Is Causation different in Equity?

The problem with Equitable Compensation for Breach of Fiduciary Duty

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To Nicola Peart, Jess Palmer and the Faculty of Law.

To my family Chunyi Li, Wenying Wang and Lulu Li.

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Table of contents

Introduction 5

I Types of Breaches by Fiduciaries 7

II Loss to Trust Property 9

A The Old Cases 9

B The English Change 11

1 Target v Redferns 11

2 AIB v Mark Redler 13

3 Scope of the change 15

C Other Jurisdictions 16

III The Change in Principles 18

A Reparation vs Performance 18

B Accounting 21

1 Common accounts 21

2 Accounts for wilful default 24

C Applying to the Cases 27

IV Disloyalty 30

A The Brickenden Rule 30

B The New Zealand Change 31

C Other Jurisdictions 33

D Remoteness 34

V Why Did the Change Occur? 37

A Procedure and Language 37

B Target and AIB 38

VI Is the Change Desirable? 42

A Policies for Old Approach 42

1 Assumption of liability 42

2 Protecting beneficiaries 43

B Policies for New Approach 44

1 Fairness 45

2 Simplicity 46

C Deeper Principles 47

VII Broader Ramifications 52

A Implementation 52

B Related Areas of Equity 54

C Fusion with Common Law 55

Conclusion 57

Bibliography 58

Introduction

People who breach legal duties can be made to compensate for loss. However, they are usually only liable for losses *caused* by their breach – they are not liable for all the losses in the world. Courts must therefore determine what losses a breach of duty caused, and they normally do so by asking what losses would not have happened "but for" the breach.[1] This looks at what position the plaintiff would be in if the defendant did not breach their duties, and compares it to the position the plaintiff is in with the breach. The difference must be due to the breach, so it is the loss caused by the breach.

It may be surprising then, to hear that this is not the position in equity. While equitable compensation can be awarded for breaches of fiduciary duty, it is often said that this does not involve causation. For example, during a discussion on this issue in *Re Dawson*, the Court said:[2]

> Considerations of causation, foreseeability and remoteness do not readily enter into the matter ... The principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach.

There are several aspects here that seem strange. Firstly, it says "causation" and whether the loss was "caused by" the breach are not relevant. Does this mean fiduciaries can be liable for losses they did not cause? Secondly, it goes on to say the inquiry is whether the loss "would have happened" without the breach. Is this not the same "but-for" test normally used for causation, and if not, what is it referring to?

This dissertation will answer these questions for one type of breach of fiduciary duty, namely breaches involving loss to trust property, though other types will be mentioned for comparison. As will be shown, breaches involving loss to trust property used to not require causation, but this changed as a "but-for" test of causation has been introduced. The change has led to much confusion and debate over whether causation should be required, and in this dissertation, it will be argued that a causation requirement is desirable.

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[1] See Andrew Burrows *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed, Oxford University Press, Oxford, 2019) at 4.
[2] *Re Dawson* [1966] 2 NSWLR 211 (SC).

First, Chapter I sets out the different types of breaches by fiduciaries. Chapter II then looks at breaches involving loss to trust property and how the test of causation changed, with Chapter III explaining the principles behind this change. Chapter IV then looks at another type of breach, namely breaches involving disloyalty, to see the bigger picture. After this, Chapter V revisits loss to trust property to consider why it changed. Chapter VI then discusses whether the change is desirable, and Chapter VII considers the broader ramifications.

