflict Between an Accounts of Profits and Compensation

Matthew Dynes-Morgan

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours) at the University of Otago

October 2018

Acknowledgements

Professor Jess Palmer, for somehow finding the time in a packed schedule to provide insight, feedback, and transforming the topic I hated the in second year into a genuinely engaging research dissertation.

My parents, Robyn and John, for proofing something ‘they didn’t really need to know about’.

James, Bryn, Max, Hamish, and Lauren for providing much needed procrastination and support.

Contents

Chapter I: Introduction

The remedies of an account of profits and compensation for loss are currently alternatives and cannot be awarded at the same time. This dissertation disputes that conclusion based on the substantive differences between the goals of accounts and compensation.

The Supreme Court in *Stevens v Premium Real Estate* faced a distinct conundrum with the facts in front of them.[1] Premium as the Stevens' agent sold their home to a buyer they had previously worked for, placing them in breach of their fiduciary obligations. The breach of a fiduciary relationship will be assumed through this dissertation.[2]

There was no concern that the Stevens could get the difference between the sale price and the initial price they were prepared to sell at as compensation. The whole Court also saw it appropriate to refund the commission, a more interesting conclusion. Despite stating that accounts of profit and compensation are inconsistent and cannot be awarded simultaneously, the Court appeared to allow a remedy which referenced the plaintiff's loss, and one which referenced the gain made by the fiduciary. This opens the question of this dissertation, which is to reconsider the orthodox view of accounts of profits and compensation as being alternative remedies.

The question was perhaps most aptly put by Professor Birks, writing shortly after accounts and compensation were first held to be alternate and inconsistent:[3]

> If a plaintiff is entitled to recover the defendant's gains when he has suffered no loss at all, it is not clear why there should be any inconsistency in his asking, where he has suffered loss, that the defendant should disgorge his own gains and make good the plaintiff's loss.

Despite being written 20 years ago, there has been little academic consideration of why and how these remedies are inconsistent and unable to apply together. This dissertation will consider this issue in three parts.

Chapter II will begin by tracing the history of the orthodox position up to *Premium Real Estate*. *Tang Man Sit v Capacious Investments Ltd* and *United Australia Ltd v Barclays Bank Ltd*, show how reasoning based on contractual, tortious and restitutionary remedies has come

[1] *Stevens v Premium Real Estate* [2009] NZSC 15, [2009] 2 NZLR 384.
[2] This includes a breach of the conflict and profit rules. These are central to the fiduciary relationship. Matthew Conaglen "Fiduciaries" in J McGhee (ed) *Snell's Equity* (33rd ed, Thomson Reuters, London, 2015) [7-000].
[3] Peter Birks "Inconsistency between Compensation and Restitution" (1996) 112 LQR 375 at 378.

to be applied to accounts without appropriate consideration.[4] This chapter then turns to the less controversial half of the conflict, compensation for loss at common law and equity. This discussion shows the pragmatic focus of the remedy and the rule against double recovery.

Chapter III assesses the principles behind account of profits, looking at three possible justifications: first, a punitive and deterrent focused explanation; second, a prophylactic function; and the third which sees the principal as having a quasi-property right to the fiduciary's profit.

With these principles analysed, Chapter IV combines them to show: first, how a spectrum of cumulation types is more appropriate than the 'alternate' label; and second that there is no fundamental inconsistency as the remedies respond to distinct issues. The principles diverge so markedly in light of the fiduciary relationship the account is tied to that this chapter argues accounts should follow a breach of fiduciary duty. Compensation would then practically assess to what extent further damages would overlap with the account, allowing the fiduciary relationship to be vindicated without the risk of an excessive award.

To adequately limit this dissertation, some brief assumptions and taxonomy will be noted.

A The Commission as an Account of Profit

Despite stripping the agent's profit, the Court in *Premium Real Estate* did not characterise the commission as an account. Instead the entire Court viewed returning the commission as appropriate as it was unearned due to the breach of fiduciary duty.[5] While some may consider this to be compensatory, there is a strong argument that this award is an account of profits in effect, if not in name.

Chief Justice Elias and Blanchard J characterised the remedy as returning an unearned payment.[6] This appears to be a near textbook definition of an account of profits, which is a personal order capturing a fiduciary's illicit gains for breach of a substantive duty.[7] The Court also discussed the 'good faith' of the agent as being relevant in determining whether this

---

[4] *Tang Man Sit v Capacious Investments Ltd.* [1995] UKPC 54, [1996] AC 514. *United Australia Ltd. v Barclays Bank Ltd.* [1941] AC 1 (HL).
[5] *Premium Real Estate*, above n 1. Elias CJ at [31] characterises it as 'a distinct claim which arises on the breach of the fiduciary duty of loyalty, which is a wrong in itself irrespective of loss'. Blanchard J at [90] saw it as 'something to which an agent has no entitlement once he or she has committed a breach of fiduciary duty'. Tipping J at [104] characterised it as 'restorative' or a restitutionary award.
[6] At [31] per Elias CJ, [94] per Blanchard J.
[7] P Devonshire *Account of Profits* (Thomson Reuters, Wellington, 2013) at 8-9.

remedy is appropriate.[8] This consideration is a specific application of allowances for fiduciaries in breach of duty, an accepted aspect of accounts.[9]

Justice Tipping approached the question differently, considering it as restorative (returning value transferred). The manner in which the 'restorative' award was discussed by Tipping J further supports this remedy being an account.[10] He viewed the justification for the restoration as reinforcing fiduciary obligations, very similar to Edelman's proposed rationales behind accounts, which will be discussed in Chapter III.[11] The distinction between this remedy and an account appears to rest on it being money received from the plaintiff rather than elsewhere, which in both cases is a profit in breach of fiduciary duty. The justification for stripping the commission was the breach of fiduciary duty committed by Premium, suggesting this was restitution for a wrong (like an account) rather than restitution based on value transferred.[12]

The construction of the commission as an account has some support academically. McLay noted that an account would be the ordinary construction of such an award.[13] Palmer noted that the Court focused on the policy justifications for the remedy, which as discussed above significantly overlaps with that of an account.[14]

There is argument to be had over whether the return of a commission is an independent remedy to that of an account of profits. Regardless of how it is characterised in this case, there remains the issue of whether accounts and compensation do indeed conflict as Chapter II argues that the judicial history is not compelling.

B Taxonomy

Adequate taxonomy is difficult in well-defined areas of law, and equity in particular has often avoided rigorous classification.[15] This discussion focuses on the conflict where there has been a breach of fiduciary duty. The terminology of 'account' will be used rather than 'gains-

[8] *Premium Real Estate*, above n 1, at [89] per Blanchard J.
[9] See *Phipps v Boardman* [1967] 2 AC 46 (HL). See also *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433.
[10] *Premium Real Estate*, above n 1, at [104]-[109] per Tipping J.
[11] J Edelman *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, Oxford, 2002) at 83.
[12] This division is discussed in Part B of this Chapter. See also IM Jackman *The Varieties of Restitution* (2nd ed, The Federation Press, Sydney, 2017) at 144.
[13] Geoff McLay "Equitable Damages" in P Blanchard (ed) *Civil Remedies in New Zealand* (Thomson Reuters, Wellington, 2011) at 184.
[14] Jessica Palmer "Student Companion: Equity: *Stevens v Premium Real Estate*" [2009] NZLJ 101.
[15] Peter Birks "Equity in Modern Law: An Exercise in Taxonomy" 26 UW Austl L Rev (1996) 1 at 3.

based' damages.[16] While both can conflict with compensatory damages, gains-based remedies are a broad group of remedies also available as contractual accounts and restitutionary awards which go beyond the scope of this dissertation. 'Account' here means the personal remedy assessed by the gain made by the wrongdoer, without reference to whether the plaintiff suffered any loss.[17] It does not include account of profits available under intellectual property as they have markedly different justifications for their action.

The competing remedy will be called 'compensatory damages' here. This includes damages stemming from a variety of rights which are loss-based, to contrast with the gain-based account.

The term 'restitution' often appears alongside accounts, and sometimes includes them, which created confusion when courts relied on *United Australia*. Professor Birks' classic definition divided restitution into two major forms, both concerned with unjust enrichment of the defendant.[18] The first involved value being transferred from the plaintiff to the defendant which is ordered to be restored, while the second involved a wrong done to the plaintiff making the defendant's profit unjust.[19] The second form of restitution included an account of profits. This dissertation accepts Edelman's view that this second form (which he calls disgorgement for wrongs) is a distinctly different measure deserving of a separate label.[20] Unlike Edelman, this dissertation focuses purely on fiduciary accounts, so the wider label of 'disgorgement' is more likely to create confusion than resolve any. In this dissertation 'restitution' will not include accounts, and will instead refer to Birks' first category, where value was transferred from the plaintiff.

[16] Used by Edelman, above n 11.
[17] Steven Elliott "Personal Monetary Claims" in J McGhee (ed) *Snell's Equity* (33rd ed, Thomson Reuters, London, 2015) at [20-038].
[18] Equity also often used restitution to connote damage, which started the overlap. Birks, above n 15.
[19] P Birks *An Introduction to the Law of Restitution* (revised ed, Clarendon Press, Oxford, 1989) at 313.
[20] Edelman, above n 11, at 79-80. See also Sarah Worthington "Reconsidering Disgorgement for Wrongs" (1999) 62 MLR 218 at 219. This has been acknowledged by Professor Birks in Peter Birks "Unjust Enrichment and Wrongful Enrichment" (2001) Texas Law Rev 1767 at 1774.

Chapter II: The Current Position

A Introduction

The current position is that accounts and compensation are alternative remedies. This has been treated as uncontroversial in cases across both England and New Zealand, but a closer analysis of the reasoning shows that the incompatibility of the remedies has been assumed and the unsatisfactorily defined use of 'alternative' obscures a complex conflict between remedies with substantively different goals.

Part B of this chapter will work back from *Premium Real Estate* through *Tang Man Sit* to the roots of why these remedies have classically been viewed as alternative. This involves the characterisation of these remedies as 'alternative' rather than 'cumulative'. According to Lord Nicholls, alternative remedies are those which are 'inconsistent' requiring the plaintiff to elect between them once judgment is given.[21] This means the award of one remedy fully satisfies the principles of the other, making an additional award excessive. Cumulative remedies do not require a plaintiff to elect between the remedies, but their aggregate recovery cannot exceed their loss.[22] Following this characterisation, tracking the historic cases demonstrates how accounts have come to be grouped with other gains-based remedies despite starkly different goals behind them.

This discussion will deal with the major historical cases in the field, including *United Australia* and *Mahesan* which led to accounts being conflated with restitution generally.[23] More recent applications of the idea of accounts and compensation as alternative will also be referenced to show how the issue has persisted in the United Kingdom similarly to *Premium Real Estate*.

Part C of this chapter will briefly cover the uncontentious half of the conflicting remedies, compensation for loss. This will show how the rule against double recovery is a corollary of the normal loss-based focus of compensatory damages. It will also show how equitable compensation is concerned with the same loss, allowing both common law and equitable compensation to be covered by Chapter IV.

---

[21] *Tang Man Sit*, above n 4, at 197.
[22] At 198.
[23] *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd.* [1978] 2 WLR 444 (PC).

B Accounts and Compensation as 'Alternative' Remedies

1 Premium Real Estate

The Court in *Premium Real Estate* allowed the commission to be refunded, while acknowledging that accounts and compensation are generally alternative remedies. This was acknowledged by all of the Court, with Elias CJ stating:[24]

> The forfeiture of commission by a disloyal fiduciary does not fit comfortably into the mutually exclusive remedies of account of profits and compensation for loss.

Justice Blanchard adopted a slightly different phrase from *Tang Man Sit*, that of 'inconsistency' stating:[25]

> There is no inconsistency in awarding the principal both damages and the refund of the commission, as there would be, for instance, if a court were to order a defendant fiduciary both to pay damages and to account for profits made by the use of the principal's asset.

Justice Tipping spent more time on the possible double counting that would result from allowing the commission to be claimed.[26] This discussion directly applied *Tang Man Sit* to conclude that compensatory and disgorgement damages are generally inconsistent.[27]

The whole Court broadly followed *Tang Man Sit* in viewing accounts and compensation as being alternative. Justice Blanchard directly lifted 'inconsistency' from *Tang Man Sit*, a term which does not appear to have been used before Lord Nicholls' judgment. Chief Justice Elias' used 'mutually exclusive', however she later substitutes 'inconsistency' when discussing the commission, indicating that both terms refer to a fundamental conflict between the remedies.[28] This wording suggests each judge saw inconsistency as the basis for disallowing the account of profits, with neither judge mentioning the phrase 'alternative'.

---

[24] *Premium Real Estate*, above n 1, at [12] per Elias CJ.
[25] At [89] per Blanchard J.
[26] At [97] per Tipping J.
[27] At [102] per Tipping J.
[28] At [31] per Tipping J.

