Correlativity is Not Causation: A Principled Approach to Account of Profits for Breach of Fiduciary Duty

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Chapter I: Introduction

Account of profits is the primary remedy for breach of fiduciary duty,[1] and is a personal order that operates to strip the defendant of unauthorised gains.[2] The liability to account for profits arises from the rule that a fiduciary must not make a profit from their position, which is derived from the wider rule that a fiduciary must not place themselves in a position where their duty and interest may conflict.[3] The no-profit and no-conflict rules enforce the overarching duty of loyalty,[4] said to be the touchstone of the fiduciary relationship.[5] It has long been recognised by courts that the ultimate amount for which a defendant can be held liable to account can be incredibly difficult to determine in practice, due to the difficulty of defining the scope of the fiduciary position.[6]

The New Zealand Supreme Court recently declined leave to appeal in the case of *Adlam v Savage*, thereby appearing to affirm the Court of Appeal's assessment that a 'but for' causal link between the breach of duty and gain received was sufficient for the plaintiff to recover the entire profit made.[7] In that case, the profits made included not only contributions from that plaintiff, but also contribution from a third-party. In the circumstances, that third party may also have a valid claim for an account of profits, but this had not yet been made out. The Court of Appeal accepted that, had both claimants successfully established a breach in the same proceedings, the respective entitlements of those parties would need to be determined. However, in absence of a second successful claim, the Court found it appropriate to order disgorgement of the entire profit to the successful plaintiff.

This dissertation seeks to determine the appropriate causal link for determining the extent of liability to account for profits made in breach of fiduciary duty. It will be argued that the approach taken by the Court of Appeal to identifying the profits liable for disgorgement, namely the use of a 'but for' causal test, is inconsistent with both precedent and principle. Chapter II describes in more detail the approach of the Courts to the causal link between breach and duty, and the issues that arise from this approach. Chapter III assesses the current approach to the causal link for this remedy as provided in other cases, but finds there is no clearly

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[1] *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [53].
[2] Peter Devonshire *Account of Profits* (Thomson Reuters, Wellington, 2013) at 8.
[3] *Boardman v Phipps* [1963] 3 All ER 721 (HL) at 123 per Lord Upjohn.
[4] *Chirnside v Fay*, above n 1, at [19] per Elias CJ.
[5] Devonshire (2013), above n 2, at 20.
[6] *Docker v Somes* (1834) 39 ER 1095 at 1097; *Siddell v Vickers* (1892) 9 RPC 152, at 162–3; *Warman International Ltd v Dwyer* (1995) 182 CLR 544, at 556.
[7] *Adlam v Savage* [2017] NZSC 11 [*Adlam v Savage* (SC)]; *Adlam v Savage* [2016] NZCA 454, [2017] 2 NZLR 309 [*Adlam v Savage* (CA)].

articulated causal link and little consistency in the approaches taken. Chapter IV considers this inconsistency in light of the possible rationales for account of profits, being compensation, deterrence and restitution. Chapter V analyses the remedy within a framework of corrective justice and argues that correlativity, as distinct from causation, can provide the guidance needed for a principled approach to account of profits.

Chapter II: The Issue with *Adlam*

In *Adlam v Savage* the plaintiff was awarded an account for profit, the quantification of which included not only contributions from that plaintiff, but also contribution of a third-party. The award for full disgorgement resulted from the application of a 'but for' test of causation in relation to a breach of fiduciary duty committed by the defendant against the plaintiff. This decision creates uncertainty as to the resulting legal position of the third party in relation to both the defendant and the successful plaintiff.[8] As a result, this dissertation queries whether Ms Adlam should have been liable to account for the entire profit generated by the GDL power station to Bath Trust only, or whether she was entitled to apportionment of the profits on the basis that part of the profits were attributable to contributions from Farm Trust, although remained unclaimed.[9]

This chapter will outline the facts and the judgments of the case from the Māori Land Court, Māori Appellate Court, Court of Appeal and Supreme Court. In so doing, it will identify the problematic approach of the Court of Appeal to the question of causation in account of profits which the remaining chapters will then address from the perspective of precedent and principle.

A *Facts of the case*

Rae Beverly Adlam was trustee of an ahu whenua trust known as Bath Trust, and in this role was responsible for the administration of a section of Māori freehold land known as Bath Block. This block of land was adjacent to another section known as Farm Block, administered by another ahu whenua trust, known as Farm Trust. The majority of Bath Trust trustees were also trustees of Farm Trust, but Ms Adlam herself was never a trustee of Farm Trust.[10]

The case concerned the profit arising from the development of two geothermal power stations on Bath block. One of these, named the GDL station, was commissioned by Geothermal Developments Limited (GDL), a company incorporated by Ms Adlam prior to and for the purposes of the development of the station.[11] The GDL station was built on the Bath block of land, but drew geothermal energy from a geothermal well situated on the Farm block of land.[12]

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[8] Jessica Palmer "Equity and Trusts" [2019] NZ L Rev 365 at 388.
[9] *Adlam v Savage* (SC), above n 7, at [11].
[10] *Adlam v Savage* [2015] NZMAC 1, [2015] NZAR 746 [*Adlam v Savage* (MAC)] at [3].
[11] *Savage v Adlam – Lot 39A 2A Parish of Matatā and Lot 39A 2B 2A Parish of Matatā* (2014) 95 Waiariki MB 176 (95 WAR 176) (MLC) [*Savage v Adlam* (MLC)] at [23].
[12] *Savage v Adlam* (MLC), above n 11, at [24], [25].

Ms Adlam arranged for a lease agreement between GDL and the trustees of Bath and Farm Trusts to lease land on the Bath and Farm blocks, respectively.[13]

Ms Adlam was sole shareholder and director of GDL at the time she proposed the lease agreement to the trusts. Therefore, in relation to Bath Trust she placed herself in a position of conflict between her own financial interests and those of Bath Trust. Adlam accepted that these actions were in breach of her fiduciary duty as trustee to Bath Trust, albeit that she claimed the breach was technical rather than deliberate.[14] Consequently, Adlam accepted she must account to Bath Trust for the profit made in breach of her fiduciary duty.[15]

In relation to Farm Trust, Adlam was never a trustee and it was never established that she owed any fiduciary or other equitable obligations to that trust.[16] In the lower courts it was suggested that Ms Adlam obtained the transaction with Farm Trust by undue influence, but this argument was not made out.[17] There was also no breach by GDL of the terms of the lease with Farm Trust.[18] As a result, the entitlement of Farm Trust to the profit was not determined.[19]

B *Decisions of the Courts*

The case was heard first in the Māori Land Court, where Ms Adlam was ordered to account to Bath Trust for the entire $11.2 million profit arising from the GDL development.[20] Judge Coxhead found a clear breach of fiduciary duty to Bath Trust by Ms Adlam in making the profit,[21] arising from her conflict of interest, self-dealing and failure to disclose the arrangements with GDL that led to the profit.[22] While Adlam accepted she had acted in breach, counsel argued that an apportionment of profit must be made between profits attributable to "trust assets" and "non-trust assets", the latter referring to the contributions of Farm Trust; evidence was given to show that 15% of the profits was attributable to the contribution of Bath Trust and 85% to the use of Farm Trust assets.[23] This argument was not accepted as Judge Coxhead stated "apportionment following an account for profits is not between two innocent parties."[24] As will be discussed in more detail later, this narrow view of apportionment

[13] *Savage v Adlam* (MLC), above n 11, at [26].
[14] At [162].
[15] At [165].
[16] At [144], [163]; *Adlam v Savage* (MAC), above n 10, at [67]; *Adlam v Savage* (CA), above n 7, at [35].
[17] *Savage v Adlam* (MLC), above n 11, at [151]-[152], [167].
[18] At [164].
[19] At [144], [163]; *Adlam v Savage* (MAC), above n 10, at [67].
[20] *Savage v Adlam* (MLC) above n 11, at [235].
[21] At [167].
[22] *Adlam v Savage* (CA), above n 7, at [39].
[23] *Savage v Adlam* (MLC), above n 11, at [194].
[24] At [177].

incorrectly excludes the very real possibility that a portion of profits may be attributable to neither the plaintiff nor defendant, but to a third party.

On appeal to the Māori Appellate Court it was considered necessary to apportion the profit, so the order was set aside and remitted back to the Māori Land Court to determine the actual contributions of each trust.[25] The Court considered that while an "expansive approach" is taken,[26] accountability must be limited to the profits attributable to the breach.[27] Later in the judgment the Court limits this test to "gain attributable to the *trust property* misused".[28]

The Court of Appeal set aside this order and reinstated the decision of the Māori Land Court requiring full disgorgement of the profits.[29] The Court considered that the causal link applied by the Māori Appellate Court was unduly narrow,[30] and that it was sufficient that the entire profit could not have been made *but for* the breach of duty to Bath Trust.[31] Farm Trust's contribution, and Bath Trust's acknowledgement of that contribution, did not alter Adlam's liability.[32] However, the court itself recognised that had Farm Trust successfully made out a claim against Ms Adlam, the respective entitlements of the Trusts would need to be resolved.[33]

The Supreme Court declined leave to appeal the decision of the Court of Appeal, with the result that Ms Adlam was ordered to pay the entire $11.2 million profits to Bath Trust.[34] The Court considered there was no error in concluding the relevant causal link was between the breach and the profits.[35] In addition, the Court considered that the existence of a third party's contribution to profit did not provide a valid basis for granting an allowance, or for allowing Ms Adlam to keep any portion of the profit.[36] The Court observed that the Trusts had agreed to apportion the profits between them, and found no reason Adlam should keep any profit "made at the expense of innocent parties."[37]

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[25] *Adlam v Savage* (MAC), above n 10, at [142].
[26] At [51].
[27] At [53].
[28] At [75], emphasis added by the Court.
[29] *Adlam v Savage* (CA), above n 7, at [51].
[30] At [33].
[31] At [40].
[32] At [41].
[33] At [47].
[34] *Adlam v Savage* (SC), above n 7, at [19].
[35] At [14].
[36] At [15].
[37] At [15].

C *The resulting position*

The resulting position from the order for full disgorgement is that Ms Adlam is stripped of the entire profit, and Bath Trust gains profits attributable to both the breach against that Trust and also to the property of Farm Trust. It was observed by the Courts that the trusts had privately agreed to share the profit between themselves and to seek approval from the Māori Land Court of their arrangement.[38] However, the Court of Appeal expressly stated that this agreement to negotiate does not alter the analysis, so the same result would have been reached in any event.[39]

In the circumstances, the sharing of profits between the parties is merely a private agreement and is not a prerequisite to the Courts' ruling.[40] Should the negotiations between the parties fail, the parties agreed they would return to the Māori Land Court.[41] In that situation, the Court would be able to resolve the respective entitlements of the Trusts with both as parties to the proceedings. However, there is no guarantee that Farm Trust would be able to establish a valid claim in the future. Even on the Māori Appellate Court's decision this was a necessary step in getting to the right result, and no guidance was provided as to what should happen if Farm Trust failed to bring a claim or if their claim failed.