I Types of Breaches by Fiduciaries

In *Bank of New Zealand v New Zealand Guardian Trust*, the New Zealand Court of Appeal held that breaches of duty by fiduciaries fall within three types:[3]

1. Breaches involving loss to trust property
2. Breaches involving disloyalty (without loss to trust property)
3. Breaches involving lack of skill or care (without loss to trust property or disloyalty)

All three types of breach can lead to awards of equitable compensation against the fiduciary. However, the Court held that the relevance of causation depends on the type.[4]

The first type refers to a breach of the fiduciary's duties in respect of property. These duties are owed when a fiduciary is in control of property that they are required to use for the benefit of others. Trustees and trust property are the main example, so they are what this dissertation will focus on. However, these duties are also owed by other fiduciaries with property, such as estate executors and company directors.[5] These duties are often called "custodial duties", and fiduciaries with custodial duties are known as "custodial fiduciaries".[6]

The second type refers to a breach of the fiduciary's duty of loyalty. This duty is owed when a fiduciary acts for another in circumstances giving rise to trust and confidence.[7] This means it can apply to fiduciary relationships both with and without property, such as between solicitors and clients or agents and principals. In each case, the duty of loyalty requires the fiduciary to avoid being in a position of conflict, and to avoid profiting from their position.[8]

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[3] *Bank of New Zealand v New Zealand Guardian Trust* [1999] 1 NZLR 664 (CA) per Tipping J.

[4] *Bank of New Zealand*, above n 3. These categories were adopted by England in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 at [59]-[60]; by Hong Kong in *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [75] and *Zhang Hong Li v DBS Bank (Hong Kong) Ltd* [2019] HKCFA 45, (2019) 22 HKCFAR 392 at [115]-[120]; and by Singapore in *Then Khek Koon v Arjun Permanand Samtani* [2013] SGHC 213, [2014] 1 SLR 245 at [108] and *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] SGCA 35 at [87].

[5] See *Halsbury's Laws of England* (5th ed, 2016, online ed) vol 14 Companies at [579] and [631]; and LS Sealy "The Director as Trustee" (1967) 25(1) Camb Law J 83.

[6] See Steven Elliott "Compensation Claims Against Trustees" (DPhil thesis, University of Oxford, 2002) at 17-18; and Charles Rickett "Equitable Compensation: Towards a Blueprint?" (2003) 25(1) SydLawRw 3.

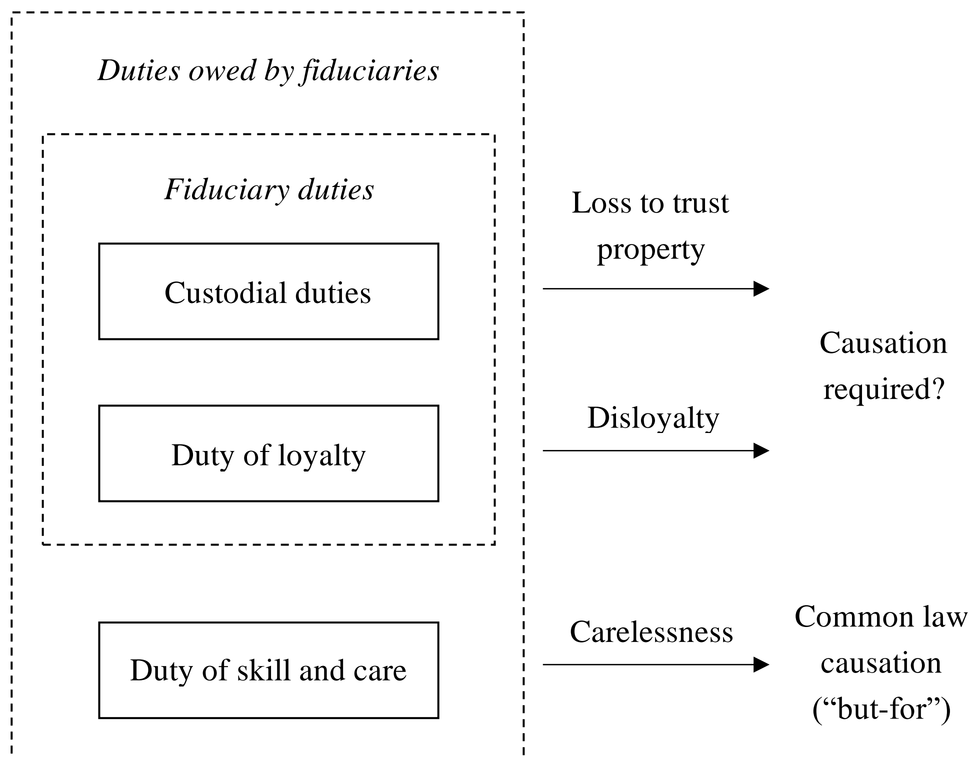
[7] See *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA).