In comparison, Tipping J used 'alternative' and 'inconsistent' interchangeably through his review of *Tang Man Sit*.[29] As to why the remedies are alternative, his Honour said:[30]

> [101] The general rule was based historically on two concurrent reasons. First, courts of law awarded damages and courts of equity generally did not; it was they that developed the remedy of account whereby gain was disgorged. Secondly, the early cases proceeded on the premise that if, as was then usual, the plaintiff and the defendant operated in the same market, the defendant's profit was the obverse of the plaintiff's loss. Hence, to award both remedies would be to award substantially the same remedy twice. Election was therefore required, originally as between courts, and later as between remedies.

This justification cited history and the paradigm case of the parties operating in the same market as the justification. In the paradigm case the remedies overlap to the extent that award of one satisfies the goals of the other, meaning any further damages would effectively double count. The historical argument has not carried much weight in New Zealand, with Courts looking to the practical consequences rather than historical roots.[31] The paradigm case provides assistance with regards to intellectual property accounts and some fiduciary accounts, but should not be extended to other fiduciary breaches where the profit and loss are not mirroring each other. This paradigm later appeared in the United Kingdom and appears to be the major objection to the two remedies being cumulative.[32] It acts as a general justification, obscuring the individual context of the interaction in cases absent a clear connection between the account and the compensatory award.

Parts of all three judgments have been cited here to show that while the result was the same, slightly different terminology was used to convey the idea that accounts and compensation are inherently incompatible. While the terminology was not entirely consistent, all three judges drew heavily on Lord Nicholls decision in *Tang Man Sit*, which bears further consideration.

2 Tang Man Sit

Tang Man Sit involved an unusual conflict between account and compensatory damages. Capacious Investments provided Mr Tang with funds for a joint venture that built 22

[29] At [100] and [102] per Tipping J. Justice Tipping also referred to *Mahesan* in his discussion at [105].
[30] At [101] per Tipping J.
[31] See *Day v Mead* [1987] 2 NZLR 443 (CA) where Cooke P held Courts were not restricted in terms of the remedies available at remedy.
[32] *Ramzan v Brookwide Ltd* [2011] 2 All ER 38 (CA).

properties on land owned by him.[33] Without the knowledge of Capacious, Mr Tang let the homes, collecting rent while they sustained significant damage. Capacious obtained a declaration that it was the equitable owner of the property, making Mr Tang liable for a breach of trust. Capacious claimed both damages and an account of the secret rent, but the extent of the damage took time to be assessed, during which Capacious was paid $1,807,774 as an account of the rent. It later attempted to claim $16,937,197 as the damages for loss of profit and diminution in value, less the account already paid.[34] Mr Tang's estate later attempted to argue that accepting the initial account amounted to election of an account, barring any damages claim.

Lord Nicholls focused on the doctrine of election, reasoning that it was a common sense doctrine designed to prevent excess recovery, and the confusion around the initial judgment for account had prevented them from making an informed election between the remedies.[35] With the acceptance of the initial sum not constituting 'election', there was no issue with the damages claim being barred.[36]

Before determining whether an election had been made, Lord Nicholls first considered whether accounts and compensation were alternatives, which would then require election. Lord Nicholls cited *United Australia Ltd v Barclays Bank Ltd* where the plaintiff had alternative remedies against one party (MFG) and cumulative remedies between parties (Barclays Bank).[37] The claims of money lent (a contractual-style debt claim) and 'money had and received' (a restitutionary claim) which both recovered the same sum, overlapped completely. These principles were applied in *Mahesan* in holding that an account of a bribe and damages for fraud were alternatives as reclaiming the bribe reduced the loss.[38]

Applying these principles to the facts of *Tang Man Sit*, Lord Nicholls felt the account and damages for loss were inconsistent and alternate remedies. The addition of 'inconsistent'

[33] *Tang Man Sit*, above n, at 194.
[34] At 195.
[35] At 201. The initial order gave Capacious both account and compensation in unqualified terms. The point was entirely overlooked and neither party initially noticed the issue. Capacious began to enforce the account, recovering under it while preparing a calculation of the loss suffered. There was no actual choice between account and compensation, when the issue became clear Capacious sought damages less the amount already paid by account.
[36] At 202.
[37] *United Australia Ltd*, above n 4 at 8.
[38] At 200. *Mahesan*, above n 23, at 500.

indicated the remedies were alternate not due to historical origins, but rather the excessive overlap if both were awarded simultaneously.[39]

Aside from this minor change Lord Nicholls left the conflict of remedies issue here, focusing on why there had not been effective election rather than why the remedies were fundamentally inconsistent. This analysis therefore turns to the two key cases relied on by Lord Nicholls to attempt to discover a justification for the 'alternative' label.

3 Pre-Tang Man Sit

United Australia and *Mahesan* combined to give Lord Nicholls comfort in finding the remedies to be alternates. *United Australia* will be addressed first, as it dealt with alternative remedies more generally, while *Mahesan* gave more specific reasoning around conflicts with accounts.

United Australia involved a cheque converted by an employee of United Australia, in favour of MFG. Barclays was the bank who received the cheque, and United Australia was looking to claim against Barclays for conversion. United Australia had earlier attempted to pursue MFG for either money lent or money had and received. This was a contractual claim for loss, or a claim for restitution for money paid.

Barclays claimed the plaintiff could not simultaneously carry on a restitutionary or contractual claim and a tortious claim, as either amounted to 'waiving the tort'. [40] This was upheld in the Court of Appeal, as the money lent claim decided in law that the cheque had been passed with a loan in return, while the restitutionary claim waived the tort to claim in 'assumpsit' a liability to refund.[41]

Much of the complexity here came from the historical doctrine of 'waiving the tort', explored extensively by Viscount Simon LC.[42] The history showed that both textbooks and judgments had assumed waiving occurred when the claim was made, with no reasoned basis for why this would be the case. Lord Atkin pointed out what truly limited the two remedies is that a plaintiff cannot require the wrongdoer to compensate them twice over and gain double recovery.[43]

The House of Lords agreed that what limited claims against other parties was satisfaction for the loss.[44] The House of Lords held that multiple defendants are cumulatively liable until the

[39] Stephen Watterson "Alternative and Cumulative Remedies: What's the Difference?" (2003) 11 RLR 7 at 9.
[40] *United Australia*, above n 4, at 6.
[41] At 10 per Viscount Simon LC.
[42] At 11-13 per Viscount Simon LC.
[43] At 28 per Lord Atkin.
[44] At 21 per Viscount Simon LC, at 31 per Lord Atkin, at 43 per Lord Porter.

plaintiff is satisfied for the loss they suffered.[45] The remedies in quasi-contract and tort were loss based, while the restitutionary claim was based on value transferred from the plaintiff, practically the same as the plaintiff's loss. Against one party, a party cannot have judgment for two remedies effecting the same compensation, or 'alternate' remedies. This acts as a hard limit preventing double recovery. Against multiple defendants, a soft limit of satisfaction prevents the plaintiff double recovering overall, but still allows an appropriate claim against all parties to the wrong.

United Australia was essential for clarifying how remedies interacted, particularly the difference between liability of one defendant against that of multiple defendants. In terms of the actual remedies claimed however, it does not provide much assistance in assessing the possible inconsistency of accounts and compensation. The majority of the remedies discussed focused on compensation for loss, while the restitutionary claim effected another technique of receiving the *exact* sum the plaintiff had lost, as it dealt with value transferred from the plaintiff. Accounts do not have the direct connection to loss that the 'money had and received' claim in *United Australia* had and the link to fiduciary accounts likely arose due to the general grouping of such claims as 'restitution for wrongs.[46] As discussed in Chapter I, 'restitution' was commonly used in cases referencing account, and they were grouped with all damages that referenced the defendant's gain despite the distinctly different purposes of the account discussed in Chapter III. *United Australia* therefore does no provide direct authority for the conflict between account and compensation beyond the outdated link to other forms of restitution.

Mahesan offered assistance on this point. It was a Privy Council case on appeal from Malaysia where a director of a building society acted as an agent to facilitate the sale of land to the building society at an inflated price. The gross profit was $488,000, of which $122,000 (25%) was passed on to the agent.[47] The housing society attempted to claim the loss due to the overinflated price and the bribe from the director as a breach of his duty to inform his principal of the lands initial price.[48] The Federal Court ordered account of the bribe and compensation for the loss, equal to the gross profit minus necessary expenses.

[45] See category (c) of John Stevens "Election Between Alternative Remedies" (1996) 4 RLR 117 at 119.
[46] Jackman, above n 12, at 144.
[47] *Mahesan*, above n 23, at 446.
[48] At 447.

Lord Diplock's view of such an award was clear in the brief judgment:[49]

> The judgment of the Federal Court thus gave to the housing society in the civil action against the agent *double* recovery of the amount of the bribe that he had received…

There was limited support for recovery of both bribes and losses which the Court found unconvincing.[50] Damages for fraud are limited to the actual loss suffered, which is reduced by the repayment for the bribe. The claim was characterised as identical to *United Australia*, the bribe could be regained (from agent or briber) through a restitutionary claim or loss from fraud, which were alternates.[51] The reason for this link was that the elements of fraud relating to a bribe created an irrebuttable presumption for the amount of the bribe, but proof was required for loss *beyond this*.[52] This indicated that the remedies are inextricably linked, the only difference being the presumption that a bribe must be repaid while loss would need to be shown by the plaintiff.

Mahesan treats the liability to account as coming through money had and received, creating an analogous situation to *United Australia*. It appears the close factual link between the bribe and the loss of profit made the Court immediately uncomfortable with the looming spectre of double recovery. This is a practical example of the paradigm scenario discussed by Tipping J, the loss to the plaintiff is the briber's gain, which is connected to the bribe. Requiring the agent to pay both would result in a clear overlap on this set of facts. This was treated as a purely common law claim for fraud, with gains-based remedies limited to those possible in restitution through 'money had and received', an unusual characterisation given the bribe was not value transferred by the principal. Lord Diplock noted the conceptual difficulties of this restitutionary remedy here, but did not go on to consider it as an account. This common law focus was despite acknowledgement that the historical basis of the agent's liability to account was equitable.[53]

The Court never considered any theoretical conflict between account and compensation. The close factual connection of the bribe to the loss combined with the characterisation as 'money had and received' created two problems in applying this case to all account conflicts. *Mahesan* functioned as a conduit for the reasoning of *United Australia*, and the 'alternate' label, to be applied to accounts, which resulted in Lord Nicholls' conclusion of inconsistency in *Tang Man*

[49] At 447.
[50] This was dicta from *Salford Corporation v Lever* [1891] 1 QB 168 and *Hovenden and Sons v Milhoff* (1900) 83 LT 41.
[51] At 450.
[52] At 451.
[53] At 448.

Sit. The grouping of accounts with restitutionary claims confused matters, as it prevented the principles of the fiduciary account from being independently considered. While the history shows a real conflict between compensation and restitution, it does not show inconsistency between compensation and account of profits.

The history shows that none of these cases have considered the basis for inconsistency, forcing the search to move elsewhere to find a principled conclusion on the interaction of these remedies.

3 Later Application

Tang Man Sit has generally been referred to without further discussion as holding that accounts and compensation are alternate and inconsistent.[54] *Ramzan v Brookwide Ltd.* provides a modern application of the *Tang Man Sit* decision, where the conflict was between compensatory damages (through trespass, breach of trust and denial of title) and an account of profits for use of a room beneficially owned by the plaintiff.[55] The Court of Appeal reversed the award of an account (related to the breach of trust). The Court commented:[56]

> The appellant submits, correctly, that double recovery cannot be allowed. Double recovery means that a claimant receives two awards for the same injury, though these may be in different amounts. In some circumstances the question whether there has been double recovery is a pure question of fact. In other circumstances it is a question of law whether the successful claimant is treated as having received more than that to which he is entitled because an award on one basis excludes the possibility of a cumulative remedy for loss on another basis.

The question of law here concerned the conflict between the account and compensatory damages measured by loss of profit. The Court applied *Tang Man Sit* and held the remedies were inconsistent, as to award them would give damages "measured both by Brookwide's gain and by his own loss".[57] However, unlike the older cases, Lady Justice Ardern gave a brief reason as to why they were inconsistent here. The plaintiff could not use the room to make a profit at the same time as Brookwide obtained a profit from effectively renting out the space.

---

[54] See *De Crittenden (Robin) v (1) Estate of Bayliss (Charles Albert) (Deceased)* [2005] EWCA Civ 1425 at [21].
[55] *Ramzan*, above n 32, at [18].
[56] At [29].
[57] At [59].