Should the parties fail to reach a private agreement and not return to the Court for determination of apportionment, Farm Trust may still have a valid claim to the profit against Ms Adlam or against Bath Trust. The respective positions of the parties resulting from the decision is unclear, and problematic.

1 Farm Trust as against Ms Adlam

Farm Trust did not succeed in making a claim against Ms Adlam in the proceedings, but this was in part due to the fact their arguments were only made on the last day of hearings, and were not included in their pleadings, so were not considered.[42] It was Farm Trust's submission that Ms Adlam had obtained the lease with Farm Trust by undue influence against those trustees.[43] In particular, she took advantage of her familial relationship to those trustees, the respect they had for her as a business woman, and their resulting deference to her in business

[38] *Adlam v Savage* (CA), above n 7, at [28].
[39] At [41].
[40] Palmer (2019), above n 8, at 387.
[41] *Adlam v Savage* (CA), above n 7, at [28].
[42] *Savage v Adlam* (MLC), above n 11, at [144].
[43] At [153].

matters.[44] The remedy claimed was a constructive trust over the profits obtained by the undue influence.[45]

The failure of Farm Trust to bring a valid claim does not mean that a valid claim did not exist, or that a valid claim may not still be available against Ms Adlam for the GDL profit. However, with the entire profits disgorged to Bath Trust, should Ms Adlam be required to account for the profits twice? If so, should she be required to account for the *entire* profits twice? That is the outcome that would result from applying the same test that she is accountable for all profits made within the scope of the breach irrespective of other contributions.[46] This cannot be right.[47]

It is well established that a defendant cannot be held to account for more than was actually received.[48] This principle was recognised by the Court of Appeal in stating that had both trusts established a breach in the original proceedings their respective entitlements would be resolved so that the total amount disgorged did not exceed the amount received.[49] Further, the Court considered that a means of checking their analysis was to consider whether the result has any punitive effect on Ms Adlam.[50] As it did not take from her any profits "legitimately obtained", there was no punitive effect. It must follow that she cannot be required to account for the same profits again out of her own pocket, as this would surely be punitive.[51] It may therefore be possible for Ms Adlam to defend against a second claim on the basis that there is no profit left to be disgorged. However, there is no precedent for this, so no certainty that such a defence would be available.

An alternative argument for Ms Adlam should a second claim be brought is that by electing to take an account of profits, Bath Trust condoned the actions of Ms Adlam thereby adopted the liability for those actions. In taking an account of profits, the defendant is treated as having made the profits on behalf of the plaintiff.[52] In contrast to seeking damages, which expressly disaffirms the actions of a trustee, it has been suggested that electing to take an account of profits instead affirms the actions.[53] In short, it has been stated that to take an account is to

[44] *Savage v Adlam* (MLC), above n 11, at [151].
[45] At [153].
[46] *Adlam v Savage* (CA), above n 7, at [48].
[47] Palmer (2019), above n 8, at 388.
[48] *Vyse v Foster* (1842) LR 8 Ch App 309 at 333 per James LJ.
[49] *Adlam v Savage* (CA), above n 7, at [47].
[50] At [41].
[51] Palmer (2019), above n 8, at 388.
[52] *Celanese International Corp v BP Chemicals Ltd* [1999] RPC 203 (Pat Ct) at [36].
[53] Devonshire (2013), above n 2, at 15.

condone the infringement.[54] This may also provide a basis for Ms Adlam to defend a second claim, leaving Farm Trust to pursue their profit into the hands of Bath Trust.

2 Farm Trust as against Bath Trust

Rather than pursuing Adlam for an account of profit she no longer has, Farm Trust may be able to seek restitution from Bath Trust for unjust enrichment by the receipt of profit attributable to Bath Trust's assets.[55] An unjust enrichment claim essentially responds to the mistaken or otherwise incorrect transfer of value, with the archetypal case being restitution of a mistaken payment.[56] Therefore, if an unjust enrichment claim is the correct, and perhaps only option available for Farm Trust to recover their portion of the profit, this serves to illustrate that the full disgorgement of profit to Bath Trust cannot be right as a matter of law.[57]

Further, while the remedy of account has been said to remove any unjust enrichment of the defendant, in doing so it should not result in the unjust enrichment of the plaintiff as against the defendant.[58] It should also follow that the remedy should not create further unjust enrichment as against other parties. As will be discussed in Chapter V, it is inconsistent with the underlying principles of corrective justice for any remedy to go beyond merely restoring the equality of the relevant parties.

D *The precedent set*

This case sets a clear precedent that in cases of breach of fiduciary duty, third party contributions to the generation of profit for which the corresponding portion remains unclaimed does not provide a basis for apportionment, thus cannot justify limiting the quantum of disgorgement. In particular, the judgment suggests that a plaintiff may recover profits properly attributable to the contribution of a third party if, *but for* the breach against the plaintiff, that profit could not have been obtained.

The operative judgment is that of the Court of Appeal, but in declining to grant leave to appeal on the basis there were no legal issues to address, the Supreme Court appears to affirm the approach taken. As such, this reasoning may be binding on all New Zealand Courts unless and until a similar situation is considered by the Supreme Court again.

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[54] *Neilson v Betts* (1871) LR 5 HL 1 at 22 per Lord Westbury.
[55] Palmer (2019), above n 8, at 388.
[56] James Edelman *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, Oregon, 2002) at 33.
[57] Palmer (2019), above n 8, at 388.
[58] *Warman v Dwyer*, above n 6, at 561.

In the circumstances of *Adlam*, no injustice appears to result as the successful plaintiff was willing to provide a share of the profit to the contributor Trust not party to proceedings. However, this will not be the case in all situations and with the Court stating that this was not a material factor in the exercise of their discretion, it cannot be distinguished on this basis.[59]

[59] *Adlam v Savage* (CA), above n 7, at [41].

Chapter III: Identifying the Causal Link

The strict rule that a fiduciary must account for unauthorised profits made in breach of their duties is deceptively simple.[60] As fiduciaries can be liable for profits made by their *position,* as well as by trust assets, the resulting liability to account can be extensive.[61] Nonetheless, there must be "some causal link" between the profits and the breach of duty.[62] Even where it is clear that a transaction involved a breach of fiduciary duty, it does not follow that the entire profit made on occasion of the transaction is due to the plaintiff.[63] This is because profits can be made from many sources, only one of which may be the breach of fiduciary duty.[64] Exactly what that that causal link is has not been clearly articulated,[65] and as yet there appears to be no consistent approach to determining the extent of a fiduciary's liability to account.

A *Settled principles*

Although frequently referred to as discretionary, the remedy is "granted or withheld according to settled principles."[66] The Federal Court of Australia recently set out these principles in the case of *Grimaldi v Chameleon Mining*: (i) liability is not penal, (ii) the plaintiff need not have suffered any loss, (iii) the remedy must be "fashioned to fit the case," and (iv) the remedy must not be carried to extremes.[67] While these principles are of general assistance, they are extremely broad and do not provide a clear formula for determining the amount a defendant should be held liable to account.

The starting point for determining quantum is the presumption that a fiduciary will be liable for all profits "made by dint of the breach."[68] Following this, the Court may make an allowance or apportionment to the defendant if, considering all the relevant circumstances, it would be "unjust not to do so."[69] The first step is therefore to "ascertain precisely" what profit was made in breach of duty. [70] However, as yet there is no precise rule or single principle as to how the relevant profit is to be identified.[71]

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[60] Matthew Conaglen "Identifying The Profits For Which A Fiduciary Must Account" (2020) 79(1) CLJ 38 at 40.
[61] Peter Devonshire "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Syd LR 389 at 395.
[62] At 395.
[63] *Murad v Al Saraj* [2005] EWCA Civ 959 at [85]; see also *Chirnside v Fay* above n 1.
[64] *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296 at [517].
[65] Conaglen (2020), above n 60, at 57.
[66] *Warman v Dwyer* above n 6, at 559; Conaglen (2020), above n 60, at 53.
[67] *Grimaldi v Chameleon Mining*, above n 64, at [514].
[68] *Chirnside v Fay*, above n 1, at [122]; citing *Boardman v Phipps*, above n 3.
[69] *Chirnside v Fay*, above n 1, at [122].
[70] *Warman v Dwyer*, above n 6, at 565.
[71] Conaglen (2020), above n 60, at 45.

Lord Upjohn of the Chancery Division in *In Re Jarvis* identified two possible methods for determining the profits for which a defendant is liable to account, but held that no general rule could be stated; rather, the approach taken in each case should depend on its facts.[72] The Court can either determine what profits, realised or anticipated, are proven to flow from the breach, or can hold the defendant accountable for the whole profits but make allowances for their time, skill and any assets brought in.[73] The difference in these approaches was explained by reference to the facts where the defendant, an executor trustee, reopened a business bequeathed to both herself and her sister by their late father, but operated the business jointly with her own similar business nearby. She was held accountable for the entire profits generated from the business at the premises in accordance with the second method above. However, the Court considered that had she chosen not to reopen the business, and in doing so had been able to increase business at her own store nearby, the first approach to account would be more appropriate and the court would assess exactly what benefits flowed to her by reason of her trustee position.[74]

The High Court of Australia in *Hospital Products* affirmed this view, stating that one approach cannot be universally preferred to the other and that the appropriate approach in each case will be that which "reflects as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty."[75]

B *The relevance of causation*

Causation has been described as playing a "limited" role in orders for accounts due to the nature of the remedy as a strict liability.[76] A defendant cannot escape liability on the basis that the same or similar profit could have been made in a non-infringing way, thereby showing the breach did not *cause* the full extent of the gain.[77] Instead, where there is a breach of fiduciary duty liability to account "arises from the mere fact of a profit having [in the circumstances of breach] been made."[78]

Nonetheless, references to causation continue to arise in cases, although not in any consistent manner.[79] The New Zealand Supreme Court stated, in *Premium Real Estate v Stevens,* that "normal principles of causation", being those applied in loss-based claims, were "irrelevant"

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[72] *In Re Jarvis (decd)* [1958] 1 WLR 815 (HC) at 820 per Upjohn J.
[73] At 820.
[74] At 820.
[75] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 (HCA) at 110 per Mason J.
[76] Devonshire (2010), above n 61, at 394.
[77] *Celanese International v BP*, above n 52, at [39]; *Murad v Al Saraj*, above n 63, at [67], [71].
[78] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL) at 145 per Lord Russell of Killowen.
[79] Conaglen (2020), above n 60, at 57.

to the remedy of account.[80] Later, in *Chirnside v Fay,* Gault J in the Supreme Court applied a 'but for' causal test to justify the quantum of an account: the defendant was held liable to account for profit they made "but would not have gained *but for* the breach."[81]

The Supreme Court of Canada has expressly affirmed the relevance of causation to account of profits, but only as a matter of evidence for determining the quantum of disgorgement, not as a prerequisite for liability.[82] This was the approach taken in *Warman International*, where a 'but for' test was used to limit the extent the defendant's liability.[83] The defendant was held liable to account for profits received for one year on the basis that *but for* the breach, the plaintiff would only have retained the distribution agreement misappropriated by the defendant for one more year.