[8] See *Mothew*, above n 7; and *Boardman v Phipps* [1967] 2 AC 46 (HL).

The third type refers to a breach of the fiduciary's duty of skill and care. This duty can be *owed by* fiduciaries, but it is not regarded as a *fiduciary* duty.[9] The fiduciary relationship provides the proximity between the parties for the duty to exist, but the duty itself is just a duty of care and breaches are seen as analogous to common law negligence. This means the common law rules of causation apply,[10] and there is no need to consider this type further.

As for custodial duties and the duty of loyalty, there is dispute over the terminology,[11] but they are commonly referred to as fiduciary duties and this dissertation will do so too. The important point is that breaches of these did not require causation in the past, though this was for different reasons, and both have now changed by introducing a "but-for" test of causation.

This dissertation is on loss to trust property, so disloyalty will only be covered for comparison purposes. The next chapter will start looking at loss to trust property and how causation was brought into this area. Further chapters will then look at the principles behind this change, why the change happened, whether it is desirable, and its broader ramifications.



[9] *Bank of New Zealand*, above n 3; and *Mothew*, above n 7. Compare Joshua Getzler "Duty of Care?" in Peter Birks and Arianna Pretto-Sakmann (eds) *Breach of Trust* (Hart Publishing, Oxford, 2002) 72.
[10] *Bank of New Zealand*, above n 3; and *Mothew*, above n 7. Compare Gretzler, above n 9.
[11] See Charles Mitchell "Stewardship of property and liability to account" [2014] Conv 215 at 216-217.

II Loss to Trust Property

This chapter will start looking at loss to trust property. It will use express trustees as the main example, though the principles apply to all custodial fiduciaries.

An express trustee will have several duties in respect of property, both from the trust deed and imposed by law. The trustee will first have to get in the property to be held on trust.[12] They must then preserve the property except when authorised to dispose of it.[13] At the same time, they can have duties to invest the property to earn an income for the trust.[14]

The question is whether breaches of these duties involve causation. A review of old cases shows that, at least for some types of breaches, the trustee *could* be liable for losses to trust property that followed the breach, even if their breach did not cause the loss.

A The Old Cases

Old cases on the irrelevance of causation mostly come from the English Court of Chancery, though some are more recent.[15] Two cases that show this particularly well are *Cocker v Quayle* and *Salway v Salway*.

In *Cocker v Quayle*, a trust was created by a marriage settlement to hold property for a family.[16] The trustees were authorised to lend trust funds to the husband on the condition he provided a bond. However, the trustees lent trust funds to the husband without getting a bond, which was a breach. The husband then became insolvent, and the trust funds were lost.

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[12] See generally John McGhee and Steven Elliot (eds) *Snell's Equity* (34th ed, Sweet & Maxwell, London) at 811-812; and Charles Mitchell *Hayton & Mitchell: Commentary and Cases on the Law of Trusts and Equitable Remedies* (13th ed, Sweet & Maxwell, London) 371.
[13] See generally Mitchell, above n 12, at 354-355.
[14] See generally Mitchell, above n 12, at 373-376. In New Zealand, see Trusts Act 2019, s 30.
[15] See *Cocker v Quayle* (1830) 39 ER 206 (Ch); *Salway v Salway* (1831) 39 ER 376 (Ch) which was affirmed on appeal in *White v Baugh* (1835) 6 ER 1354 (HL); *Clough v Bond* (1838) 40 ER 1016 (Ch); *Gibbins v Taylor* (1856) 52 ER 1140 (Ch); and *Magnus v Queensland National Bank* (1888) 37 ChD 466 (CA); See also *British American Elevator Co v North America Bank* [1919] AC 658 (PC), which was a Privy Council appeal from Canada about knowing recipients of trust property, who have limited custodial duties.
[16] *Cocker v Quayle*, above n 15, at 206.