This case gave the most detail as to why the remedies were inconsistent and yet was still limited to a single sentence. The conflict here seems to be explicitly linked to the close factual connection between compensation and illegitimate profit. As the physical space could not be used simultaneously for the plaintiff's fictional profits and the actual profits gained, a claim was limited to one of the measures. This seems similar to the reasoning in *United Australia* of inconsistent rights,[58] and is another example of Tipping J's paradigm of plaintiffs in the same market having obverse profit and loss. The plaintiff had a right to the profits of the trust assets, and the infringement of this right can be measured by a loss of profit, or accounting for the actual profit gained (which only differed here due to the quirk in the use of space). Technically, this does not support the remedies being fundamentally inconsistent, but rather suggests that any assessment of compensatory damages has to be alive to considering to what extent it would practically overlap with an account.

Later cases have not addressed the situation where the compensation is measured by a diminution in value, and there is no overlap between profits of a space. Nor do they clearly apply to non-custodial fiduciaries, where physical space is not at issue.

The case law in this field provides little help in assessing why accounts and compensatory damages are inconsistent. This point was noted by both Birks[59] and Watterson,[60] but despite this, *Premium Real Estate* and *Ramzan* directly adopted *Tang Man Sit* without further analysis of any underlying inconsistency between the remedy. The recurring reason appears to be the 'account is the obverse of loss' paradigm discussed by Tipping J which is not applicable to all conflicts. This has resulted in the 'alternative' label cloaking an absence of discussion as to the conflict between accounts and compensation.

C Principles of Compensatory Damages

The justifications for compensatory damages and account therefore need to be independently considered to assess whether there is any real underlying inconsistency between each. Compensation for loss will be considered first, as it provides a more stable picture than accounts. The rule against double recovery will be focused on, as it formed an important element of Lord Nicholls decision when stating that accounts and damages are inconsistent.[61]

[58] *United Australia*, above n 4, at 29 per Lord Atkin.
[59] Birks, above n 3, at 378.
[60] Watterson, above n 39, at 7.
[61] *Tang Man Sit*, above n 4, at 198.

Damages for breach of contract have focused practically on the plaintiff's loss, with courts being careful not to place the plaintiff in a better position than they would have been in if the contract had been fulfilled.[62] This idea contrasts markedly with the principled basis for accounts, discussed in Chapter III.

This chapter will also look to the principles behind equitable compensation, the remedy which most often finds itself in conflict with accounts.[63] The juristic basis for this remedy will be traced to show how equitable compensation generally has the same purposes as common law damages. This allows later discussion of the interaction between account and damages to apply to both common law and equitable remedies without further distinction.

1 General Objectives of Contractual Damages

Any discussion of the objectives of damages must begin with the classic statements of Baron Parke in *Robinson v Harman.*[64] Baron Parke stated that the object of contractual damages was:[65]

> Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

This principle has been supported by the Supreme Court in New Zealand and remains a core pillar of contractual damages.[66]

These principles provide a definition for damages which contains clear limitations. As the focus is on *compensation* for *loss*, any remedy should not put the plaintiff in a better position than if the contract was performed.[67] This has been described as a "principle that is absolutely firm, and which must control all else."[68]

---

[62] This assumes there is a contract. This concern is seen in the deduction made for betterment in *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 (HC).
[63] As in *Tang Man Sit*, above n 4, and *Premium Real Estate*, above n 1.
[64] *Robinson v Harman* (1848) 1 Exch Rep 850.
[65] *Robinson*, above n 64, at 855.
[66] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.
[67] *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 (Comm) at [45]. The United States goes so far as to legislate to prevent recovery greater than possible performance, see Cal Civ Code CIV § 3358.
[68] *Skelton v Collins* (1966) 115 CLR 94 (HCA) at 128.

This proposition has been challenged as a general definition, given that nominal damages are possible damages for breach of contract.[69] Lord Nicholls further questioned this principle in *Attorney General v Blake*, eventually finding room for an account to be ordered for breach of contract.[70] While these arguments may show that *loss* is not an all-encompassing principle, the legitimacy of exceptions does not affect the guiding role it plays in measuring most forms of damage. Nominal damages, as well as contractual accounts have separate considerations which do not intrude on ordinary considerations of pecuniary damages for breach of contract.[71]

These classic definitions of damages were confined by excluding restitution.[72] This was restitution based on unjust enrichment due to the benefit received, rather than loss to the plaintiff.[73] The divide can be seen when restitution and compensation could be both be claimed.

Restitution could often overlap with compensation, with a plaintiff having paid a sum under contract before suffering an additional loss on breach. This conflict was almost exclusively considered with restitution following a transfer of value and *not* restitution for wrongs like accounts. *Baltic Shipping Company* suggested that a plaintiff could not receive full damages and complete restitution (of value transferred) for several reasons.[74] Restitution removes the consideration which entitled performance, or the plaintiff will generally be adequately protected by contractual damages which consider substitute performance or reliance loss.

These points do not have the same application to accounts where proper fiduciary performance is connected to the unauthorised profit. The reasoning does show how cases which deal with restitution, like *United Australia*, are comfortable viewing the remedies as alternative.

Underlying these arguments is a principle common to most jurisdictions, that a plaintiff cannot combine remedies to gain compensation in excess of their loss.[75] The concept of loss

---

[69] J Edelman *McGregor on Damages* (20th ed, Thomson Reuters, London, 2018) at [1-009]. Argued further in Edelman, above n 11, at 6-22. Edelman also mentions exemplary damages, but these are not available in New Zealand following *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169.
[70] *Attorney General v Blake* [2001] 1 AC 268 (HL) at 278.
[71] Lord Hoffman in *The Gleaner Co Ltd v Abrahams* [2004] 1 AC 628 (PC) at [41] noted that compensatory damages can have a punitive or deterrent function. Edelman, above n 69, at [1-010] stressed that while these might be consequential effects, the aim remains compensation.
[72] Restitution where value was transferred, as discussed in Chapter I.
[73] Edelman, above n 69 at [1-004]-[1-006].
[74] *Baltic Shipping Company v Dillon* (1992) 176 CLR 344 (HCA) at 359.
[75] GH Treitel *Remedies for Breach of Contract: A Comparative Account* (Clarendon Press, Oxford, 1988) at 89.

therefore leads to a derivative, but essential principle, the rule against double recovery. In *Baltic Shipping*, as in other cases like *P & O Steam Navigation Company*, there is no theoretical objection to combination of remedies as long as the plaintiff is prevented from obtaining double recovery.[76] This is why Tipping J in *Premium Real Estate* was happy to characterise the agency payment as a restitutionary claim, it presented no logical inconsistency on those facts.[77]

The rule against double recovery is considered a somewhat trite concept and has received little judicial consideration. Most authors see it as an immovable bar to damages, and do not consider it further.[78] As compensation flows from loss, any remedy which allows recovery beyond loss gives the plaintiff a windfall, or 'double recovery' of the loss. The rule against double recovery is the negative framing of the central purpose of compensatory damages, in limiting compensation to loss, damages avoid excess recovery for the plaintiff.

The broad focus on loss, interaction with restitution, and rule against double recovery paint compensation as a pragmatic response to harms suffered by the plaintiff. This is in direct contrast to the principles tying accounts to the fiduciary relationship.

2 Equitable Compensation

Premium Real Estate was not concerned with common law damages. The loss claimed was rectified using equitable compensation, asking the question of whether the same limitations discussed above apply to equitable measures of damage.

The remedy for breach of an equitable obligation was classically that of account, which will be discussed in more detail in Chapter III.[79] As law and equity are said to have merged, courts have become increasingly comfortable with monetary compensation being possible in equity. This has been the clear position in New Zealand following the judgment of Cooke P in *Day v Mead*:[80]

---

[76] *P & O Steam Navigation Company v Youell* [1997] 2 Lloyd's Rep 136 (CA) at 141.
[77] *Premium Real Estate*, above n 1, at [110] per Tipping J.
[78] Treitel, above n 75, at 96-100. E Peel *Treitel: The Law of Contract* (13th ed, Sweet & Maxwell, London, 2011) at 20-036.
[79] JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis, Wellington, 2015 at [26-015].
[80] *Day*, above n 31, at 450. See also *Coleman v Myers* [1977] 2 NZLR 225 (CA).

> It can hardly be doubted that monetary compensation can be awarded for breach of such an obligation and that the Courts are not restricted to the remedies of injunction or account, neither of which could meet the circumstances of the present case.

The point was later regarded as settled in New Zealand in *Aquaculture Corp*[81] and was followed in *Premium Real Estate*.[82] Burrows considered any previous divide as being due to history rather than principle.[83]

Equitable compensation is therefore established for a breach of fiduciary obligations, leading to the next enquiry, which is asking whether it is responding to the same form of loss as common law damages.[84] Speaking of equitable compensation broadly, there is some dispute as to whether it always focuses on loss.[85] In the case of specific breaches of fiduciary obligations, it appears to more closely mirror common law damages.[86]

The remedy is sometimes available in cases where the principal has not suffered a loss, as where it is used instead of rescission, or 'substitutive' claims.[87] Mitchell in his work on equitable compensation viewed such awards as a special kind of damage, removed from the ordinary losses the remedy applies to.[88] The key distinction here is recognising the broad variety of claims possible under equity, where some such as substitutive claims are not concerned with loss.[89] The general 'equitable compensation' terminology should not obscure the different nature of the obligation in question, an example being the duty on a custodial fiduciary to reconstitute the trust.[90]

Specific application of compensation to breaches of fiduciary obligations show the remedy as falling much closer to common law damages. This is an example of 'reparative' equitable compensation for a loss consequential on breach of fiduciary duty.[91] Reparative claims are

---

[81] *Aquaculture Corp v NZ Green Mussell Co Ltd* [1990] 3 NZLR 299 (CA).
[82] *Premium Real Estate*, above n 1, at [33] per Elias CJ.
[83] A Burrows *Principles of the English Law of Obligations* (Oxford University Press, Oxford, 2015) at 330.
[84] The jurisdiction for this compensation in the context of fiduciaries comes from the Court's inherent jurisdiction over fiduciary's conduct. Julie Ward 'Equitable Compensation-An Overview' in S Degeling and JNE Varuhas (ed) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, Oxford, 2017) 65 at 73.
[85] Above at 67.
[86] *Mothew v Bristol & West Building Society* [1998] 4 All ER 698 and *Libertarian Investments Ltd v Hall* [2013] HKCFA 93 at [170].
[87] See *McKenzie v McDonald* [1972] VLR 135 and *Maguire v Makaronis* [1997] 188 CLR 449.
[88] Charles Mitchell "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 CLP 307 at 318.
[89] Lionel Smith "The Measurement of Compensation Claims against Trustees and Fiduciary's" in E Bant and M Harding (eds) *Exploring Private Law* (Cambridge University Press, Cambridge, 2010) 372.
[90] Mitchell, above n 88, at 321-324.
[91] Steven Elliott, above n 17, at 20-028.

where breach of a primary right leads to a secondary obligation to compensate, similar to claims in breach of contract.

Beginning with *Nocton v Lord Ashburton* the remedy was described similarly to reliance damages as attempting to put the plaintiff in as good a position as before the wrong.[92] Lord Justice Millett as he was then in *Bristol* clarified that compensation for breach of the duty of care and skill is concerned with loss.[93]

His Lordship noted that this is not the same as a fiduciary duty, which sometimes attracts substitutive remedies like rescission.[94] Reparative compensation would appear to parallel the damages Millett LJ discusses, because they are tied to the secondary obligation to make good a loss. This is why Edelman and Elliott characterised reparative equitable compensation as 'damages' broadly, like other damages they focus on compensation for loss.[95] Despite confusion around issues of causation and remoteness, the fundamental question for reparative compensation appears to be loss.[96]

Equitable compensation is effectively the same as common law damages in goal. It attempts to compensate the plaintiff for the loss suffered, and while some principles around causation may differ, those around double recovery will not. Any combination of equitable compensation with another loss-focused remedy would result in the plaintiff obtaining more than their loss, placing them in a better position than they were before the harm. Chapter IV's discussions around combination of remedy can therefore equally apply to equitable compensation without further distinction.

3 Conclusions

Both contractual and equitable compensation focus on the plaintiff's loss. Remedies which practically exceed this loss raise concerns of double recovery which cannot be fully ignored, even if the source of the additional remedy comes from outside of compensatory damages. When accounts are combined with compensation, there is a risk that the account indirectly overcompensates the plaintiff. However, as the next chapter shows, accounts have an entirely

[92] *Nocton v Lord Ashburton* [1914] AC 932. See McLay, above n 13, at 182.
[93] *Bristol,* above n 86, at 711.
[94] Above, at 711.
[95] James Edelman and S Elliott "Money Remedies against Trustees" (2004) 18 Tolley's Trust Law International 116 at 121.
[96] For the discussion around this confusion and the leading case of *Target Holdings Ltd v Redferns* [1996] AC 421 see Mitchell, above n 88 and McLay, above n 13, at 160.

separate set of objectives to compensation, which would not be adequately fulfilled without forcing the defendant to disgorge their profit.