The majority of the England and Wales Court of Appeal expressly rejected a 'but for' causal test for determining the quantum of account in *Murad v Al Saraj*.[84] In that case, the Court ordered disgorgement of the entire profit made by the defendant, despite evidence that some of that profit would have been received had the defendant acted loyally. The relevant breach of fiduciary duty to the partners of a joint venture project was failure to disclose the set-off arrangement by which he was making his contribution to the purchase. At trial it was found that had the defendant made full disclosure of the details, the plaintiffs would have entered the contract anyway but negotiated a higher profit share.[85] The defendant argued he should only be liable for the increase received as a result of the breach, on application of a *but for* test,[86] but this was rejected by the majority on the basis that "it is only actual consent" that defeats liability to account.[87] The Court was thus unwilling to give the defendant the benefit of the doubt that consent would have been obtained had they made full disclosure, but instead found the stringent liability justified on the policy of deterrence.[88]

The differing approaches to the relevance and role of causation make it clear that, at best, it is not a settled principle of the remedy of account, and further that it cannot provide a comprehensive rule for determining liability itself nor the extent of liability. Some of this

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[80] *Stevens v Premium Real Estate* [2009] NZSC 15, [2009] 2 NZLR 384 at [32].
[81] *Chirnside v Fay*, above n 1, at [54] per Gault J.
[82] *Atlantic Lottery Corporation Inc v Babstock* (2020) SCC 19; *Strother v 3464920 Canada Inc* [2007] SCJ 24, (2007) SCC 24.
[83] *Warman v Dwyer*, above n 6.
[84] *Murad v Al Saraj*, above n 63.
[85] *Murad and another v Al-Saraj and another* [2004] EWHC 1235 (Ch) at 287.
[86] *Murad v Al Saraj*, above n 63, at [99].
[87] At [71].
[88] At [74], [75].

inconsistency may result from the fact that a 'but for' test can only identify the causal relevance of a factor, but is not a complete assessment of causation. Causation, as a legal concept, is the process of "attributing legal responsibility to causally relevant conditions."[89] A 'but for' test can identify the relevance of a condition existing to the occurrence of an event or events, but does not, by itself, place any limits on the consequences for which that causal condition can be held responsible.[90] Without limits such as remoteness, the legal responsibility attaching to any particular cause would extend indefinitely.[91] Limiting the liability for breach of fiduciary duty is important as the stringent rule should not be "carried to extremes."[92]

The potential for the remedy of account to create indeterminate and potentially indefinite liability on a causal analysis is most pronounced in cases where a business has been established in breach of fiduciary duty.[93] In *CMS Dolphin Ltd v Simonet* the director of a company, in breach of his fiduciary duty, set up a new company in competition and diverted existing business from three major clients to his new venture.[94] Justice Lawrence Collins considered that the particular contracts unlawfully diverted may have provided the cash flow and opportunity to gain other contracts, thereby a contributory cause of those profits.[95] However, for the purpose of account he held there must be some "*reasonable* connection" between the breach of duty and profit gained.[96] The order for account in that case was limited to the profit obtained from the three clients, from the specific contracts diverted and also from the future business opportunities gained from those particular clients.[97] Despite the Court's recognition that the business from these clients may have provided opportunity and resource to obtain new business, thus might not have been obtained *but for* the breach, the account did not extend to profit obtained from any other clients.[98]

C *Assessment by attribution*

Matthew Conaglen argues that the necessary connection is better described as an exercise of attribution, than of causation.[99] Conaglen does not argue that the connection is *not* causation,[100] and concedes that the process of identifying profits does involve a "causal" analysis of some

[89] Rebecca Lee "Causation and Accounts of Profits for Breach of Fiduciary Duty" (2006) Sing JLS 488 at 498.
[90] At 498-499.
[91] At 498.
[92] *Warman v Dwyer* above n 6, at 561.
[93] *Warman v Dwyer* above n 6, at 561; *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 (Ch).
[94] *CMS Dolphin Ltd v Simonet,* above n 93.
[95] At [97].
[96] At [97].
[97] At [140].
[98] Conaglen (2020), above n 60, at 52.
[99] At 61.
[100] At 61.

sort.[101] Instead, Conaglen states that the term "causation" is confusing in a gain-based setting due to its many connotations elsewhere.[102] In particular, the concept of causation carries with it a notion of necessity; to be the cause of something a factor must be necessary for that thing to happen, and without which it may not happen.[103] Further, the concept of causation suggests there must be a cause and effect, being a breach and a gain. In a fiduciary context, the making of profit itself is the breach; the profit causes the breach as much as the breach causes the profit. Therefore, the court's concern lies with determining whether the making of profit *is or is not* in breach, rather than whether any particular breach *caused* a profit to be made.[104] As such, the enquiry is not one of causation but:

> "*whether, and to what degree*, the profit was made from assets held in a fiduciary capacity, or otherwise generated within the scope of, or by reason of, the fiduciary position, or in a transaction that involved a conflict."[105]

This is consistent with a recent statement by the New Zealand Supreme Court that the remedy of account seeks to strip the defendant of "gain attributable to the trust property or properly to the account of the principal."[106] In relation to the misappropriation of trust property, particularly where the breach involves single or few transactions or identifiable assets, determining the appropriate profit to account for is usually relatively straightforward.[107] However, the wide variety of ways that profit can be made in breach leads to even more complex cases, such that identifying the relevant profit becomes a "complex and costly exercise of attribution".[108] In order to define fairly the profit derived from the fiduciary position, the court must consider all the circumstances, including the nature of the breach.[109] It has been recognised that this inquiry may not produce "mathematical exactness", and can often only result in a reasonable approximation of the profit to be accounted for.[110]

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[101] Conaglen (2020), above n 60, at 63.
[102] At 39, 57, 59.
[103] At 58.
[104] At 60.
[105] At 61.
[106] *Stevens v Premium Real Estate*, above n 80, at [32] per Sian Elias CJ. This statement was made in the context of comparing account of profits to equitable compensation, which seeks to restore the plaintiff to the position they would have been in had the breach not occurred.
[107] Conaglen (2020) above n 60, at 45.
[108] *Grimaldi v Chameleon Mining*, above n 64, at [517].
[109] *Estate Realties Ltd v Wignall* [1992] 2 NZLR 615 (HC) at 631.
[110] *My Kinda Town Ltd v Soll* [1982] FSR 147 (Ch) at 159.

D *Profits derived from the fiduciary position*

The limits of the fiduciary position are not readily defined,[111] but some principles can be derived from the authorities as to what is meant by profits derived "within the scope of," or "by reason of," the fiduciary position. The House of Lords in *Regal Hastings* provided that a fiduciary must account for profits acquired "by reason of the opportunity and the knowledge," resulting from it.[112] Lord Cohen in *Boardman v Phipps* provides that this must be distinguished from mere knowledge and opportunity which "comes to the trustee… in the course of his trusteeship."[113] In *Boardman* the defendants were held liable to account for their profits because, in the course of negotiating to purchase the shares from which the profit was derived, they purported to act in their position as trustees thereby obtaining the shares and profit *by use* of the fiduciary position.[114] Lord Cohen stated that to distinguish situations in which a fiduciary is acting within the scope of their duties and situations that arise merely in the course of trusteeship it must be determined whether there is a possibility of conflict between the fiduciary's personal interest and their duty to the principal.[115] This is consistent with the juxtaposition of these principles in the statement of the rule in *Bray v Ford*: "a person in a fiduciary position… is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict."[116]

As a result, it is submitted that the latter parts of Conaglen's statement are equivalent: profit is gained within the scope of, or by reason of, the fiduciary position when obtained in a transaction in which there is a conflict of interest. In both *Chan v Zacharia* and *Warman* the High Court of Australia sets these out as distinct situations:

> "A fiduciary must account for a profit or benefit if it was obtained either (1) when there was a conflict or possible conflict between his fiduciary duty and his personal interest, or (2) by reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position."[117]

Further, the Court in *Chan* stated that these two limbs of the rule, "while overlapping, are necessarily distinct."[118] The object of the former is to prevent the fiduciary from being *swayed*

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[111] *Boardman v Phipps*, above n 3, at 746.
[112] *Regal (Hastings) Ltd v Gulliver*, above n 78, at 154.
[113] *Boardman v Phipps*, above n 3, at 741 per Lord Cohen.
[114] At 742 per Lord Cohen.
[115] At 743.
[116] *Bray v Ford* [1896] AC 44 (HL) at 51.
[117] *Warman v Dwyer*, above n 6, at 557; see also *Kak Loui Chan v Zacharia* [1984] HCA 36, (1984) 154 CLR 178 at 199.
[118] *Chan v Zacharia*, above n 117, at 199.

by personal interest, and the latter is to prevent the fiduciary from *actually misusing* their position.[119] As a result, the Deane J in that case opined that neither limb "fully comprehends the other," and to rely on only one in formulation of the rule will render it incomplete.[120]

The overlap in these two limbs is clear, as the misuse of the fiduciary position necessarily results from being swayed by personal interest.[121] If the second limb is to extend to *any* opportunity arising in the course of the fiduciary position, not only those in which a conflict may arise, it is submitted that this presents an over-extension of the fiduciary principle. If a fiduciary takes advantage of an opportunity, or knowledge, obtained in the course of their position that could in no way raise the possibility of a conflict of interest, no breach of duty can arise to trigger liability to account. As the first limb includes situations of *possible* conflict, this is sufficient protection for the fiduciary position. While liability to account is strict in the sense that a fiduciary is required to account for even innocent breaches, a breach must still be established.

E *Conclusion*

The first step to determining the extent of a defendant's liability to account is to define the profit obtained in breach of trust. This has sometimes been assessed on the basis of a 'but for' causal analysis, although the use this test is inconsistent between the cases in which it is applied, and has elsewhere been expressly deemed irrelevant or inconsistent with the policy of deterrence. A direct analysis of attribution provides that profits are sufficiently connected to the fiduciary position when made in direct breach of fiduciary duty. However, there is some suggestion that the use of mere opportunity may be sufficient to trigger liability to account, even where there is no possibility of breach due to the absence of a conflict of interest. It is argued this presents an unduly strict application of the rule. Whether this stringent approach can be sustained requires further inquiry into the rationale for account, and to wider theories of private law.