When the beneficiaries sued the trustees to recover the trust funds, the trustees argued their breach did not cause the loss. This was because the bond they had to obtain would have ranked as a specialty debt in the insolvency, which would not have allowed recovering anything. Therefore, even if the trustees had performed their duties by getting a bond, the trust funds would still have been lost.

The Court, however, rejected this argument. As the trustees paid out trust funds in breach, they had to repay those funds.[17] It did not matter the breach ended up making no difference to the loss. In particular, the Court accepted the beneficiary's argument that:[18]

> …the moment the trustees lent the money to the husband, in a manner not warranted by the marriage settlement, they became answerable for the amount; and this liability could not be removed from them by any subsequent event.

The other case showing this approach is *Salway v Salway*.[19] This case involved a receiver, which is another type of custodial fiduciary.[20] The receiver was entrusted with funds and was authorised to deposit them at a bank, which he did. However, he deposited the funds in an account that a third party controlled. This was a breach as it put the funds under the control of someone else. The bank then failed, and the funds were lost.

The receiver argued his breach did not cause the loss, as if he deposited the funds in his own account, the bank would still have failed and the funds would still have been lost. However, the Court held that depositing the funds in breach made the receiver liable for them, even if the cause of loss was the bank failure.[21] This decision was upheld in the House of Lords, which dealt with the lack of causation defence by saying:[22]

> …it was pressed in argument that the loss did not arise from that circumstance. That, however, appears to me a point altogether immaterial … The Court says, "You cannot be relieved from your liability unless your conduct has been strictly regular, whether the loss has been occasioned by the irregularity of your conduct or not."

[17] At 207.
[18] At 207.
[19] *Salway v Salway*, above n 15.
[20] *Salway v Salway* was used as authority for the irrelevance of causation in *Re Dawson*, above n 2.
[21] *Salway v Salway*, above n 15, at 378.
[22] *White v Baugh*, above n 15, at 1362.

These cases show that, at least where trustees made unauthorised dispositions of trust property, they would be immediately liable for that amount, and their liability would continue even if it turned out the trust property would have been lost without the breach. There was no need to show that their breach caused the loss.

B The English Change

In recent decades, two English cases changed this approach by introducing a "but-for" test of causation. This began with *Target Holdings Ltd v Redferns* and was affirmed by *AIB (UK) Group plc v Mark Redler & Co Solicitors*.[23]

1 Target v Redferns

Target v Redferns concerned a mortgage transaction.[24] Target was the lender, and it agreed to lend £1.5 million to a purchaser of property in exchange for a mortgage over the property.[25] Redferns acted as Target's solicitor, and Target gave it the loan money to hold on trust.[26] Redferns was only authorised to release the loan money to the purchaser after receiving the mortgage. However, Redferns released the loan money before receiving the mortgage, which was a breach.[27] It was not until later that Redferns received the mortgage.[28]

The purchaser then defaulted on the loan.[29] Target exercised its sale under the mortgage, but the property turned out to be overvalued and was only sold for £500,000.[30] This meant Target did not recover most of its loan. It tried suing the property valuers for negligence, but they were also insolvent.[31] Target therefore went after Redferns. Redferns had released the £1.5 million in breach of its trustee duties, so Target wanted Redferns to repay this amount, subject to a deduction for the £500,000 recovered from the sale.

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[23] *Target Holdings Ltd v Redferns* [1996] AC 421 (HL); and *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503.
[24] *Target Holdings Ltd v Redferns*, above n 23.
[25] At 428.
[26] At 429.
[27] At 429.
[28] At 429-430.
[29] At 430.
[30] At 430.
[31] At 430.

Redferns argued its breach did not cause Target any loss. This was because it still got the mortgage, so Target ended up with exactly what it would have had without the breach. If Redferns performed its duties, it would have released the loan money after receiving the mortgage. The purchaser would then still have defaulted, the mortgage sale would still have failed to recover the loan, and Target would have suffered the same loss.