Chapter III: Account of Profits

A Introduction

Compensatory damages focus on loss, in direct contrast with gain-focused accounts. This chapter considers the principles justifying the account for breach of fiduciary duty, to determine how an award of compensation as in *Premium Real Estate* could indirectly satisfy them.

As noted by Elias CJ in *Chirnside v Fay*, a breach of fiduciary duties attracts different legal consequences to breaches of other duties.[97] The primary remedy is an account of profits flowing from the breach of the no profit rule.[98] Accounts have a winding history, and several different meanings, but this dissertation focuses on accounts which are remedial responses calculated by reference to the defendant's gain. [99]

Accounts are described as discretionary, however they are granted or withheld based on settled principles.[100] The starting point from *Regal (Holdings) Ltd v Gulliver* and *Boardman v Phipps* is that an account of profits is available where a fiduciary has acquired a profit within the scope of the fiduciary relationship, regardless of whether the fiduciary was acting in good faith or whether the principal could have made the profit.[101] An allowance can be made for the care and skill of the fiduciary in making the profit.[102] An account of profits can be prevented by equitable defences or if ordering one would be unconscientious.[103]

This chapter introduces three different models justifying an account as a remedy. Part B sets out a punitive justification, focused on deterring the fiduciary and others from future breaches. This discussion will indicate that this approach is more appropriately viewed as a side effect rather than guiding normative theory of accounts. Part C discusses the

---

[97] *Chirnside*, above n 9 at [16] per Elias CJ.
[98] At [56] per Gault J. See also *Curtis v Gibson* [2011] NZCA 373 at [84] and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL). This is tied to the no conflict rule as discussed in Chapter III: Part B.
[99] For a detailed history of the account see Devonshire, above n 7, at 3 and Heydon, above n 79 at 907. Charles Rickett and Jessica Palmer "Restitutionary Remedies" in P Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2013) 383 at 416.
[100] *Warman International v Dwyer* [1995] 182 CLR 544 (HCA) at 560.
[101] *Regal*, above n 98 and *Boardman*, above n 9. See also *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 (HC). Also see *Keech v Sandford* (1726) 25 ER 223 although the generally applicability of the rule derived from this case has been disputed, see Andrew Hicks "The Remedial Principle of *Keech v Sandford* Reconsidered" (2010) 69 CLJ 287.
[102] *Boardman* above n 9, at 64 per Lord Cohen. Also see *Chirnside*, above n 9, at [122] per Tipping and Blanchard JJ.
[103] Heydon, above n 79, at [5-270].

prophylactic justification of account, which deters fiduciaries from breaching their duty in the first place. This is perhaps the most widely accepted model. Part D addresses a novel model, the quasi-property approach which helps explain why the principal is due the fiduciary's gain. Elements of these two models provide direct assistance to Chapter IV when assessing how accounts should interact with compensation, particularly through how they illuminate the essential elements of the fiduciary relationship.

These theories focus more on the substance of the law at present, rather than the historical basis of accounts. This approach has been favoured as fiduciary relationships have moved further from their traditional trust roots.[104]

B Account as a Punitive Remedy

The simplest conception of disgorgement is as a remedy to punish and deter fiduciaries from breaching their obligations. [105] There are issues which make this an inappropriate primary justification for accounts, but the simplicity and indirect support for this model makes it appropriate to address first. Stripping the defendant of their gain functions to punish and deter breach by others by removing any benefit accrued by the breaching fiduciary.

There is a fine distinction between the punitive and deterrence justification discussed here and the prophylactic justification discussed below. This model focuses on punishing the fiduciary's breach and deterring others from taking similar action. In comparison, the prophylactic model uses an account to disincentivise breach of the fiduciary's fundamental obligations, dissuading breach before it has occurred.[106]

1 Support for the Punitive Approach

[104] *Bristol*, above n 86, at 710.
[105] Mason P in *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 at [162] stated that the authorities rarely distinguish between 'punishment' and 'deterrence', however the deterrence discussed in the punitive and prophylactic measures differs, as discussed in the prophylactic approach.
[106] The difference this makes is discussed further in Part C. Another way to describe it is as enforcing the no profit rule in the abstract against enforcing it in pursuance of enforcing other aspects of the fiduciary relationship.

Courts are aware of the punitive and deterrent effects of accounts. Chief Justice Elias in *Chirnside v Fay* favourably cited Parker LJ in *Murad v Al-Saraj* where he stated:[107]

> As Lord Keith observed in *Attorney-General v Guardian Newspapers Limited (No 2)* (1990) 1 AC 109 at 262E-F, the remedy of an account of profits: "….is, in my opinion, more satisfactorily to be attributed to the principle that no one should be permitted to gain from his own wrongdoing".

This passage supports the notion that the focus is on ensuring the fiduciary is unable to benefit from the breach. The deterrence aspect of this model is further supported by the strict application of accounts, with liability not depending on bad faith. This position was initially stated in *Regal (Hastings) Ltd v Gulliver* and supported by Tipping J in *Estate Realties v Ltd. v Wignall.*[108] The strict application is only alleviated through provision of an allowance, the basis for which Tipping J referred back to Lord Denning MR in *Phipps v Boardman*:[109]

> If the defendant has done valuable work in making the profit, then the court in its discretion may allow him a recompense. It depends on the circumstances. If the agent has been guilty of dishonesty or bad faith, or surreptitious dealing, he might not be allowed any remuneration or reward.

This passage, along with the policy of allowances discussed in *Chirnside*, indicates that a fiduciary breaching in bad faith is punished more severely than a fiduciary acting generally in good faith.[110]

New Zealand initially appeared to ignore the conduct of the fiduciary in the context of allowances, instead using it to accurately define the profit made.[111] More recently, Courts have shifted towards considering the fiduciary's moral culpability, with the majority in *Chirnside* clarifying that allowances are discretionary, and a Court will be less inclined to give an allowance for particularly reprehensible conduct.[112]

This application of allowances varies disgorgement based on moral responsibility. Courts appear to claim that accounts are not penal on one hand, while using the

---

[107] *Chirnside*, above n 9, at [17] per Elias CJ. Citing *Murad v Al-Saraj* [2005] EWCA Civ 959 at [108].
[108] *Estate Realties Ltd. v Wignall* [1992] 2 NZLR 615 (HC) at 620-621.
[109] Above, at 622. Citing *Boardman*, above n 9, at 1020.
[110] This is penal approach is directly supported by Mason P in *Harris*, above n 105 at [160].
[111] *Estate Realties*, above n 108 and *O'Sullivan v Management Agency and Music Ltd* [1984] 3 WLR 448 (CA).
[112] *Chirnside*, above n 9, at [122] per Tipping and Blanchard JJ.

discretionary allowance to benefit some fiduciaries more than others. The operation of the allowance therefore appears to have some penal aspect to it.

There is academic support for a punitive justification for gains-based remedies. Friedmann divides restitution on a property and non-property basis.[113] Non-properetary restitution[114] is justified by considerations of deterrence and punishment in the context of the duty breached.[115] This differs from ordinary punitive remedies which are not related to the defendant's profit.

Edelman similarly identified the deterrence of future fiduciaries as the basis for disgorgement damages, stating:[116]

> Preventing a defendant from profiting from a wrong ensures that both the defendant (in future cases), and others that might be in a similar position, are deterred from committing that type of wrong where profit might be a motive or encouragement.

This deterrence is necessary in the context of fiduciary relationships, as they are institutions which can be damaged by profit making.[117] The relationship is characterised by trust and vulnerability, and therefore requires stringent rules to ensure fiduciaries are constantly avoiding even innocent breach.[118] Edelman also conceives allowances as a tool to assist in assessing causation, with the denial of allowances being punitive as discussed earlier.[119]

2 Issues with the Punitive Approach

There is intuitive appeal in the account as a punitive measure. It explains why an account functions regardless of the principal having suffered no loss or being unable to make the profit in question. The focus is purely on stripping the fiduciary of any benefit, and in doing so this deters fiduciaries from abusing their positions. In spite of this, there are issues with this approach, both theoretically and in how it has been discussed by courts.

Judicial discussion of accounts has traditionally steered away from describing them as punitive. The High Court of Australia has clearly stated that the purpose of an account is not

---

[113] Daniel Friedmann "Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong" (1980) 80 Colum L Rev 509.
[114] Friedmann includes accounts for breach of fiduciary duty in his definition of 'restitution' here.
[115] At 551.
[116] Edelman, above n 11, at 83.
[117] At 85. See also Jackman, n 12, at 156.
[118] At 85.
[119] At 105.

to punish,[120] and the New Zealand Court of Appeal has described equity and penalty as strangers.[121] Edelman points out that courts are attempting to dissociate the penal effect from what controls the measure of damage, rather than denying any penal effects.[122]

Allowances often appear to be operating punitively. Justice Tipping in *Chirnside* acknowledged that denying an allowance can have a penal effect, but clarified that this was not the purpose of refusing allowances. Instead this was simply the consequence of a fiduciary failing to satisfy the Court that a more liberal approach should have been taken.[123] This approach allows a degree of flexibility for the remedy of account while still leaving the default position of complete account. While this flexibility can have punitive effects, it does not mean that the original account is aimed at punishment.[124]

Further theoretical issues have been identified with a punitive approach to accounts. Lionel Smith commented that the account only strips the fiduciary of their actual profit.[125] As accounts are strictly limited to the profit gained, they struggle to have a deterrent effect.[126] It is impossible for a fiduciary to end up in a worse position than they began in, requiring detection and enforcement to be fully effective to prevent overall profit from breaches.[127] Friedmann also identified this issue, the account is proportional to the defendant's success rather than the severity of the breach for the plaintiff.[128] This indicates the account is *preventing* gain rather than punishing it, directing towards the prophylactic justification discussed in Part C.

The punitive approach also appears a weak justification in the practical context of fiduciaries. *Boardman v Phipps* has shown that breach can be innocent, and even honest.[129] A fiduciary can therefore be quite unwitting that their actions have fallen afoul of their strict duties, making it difficult for previous decisions to dissuade their conduct. [130] This is particularly the case given the flexibility available when finding a fiduciary relationship, resulting in

[120] *Dart Industries Inc v Décor Corporation Pty Ltd* (1993) 179 CLR 101 (HCA) at 106.
[121] Aquaculture, above n 81, at 302.
[122] Edelman, above n 1, at 83.
[123] *Chirnside* above n 9, at [142] per Tipping and Blanchard JJ.
[124] M Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties*, (Hart Publishing, Oxford, 2010) at 80-84.
[125] Lionel Smith "Deterrence, Prophylaxis and Punishment in Fiduciary Obligations" (2013) 7 J Eq 87.
[126] This is supported by Mason J in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 (HCA) at 109-110 where he notes that equity does not punish by going beyond the profits actually received.
[127] Smith, above 125, at 91.
[128] Friedmann, above, n 113, at 552.
[129] *Boardman*, above n 9. A 'duty of loyalty' is a common phrase in relation to fiduciaries, see *Chirnside*, above n 9, at [21] per Elias CJ and *Stevens*, above n 1, at [4] per Elias CJ.
[130] Smith, above n 125, at 93. As illustrated in *Boardman*, above n 9.

unwitting fiduciaries.[131] The fiduciary duties can be construed as directing appropriate conduct in a relationship characterised by a power imbalance.[132] It is not directed to punishing undesired conduct, which is why the remedies are not adequately designed to act as effective deterrents.

C Account as a Prophylactic Tool

Accounts can be understood as a prophylactic measure to prevent harm which could be caused by an errant fiduciary. This is subtly different to the punitive justification as under this approach the account works to protect the wider fiduciary relationship. An account under this model is still acting as a deterrent, but can be distinguished by the *internal* focus of the prophylactic method. This method views accounts as putting hurdles in the way of an errant fiduciary, disincentivising breaches of duty. The punitive approach has an *external* focus and uses the account to make an example of a breaching fiduciary for others.

Courts have often focused on accounts setting high standards for fiduciaries and producing a disinterest in breaching their duties. Justice Tipping in *Estate Realties* referred favourably to the oft cited passage of Lord Herschell in *Bray v Ford*, which contains several of these principles:[133]

> It does not appear to me that this rule is, as has been said, founded on principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding the fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.

The account works to remove the temptation to self-benefit, therefore acting as a neutral tool to protect the fiduciary duty. On a cynical view, without any possibility of self-benefit, the fiduciary is left only with the option of fulfilling their fiduciary role, and gaining the benefits that come from their honest work. This idea of 'financial disinterest' is supported by Chief Justice Elias in *Chirnside*, where she refers to *Attorney General v Blake* and how the account

---

[131] *Chirnside*, above n 9, at [72] per Tipping and Blanchard JJ. A fiduciary's lack of knowledge does not impact their culpability, but it may go to how effective an account is as a deterrent.
[132] Irit Samet "Fiduciary Loyalty as Kantian Virtue" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 125 at 137.
[133] *Estate Realties*, above n 108, at 623. Quoting *Bray v Ford* [1996] AC 44 at 51 per Lord Herschell.