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[119] *Chan v Zacharia*, above n 117, at 198.
[120] At 199.
[121] *Warman v Dwyer*, above n 6, at 558.

Chapter IV: Rationale for Account

It is so far established that, despite the express rejection of causation in some cases, some reasonable connection must be established between the breach of fiduciary duty and profit made. The exact nature of this connection is unclear. In particular, it is not clear as to whether a fiduciary can be liable for profits arising from an opportunity obtained in the course of their fiduciary position, but in which there is no possible conflict of their personal interests with their duty owed. The policy of deterrence has been referred to as justification of a more stringent approach,[122] but whether such an approach is justified in principle, and sustainable in practice, requires a further look into the underlying rationale of account.

There is disagreement as to whether the rationale for account of profits is compensatory, and responds to the plaintiff's loss, or deterrent of wrongdoing, thereby responding to the defendant's conduct. There is also some suggestion that the rationale might be restitutionary, thereby operating on the same corrective justice principles as claims for restitution of unjust enrichment. It will be argued that this is the correct classification.

A *The link between rationale and the causal link*

The classification of the remedy is important for the assessment of causation and ultimate determination of the quantum of account.[123] If the rationale is truly that of deterrence, then this may justify extending liability to account to remoter profits not necessarily made at the expense of the plaintiff, nor within the scope of the fiduciary relationship, but that are made in connection to the wrong such that public policy requires disgorgement nonetheless. On the other hand, if the rationale of account is compensatory, principles of causation and remoteness may apply to limit the reach of account to only profits derived directly from the breach.[124] If the rationale is restitutionary, the principle of correlativity operates in a similar manner to remoteness to confine the reach of the remedy to profits made in direct breach of duty.

B *The rationale as compensation*

While account of profits is considered the primary remedy for a breach of fiduciary duty resulting in profit,[125] compensatory damages are also available and the plaintiff is entitled to an election between these.[126] The availability of these remedies as alternatives in the same

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[122] *Murad v Al Saraj* above n 63, at [74]-[75].
[123] Jessica Palmer "Fiduciaries and Remedies" [2007] NZLJ 36 at 39.
[124] At 39.
[125] *Chirnside v Fay*, above n 1, at [53].
[126] At [20] per Elias CJ.

circumstances, albeit measured in different ways,[127] might suggest they have the same underlying rationale. In *Chirnside v Fay*, Tipping J stated the purpose of the accounting exercise is "to fix compensation or damages on the basis of disgorgement of profits properly analysed."[128] This was in contrast to compensation for loss of chance, the approach taken by the Court of Appeal,[129] but Tipping J considered that both remedies lay within the range of remedies available "when compensating for a breach of equitable obligation."[130]

Others have argued that the very recognition that compensatory damages are available in equity means that account of profits, as a different remedy, must have a different rationale.[131] The suggestion that the rationale for account is compensatory is also widely rejected on the basis that loss to the plaintiff, of property or profit, is not a prerequisite for liability to account.[132] A defendant will be accountable for profit made in breach even where there is no factual loss to the plaintiff.[133]

Regarding the extent of liability, it is also well established that the quantum of account is measured by reference to the defendant's gain and not the plaintiff's loss.[134] The Court in *Murad* regarded this distinction as important as the plaintiff's loss is not "the other side of the coin" to the defendant's gain.[135] In contrast, the Court in *Warman* considered that in some circumstances the loss to the plaintiff may be a relevant consideration for determining the extent of liability.[136] As there was convincing evidence that the plaintiff would have only kept the relevant distribution contract for another year had the breach not occurred, the Court considered that to require the defendant to account for the new business for a period of time far exceeding that would be inequitable.[137] The defendant was only held to account for the profit of the business for a two year period, to reflect the estimated one year period of business that the plaintiff lost, and also further loss associated with the employees taken from the company by the fiduciary in breach.

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[127] *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) HCA 50, 122 CLR 25 at [17].
[128] *Chirnside v Fay*, above n 1, at [98], [142].
[129] At [95].
[130] At [100].
[131] Edelman (2002), above n 56, at 82.
[132] Graham Virgo "Restitutionary Remedies for Wrongs: Causation and Remoteness" in CEF Rickett (ed) *Justifying Private Law Remedies* (Hart Publishing, Oregon, 2008) 301 at 308; Edelman (2002), above n 56, at 82.
[133] *Murad v Al Saraj*, above n 63, at [58] per Arden LJ; *Warman v Dwyer*, above n 1, at 562
[134] *Colbeam Palmer v Stock Affiliates*, above n 127, at [17].
[135] *Murad v Al Saraj*, above n 63, at [58] per Arden LJ.
[136] *Warman v Dwyer*, above n 6, at 565.
[137] At 561.

An issue with the compensatory rationale, if it is accepted, is that it cannot explain why the quantum of account is determined by the defendant's gain, rather than simply fixing an amount to reflect the plaintiff's loss, if that is indeed the focus. To do so would render the remedy equivalent to that of equitable compensation. Despite the focus on the plaintiff's loss in *Warman*, the resulting order was not equivalent to that of compensatory damages. Instead, in making its order the Court overturned the lower Court's order for equitable compensation only, finding no reason that the defendants should retain any benefit "over and above" the amount that would compensate the loss actually sustained.[138]

Determining quantum by reference to the defendant's gain is conceded as a "peculiar measure" by those supporting its classification as compensatory remedy,[139] although it suggested this is justified in equity where it is "impossible to know the extent of the damage."[140] Further, in *Warman*, the Court held that the consequences of breaching a position of trust must be more severe than the compensatory remedies that are available for breach of contract due to the nature of the fiduciary relationship.[141] This has the purpose of ensuring fiduciaries conduct themselves "at a level higher than that trodden by the crowd."[142] In *Murad* the Court identifies this uniquely stringent approach as justified by the special policy of deterrence.[143]

C *The rationale as deterrence*

It is more widely accepted that the rationale for account of profits is to ensure deterrence of wrongdoing by making wrongs unprofitable.[144] The purpose of deterrence is said to be of paramount importance in the fiduciary context as to allow a fiduciary to profit from their breach would "provide an incentive for undermining the very basis of trust."[145] Requiring fiduciaries to account for any unauthorised profit derived from their position, irrespective of any bad faith in doing so, is said to ensure fiduciaries are financially disinterested in their duties.[146] In this way, the availability of account is not only deterrent of intentional wrongdoing but prophylactic of the "disease of temptation."[147]

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[138] *Warman v Dwyer*, above n 6, at 562.
[139] Walter Ashburner and Dennis Brown *Ashburner's Principles of Equity* (2nd ed, Legal Books, Sydney, 1983) at 40; cited in *Colbeam Palmer v Stock Affiliates*, above n 127, at [20].
[140] *Hogg v Kirby* (1803) 8 Ves 215, (1803) 32 ER 336 at 339; cited in Edelman (2002), above n 56, at 82.
[141] *Warman v Dwyer*, above n 6, at 563.
[142] At 557; citing *Meinhard v Salmon* (1928) 164 NE 545, at 546, per Chief Justice Cardow.
[143] *Murad v Al Saraj*, above n 63, at [75]-[77].
[144] Edelman (2002), above n 56, at 83; Virgo (2008), above n 132, at 302; Devonshire (2010), above n 61, at 58; *Murad v Al Saraj*, above n 63, at [75]-[77] and [121]; *Regal (Hastings) Ltd v Gulliver*, above n 78, at 155.
[145] Devonshire (2010), above n 61, at 406.
[146] *Attorney General v Blake* [2001] 1 AC 268 at 280.
[147] *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 at [413].

While it is considered fundamental that "no wrongdoer should profit from the commission of their wrong,"[148] a principle stated in such broad terms "does not of itself provide any sure guidance to the solution of a problem in any particular case."[149] In particular, the rationale of deterrence does not appear to justify any stricter approach to quantum than advocated by a compensatory or restitutionary approach. A fiduciary is not stripped of anything they were entitled to on their own account,[150] and Devonshire has claimed that the "vigour" of the remedy "recedes in the face of competing claims."[151] As a result, a defendant cannot be left in a worse position than they were prior to the breach. This is justified on the basis that the purpose is only to deter but not to punish.[152] As a result, even if the rationale is deterrent, this does not appear incompatible with considerations of causation and remoteness.

This becomes even more evident when considering the approach to equitable allowances. The availability of equitable allowances in absence of a remuneration agreement provides a breaching fiduciary recompense for work they were never authorised to perform, let alone entitled to be paid for. The fiduciary is therefore not only *not* left in a worse position from the breach, but such recompense may even make the breach a worthwhile venture for them. Where a breach is made innocently, or the fiduciary is even well-meaning but mis-informed, it is arguable that the deterrent effect is not undermined by making the breach cost-neutral. While a fiduciary who has acted in bad faith is less likely to be awarded an allowance, bad faith is not an absolute bar to making an allowance.[153] Where such an allowance is made to a fiduciary who has acted deliberately and in bad faith, it cannot be denied that the deterrent effect is severely undermined to the point of being rendered inapplicable; this is stated in no uncertain terms in the dissent of Elias CJ in *Chirnside v Fay*.[154]

Any personal remedy can be described as having a deterrent effect, as any order against a person will cause them some prejudice. However, the fact that account of profits may have a deterrent effect does not mean that the underlying rationale and governing principle must be to deter. In *Chirnside v Fay* Tipping J comments that while account may be seen as having deterrent effect, it is important not to confuse effect and purpose.[155] It is evident from the limited scope of the remedy that the consideration of deterrence does not operate to render

[148] Virgo (2008), above n 132, at 301.
[149] *Attorney-General v Observer Ltd* [1990] 1 AC 109 (HL) at 286 per Lord Goff.
[150] *Murad v Al Saraj*, above n 63, at [85].
[151] Devonshire (2013), above n 2, at 59.
[152] *Estate Realties v Wignall*, above n 109, at 629.
[153] *Chirnside v Fay*, above n 1, at [122], [127].
[154] At [48].
[155] At [142] per Tipping J.

considerations of causation or remoteness irrelevant for the purposes of quantum. Rather the relevance of deterrence is limited to justifying the availability in absence of bad faith and in absence of loss to the plaintiff.

D *The rationale as restitution*

Account of profits has been described as restitutionary,[156] but it is important to note that the term "restitution" takes on many meanings in law. The law of restitution concerns the award of gain-based damages, but under this umbrella there are remedies that are "literally restitutionary," that reverse a transfer of value from the claimant to the defendant, and remedies that involve disgorgement of gain, which may have been made by the defendant from any source.[157] Account of profits is properly categorised as disgorgement, as the gain need not result from a transfer of value from the trust or beneficiary directly.[158] Edelman asserts there is a distinction between the rationales of these two types of gain-based remedies: that restitutionary damages are concerned with corrective justice while disgorgement damages are concerned with "broad notions of deterrence."[159]

Despite this distinction, language normally associated with restitutionary damages continues to appear in both the cases and commentary on disgorgement damages. Devonshire describes the operation of the remedy as "an adjustment of private rights,"[160] and in some cases the courts have sought to identify profits made *at the expense* of the plaintiff.[161] More clearly, the purpose has been stated as preventing the unjust enrichment of the defendant.[162] The use of this language is consistent with concepts of corrective justice, so suggests that the rationale of disgorgement damages may not be so distinct from that of purely restitutionary damages after all.