At the Court of Appeal, the majority rejected this argument.[32] Following the old approach, Redferns paid away trust money in breach and was immediately liable to repay the whole amount. This could not be changed by what happened afterwards.[33] At most, its liability could only be reduced by the £500,000 recovered in the sale.[34]

The House of Lords, however, took a different approach.[35] Lord Browne-Wilkinson gave the only speech, where he laid out what were said to be fundamental principles: [36]

> At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put "in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation:" … those two principles are applicable as much in equity as at common law.

This is significant as it endorses a "but-for" test of causation. In response to what the Court of Appeal said, Lord Browne-Wilkinson agreed that Redferns would have been liable to repay the whole amount immediately after the breach.[37] However, he held there was no reason to "stop the clock" at that moment. The Court could look at what happened afterwards, and if later events show the loss would have happened anyway, then there should be no liability for it.[38] On the facts, all of Target's loss would have happened anyway, so Redferns was not liable for anything.[39]

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[32] *Target Holdings Ltd v Redferns* [1994] 1 WLR 1089 (CA).
[33] At 1104-1106.
[34] At 1104-1106.
[35] *Target Holdings Ltd v Redferns*, above n 23.
[36] At 432.
[37] At 437.
[38] At 437.
[39] At 440. This was on the assumed facts of the summary judgment.

2 AIB v Mark Redler

The change was then affirmed in *AIB v Mark Redler*.[40] This was another mortgage transaction where AIB was the lender. It had agreed to lend £3.3 million to the borrowers in exchange for a mortgage over their house.[41] At the time, the borrowers had taken out loans from Barclay's Bank, and this was already secured by a first charge over their house.[42] AIB therefore wanted to use some of its £3.3 million to pay off the borrower's loans to Barclay's. This would remove Barclay's first charge, and AIB would be free to get a first charge over the house. The rest of the loan money would then be released to the borrowers.[43]

Mark Redler was AIB's solicitors and received the £3.3 million of loan money to hold on trust. They were instructed to pay off the borrower's loans to Barclay's and get a first charge for AIB, before releasing the remaining money to the borrowers.[44] However, Mark Redler made a mistake. It did not pay off all the borrower's loans to Barclay's before releasing the rest of the money to the borrowers. This meant Barclay's first charge was not removed, and AIB could not get a first charge.[45] After the mistake was discovered, AIB and Barclay's entered negotiations, and AIB only got a second charge over the house.[46]

The borrowers then defaulted, and the house was sold for £1.2 million.[47] Barclay's collected its debts with its first charge, and £900,000 was left for AIB's second charge.[48] AIB then sued Mark Redler for the rest. It claimed Mark Redler paid away £3.3 million in breach, so it had to repay that amount, minus £900,000 recovered in the sale. This gave a liability of £2.4 million.[49] Mark Redler, however, argued its breach did not cause that much loss. If it got AIB a first charge, AIB would have recovered £1.2 million from the sale. In reality, AIB got a second charge and recovered £900,000, so the shortfall of £300,000 should be AIB's loss.[50]

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[40] *AIB v Mark Redler*, above n 23.
[41] At [2].
[42] At [2].
[43] At [3].
[44] At [4].
[45] At [5].
[46] At [6].
[47] At [7].
[48] At [7].
[49] At [8]
[50] At [8].

AIB's argument:

£3,300,000	–	£900,000	=	£2,400,000
Paid out in breach		Recovery		Liability

Mark Redler's argument:

£1,200,000	–	£900,000	=	£300,000
Recovery without breach		Recovery with breach		Liability

Mark Redler argued that, following *Target*, their liability should be determined using the "but-for" test by comparing AIB's position with and without the breach. In response, AIB claimed there was a crucial difference to *Target*. In that case, the solicitors eventually got the mortgage they were required to. In this case, Mark Redler never got the first charge.[51]

The Supreme Court, however, thought AIB's argument was irrelevant. Whether Mark Redler got the first charge or not, the correct approach was the "but-for" test.[52] Lord Toulson and Lord Reed gave speeches affirming this approach, with Lord Toulson saying:[53]

> The basic equitable principle applicable to breach of trust, as Lord Browne-Wilkinson stated, is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach.