'reinforces' wider fiduciary duties.[134] This discussion sees the account less as making an example of fiduciaries, rather trying to remove the incentives to breach what can often be a powerful position.

Lord Justice Millett's classic speech in *Mothew v Bristol & West Building Society* lends further support to this approach.[135] He characterised the no profit and no conflict rules as facets of the overall obligation of loyalty.[136] With the account giving weight to the no profit rule, it is functioning to ensure the loyalty of the fiduciary. *Chan v Zacharia* supports this analysis for the no conflict rule, indicating that the objective is to prevent the fiduciary from considering their personal interest.[137]Any unlawful gain which would breach the duty of loyalty is stripped, making such action futile.[138] While the allowance discretion can be used punitively, the actual account remains directed towards preventing breach from every occurring.

The prophylactic principle finds wide support academically, but there are differences in what aspect of the fiduciary relationship authors believe accounts are protecting. Both Conaglen[139] and Stephen Smith view the no profit rule and account as acting to protect non-fiduciary duties.[140] Conaglen views the entire fiduciary relationship as acting prophylactically to give effect to these non-fiduciary duties.[141] This draws from *Hospital Products Ltd v US Surgical Corp* where Mason J stated the non-fiduciary duties are what; "regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of [these duties]".[142]

---

[134] *Chirnside*, above n 9, at [19] per Elias CJ, referring to *Attorney General v Blake*, above n 70, at 280. The duty 'reinforced' here is the wider duty of fidelity, rather than other aspects of the fiduciary content discussed by academics later in this chapter.
[135] *Bristol*, above n 86, at 710-715.
[136] At 712.
[137] *Chan v Zacharia* [1984] 154 CLR 178 (HCA) at 198 per Deane J.
[138] *Harris*, aboven n 105, at [408].
[139] Conaglen, above n 124.
[140] Stephen Smith "The Deed Not the Motive: Fiduciary Law Without Loyalty" in P Miller and A Gold (ed) *Contract, Status, and Fiduciary Law* (Oxford University Press, Oxford, 2016) 213.
[141] Conaglen, above n 124, at 62. Conaglen also refers to the duty of loyalty as operating to effect these non-fiduciary duties.
[142] *Hospital Products*, above n 126, at 97. There has been criticism of the weight placed on this decision due to the contractual context and remedial issue at stake. Joshua Getzler "Ascribing Fiduciary Obligations" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 39 at 47.

Conaglen reinforced the prophylactic role of accounts by contrasting them with the operation of gain-based remedies in contract and tort.[143] Profit-stripping in contract and tort often relates to deliberate wrongdoing, whereas accounts against fiduciaries are almost always available as a matter of right.[144] In Conaglen's view, the possibility of profit is what creates the risk of breach, and the account removes this incentive.[145] By not accounting for wrongdoing, the account acts neutrally to prevent the fiduciary from acting in conflict with their principal's interest, protecting their non-fiduciary duties. Stephen Smith disagreed as to the existence of the duty of loyalty but views the no conflict rule as having a similar effect in ensuring the fiduciary fulfils their mandate.[146]

Lionel Smith argues that the no conflict and no profit rules are prophylactic, but on a different basis to Conaglen and Stephen Smith. The no conflict rule goes beyond removing self-interest, it is also concerned with a fiduciary overcompensating when trying to be objective which is why it is applied strictly in both situations.[147] This danger of unconscious conflict when exercising discretion requires a strict rule, indicating compensatory damages would need to practically assist if accounts are to be alternative.[148]

The duty of loyalty is central to Harding's discussion of accounts.[149] This duty creates a norm of selflessness which is informed by the no profit rule, rather than the no profit rule existing independently.[150] As this rule operates to create selflessness, a principal can enter into a fiduciary relationship without trusting the fiduciary personally. The account mimics what the fiduciary would have been expected to do had they conformed to the selflessness norm.[151]

Despite disagreements as the exact nature of the duties, these authors create a convincing picture of the account and related rules of no conflict as essential to ensuring the fiduciary acts appropriately with the discretion derived from the principle. An economic analysis of fiduciary law supports the need for prophylactic measures in the distinct agency problem

[143] These are limited to specific interests in contract, as in *Attorney General v Blake*, above n 70. In the context of torts this has related to cynical commission of some torts, see Edelman, above n 11, at 136.
[144] Conaglen, above n 124, at 84.
[145] The principle of removing interest in benefits is also discussed in Devonshire, above n 7, at 50.
[146] Stephen Smith, above n 140, at 214.
[147] Lionel Smith, above n 125, at 98.
[148] Irit Samet "Guarding the Fiduciary's Conscience - A Justification of a Stringent Profit Stripping Rule" (2008) 28 OJLS 763.
[149] Matthew Harding "Disgorgement of Profit and Fiduciary Loyalty" in S Degeling and J Varuhas (eds) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, Oxford, 2017) 19.
[150] At 28.
[151] At 30.

created by the fiduciary's 'imperfect observable discretion'.[152] Limiting discretion is undesirable where the principal cannot foresee future circumstances, so prophylactic rules minimise transaction costs needed in setting limits and induce disclosure of conflicts.[153]

Prophylactic rules protect the relationship independent of harm, justifying a strict account. This indicates that the relationship itself would be damaged or destroyed by a possible profit, speaking to the importance of the norms of selflessness at the centre of the fiduciary relationships which will be discussed in Chapter IV. The law is comfortable providing for non-compensatory damages elsewhere,[154] even where a right has no market value.[155] The account therefore acts as a reasonable way to place a value on this right of the principal to prevent unauthorised profits.[156] The fiduciary's profit is an objective measure, embodying the right that they breached, and represents the monetary value of failing to obtain the principal's consent.[157]

The prophylactic approach receives the broadest level of support both judicially and academically. It avoids the complicated effect of punishing defendants by leaving it as a side-effect, and places the account as a supporting tool for the overall fiduciary relationship. The prophylactic approach indicates that the elements of vulnerability, trust and confidence that typify the relationship require independent support that a loss focused remedy would not always provide. It does not fully explain why the principal is rightfully due the profits, a gap which is assisted by a quasi-property analysis.

D Disgorgement as giving effect to quasi-property rights

The final approach discussed in this chapter differs markedly from the two deterrence focused approaches discussed above. The quasi-property approach focuses less on policy reasons around protecting the fiduciary institution, and more on how the nature of the

[152] Robert Sitkoff "An Economic Theory of Fiduciary Law" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 197 at 199.
[153] At 201 and 207.
[154] See for example, failure to perform a contractual service having damages at market value *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) at 557.
[155] See the controversial *Wrotham Park* damages from *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798. However, it is important to note that these are not gains-based *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20. See also *Attorney General v Blake*, above n 70.
[156] Stephen Smith, above n 140, at 244.
[157] Above at 245.

principal's rights connect to the gain the fiduciary has made. This connection results in the profit being in some way the property of the principal, which can make a significant difference when justifying when a principal should be barred from claiming an account.

Two fields which introduce a quasi-property aspect to the account will be discussed. The first involves the contentious area of 'secret commissions' and constructive trusts, which are used as a remedy where an account would normally be used. The second focuses on Sirko Harder's 'exclusive entitlement' analysis, which views any profit as the property of the principal. Intellectual property accounts also have a tie to the plaintiff's property, but they fall comfortably into Tipping J's mirrored remedies paradigm, so do not assist with accounts which are factually distinct from the possible compensation.

1 The 'Secret Commission' and Constructive Trust

Monetary accounts have always been closely aligned with constructive trusts as remedies for breach of fiduciary duty. *Timber Engineering Co Pty Ltd v Anderson* provides an example of where a fiduciary can be treated as a trustee by implication, resulting in them holding profits as a constructive trustee.[158] This follows from *Boardman v Phipps* where Mr Boardman, the solicitor, was held to hold shares on trust.[159] As so much of fiduciary law has been informed by the development of trustee duties, it is unsurprising that the line between proprietary and personal remedies has been blurry. Dr Finn's seminal work on fiduciaries even stated:[160]

> The fiduciary's liability for gains is a liability as a trustee and as for trust property. It is, as will be seen, one which can give rise to personal actions against a fiduciary.

Using this trustee like liability, the Courts have had wide discretion to find a constructive trust or personal remedy as appropriate. Indeed they have classically avoided laying down a general rule where such situations arise.[161] The question therefore arises of whether a useful principle relating to accounts generally can be distilled from such discretion.

The law surrounding bribes provides some assistance. *Lister & Co v Stubbs* originally held that with bribe money belonging to the fiduciary, the breach of fiduciary duty could not transform any remedy from personal to proprietary.[162] By contrast the Privy Council in *Attorney General for Hong Kong v Reid* held that 'equity regards done what ought to be

---

[158] *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488 at 495.
[159] *Boardman*, above n 9.
[160] PD Finn *Fiduciary Obligations* (Law Book Co, Sydney, 1977) at 111.
[161] *Re Jarvis (decd)* [1958] 1 WLR 815 (HC) at 820 per Upjohn J.
[162] *Lister & Co v Stubbs* (1890) 45 Ch D 1 (CA).

done' and found the proceeds were held on constructive trust even though the principal could never have obtained it.[163] Initially Justice Neuberger in the Court of Appeal limited this to fiduciaries exploiting property or fiduciary opportunities rather than wrongful use of the position generally.[164] More recently Lord Neuberger in *FHR European Ventures LLP v Mankarious* muddied the waters further by finding a constructive trust on a variety of grounds, including the practicality of a broad rule, aligning it with accounts, and support from cases like *Boardman v Phipps*.[165] He justified the change partially on the grounds of the concept of equitable proprietary rights being 'somewhat paradoxical' indicating the unsettled principles of this area of law.[166]

The extension of constructive trusts in the context of fiduciary relationships casts some light on accounts. Accounts remain a personal order, but if the relationship justify a constructive trust, it indicates that a breach of duty creates some specific claim on the profits beyond policy based deterrence. Any conclusions must be tempered by criticism of this development of constructive trusts, while they have been embraced in Australia,[167] they are creating property rights where none existed before.[168]

2 Exclusive Entitlement: Harder's Approach

Harder proposes a quasi-property approach to accounts, developing the work of Friedmann and Weinrib.[169] Friedmann viewed fiduciary accounts as primarily deterrence and punishment based, but also saw accounts as available for interference with quasi-property rights.[170] Quasi-property rights include protected ideas, information and opportunity, the wrongful appropriation of which forms the basis for gain-based relief.[171]

---

[163] *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 (PC) at 331.
[164] *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347 at [80].
[165] *FHR European Ventures LLP v Makarious* [2013] EWCA Civ 17 at [35]-[45].
[166] At [32].
[167] *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6.
[168] Thomas Allen "Bribes and Constructive Trusts: *AG of Hong Kong v Reid*" (1995) 58 MLR 87.
[169] S Harder *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart Publishing, Oxford, 2010) at 209. Harder's terminology of gain-based remedy will be used here to reflect his analysis, but these principles directly apply to accounts.
[170] Friedmann, above n 113.
[171] At 508.

Weinrib has characterised private law as focusing on corrective justice, with injustice reversed by remedies.[172] Under this construction, gains-based remedies are justified where the gain lies within the right of the claimant. The fiduciary's loyalty is the right of the principal, meaning they cannot profit, and any gain is the material embodiment of the breach.[173]

Harder agrees that gain-based relief is appropriate where a defendant has benefitted from an asset. Asset here is defined in a wide sense as the exclusive entitlement, the unauthorised use of which justifies gain-based relief.[174] This right can be enforceable against the whole word (like intellectual property rights) or against another party, as in the case of a fiduciary. The no profit rule encompasses the principal's exclusive right to gains made using power derived from them.[175]

When valuing the use of the asset, allowances function to account for the skill or good faith efforts of the fiduciary.[176] This views allowances as similar in operation to the prophylactic model, as they attempt to accurately calculate the true gain, which is described as the 'value of the right' in Harder's analysis. This can be extended to cover profits which the principal could never have gained, with the exclusive entitlement being the right to decide whether to allow the fiduciary to take the opportunity.[177]

This construction justifies the application of gains-based remedies generally in contract, tort and fiduciary law. Harder does not go into depth on some of the finer aspects of its application to fiduciaries beyond justifying an account of profits the principal could not have made. The 'secret commissions' factual circumstance stands out as one that the construction may struggle with. It is difficult to conceptualise a principal as having a right to decide whether their fiduciary can take a bribe. The only way to reconcile it would be to introduce Lord Neuberger's analysis from *FHR European Investments,* suggesting that bribes deprive

[172] Ernest J Weinrib "Restitutionary Damages as Corrective Justice" (2000) 1 Theo Inq L 1.
[173] Harder, above n 169, at 214 discussing Weinrib, above, at 172.
[174] Harder, at 216.
[175] This concept of fiduciary power being distinctive due to being derived from the principal's authority finds support from PB Miller "A Theory of Fiduciary Liability" (2011) 56 McGill LJ 235 at 262 and Paul B Miller "The Fiduciary Relationship" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 63 at 70.
[176] Harder, above n 169, at 218.
[177] At 238.

the principal of the right to purchase at the normal price absent the fiduciary's actions.[178] This strains the theory.