The Court in *Murad* considered that the notion of unjust enrichment had been rejected in *Warman*, on the basis that liability to account does not require detriment to the plaintiff.[163] While it is clearly established that *factual* loss to a plaintiff is not required, it must nonetheless be shown that the profit in question is reasonably connected to a breach of duty, which constitutes a *normative* loss: in breaching their duty, a fiduciary fails to fulfil their obligation

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[156] *Estate Realities v Wignall*, above n 109, at 629.
[157] Virgo (2008), above n 132, at 301.
[158] At 302.
[159] Edelman (2002), above n 56, at 86.
[160] Devonshire (2013), above n 2, at 60.
[161] *Halifax Building Society v Thomas* [1996] 2 WLR 63 (CA) at 71.
[162] *Dart Industries Inc v Décor Corporation Pty Ltd* (1993) 179 CLR 101 (HCA) at 387.
[163] *Murad v Al Saraj*, above n 63, at 61; citing *Warman v Dwyer*, above n 6, at 557.

of loyalty to the trust. Regardless of whether the plaintiff experiences a factual loss or gain from the breach, the breach itself represents a normative loss of loyalty, from which the defendant has been enriched. It is this correlative loss and gain to which the principles of corrective justice can apply to remedy, and this is explored in more detail in the following chapter.

E *Conclusion*

The compensatory and deterrent rationales are opposite in their focus: a compensatory rationale would focus account on the plaintiff's loss, while a deterrent approach would focus on the defendant's wrongdoing and gain. As discussed, neither approach provides a satisfactory explanation for why account of profits operates in the way that it does. If the rationale is truly compensatory, the remedy should reflect a fixed amount proportionate to the plaintiff's loss. If the rationale is deterrence, that does not appear to affect the determination of quantum in any meaningful way.

A restitutionary rationale would explain why there is some consideration of the plaintiff's loss, but that the quantum remains measured ultimately by the enrichment of the defendant, this being the failure of the compensatory rationale. Further, a restitutionary rationale can also explain why liability is limited to the enrichment of the defendant, but remuneration for work is not precluded, this being the failure of the deterrence rationale.

If the rationale is restitutionary, principles of correlativity and remoteness can apply to provide a more principled determination of the profits to be disgorged, which is arguably preferable to the "broad notions of deterrence," asserted as governing the remedy of account currently.[164] Virgo argues that language of remoteness is preferable to language of unjust enrichment, such as 'at the claimant's expense.'[165] However, when the 'expense' of the claimant is viewed as a normative loss of loyalty rather than necessarily a factual detriment, the principles of remoteness that would confine the reach of account to profit made within the scope of the breach apply in the same manner as principles of unjust enrichment and corrective justice. It is therefore argued that the restitutionary rationale is correct, and the following chapter will seek to apply a framework of corrective justice to the remedy of account. In particular, the causal link will be reconsidered in light of the principle of correlativity that is fundamental to corrective justice.

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[164] Edelman (2002), above n 56, at 86.
[165] Virgo (2008), above n 132, at 307.

Chapter V: A Principled Approach

The causal link that emerges from the cases is that there must be some reasonable connection between the profits and breach of duty, but it is in dispute as to whether this connection is necessarily *causation*. Further, it is unclear whether the policy of deterrence can serve to weaken the threshold for this connection by allowing claims to profits only indirectly connected to a breach of duty. A more principled approach is sought, and is necessary in light of the unique situation in *Adlam* where, on the current approach, there may be more than one claim to the whole profit. This chapter will evaluate the remedy of account within a framework of corrective justice, and conclude that the principle of correlativity can provide an appropriate limitation to the causal analysis and resulting determination of quantum, thereby providing a more principled basis for taking accounts. An opposing theory, namely the exceptionalism thesis, will also be discussed but found to be inconsistent with principle, as to extend the liability of the defendant to account for gains beyond those made in breach is to introduce a penal element to the remedy.

A *A framework of corrective justice*

Corrective justice is an approach to private law that views justice as the correction of an inequality created between parties by a wrong.[166] As private law remedies, including account of profits, involve a direct transfer of resources from the wrongdoer to the wronged, their validity rests on the essential question: *what entitles this plaintiff to recover from this defendant?*[167] Implicit in this question are two enquiries: what is the plaintiff's basis for seeking recovery, and why from that particular defendant.[168] Under Aristotle's account of corrective justice, these can be answered by the principle of correlativity.[169]

Aristotle's approach to corrective justice is mathematical, where each wrong consists of an unjust gain to the wrongdoer and a correlative unjust loss to the wronged.[170] The loss or gain are not treated independently but are viewed as two correlative aspects of a single event,[171] meaning they are qualitatively equal: the plaintiff has lost what the defendant has gained.[172] As factual loss or gain will not always result from a wrong, correlativity must be understood from

[166] Ernest Weinrib *The Idea of Private Law*, (Harvard University Press, London, 1995) at 62-63.
[167] At 56.
[168] Paul Miller "Justifying Fiduciary Remedies" (2013) 63 UTLJ 570 at 577.
[169] Weinrib (1995), above n 166, at 114.
[170] At 115.
[171] At 73.
[172] At 63.

a *normative* rather than *factual* perspective.[173] For example, the law of negligence provides a remedy where there is no factual gain, and the law of unjust enrichment provides a remedy where there is no factual loss.[174] Remedies are awarded on the basis that there has been a breach in the norm governing the interaction between parties, such norms being the rules that set the terms for fair interaction.[175] Correlativity thereby provides the answers needed to justify private law remedies: the plaintiff is entitled to recover because they have suffered a loss, though this may not be factual; and the plaintiff is entitled to recover from the defendant specifically because the defendant has made a gain equal to the plaintiff's loss.

The correlativity of loss and gain is a fundamental concept to corrective justice as it provides both the basis for liability, and a framework for determining the appropriate remedy. To remedy the normative imbalance between the parties a transfer of value is ordered that restores the parties to the correct position according to the norm governing that interaction.[176] In doing so, the court "restores the parties to the equality that would have prevailed had the norm been observed."[177]

B *Application to account of profits*

1 Justifying liability

In order to apply a corrective justice framework to account of profits for breach of fiduciary duty, it must first be determined what the norm governing the fiduciary relationship is, and the corresponding loss and gain in relation to that norm. As the norm provides the justification for liability, the justification as ordinarily relied on by the Court gives guidance as to the underlying norm.[178] Further, to meet the requirements of correlativity, the same norm must apply to both parties; the justificatory consideration that deems one party to have suffered a loss must be the same justification for the assertion that the other party has received a gain.[179]

Deterrence is an example of a norm that does not meet the conditions of correlativity: taking from the defendant may be justified by the need to deter the relevant conduct, but this does not

[173] Weinrib (1995), above n 166, at 116.
[174] At 116.
[175] At 115.
[176] At 115.
[177] At 117.
[178] At 116.
[179] At 120.

also justify the plaintiff's entitlement to an award.[180] The norm is therefore one-sided as deterrence could equally be satisfied by, for example, payment to the state.[181]

In contrast, correlativity is satisfied where one party owes a duty to another, and the other has the right to performance of that duty.[182] The same justification applies to both parties as the object of the right is the content of the duty.[183] In a fiduciary context, the fiduciary owes a duty of loyalty to the beneficiary or principal, and the beneficiary has a corresponding right to the loyalty of the fiduciary. Where a breach of fiduciary duty results in profit to the defendant there is a clear factual gain, but they have also experienced a normative gain by the voluntary and unlawful release from the restriction of their fiduciary obligations.[184] The underlying norm of the fiduciary relationship is that the fiduciary must not place themselves in a position where their duty and personal interest *can* conflict,[185] without the express and informed consent of the beneficiary.[186] Therefore, even where the fiduciary has acted in the best interests of the beneficiaries so cannot be said to have substituted their own interests, to allow the possibility of conflict is a release from this restriction and therefore a normative gain made at the expense of the fiduciary who, in the same event, loses the protection of their interests. In short, where there is a breach of fiduciary duty the beneficiary experiences a normative loss of loyalty, that directly correlates to the normative gain of the fiduciary, being release from the restrictions that the norm of loyalty imposes on their actions.

2 Determining the remedy

While the focus of corrective justice is on the normative imbalance created by a wrong, this must necessarily translate into factual terms in order for private law to provide a remedy in the form of a transfer of resource between plaintiff and defendant. In circumstances where a breach of trust generates a profit for the fiduciary, Weinrib describes this as "the factual embodiment of the plaintiff's right to the fiduciary's loyalty."[187] Miller disagrees with this on the basis that the right to loyalty only has a correlative duty to avoid conflicts of interest, but does not necessarily give a positive entitlement to profits resulting from a conflict.[188] To reconcile this

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[180] Weinrib (1995), above n 166, at 122.
[181] Miller (2013), above n 168, at 595.
[182] Weinrib (1995), above n 166, at 123.
[183] At 123.
[184] AVM Lodder *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart Publishing, Oregon, 2012) at 101.
[185] *Aberdeen Ry Co v Blaikie Brothers* (1854) 1 Macq HL 461, [1843-60] All ER Rep 249 (HL) at 252 per Lord Cranworth LC; cited *Boardman v Phipps*, above n 3, at 745 per Lord Hodson.
[186] *Regal (Hastings) Ltd v Gulliver*, above n 78, at 392 per Lord Wright.
[187] Weinrib (1995), above n 166, at 141.
[188] Miller (2013), above n 168, at 614.

rule, Miller argues that while the right to loyalty does not connote a correlative duty to create profit, to the extent that profit is created the beneficiary must have an implied right to receive it.[189]

On either approach, the beneficiary's entitlement to the fiduciary's loyalty is treated as quasi-proprietary. Indeed, Weinrib describes this right to loyalty as "within the plaintiff's possessions."[190] Miller elaborates on this by explaining that while loyalty itself is not property,[191] the exclusive right to the exercise of fiduciary power in making decisions for the beneficiary is akin to the exclusive right over possession over actual property.[192] The possession of the right to fiduciary power is an exclusive right as it entitles the beneficiary to the exercise of that power for their interests alone.[193] A fiduciary who exercises their power for the interests of any person other than the beneficiary, including for themselves, infringes this right to exclusive possession and in doing so breaches their correlative duty. The misappropriation of the discretionary power held by the fiduciary entitles the beneficiary, having exclusive right to the exercise of that power, to the benefits flowing from that misuse.