Harder's theory indicates why the account flows to the principal, where the prophylactic measure is satisfied as long as the profit is stripped. The selfless loyalty is owed to the principal, giving them a right to it and corollary interest in gains made which harm it. As with the prophylactic approach, this aspect of the relationship would not automatically be resolved by compensatory damages, as will be seen in Chapter IV.

E Conclusions

Accounts have punitive side-effects in their operation, but this should not be taken as their driving purpose. The remedy functions to protect the fiduciary relationship which would otherwise be vulnerable, particularly where the principal suffered no loss and a compensation remedy is thus not available. The derivation of the powers from the principal also provides a useful link for why the account flows back from them, while also indicating the importance of the link between the fiduciary and principle. All the fiduciary's duties stem from this unique relationship, which has consequences for how accounts interact with compensation. The principles of loss in Chapter II do not clearly conflict with the account in the same way that they do with classic restitution.

[178] *FHR European Investments*, above n 165, at [106]-[110].

Chapter IV: The Combination of Compensation and Account

A Introduction

The principles discussed in Chapter's II and III immediately show significant differences. Where one is remedying loss, the other is concerned with protecting and vindicating a unique relationship. This chapter now looks to how this conflict has been analysed, providing a fresh contrast between the two remedies.

Part B of this chapter will show that the current binary model of alternative and cumulative remedies is not absolute and looks to the limited academic writing in this field. Using Watterson's model based on three types of remedial cumulations, it will provide a more descriptive account of why the remedies are conflicting, and how accounts and compensation sit in this.

Part C looks outside the alternative-cumulative paradigm to the purposes of fiduciaries, positing that accounts form an inviolable aspect of the fiduciary obligation, drawing especially on the prophylactic approach discussed in Chapter III. The account supports the strict application of the no conflict rule, which is what differentiates fiduciary relationships from other relationships in private law. This difference is necessary to uphold the selflessness required by a fiduciary. Part C therefore argues that an account should always follow from a breach of the fiduciary duty, and because it is not loss-based it should not be limited by the rule against double recovery. This may result in the principal appearing to be overcompensated in some cases by the remedies awarded against the breaching fiduciary, but such overcompensation is not an anathema to fiduciary law.

B Rejection of a Binary Approach

The case line discussed in Chapter II paints a picture of conflicts between a wide variety or remedies in specific factual scenarios. It also showed how a relatively small number of cases which have been used to form a settled view of accounts and compensation as alternative.

Academic commentary generally follows the *Tang Man Sit* line without adding more.[179] Birks identified the gap this has created without addressing it, and this has not been addressed

[179] Conaglen, above n 2, at 7-052.

in the later cases of *Premium Real Estate* and *Ramzan*.[180] Watterson remains one of few authors to have engaged with the problem, with him focusing in particular on accounts in intellectual property law.[181]

Watterson initially identified the gap left by the courts in not questioning why some remedies are alternative.[182] He emphasised Lord Nicholls use of 'inconsistent' alongside 'alternative' and rejected a binary choice between alternative and cumulative remedies. There are several types of cumulative remedies, some of which practically operate like 'alternative' remedies.[183] To this effect he identified three types of cumulative remedy. Type 1 remedies are wholly independent and can be claimed in full together as with several liability of multiple parties for exemplary damages.[184] Type 2 remedies indirectly overlap, awarding one wholly or partly removes the need for the other, as with the limits on exemplary damages in tort in the United Kingdom, where they can only be awarded where compensation is inadequate to punish and deter. Type 3 remedies wholly overlap, claiming one removes the right to claim another, the best example being the joint liability of multiple parties in *United Australia* being limited only by satisfaction. The key mischief to be avoided is that of 'excessive remedial cumulations'. The key objective is minimum award necessary to achieve the aims of both remedies.[185]

Type 1 and 3 remedies lie at the opposite ends of a spectrum, with type 2 remedies covering partial overlap in remedies in between.[186] Type 3 remedies are multiple avenues to the same loss, as with the use of tort and restitution in *United Australia* and is not applicable to accounts which are gain-based. The three classes of remedy remove the need for the 'alternative' label, as they cover the different situations where multiple remedies are inappropriate, while more accurately describing why the remedies are not both awarded in full. It solves the inconsistency where the same conflict is cumulative between defendants while alternative against one wrongdoer.[187] For type 2 remedies, award of one satisfies the goals of the other to some extent, indicating there is a spectrum of type 2 remedies which

[180] P Birks, above n 2, at 376.
[181] Stephen Watterson "An Account of Profits or Damages? The History of Orthodoxy" (2004) 24 OJLS 472.
[182] Watterson above n 39.
[183] At 9.
[184] Bevan Marten "Exemplary Damages" in P Blanchard (ed) *Civil Remedies in New Zealand* (Thomson Reuters, Wellington, 2011) 521 at 537.
[185] Watterson, above n 39, at 15.
[186] Type 2 remedies near the type 3 end practically overlap to the point where they fully satisfy the aims of the other (even if the aims are different). This is subtly different to type 3 remedies which are different avenues to the same loss (the aims are the same) but has the same practical effect in only allowing one of the remedies.
[187] At 14.

overlap to different extents. Further recovery would go beyond these goals, creating a type of double recovery. Watterson characterised accounts and compensation as type 2; they respond to different aims, but practically the account reduces the loss while the compensation reduces the fiduciary's wrongful enrichment. This lies towards the type 3 end of the spectrum, where there is complete overlap meaning one award entirely extinguishes the need for the other. This assumes the loss is connected to the profit, where Part C will show that the special nature of the fiduciary relationships makes this an independent wrong.

The inconsistency of account and compensation in patent disputes provides an illustration of how remedies come to be considered alternative.[188] They are classically viewed as alternates since *Neilson v Betts*, and Watterson sees this as an example of excessive cumulations.[189] The key point in the development of this view is that what amounts to 'excessive' depends substantially on the prevailing conceptions of the remedy's aims.[190] This is where any analogy to fiduciary accounts breaks down. The account in patent law acts like a fictional 'loss of profits' compensation, calculated by references to the profits the defendant made.[191] This is similar to the reasoning in *Ramzan*, where a single piece of property could have the *fictional* loss of profits claimed, or the *actual* account, but not both. There is a clear logical overlap, as in both cases the account is operating as a tool to give a form of loss of profits, particularly useful if a loss of profits claim is difficult to prove. This appears to be the basis for Tipping J's obverse award paradigm and would sit as type 3 remedies which are different routes to the same missed profit.

Where the compensation claimed is a loss of profit on the plaintiff's part, and the actual profit made by the defendant is the mirror, or evidentially identical, award of one satisfies the goals of the other. Examples of this beyond patents and *Ramzan* include a director who misappropriates an opportunity due to a business, thereby making a profit. Whether the award comes via an account or loss of profits damages, both remedies are satisfied, making them type 3 remedies as discussed above. The director loses any profit (removing any benefit to breach) and the plaintiff's loss is recovered. This is the approach advocated by Street, who notes that the account should limited by any damages award that is connected to profit.[192]

[188] Watterson, above n 181, at 472.
[189] *Neilson v Betts* (1871) LR 5 (HL).
[190] Watterson, above n 181, at 487.
[191] At 482.
[192] H Street *Principles of the Law of Damages* (Sweet & Maxwell, Wellington, 1962) at 266.

But what of situations where the profit and loss are not so closely connected, as in *Premium Real Estate*? Watterson characterised accounts and compensation as type 2 cumulations which almost fully overlap, without delving deep into the background principles.[193] This effectively means the larger remedy is awarded, as it satisfied the purposes of the other. This appears to fit where the account is awarded as the larger remedy. Common law damages are satisfied because the plaintiff's loss is indirectly within the account. However the analysis is less clear where the compensation is higher, as while some degree of deterrence is likely achieved, it is difficult to say this 'satisfies' the goals of account which also include prophylaxis and the principal's right to the fiduciary's loyalty. Watterson's approach is developed in the limited context of intellectual property, which differs markedly from the fiduciary law. Intellectual property has practical overlap between the loss of profit and actual profit reclaimed by account, which is reflected by Watterson's type 2 categorisation. This is not always the case where a fiduciary duty has been breached.

Type 2 remedies are concerned with satisfaction of the aims of each remedy. Satisfaction is a tricky term in this area. When Lord Nicholls used the phrase in *Tang Man Sit* he spoke of it in terms of recovering more than a plaintiff's loss.[194] If satisfaction is to be defined more broadly to include the goals of gains-based remedies, it would require courts to take a more nuanced view of whether limiting damages to compensation has fully realised the goals of the fiduciary account. Despite introducing some uncertainty, this is the approach proposed here, and remedial flexibility is something courts in New Zealand have been open to.[195]

The uniqueness of the fiduciary relationship justifies a contextual approach. Account and compensation will sometimes overlap, as with *Ramzan* or *Mahesan*, indicating that the type 2 categorisation is appropriate. This overlap will not always occur, indicating the remedies will not always sit near the complete overlap end of the type 2 spectrum. Where the compensation does not adequately protect the fiduciary relationship, a contextual approach would place it closer to a type 1 remedy, indicating either no overlap or a small one. As Part C will show, the best way to effect this contextual approach is to focus on the account and the individual features of the relationship it effects.

[193] Watterson, above n 39, at 14.
[194] *Tang Man Sit*, above n 4, at 198.
[195] See *Chirnside*, above n 9, at [100] per Tipping J.

C The Account is Not Loss Based

This discussion has indicated that accounts and compensation are not inconsistent, and a closer analysis of the distinguishing aspects of a fiduciary relationship supports this. This final part looks to the ill-defined core of the fiduciary obligation, as remedies cannot be fully understood in isolation from the relevant right.[196] The prophylactic and quasi-property justifications discussed in Chapter III assist here, as the account is tied to the conflict and profit rules at the heart of the fiduciary duty. The prophylactic approach supports the absolute prohibition on conflict, and the quasi-property approach goes to the selfless use of another's powers, both of which are core aspects of the fiduciary duty.

1 The Selfless Nature of the Fiduciary Relationship

Fiduciary relationships are not alone in having power that can be abused. Contract and tortious relationships can both be abused by a party, but neither field of law responds with the same strictness as fiduciary law. Identifying what is unique about fiduciary relationships helps determine whether accounts can be said to overlap with compensatory damages.

Fiduciary relationships are generally context dependant, however there are unifying duties which make them distinct from relationships derived in contract.[197] These are exemplified by the no conflict and no profit rules, which ensure non-fiduciary obligations are complied with, forming the basis for the prophylactic justification. It is therefore the circumstances and characteristics of the *non-fiduciary duties* that attract the *fiduciary duties* which sheds light on why a strict remedy is necessary.[198]

Which relationships attract fiduciary duties is a complicated issue requiring its own dissertation.[199] What is of interest here is the common features of these relationships that create the circumstances demanding an absolute prohibition on conflict. The most frequently used phrase is 'trust and confidence',[200] but this does little to assist in identifying why this relationship is qualitatively different to that in tort or contract.[201]

---

[196] A Burrows *Remedies for Tort and Breach of Contract* (3rd ed, Oxford University Press, Oxford, 2004) at 323.
[197] Conaglen, above n 124, at 60. See also *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC).
[198] This role of the no conflict and no profit rule was endorsed by Conaglen and Stephen Smith in Chapter III: Part C.
[199] See Stephen Laing "Two Forms of the Fiduciary Relationship" [2013] OYLR.
[200] *Chirnside*, above n 9, at [80] per Tipping and Blanchard JJ. *Bristol*, above n 86, at 18. *Estate Realties*, above n 108, at 492.
[201] Worthington, above n 20, at 219.

Dr Finn provides more clarity in his survey of the fiduciary obligation.[202] He states:[203]

> If, from whatever combination of factual conditions, the parties in their relationship are so circumstanced that one is reasonably entitled to expect that the other is acting or will act in his interests, then that person should be entitled, on bare ground of public policy, to have that expectation protected

Trust and confidence render the expectation reasonable as do other factors like influence, vulnerability and ascendancy of the fiduciary.[204]

Combining these features, Finn goes on to characterise the fiduciary relationship as one existing solely for the benefit of another, where the fiduciary alone has *discretion* in determining how to discharge their duties.[205] It is this combination of discretion with selflessness which requires an entirely separate proscriptive field of law.[206] Some generalisation is useful here: Contract law duties require parties to fulfil only what they agreed to perform; tort law require a party to avoid actions which may harm another; the fiduciary is required to act entirely for the principal, without account for their own interest and that is almost unique within private law. The selflessness demands a high standard from the fiduciary, which the discretion makes easy to breach. It is this unusual combination which attracts strict duties.

Further, the principal in a fiduciary relationship is often at a practical disadvantage. Fiduciary's discretion often has little oversight from the principal, an issue which can be exacerbated where the fiduciary has special expertise, like lawyers and doctors.[207]

The fiduciary is therefore in a potentially powerful position, albeit a useful one, with discretion allowing skilled fiduciaries to work while minimising the costs of constant oversight.[208] The law has historically been cynical towards this fiduciary position, with Lord Herschel's oft cited statement in *Bray v Ford* seeing human nature as making it a real risk the

---

[202] Paul D Finn "The Fiduciary Principle" in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Law Book Co, Carswell, 1989) 1.
[203] Finn, above n 160, at 46.
[204] New Zealand has focused on 'trust and confidence' in particular, see *Chirnside* above n 20, but this description provides more detail on the distinguishing features of the fiduciary relationship.
[205] Finn, above n 202, at 9. See also PD Finn 'Fiduciary Reflections' (2014) 88 Aust. Law Journal 127 at 136. Miller, above n 175, at 69. Weinrib, above n 172, at 5.
[206] There is more to the fiduciary relationship than selflessness and discretion, however these provide a useful generalisation in the context of remedies. For a more complete description see Paul B Miller "Justifying Fiduciary Duties" (2013) 58 McGill LJ 969.
[207] Robert Cooter and Bradley Freedman "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991) 66 NYU L Rev 1045 at 1046.
[208] Sitkoff, above n 152, at 202.

fiduciary will consider their own interests, jeopardising the selflessness central to the relationship.[209]

While strong protection is clearly needed, the above discussion does not indicate why it would need to involve an absolute prohibition on conflict. Indeed, Arden LJ in *Murad v Al-Saraj* indicated that she believed the no conflict rule could be relaxed where the fiduciary believed they were acting in the best interest of the beneficiary.[210] If fiduciaries could be trusted to always be rational, this would likely work, but it is difficult where self-interest in involved. As discussed by Samet, there is a real risk of self-deception in fiduciary relationships characterised by wide discretion.[211] Allowing permission to enter a self-interested transaction would permit a situation where the fiduciary is balancing their own gain with harm to the principal.[212] Humans are prone to this type of deception where an improper course of action is justified by unconscious selective attention to certain pieces of evidence over others.[213] This is always a risk, even for experts, but such self-deception is particularly dangerous when self-interest is at play, as it would undermine the entire selfless purpose of the fiduciary.

The danger presented by conscious and unconscious self-interest requires rules to prevent conflicts from occurring in the first place. The norms of selflessness which are of practical and economic benefit necessitate safeguards that prevent any breach, as principals would otherwise have to rely on difficult oversight or avoid the relationship altogether. The fiduciary's unique position therefore requires the prophylactic protection of the account discussed in Chapter III.

The selflessness or loyalty required of the fiduciary can also explain the quasi-property nature of the relationship. This helps explain why breaching a fiduciary duty results in the account going to the principal. *Chan v Zacharia* stated that fiduciary law 'appropriates [the gain] for the benefit of the person to whom the fiduciary duty is owed'.[214] The discretion is derived

[209] *Bray v Ford*, above n 133.
[210] *Murad v Al-Saraj* [2005] All ER 503 at [81].
[211] Samet, above n 148, at 767.
[212] Above at 772. See also James E Penner "Is Loyalty a Virtue" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 159 at 169.
[213] Above at 774. Citing R Trivers "The Elements of a Scientific Theory of Self-Deception" (2000) 907 Ann NY Acad Sci 114.
[214] *Chan*, above n 137, at 198.

from the authority of the principal, and therefore any benefits from the abuse of the position should flow back to the principal.[215]

Fiduciary law allows the no profit rule to be expressly excluded from the fiduciary relationship, indicating it is not an absolute rule.[216] This relates to the disagreement over whether fiduciary duties are voluntary undertakings, or as 'parasitic' duties existing only to protect certain relationships.[217] The prophylactic approach to accounts is consistent with the parasitic approach, with the account protecting the non-fiduciary relationship. The quasi-property approach is tied to an undertaking by the fiduciary to hold gains for the principal, going to the consent approach. Adopting the prophylactic model of accounts would indicate that the conflict and profit rules are essential elements of the relationship, forming a kind of 'irreducible core' which could not be excluded.[218] Integrating the prophylactic model of account into wider theories of fiduciary law supports Getzler's view that some fiduciary duties may form a 'irreducible core' undermining the universal application of the consent approach.[219]

2 The Unique Remedy of Account

The importance of *selflessness* due the principal in the exercise of *discretion* should be a central consideration when the account conflicts with compensation. Recovery of the loss suffered will not automatically protect the fiduciary relationship commensurately. This is best illustrated through simple practical examples.

Scenario A involves a fiduciary in a conflict of interest, causing a loss of $2,000 to the principal while the fiduciary makes a profit of $1,000. Scenario B is the inverse, where the loss suffered is $1,000 while the profit is $2,000. The current position would be to allow only one of the two remedies.[220] In scenario B the principal would elect the account. This strips the fiduciary of any profit, reinforcing their fiduciary position as being strictly selfless. It

---

[215] Paul D Finn "Fiduciary Reflections" (2014) 88 Aust. Law Journal 127 at 142-144. PB Miller, above n 175, at 71.
[216] See *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963. E Lim "Contracting Out of Fiduciary Duties" (2015) 44 Common Law World Review 276. James Edelman 'Four Fiduciary Puzzles' in E Bant and M Harding (eds) *Exploring Private Law* (2010, Cambridge, Cambridge University Press) 298.
[217] For the consent model see: *Hospital Products*, above n, at 97. *Bristol Building Society*, above n, a 18. James Edelman "The Role of Status" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 21. James Edelman "The Importance of the Fiduciary Undertaking" (2013) 7 J Eq 128. For criticism and discussion of the parasitic approach see Getzler, above n 142.
[218] Getzler, above n 142, at 50-51.
[219] At 61.
[220] See Chapter II and the discussion of *Premium Real Estate* and *Tang Man Sit*.

indirectly compensates the plaintiff for the entire $1,000 loss which practically satisfies the of compensation, and the remaining $1,000 in the account is not considered an additional recovery as it is protecting a special relationship.

In scenario A the principal would elect the compensation, leaving the $1,000 profit with the fiduciary. As noted by Watterson, this compensation could be seen as a 'cost' in generating the profit, indicating these are type 2 cumulations. However, a contextual examination of the factually connection between the loss and profit are necessary to determine to what degree the remedies overlap, and where on the type 2 spectrum it should sit. If the profit is unconnected to the loss, as in *Premium Real Estate*, only allowing the loss does nothing to vindicate the wrong to the fiduciary relationship. The fiduciary has committed two wrongs, to the relationship and by causing loss which they bear the responsibility for as they would if the relationship was contractual. The compensation does not necessarily adress the harm to the relationship without the factual connection to the account, indicating this should close to a type 1 remedy, and be independently recoverable.

To treat the compensation as adequate in this circumstance relegates the fiduciary relationship to a similar position as tortious and contractual relationships. The only difference is the contested possibility that there are lower causation requirements in the fiduciary context.[221] This does not give sufficient weight to the unique requirement of absolute selflessness which is the right of the principal in a fiduciary relationship. Unlike tort, the fiduciary obligation goes beyond a responsibility not to harm the plaintiff, it instead demands loyalty which is harmed by any profit. The remedies in this context are hierarchical, and the account must automatically follow the breach of fiduciary duty before compensation falls to be considered. This means the principles of the account are always satisfied, and pragmatically focused compensation can then address whether there is an unacceptable overlap.

As seen in Chapter II, compensatory damages are practically concerned with compensating the plaintiff for loss. The rule against double recovery stems from this general principle, and should not be applied to a distinct remedy like the fiduciary account. This does not mean that an account and compensation are completely cumulative and should always be awarded

[221] This relates to the *Brickenden v London Loan & Savings Co* (1934) 3 DLR 465 and its application in New Zealand in *Premium Real Estate*, above n 1, at [38]-[41]. See also Matthew Conaglen "'*Brickenden*'" in S Degeling and JNE Varuhas (ed) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, Oxford, 2017) 111.

together where both arise. With the account flowing automatically from the breach in scenario A, a Court will then have to consider the connection between those profits and the possible compensatory damages. Where the loss is measured by a loss of profits, as in *Ramzan*, the account may already have compensated for these damages.[222] In this case, the compensation would be appropriately reduced, giving a total award of $2,000. This is a fully overlapping type 2 cumulation discussed by Watterson above.

A 'connection' between the account and loss is difficult to conceptualise in the abstract. The link between the non-fiduciary duties and the type of loss assists. Where the fiduciary would not be able to benefit from the principal's loss, then the fiduciary's own gain is unconnected. The gain here is an independent wrong to the fiduciary relationship with which compensation will not overlap with, pushing it towards the type 1 cumulative end of the spectrum. If the fiduciary sees some benefit, direct or indirect, that also constitutes the principal's loss, an account will already satisfy compensation for this loss. This is because the loss has the fiduciary's gain incorporated within it. In this situation compensation for a loss of profits is more likely to overlap, as the fiduciary's profit (through bribe or secret commission for example) would be connected to the hypothetical opportunity and should not be awarded twice by an account of profits and an award of compensation.

Mahesan provides an example of a connected account and compensation.[223] The agent was an indirect beneficiary of the principal's lost opportunity which compensatory damages would have remedied. The property could equally have been sold to the fiduciary, and in both cases the account addresses the lost opportunity to sell at a higher price. The gain of the fiduciary was part of the difference between market price and the actual sale price and so cannot be awarded both by an account and compensation.

In comparison, the agent in *Premium Real Estate* was not a beneficiary of the lost principal's opportunity. The commission was based on the absolute sale price, not the advantage to the fiduciary or a third party. The agent could never have benefitted *via* a commission for appropriating the property themselves, making it an independent wrong to the fiduciary relationship. If Mr Larsen (who received the undervalued property) had paid Premium a secret commission to facilitate the transaction, full compensation would recover the same benefit which the account had already stripped. How the fiduciary achieved the gain is

[222] *Ramzan*, above n 32.
[223] *Mahesan*, above n 23.

therefore important in determining where on the spectrum of type 2 cumulations the overlap falls.

The Court in *Premium Real Estate* treated the commission as the actual gain of the agent, which supports this idea.[224] If they had assessed it based on a percentage of the higher sale price as they did when calculating compensation it would be less clear that the gain was independent of the lost opportunity.[225] However, because the actual gain by the fiduciary was used, it remains a fully independent wrong to the fiduciary relationship, which does not address the loss on the sale. If the account was deducted from the compensation the agent would have avoided accounting for their disloyalty and be liable only for harm the principal suffered.

Compensation being a pragmatic assessment, patterns of likely overlap can be identified. A close factual connection is more likely where the principal's loss is measured by a loss of profit than where it is a diminution in value or reliance measured damages. Justice Tipping's paradigm of loss of profit being obverse to account remains a useful example of where the compensation will have already been substantially affected, making it an overlapping type 2 cumulation.

D: Conclusions

Watterson's cumulative types model provides a more nuanced approach to the conflicts between remedies then the 'alternative' label. Combined with the goals of the account and the unique features of the fiduciary relationship, this suggests that accounts should follow a breach of fiduciary duty. Compensation will then follow to the extent that the account does not satisfy its aims. This requires a contextual analysis of how the compensation is measuring the loss and if this is factually the obverse of the account, or otherwise connected through the non-fiduciary duties. The type 2 cumulative spectrum provides room for flexibility which was absent from the binary 'alternative-cumulative' approach.

[224] *Premium Real Estate*, above n 1, at [12] per Elias CJ, [89] per Blanchard J,
[225] *Premium Real Estate*, above n 1, at [88] per Blanchard J.

Chapter V: Conclusions

This dissertation has focused on the conflict between accounts and compensation. Chapter II assessed the current position of the remedies as 'alternative', showing that this label has obscured the lack of judicial consideration as to the conflict between accounts and compensation. It also argued that compensatory damages are pragmatically focused on loss, contrasting markedly with the gain-based account.

Chapter III argued that the account is based on principles of prophylaxis and effecting the quasi-property rights of the principal. Identifying these principles indicated that the historical reasoning around restitution and compensation would not adequately cover the conflict with accounts. This chapter also argued that the account may have punitive effects but are not designed to punish errant fiduciaries.