The treatment of fiduciary power as quasi-proprietary thus provides a principled mechanism for converting the normative difference in the parties' positions to a factual difference, thereby providing the quantum for remedy. However, this proprietary reasoning does not convert the personal claim to a proprietary one. The important difference between the personal right of the plaintiff against the defendant and truly proprietary rights is that the right of the plaintiff is enforceable against the defendant only, whereas truly proprietary rights are enforceable against the world at large.[194] If the fiduciary power were truly proprietary then the appropriate remedy would be a constructive trust over profits. While a constructive trust can be imposed to support an order for account,[195] account of profits by itself is a personal order.[196]

3 Correlativity and the causal link

As the focus of correlativity is on the normative loss and gain created by the breach of the fiduciary duty, and this is converted to a monetary remedy by treating the fiduciary power as quasi-proprietary, the causal link must be to profits made by misuse of the fiduciary power,

[189] Miller (2013), above n 168, at 615.
[190] Weinrib (1995), above n 166, at 141.
[191] Miller (2013), above n 168, at 600.
[192] At 611.
[193] At 611.
[194] Lodder (2012), above n 184, at 25.
[195] Devonshire (2013), above n 2, at 8.
[196] Devonshire (2013), above n 2, at 50.

thereby in *direct* breach of fiduciary duty. Quantum of account must be limited to the gain derived directly from the breach, as this is the amount correlative to the plaintiff's loss. This is consistent with the argument discussed in Chapter III, that mere opportunity provided by the fiduciary position is insufficient to establish the necessary connection. Instead, the defendant is only accountable for profits made at the expense of the plaintiff, that expense being the fiduciary's loyalty owed to the plaintiff, established by the breach of fiduciary duty.

C *Exceptions to correlativity*

1 Exceptionalism thesis

While this dissertation will continue to argue in favour of the application of corrective justice principles to the remedy of account, it is important to consider the opposing view that account of profits presents an exception to correlativity by engaging public interests that are external to the interaction of the parties.[197] In particular, the consideration of deterrence often referred to in association with the remedy is one "directed to the world at large," even though the plaintiff is the one to receive the benefit of the order with such effect.[198] Miller labels this notion that disgorgement damages for breach of fiduciary duty cannot be reconciled with formal corrective justice the "exceptionalism thesis".[199] Those in favour of this argument assert that the strict remedy of disgorgement is available in circumstances where compensation is inappropriate due to the policy interests in providing extra protection to the institute of trust.[200] Instead, disgorgement is thought to result in a windfall benefit to the plaintiff who has often suffered no factual loss, but this is justified by public interest considerations rather than on the basis of redressing any imbalance between the parties.[201]

On this approach, disgorgement damages are essentially a private sanction for a public purpose.[202] This fails to answer the question of why the plaintiff of all people is entitled to recover this over-compensation, as such sanction could be effected by a fine or other penalty.[203] While it may be asserted that deterrence is a consideration, and even purpose, for account of profits, it is also settled law that the remedy is not punitive. In *Estate Realties* the New Zealand High Court considered that to introduce a punitive element is "unsound in principle and not

[197] Miller (2013), above n 168, at 572.
[198] Devonshire (2013), above n 2, at 59.
[199] Miller (2013), above n 168, at 590.
[200] At 591.
[201] At 591.
[202] At 591.
[203] At 595.

supported by authority,"[204] and the Supreme Court in *Chirnside* held it is not the purpose of account to "apply a sanction or punishment for the breach of duty."[205] In *AIB v Redler* the court considered that any monetary award not reflective of a loss caused nor profit gained by the wrongdoer by reason of the breach is penal.[206]

The correlativity required by a corrective justice approach need not be entirely unresponsive to social values and purposes.[207] Hanoch Dagan argues that while correlativity is essential to the justification of private law remedies, the norms on which correlativity is based are essentially reflective of public values;[208] social goals for the interaction of parties define their initial entitlements from which their correlative surplus and deficit are measured.[209] Dagan therefore argues that the fear of introducing social values to private law is groundless as they are already present as the very bases for imposing liability.[210] Despite the social basis for correlativity, Dagan agrees that parties are not further entitled to society's disapproval of a wrongdoer's behaviour in the form of a remedy unconnected to their correlative loss and gain.[211]

As discussed in Chapter IV, the fact that the remedy may have a deterrent effect does not necessarily mean that deterrence as a consideration should affect the extent of its reach. It is unnecessary to justify any apparent windfall gain to the plaintiff on the basis of deterrence where it can be justified on the basis of their normative loss, in absence of any factual loss. However, to extend the reach of account to profits beyond those reflecting the correlative loss and gain of the parties would be to introduce a punitive element to the remedy of account, which has already been deemed inappropriate.

2 Equitable allowances

Equitable allowances made to a defendant fiduciary in absence of a remuneration agreement presents an exception to the principle of correlativity, as represents an adjustment of rights in favour of the defendant to which they are not normatively entitled. Where a remuneration agreement exists, and an allowance is made in accordance with this agreement, there is no deviation from correlativity as the payment of remuneration to the defendant presents no breach

[204] *Estate Realties v Wignall*, above n 109, at 629.
[205] *Chirnside v Fay*, above n 1, at [142] per Tipping J.
[206] *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2014] 2 WLR 1367.
[207] Hanoch Dagan "The Limited Autonomy of Private Law" (2008) 56 Am J Comp L 809 at 813.
[208] At 817.
[209] At 826.
[210] At 826.
[211] At 827.

to the norm of loyalty. Where no remuneration agreement exists, the fiduciary acts in their position as a volunteer and the plaintiff is thus entitled to the benefit of their work. Therefore, in absence of an agreement, allowances that remunerate a defendant for their time, skill and effort invested in the exercise of their fiduciary power, to which the beneficiary has a quasi-proprietary right, thus clearly fall outside the correlativity framework. However, the court will only do so if appropriate "on the overall balance of equities,"[212] and the object of the exercise remains to "define fairly the profit for which the fiduciary is required to account."[213] This suggests that, while inconsistent with entitlements under the norm of loyalty, there may be other normative considerations at play that justify allowances in these circumstances.

D *Conclusion: a principled approach*

Analysing the remedy of account of profits within a framework of corrective justice provides a principled basis for determining the quantum of disgorgement for profits made by breach of fiduciary duty. On this approach, the scope of the fiduciary duty provides both the entitlement and limitation for liability to account. A plaintiff is entitled to a remedy on the basis they have suffered a normative loss of loyalty, and they are entitled to seek that remedy from the defendant because that person has experienced the correlative gain. However, only profits made in direct breach of duty are liable to disgorgement. Profits made outside the scope of the fiduciary relationship, where the defendant was not under an obligation to act in the interests of the beneficiary, fall outside the scope of the plaintiff's entitlement.

The exceptionality thesis is unsustainable on the basis that while deterrence may be the effect of the remedy, and wider policy values may inform the rule providing the basis for and, availability of, the remedy, these do not preclude the application of corrective justice principles to govern the *application* of the remedy. To assert that policy values should define the parameters of the plaintiff's entitlement and defendant's liability converts account to private sanction for public purposes.

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[212] *Chirnside v Fay*, above n 1, at [127].
[213] At [122].

Chapter VI: Revisiting *Adlam*

The order in *Adlam v Savage* for full disgorgement of profit to the plaintiff appears problematic as it creates uncertainty about the resulting legal position of a third party, who also contributed to and may have a claim to the profit made.[214] This order resulted from the application of a 'but for' test of causation,[215] which this dissertation has argued cannot be justified on precedent nor principle.

The first part of this chapter will compare the approach set out in Chapter V to the approach taken in *Adlam.* It will be shown that while the Court correctly identified the defendant's liability as for "profits attributable to the breach of duty," this was misconstrued as an assessment of profits *caused* by the breach of duty. As argued in Chapter III, these are not equivalent.

Having identified the error in the Court's approach, this chapter proceeds to revisit the situation of the parties in *Adlam* in order to determine the true entitlement of Bath Trust. It will be found that applying the correct approach may still reach the same result for full disgorgement, but not for the reasons given.

This chapter will continue to consider how multiple possible claims to the same profit should be dealt with in this context. The final part of this chapter makes suggestions as to how the problematic precedent set by *Adlam* can be distinguished, and the law redirected, in future cases.

A *Identifying the error*

The Court of Appeal correctly identified that "the key question is whether the profit was made within the scope of the defendant's duty,"[216] and liability is for disgorgement of profits "*derived from* the defendant's breach of duty."[217] To answer this key question, the Court referred to the finding of the Māori Land Court that the defendant had made the entire profit in breach of her fiduciary duty.[218] Taken in isolation, these statements reflect the approach proposed herein and that should have been sufficient to justify the order made.

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[214] *Adlam v Savage* (CA), above n 7.
[215] At [40].
[216] At [31].
[217] At [30] (emphasis added).
[218] At [43]; *Savage v Adlam* (MLC), above n 11, at [192].

However, there are two critical issues with the Courts' reasoning. First, in finding that the entire profit was made in breach, the Courts make reference to Adlam's wrongdoing against the third party, which is an inappropriate consideration for this assessment. Further, in defining the test applied the Court of Appeal misconstrued it as an assessment of causation, not attribution.

1 The finding of the Māori Land Court

Judge Coxhead of the Māori Land Court held that, as Adlam could not prove that a portion of profits was "solely attributable to her own effort, rather than arising out of her breach of duty,"[219] the entire profit was made in breach of the fiduciary duty owed. This statement itself is unproblematic; it is logical that the net amount remaining after the deduction of expenditure reflects the amount attributable to a fiduciary's labours.[220] However, Judge Coxhead rejected the argument that profit made by use of Farm Trust assets could be profit Adlam was entitled to on her own account.[221] The Judge stated that apportionment must be made between the plaintiff and defendant on the basis of determining profits "attributable to the wrongful conduct,"[222] and that apportionment is not made between two "innocent parties."[223]

This approach suggests that, despite the fact no claim had been properly made by Farm Trust,[224] the Judge had nonetheless come to the conclusion that the profit derived from their assets was also obtained by wrongdoing, so Adlam could not be entitled to it. The Court of Appeal reiterated that the order made was justified on the basis it did not deprive Adlam of "profits legitimately obtained."[225] This view is also reflected in the Supreme Court's statement that Adlam had failed to establish an entitlement to "profit made at the expense of innocent *parties*,"[226] thereby referring to both even though only one had established a valid claim.

With respect, it is clear that the finding of the Māori Land Court was unjustified, and the Court of Appeal and Supreme Court were incorrect to accept this finding. Farm Trust had not established any breach of equitable obligation, nor was there any suggestion that the terms of the lease agreement had been breached.[227] Therefore, as far as the Courts were aware, the profits made under the lease to Farm Block were legitimately obtained as between Adlam and

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[219] *Savage v Adlam* (MLC), above n 11, at [194].
[220] Devonshire (2013), above n 2, at 74.
[221] *Savage v Adlam* (MLC), above n 11, at [194].
[222] At [181].
[223] At [177].
[224] At [163].
[225] *Adlam v Savage* (CA), above n 7, at [41].
[226] *Adlam v Savage* (SC), above n 7, at [15].
[227] *Savage v Adlam* (MLC), above n 11, at [164].