Chapter IV adapted a model of cumulative remedies to argue that a spectrum of overlapping remedies provides a more useful description of conflicts than the 'alternative' label. Applying this method to the conflicts of account and compensation indicated that the remedies would be type 2 remedies where the principles could overlap to a varying extent.

Considering the account in light of the unique fiduciary relationships indicated that it is an essential tool in controlling and giving effect to a valuable relationship. The account is necessary to ensure *selfless* exercise of the *discretion* that characterises the relationship, suggesting that it should always follow a breach of fiduciary duty. Compensation's pragmatic focus would then allow the conflict to be addressed by considering whether the account was sufficiently connected to the loss, resulting in the position on the cumulative remedy spectrum changing based on the loss suffered.

Discussion of fiduciary theory often focuses on the relationship and obligations.[226] The principles that can be distilled from the remedy of account and how it practically interacts with other remedies indicates that a consideration of the fiduciary relationship's remedy could provide a different approach to fiduciary jurisprudence.

[226] Andrew S Gold and Paul B Miller "Introduction" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 1 at 2.

Bibliography

A Cases

1 *New Zealand*

- *Aquaculture Corp v NZ Green Mussell Co Ltd* [1990] 3 NZLR 299 (CA).
- *Coleman v Myers* [1977] 2 NZLR 225 (CA).
- *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433.
- *Curtis v Gibson* [2011] NZCA 373.
- *Day v Mead* [1987] 2 NZLR 443 (CA).
- *Estate Realties Ltd. v Wignall* [1992] 2 NZLR 615 (HC).
- *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 (HC).
- *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.
- *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169.
- *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC).
- *Stevens v Premium Real Estate* [2009] NZSC 15, [2009] 2 NZLR 384.

2 Australia

- *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963.
- *Baltic Shipping Company v Dillon* (1992) 176 CLR 344 (HCA).
- *Chan v Zacharia* [1984] 154 CLR 178 (HCA).
- *Dart Industries Inc v Décor Corporation Pty Ltd* (1993) 179 CLR 101 (HCA).
- *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6.
- *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10.
- *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 (HCA).
- *McKenzie v McDonald* [1972] VLR 135 (SC).
- *Maguire v Makaronis* [1997] 188 CLR 449 (HCA).
- *Skelton v Collins* (1966) 115 CLR 94 (HCA).

- *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488.
- *Warman International v Dwyer* [1995] 182 CLR 544 (HCA).

3 England and Wales

- *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL).
- *Attorney General v Blake* [2001] 1 AC 268 (HL) at 278.
- *Bray v Ford* [1996] AC 44.
- *De Crittenden (Robin) v (1) Estate of Bayliss (Charles Albert) (Deceased)* [2005] EWCA Civ 1425.
- *FHR European Ventures LLP v Makarious* [2013] EWCA Civ 17.
- *Hovenden and Sons v Milhoff* (1900) 83 LT 41.
- *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 (HC).
- *Keech v Sandford* (1726) 25 ER 223.
- *Lister & Co v Stubbs* (1890) 45 Ch D 1 (CA).
- *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20.
- *Mothew v Bristol & West Building Society* [1998] 4 All ER 698 (CA).
- *Murad v Al-Saraj* [2005] EWCA Civ 959.
- *Nocton v Lord Ashburton* [1914] AC 932.
- *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 (Comm).
- *O'Sullivan v Management Agency and Music Ltd* [1984] 3 WLR 448 (CA).
- *P & O Steam Navigation Company v Youell* [1997] 2 Lloyd's Rep 136 (CA).
- *Phipps v Boardman* [1967] 2 AC 46 (HL).
- *Ramzan v Brookwide Ltd* [2011] 2 All ER 38 (CA).
- *Re Jarvis (decd)* [1958] 1 WLR 815 (HC).
- *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL).
- *Robinson v Harman* (1848) 1 Exch Rep 850.
- *Salford Corporation v Lever* [1891] 1 QB 168.
- *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347.
- *Target Holdings Ltd v Redferns* [1996] AC 421 (HL).
- *United Australia Ltd. v Barclays Bank Ltd.* [1941] AC 1 (HL).
- *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798 (HC).
- *Neilson v Betts* (1871) LR 5 (HL).

4 Commonwealth

- *Brickenden v London Loan & Savings Co* (1934) 3 DLR 465 (PC).
- *Libertarian Investments Ltd v Hall* [2013] HKCFA 93.
- *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd.* [1978] 2 WLR 444 (PC).
- *Tang Man Sit v Capacious Investments Ltd.* [1995] UKPC 54, [1996] AC 514.
- *The Gleaner Co Ltd v Abrahams* [2004] 1 AC 628 (PC).

B Legislation

- 2017 California Civil Code.

C Books and Chapters in Books

- P Birks *An Introduction to the Law of Restitution* (revised ed, Clarendon Press, Oxford, 1989).
- A Burrows *Principles of the English Law of Obligations* (Oxford University Press, Oxford, 2015).
- A Burrows *Remedies for Tort and Breach of Contract* (3rd ed, Oxford University Press, Oxford, 2004).
- A Butler and T Clarke (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009).
- Matthew Conaglen "Fiduciaries" in J McGhee (ed) *Snell's Equity* (33rd ed, Thomson Reuters, London, 2015).
- M Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties*, (Hart Publishing, Oxford, 2010).
- Simon Degeling and Jason NE Varuhas "Equity's Personal Monetary Remedies" in S Degeling and JNE Varuhas (ed) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, Oxford, 2017) 1.
- P Devonshire *Account of Profits* (Thomson Reuters, Wellington, 2013).

- James Edelman 'Four Fiduciary Puzzles' in E Bant and M Harding (eds) *Exploring Private Law* (2010, Cambridge, Cambridge University Press) 298.
- J Edelman *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, Oxford, 2002).
- J Edelman *McGregor on Damages* (20th ed, Thomson Reuters, London, 2018).
- James Edelman "The Role of Status" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 21.
- Steven Elliot "Personal Monetary Claims" in J McGhee (ed) *Snell's Equity* (33rd ed, Thomson Reuters, London, 2015).
- PD Finn *Fiduciary Obligations* (Law Book Co, Sydney, 1977).
- Paul D Finn "The Fiduciary Principle" in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Law Book Co, Carswell, 1989) 1.
- T Frankel *Fiduciary Law* (Oxford University Press, Oxford, 2010).
- Joshua Getzler "Ascribing Fiduciary Obligations" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 39.
- Joshua Getzler "Rumsford Market and the Genesis of Fiduciary Obligations" in P Birks and A Rodger (eds) *Mapping the Law* (Oxford University Press, Oxford, 2006) 577.
- Andrew S Gold and Paul B Miller "Introduction" i in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 1.
- S Harder *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart Publishing, Oxford, 2010).
- Matthew Harding "Disgorgement of Profit and Fiduciary Loyalty" in S Degeling and J Varuhas (eds) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, Oxford, 2017) 19.
- JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis, Wellington, 2015).
- IM Jackman *The Varieties of Restitution* (2nd ed, The Federation Press, Sydney, 2017).
- Bevan Marten "Exemplary Damages" in P Blanchard (ed) *Civil Remedies in New Zealand* (Thomson Reuters, Wellington, 2011) 521.

- Geoff McLay "Equitable Damages" in P Blanchard (ed) *Civil Remedies in New Zealand* (Thomson Reuters, Wellington, 2011).
- Paul B Miller "The Fiduciary Relationship" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 63.
- E Peel *Treitel: The Law of Contract* (13th ed, Sweet & Maxwell, London, 2011).
- James E Penner "Is Loyalty a Virtue" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 159.
- Charles Rickett and Jessica Palmer "Restitutionary Remedies" in P Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2013) 383
- Irit Samet "Fiduciary Loyalty as Kantian Virtue" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 125.
- Robert Sitkoff "An Economic Theory of Fiduciary Law" in AS Gold and PB Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 197.
- Lionel Smith "The Measurement of Compensation Claims against Trustees and Fiduciary's" in E Bant and M Harding (eds) *Exploring Private Law* (Cambridge University Press, Cambridge, 2010) 372.
- Stephen Smith "The Deed Not the Motive: Fiduciary Law Without Loyalty" in P Miller and A Gold (ed) *Contract, Status, and Fiduciary Law* (Oxford University Press, Oxford, 2016).
- H Street *Principles of the Law of Damages* (Sweet & Maxwell, Wellington, 1962).
- GH Treitel *Remedies for Breach of Contract: A Comparative Account* (Clarendon Press, Oxford, 1988).
- G Virgo *Principles of the Law of Restitution* (3rd ed, Oxford University Press, Oxford, 2015).
- Julie Ward 'Equitable Compensation-An Overview' in S Degeling and JNE Varuhas (ed) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, Oxford, 2017) 65.

D Journal Articles

- Thomas Allen “Bribes and Constructive Trusts: *AG of Hong Kong v Reid*” (1995) 58 MLR 87.
- Peter Birks “Equity in Modern Law: An Exercise in Taxonomy” 26 UW Austl L Rev (1996) 1.
- Peter Birks “Inconsistency between Compensation and Restitution” (1996) 112 LQR 375.
- Peter Birks “Unjust Enrichment and Wrongful Enrichment” (2001) Texas Law Rev 1767.
- Robert Cooter and Bradley Freedman “The Fiduciary Relationship: Its Economic Character and Legal Consequences” (1991) 66 NYU L Rev 1045.
- James Edelman “The Importance of the Fiduciary Undertaking” (2013) 7 J Eq 128.
- James Edelman and S Elliott “Money Remedies against Trustees” (2004) 18 Tolley’s Trust Law International 116.
- PD Finn ‘Fiduciary Reflections’ (2014) 88 Aust. Law Journal 127.
- Tamar Frankel “Fiduciary Duties as Default Rules” (1995) 74 Or L Rev 1209.
- Daniel Friedmann “Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong” (1980) 80 Colum L Rev 509.
- Joshua Getzler “An Interdisciplinary View of Fiduciary Law” (2011) 91 BU L Rev 973.
- Matthew Harding “Trust and Fiduciary Law” (2013) 33 OJLS 81.
- Andrew Hicks “The Remedial Principle of *Keech v Sandford* Reconsidered” (2010) 69 CLJ 287.
- Parker Hood “What is So Special about Being a Fiduciary” (200) 4 EdinLR 308.
- Darryn Jensen “Prescription and Proscription in Fiduciary Obligations” (2010) 21 KLJ 333.
- Stephen Laing “Two Forms of the Fiduciary Relationship” [2013] OYLR.
- E Lim “Contracting Out of Fiduciary Duties” (2015) 44 Common Law World Review 276.
- PB Miller “A Theory of Fiduciary Liability” (2011) 56 McGill LJ 235.
- Paul B Miller “Justifying Fiduciary Duties” (2013) 58 McGill LJ 969.
- Charles Mitchell “Equitable Compensation for Breach of Fiduciary Duty” (2013) 66 CLP 307.
- Jessica Palmer “Restitution” [2016] 2 NZ L Rev 435.

- Jessica Palmer "Student Companion: Equity: *Stevens v Premium Real Estate*" [2009] NZLJ 101.
- Larry E Ribstein "Fencing Fiduciary Duties" (2011) 91 BU L Rev 899.
- Irit Samet "Guarding the Fiduciary's Conscience - A Justification of a Stringent Profit Stripping Rule" (2008) 28 OJLS 763.
- Austin W Scott "The Fiduciary Principle" (1949) 37 CLR 539.
- Robert Sitkoff "The Economic Structure of Fiduciary Law" (2011) 91 BU L Rev 1039.
- Lionel Smith "Deterrence, Prophylaxis and Punishment in Fiduciary Obligations" (2013) 7 J Eq 87.
- EW Thomas "An Affirmation of the Fiduciary Principle" [1996] NZLJ 405.
- R Trivers "The Elements of a Scientific Theory of Self-Deception" (2000) 907 Ann NY Acad Sci 114.
- Stephen Watterson "Alternative and Cumulative Remedies: What's the Difference?" (2003) 11 RLR 7 at 9.
- Stephen Watterson "An Account of Profits or Damages? The History of Orthodoxy" (2004) 24 OJLS 472.
- Ernest J Weinrib "Restitutionary Damages as Corrective Justice" (2000) 1 Theo Inq L 1.
- John Stevens "Election Between Alternative Remedies" (1996) 4 RLR 117 at 119.
- Sarah Worthington "Reconsidering Disgorgement for Wrongs" (1999) 62 MLR 218.

E Conference Papers

- Peter Devonshire and Tim Mullins "Damages and Account of Profits" (paper presented to the Family Law Section and Property Law Section, New Zealand Law Society, October 2008).
- James Edelman "The Role of Status in the Law of Obligations: Common Callings, Implied Terms and Lessons for Fiduciary Duties" (paper presented to the Conference on the philosophical foundations of fiduciary law, DePaul University, 19 July 2013).