Farm Trust. As will be discussed in the next part of this chapter, it was open to the Court to conclude that the portion of profits attributable to the use of Farm Trust assets were recoverable by Bath Trust, but only if it could be shown that doing so was in breach of duty to *Bath Trust*. This was not the approach taken.

2 The Court of Appeal's causal analysis

The statement of the rule and acceptance of Judge Coxhead's finding could have ended the analysis in the Court of Appeal, but the Court went on to elaborate that the necessary "causal link" between breach and duty is satisfied on a 'but for' test of causation. *But for* the breach of duty to Bath Trust, the profit including Farm Trust's contribution could not have been made, and this was held sufficient to entitle Bath Trust to recover the profits properly attributable to the arrangement with Farm Trust.[228] With respect, this misinterprets the test. The Court correctly stated the focus as on "profits attributable to the breach of duty,"[229] but proceeded to make this determination by an assessment of causation. As argued by Conaglen, a 'but for' test of causation is not the same as attribution.[230] While attribution can be labelled a "causal" analysis of a sort,[231] it is an assessment of whether the "making and retaining the profit *is itself* the breach of fiduciary duty," not "whether the breach *caused* a profit to be made."[232] On this basis Conaglen argues use of the term "causation" in this context is unnecessarily confusing.[233] In the same manner, it is likely that in this case the use of the term "causal link" misled the court to a causal analysis.

B *Applying the correct approach*

It is herein argued that, properly understood, the rule that a defendant is liable to account for unauthorised gains made within the scope of their fiduciary duty means that they are liable to disgorge any profit made in direct breach of their fiduciary duty. This rule provides both the basis of entitlement and the limit to the remedy:[234] a defendant must disgorge unauthorised gains but *only* gains that were unauthorised. Gains are unauthorised when made in circumstances where the fiduciary's obligations of loyalty to the principal are engaged so that the taking of profit for themselves is in breach of their duty. The fact that the breach against the plaintiff was a contributory cause of the defendant's gain does not entitle the plaintiff to

[228] *Adlam v Savage* (CA), above n 7, at [40].
[229] At [48].
[230] Conaglen (2020), above n 60, at 58.
[231] At 63.
[232] At 60 (emphasis added).
[233] At 39, 57, 59.
[234] Devonshire (2013), above n 2, at 59 (emphasis added).

recovery of the entire profit. Instead, where profit has been made from multiple sources it must be determined which sources were accessed in breach, thereby determining what proportion of profit is correlative to the loss of the plaintiff. This requires independent assessment of each source.

1 Assessing the arrangements independently

Ms Adlam was trustee of Bath Trust only,[235] and no claim as to a fiduciary relationship to Farm Trust was properly pleaded.[236] In making the relevant profit Ms Adlam, acting as the controlling mind of her company GDL, secured a lease to Bath Trust for the use of their land. Ms Adlam also negotiated, for GDL, a lease to Farm Trust for the access and use of a geothermal well on their land. It was accepted that the assets of both Trusts, obtained by the lease arrangements, contributed to the ultimate profit made.[237] Therefore, in order for Bath Trust to be entitled to recover the entire profit it must be established that *both* lease arrangements were acquired in breach of Adlam's fiduciary duty *to Bath Trust.*

Regarding the lease to Bath Trust, Ms Adlam put herself in a position in which her personal interest in GDL and fiduciary obligation to Bath Trust conflicted, thereby breaching the no-conflict rule and her duty of loyalty. Adlam had told the trustees she required "full control" of the project,[238] but failed to disclose she also stood to make a significant profit personally by selling the shares in GDL, for which she already had negotiations on foot.[239] This failure to make full disclosure as to the nature of her interest in the project presented a clear breach of duty.[240] Adlam only accepted this on the eve of trial,[241] but the fact she had acted in breach of her duties was ultimately not in dispute.[242]

Regarding the lease to Farm Trust, it was never directly addressed whether Adlam's arrangement with Farm Trust breached her fiduciary duty to Bath Trust. Instead, the court was satisfied that, as the whole profit could not have been made *but for* the breach to Bath Trust, the entire profit from both sources must have been made *in breach*. As has been discussed, those are not one and the same so that conclusion was not well founded. Unfortunately, Judge

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[235] *Adlam v Savage* (MAC), above n 10, at [3].
[236] *Savage v Adlam* (MLC), above n 11, at [144], [163]; *Adlam v Savage* (MAC), above n 10, at [67]; *Adlam v Savage* (CA), above n 7, at [6].
[237] At [40].
[238] At [17].
[239] *Savage v Adlam* (MLC), above n 11, at [162]; *Adlam v Savage* (CA), above n 7, at [39].
[240] At [39].
[241] *Savage v Adlam* (MLC), above n 11, at [158].
[242] *Savage v Adlam* (MLC), above n 11, at [162]; *Adlam v Savage* (MAC), above n 10, at [36]; *Adlam v Savage* (CA), above n 7, at [14]; *Adlam v Savage* (SC), above n 7, at [5].

Coxhead's finding that all of the profit was made in breach of duty was never challenged in the Court of Appeal,[243] so full discussion on this issue is not available in the judgments. Further, as Adlam accepted her liability to Bath Trust, limited detail is given about the lease and the manner in which it was obtained.[244]

2 Application to the facts

This part will proceed to explore the issue of whether the arrangement with Farm Trust was entered in breach of Adlam's duty to Bath Trust. As this was not directly addressed by the Court, nor discussed in submissions by counsel, the information on which this discussion is based is necessarily incomplete. However, given that the approach taken by the Courts is clearly shown to be incorrect, it is appropriate to attempt an application of the correct approach to the facts that are available.

For the arrangement between GDL and Farm trust to present an independent breach of duty from which Bath Trust can gain an entitlement to the resulting profit, it must be shown that in negotiating that arrangement Adlam had placed herself in a position of conflict between her personal interests and her duty of loyalty to the interests of Bath Trust.

To establish the opposite, that the entire profit was not made in breach of Adlam's duties to Bath Trust, it must therefore be shown that in securing the lease between GDL and Farm Trust, considered separately from the lease to Bath Trust, Adlam did not owe a duty of loyalty to Bath Trust. To make this argument, it must be shown that Adlam's fiduciary position with respect to Bath Trust merely provided the opportunity to transact with Farm Trust, but that in taking this opportunity her personal interests did not conflict with her duty to Bath Trust. As established in Chapter III, mere opportunity acquired while acting in a fiduciary capacity does not trigger liability to account if taking that opportunity does not create a situation of conflict. The fact that the breach to Bath Trust was essential to the overall venture cannot, and should not, convert mere opportunity to something more; to do so extends recovery beyond the amount necessary to remedy the correlative normative difference between the parties.

It appears that the two arrangements were created under the same lease document and signed by the same people as trustees of both trusts.[245] This complicates the analysis by blurring the line between what must, for the purposes of a principled approach, be treated as separate

[243] *Adlam v Savage* (CA), above n 7, at [44].
[244] At [14].
[245] *Savage v Adlam* (MLC), above n 11, at [26]; *Adlam v Savage* (MAC), above n 10, at [33].

arrangements. The breach by Ms Adlam against Bath Trust was identified as conflict of interest, self-dealing, and failure to disclose.[246] These wrongs appear to relate only to the arrangement made for the lease of Bath Block. Adlam's failure to disclose the nature of her interest to Bath Trust is only relevant to gaining that Trust's agreement to the lease of their land. Assuming, for the purposes of this argument, that Adlam did indeed owe no fiduciary duties to Farm Trust then she was under no obligation to disclose her personal interest in the transaction to them when securing the lease to Bath Block. The duty to disclose a conflict of interest is a special duty imposed by the fiduciary relationship, but such a good faith obligation does not exist for ordinary business contracts.[247] The question remains as to whether Adlam's duty to Bath Trust was engaged when negotiating the terms of the lease between GDL and Farm Trust.

Considering the facts available, it is of note that at one meeting in particular, considered critical in gaining Bath Trust's consent to the lease of Bath Block, Adlam rejected a suggestion for a "group" to undertake the project development.[248] No more detail on what such a "group" would entail, but it is inferred that such an arrangement may have afforded Bath Trust a greater interest in the project than their entitlement to rent from the lease agreement ultimately secured.[249] On this basis, it is arguable that by obtaining the lease to Farm Trust for GDL and not for Bath Trust Adlam breached her fiduciary duty to Bath Trust. It is stated in the judgment that the Bath trustees were aware of and agreed to her (GDL's) role as sole developer of the part on Farm Block.[250] However, in light of her failure to disclose the nature of her interest in the development on the whole it is likely that this cannot be considered informed consent to that particular conflict of interest. Even if it would have been impossible to obtain the lease to Farm Block on behalf of the Bath Trust instead of GDL, this would not remove Adlam's liability to account.[251] While it is recognised there are limited facts available to make this assessment, it is likely that a reasonable man would consider there is a "real sensible possibility of conflict" in the circumstances.

As a result, it is possible that the Māori Land Court was correct to find that Adlam made the entire profit in breach of her fiduciary duty to Bath Trust,[252] and the Court of Appeal was

[246] *Adlam v Savage* (CA), above n 7, at [39].
[247] H G Beale (ed) *Chitty on Contracts* (32nd edition, Sweet & Maxwell, London, 2018) at 35 and 43.
[248] *Adlam v Savage* (CA), above n 7, at [17].
[249] *Adlam v Savage* (MAC), above n 10, at [31].
[250] *Savage v Adlam* (MLC), above n 11, at [216].
[251] *Keech v Sandford* (1726) 25 ER 223.
[252] *Savage v Adlam* (MLC), above n 11, at [195].

correct to order full disgorgement to Bath Trust.[253] *If* this is the case, it is not for the reasons given. The entire profit did not result from a single breach to Bath Trust that, being essential to the generation of the profit, meant they are entitled to the gain from both recognised contributions. Rather, it is possible that the entire profit was made as a result of two breaches against Bath Trust in relation to each of the two contributions. In short, *if* Bath Trust is entitled to the total profit it is not because a breach against them *caused* the entire profit, but because every part of the profit is *attributable* to a breach against them. It is important to note that it has been inferred from limited facts that the arrangement between GDL and Farm Trust does present a breach to Bath Trust; as discussed above this finding is only implicit in the Courts' decisions and did not form the basis of the Courts' approach to the causal link.

In this respect, the Māori Appellate Court was correct to focus on the source of the profits, but the Court of Appeal was correct to criticise the focus on the sources as the assets of each trust as unduly narrow.[254] The very nature of disgorgement damages is that they entitle a plaintiff to recover profits obtained from a third party source.[255] Therefore, the fact that a portion of the total profit was attributable to the contribution of Farm Trust assets does not, by itself, preclude a claim to that profit by Bath Trust. Rather, the question is whether in deriving profit from Farm Trust the defendant did so in breach of her duty to Bath Trust. Such an assessment must be made in relation to each source of, or contribution to, the total profit.

C *Dealing with overlapping entitlements*

The circumstances of *Adlam* provide a clear illustration that entitlements to the same profit can overlap. This is a result of the nature of disgorgement damages allowing a plaintiff to recover profits derived from factual sources other than the plaintiff themselves. This also results from the normative rather than factual focus of the causal link, which embodies the corrective justice principle of correlativity.

The Māori Appellate Court and Court of Appeal both stated they could not find a case dealing with the same scenario of a fiduciary breaching their duty to one trust but generating a profit from the assets of two trusts.[256] The Court of Appeal considered that despite the apparently novel situation, it was "no different" from account of profit claims in which the defendant has made profits in breach of their duties from the assets of a third party as well as from the

[253] *Adlam v Savage* (CA), above n 7, at [52].
[254] At [35].
[255] Virgo (2008), above n 132, at 302.
[256] *Savage v Adlam* (MLC), above n 11, at [56]; *Adlam v Savage* (CA), above n 7, at [46].

plaintiff.[257] In such situations, expense may be incurred for the use of third party assets but this is factored into the calculation of net profit.[258] *Adlam* presents a unique situation that the way in which the profits were derived from third party assets may not merely incur an expense, but may entitle that party to an account of profits over the entire resulting gain. As discussed in Chapter II, Farm Trust may also have a claim for breach of fiduciary duty or for undue influence, both of which can be remedied by account of profits.[259]

However, having disgorged the full amount of profits to Bath Trust Adlam is no longer in possession of the profits for which the account is claimed. As mentioned in Chapter II, it may be available for Adlam to defend a claim by Farm Trust against her for recovery of the profit on the basis that in claiming an account of profits the successful plaintiff adopts her actions, such that she is treated as having acted on behalf of the Trust. However, this adoption theory is not settled law and has been described as "dubious" in relation to intellectual property claims.[260] Further, account of profits is a personal, as opposed to proprietary claim,[261] the fact that Adlam is no longer in possession of the profits made may not necessarily provide a defence for her against this claim. Given the estimated claim by Farm Trust is for over one million dollars,[262] the *in personam* nature of a claim for account may present a significant limitation to Farm Trust if Adlam is unable to meet this expense.[263]

It is therefore appropriate, to prevent Adlam from a second liability to account and to enable Farm Trust to recover their due, that in claiming an account of profits the plaintiff trust is treated as having adopted Adlam's actions, including any liability attaching to them. To do so is also in a similar nature to deducting expenses incurred during the accounting process, as in the same way Bath Trust gains only the net profit Adlam herself would have made from the venture. This is also consistent with the view that the net profit after deductions reflects the profit attributable to the fiduciary's conduct, so where the fiduciary's conduct is wrongful this may result in zero profit.

On this line of reasoning it could also be argued that the anticipated liability should be factored in at the outset; an order can be made for an account of anticipated profits,[264] so this lends itself

[257] *Adlam v Savage* (CA), above n 7, at [46].
[258] Devonshire (2013), above n 2, at 74.
[259] Beale (2018), above n 247, at 814.
[260] Edelman (2002), above n 56, at 83.
[261] Devonshire (2013), above n 2, at 50.
[262] Evidence given at trial indicated 85% of profits were attributable to Farm Trust; 85% of $1,200,000.00 is $1,020,000.00; see *Savage v Adlam* (MLC), above n 11, at [130], [141], [179].
[263] Devonshire (2013), above n 2, at 50.
[264] *Chirnside v Fay*, above n 1, at [13] per Elias CJ.

to factoring anticipated deductions into the calculation of net profit. As Farm Trust's claim is not a certainty, this is unlikely to be considered appropriate in light of the strict nature of account. *If* Bath Trust can establish an entitlement to the entire profit, the fact that Bath Trust may have a potential claim should not "dilute" Adlam's liability to account. This is consistent with the principle of correlativity as, if the entire profit was obtained from both sources in breach of duty, the fact that a third party claim may exist against the defendant is external to relationship of the parties, being a consideration that applies to Adlam only.

If the above analysis of the facts is incorrect and the arrangement with Farm Trust does not present an independent breach of loyalty against Bath Trust, then Bath Trust can only be entitled to the portion of profit attributable to the breach against that trust in obtaining the lease to Bath Block. In such a situation, even if the remainder of profit was also obtained from Farm Trust by wrongdoing, it does not concern the court what happens to the balance.[265]

D *Correcting the precedent*

Whether the particular order on the facts of *Adlam* is correct, and indeed it might be, is less important than ensuring the correct approach can emerge in future cases. This part will detail how the law can and should proceed in future cases.

1 Distinguishing the facts

As noted above, there was no challenge in the Court of Appeal to the finding that all of the profit was made in breach of duty.[266] This was reached on an analysis of causation, not attribution. As the correct approach is to identify whether the profits derived from each factual source present an independent breach of duty, challenging that presumptive finding must be the starting point in future appeals.

In *Adlam* it was emphasised that the breach against Bath Trust was an essential factor to the making of the entire profit. Whether or not a factor is essential does not affect liability to account, as a defendant will be liable to account even if they could have made the same profit in a non-infringing way.[267] However, essentiality is an implied requirement of the *but for* test used to link the profit sourced from the breach to Bath Trust and the profit sourced from Farm Trust assets.[268] On this basis, a future case could be distinguished where in the circumstances

[265] As stated by the Māori Appellate Court in *Adlam v Savage* (MAC), above n 10, at [77].
[266] *Adlam v Savage* (CA), above n 7, at [44].
[267] *Celanese International v BP*, above n 52, at [39].
[268] Conaglen (2020), above n 60, at 59.

a breach of trust was a contributory cause to the entire profit, but was not an essential pre-condition for profit to be made from other sources. In other words, where it cannot be claimed that a profit would not have resulted *but for* the breach of trust.

The Court of Appeal also noted there were discretionary factors against remitting the decision to the Māori Land Court, including the fact that proceedings had been ongoing for a number of years and that they considered Adlam was unlikely to be able to provide any new evidence to support her claim for apportionment.[269] In a future case where such discretionary considerations do not exist, a Court may find it appropriate to give greater consideration to the apportionment assessment.

The case cannot be distinguished on the basis that, in *Adlam*, the two Trusts had an agreement to negotiate a profit sharing arrangement between them outside of proceeding as the Court of Appeal expressly stated this factor did not alter their analysis.[270] It is consistent with the principle of correlativity that this factor should not alter the analysis as it only applies to the position of Bath Trust, but does not apply equally to the position of Farm Trust. However, on the causal approach taken this factor is critical for creating the appearance of a fair result. As has been stated, the principal concern with the result in *Adlam* is that the defendant may be liable to respond to a second claim for accounts. The fact the successful plaintiff has agreed to provide a share of the profit disgorged to the potential plaintiff means that a second claim is highly unlikely in the circumstances, and each trust is also likely to receive what they would have had both made successful claims in the first instance.

2 Re-writing the rule

While in future it may be possible to avoid the precedent set in *Adlam* by distinguishing cases as inapplicable on their facts, it is also important that the correct approach emerges in future cases. As discussed in Chapter III there is no clearly established method for calculating the profits for which a defendant fiduciary is liable to account; some courts have applied a *but for* test of causation while others expressly reject causation as irrelevant. This dissertation has argued that the correct rule is that a defendant fiduciary is only liable to account for profits made in direct breach of their duties, and that this is not equivalent to profit for which the breach of duty is a cause. A *but for* test may coincidentally reach the correct result in some cases, but is inappropriate to apply as a rule determining the quantum of disgorgement.

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[269] *Adlam v Savage* (CA), above n 7, at [49]-[50].
[270] At [41].

The operative judgment in the case of *Adlam* is that given by the Court of Appeal, so is binding precedent on the High Court and lower courts. The Supreme Court refused leave to appeal, thereby appearing to affirm the Court of Appeal's reasoning. However, the exact wording of the Supreme Court's judgment is that they could find no reason to conclude the Court of Appeal was in error "in concluding that *in this case* a causal link between the breach and the profits made sufficed." That does not purport to suggest that the approach taken will be correct in every case, and this reflects the continued reservation of courts to express a singular comprehensive approach to taking account.[271] As a result, it is open for future courts to adopt a different approach on the basis that it better reflects the true measure of profit obtained by the fiduciary in breach of duty.[272]

[271] *In Re Jarvis*, above n 72; *Hospital Products v United States Surgical Corp*, above n 75.
[272] *Hospital Products v United States Surgical Corp*, above n 75, at 110 per Mason J.

Chapter VII: Conclusion

This dissertation has sought to determine the appropriate causal link for determining the extent of liability to account for profits made in breach of fiduciary duty, in light of the Court of Appeal's approach in *Adlam v Savage*. Chapter II identified the causal link applied in that case, and resulting uncertainty of the third party's position due to the order for full disgorgement.

Chapter III found that, as yet, there is no clear approach to determining the quantum of disgorgement. While there is some precedent for the application of a 'but for' test, the application and largely inconsistent between the cases in which it is used, and it is not used in all cases. As such, a more principled approach for determining quantum was sought.

Chapter IV concluded that rationale for account is restitutionary, as this best explains the operation of the remedy with respect to determining quantum. While deterrence may be a relevant consideration for the strict application of the remedy, it does not have any meaningful impact on the determination of the extent of a fiduciary's liability to account.

Chapter V applied a corrective justice framework to the remedy of account and argues that the principle of correlativity can appropriately define and limit the extent of liability. In particular, correlativity should apply to limit the quantum of account to profits derived directly from the breach, as that is the amount reflecting the normative loss that grounds the plaintiff's entitlement. This proposed approach is consistent with Conaglen's attribution approach, but expands on this theory by providing a more precise and principled basis on which to determine which profits are attributable to a breach.

Chapter VI revisits the case of *Adlam* and finds that the Court erred in applying a test of causation, and not attribution. On the correct approach, an order for full disgorgement would be available if it could be established that the act of obtaining the profit from Farm Trust was in breach of Adlam's duties to Farm Trust, by virtue of placing her in a position where personal interest conflicted with her fiduciary duty. As a result, it was shown that overlapping entitlements are possible, and it was argued this must be dealt with by treating the principal as having 'adopted' any liability connected to the profit made. The final part of this chapter suggests how the precedent set by *Adlam* can be treated in the future to allow for the proposed principled method to emerge as the dominant approach for ordering account.

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A Cases

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