Under the "but-for" test, Mark Redler's breach only caused the shortfall in what AIB would have recovered with a first charge, so they were only liable for £300,000.[54]

[51] At [39]-[40]. The importance of this is discussed in Chapter III C.
[52] At [62], [64], [105] and [107].
[53] At [73].
[54] At [142].

3 Scope of the change

After *Target* and *AIB*, there was some confusion over the scope of these cases. Firstly, it was unclear what types of trusts the decisions applied to. Both *Target* and *AIB* were about trusts in commercial transactions, and both cases emphasised how this made them commercial trusts.[55] This led some to believe the cases only introduced a "but-for" test in commercial trusts.[56]

On the other hand, the principles in *Target* and *AIB* were stated generally, and *AIB* said they applied to all trusts.[57] It therefore seems likely that the "but-for" test was intended for non-commercial trusts too. Saying the trust was part of a commercial transaction could just mean the *application* of the "but-for" test depended on what happened in the overall transaction.[58] In any event, some later English cases have cited *Target* and *AIB* as introducing a "but-for" test for all trusts,[59] so the "but-for" test could now have general application.

The other issue is what exactly *Target* and *AIB* changed the test of causation to. Although they were clear about the "but-for" test, both cases said the test of causation was still different to the common law,[60] though they did not say how. Both cases also said the common law rules of remoteness were still inapplicable,[61] though they did not say why.

The problems with *Target* and *AIB* will be dealt with in later chapters.[62] For now, the rest of this chapter will consider how other jurisdictions responded to these cases.

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[55] *Target v Redferns*, above n 23, at 435-436; and *AIB v Mark Redler*, above n 23, at [17], [70] and [102].

[56] See Matthew Carn "Distinguishing traditional from commercial trusts: a dangerous precedent or necessary complication?" (2015) 21(8) Trusts Trustees 868; Paul Davies "Compensatory Remedies for Breach of Trust" (2016) 2(1) CJCCL 65 at 83-85; and Philippa Ryan "Examining breaches of fiduciary duty by solicitors in commercial arrangements" [2016] UTSLRS 19.

[57] *Target v Redferns*, above n 23, at 432; and *AIB v Mark Redler*, above n 23, at [70], [73] and [102].

[58] See also Elliot, above n 6, at 148-151

[59] The latest case *LIV Bridging Finance Ltd v EAD Solicitors LLB* [2020] EWHC 1590 (Ch) used general wording at [23]. Compare *Various Claimants v Giambrone and Law (A Firm)* [2017] EWCA Civ 1193, [2017] 7 WLUK 765 at [63]. See also *Auden McKenzie (Pharma Division) Limited v Amit Patel* [2019] EWCA Civ 2291, [2019] 12 WLUK 399, which held the lack of causation defence could apply to a company director even though the disposition of assets was not part of a broader transaction.

[60] *Target v Redferns*, above n 23, at 432 and 434; and *AIB v Mark Redler*, above n 23, at [17], [116] and [136]-[137]. See also *LIV Bridging* Finance, above n 59, at [23].

[61] *Target v Redferns*, above n 23, at 434; and *AIB v Mark Redler*, above n 23, at [17] and affirming other cases with this conclusion at [60], [98] and [132].

[62] See Chapter V.

C Other Jurisdictions

The only jurisdiction where similar facts have arisen is Australia. This was in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*, which was another case about releasing trust money without getting a security.[63] Youyang wanted to invest $500,000 in an investment company, and the company would use this money in an investment scheme.[64] Half the money was to be deposited at a bank in exchange for a deposit certificate. The deposit would mature in 10 years to give $500,000, and the certificate would entitle Youyang to this amount, thus acting as its security.[65] The other half of the money would be invested in speculative investments.[66]

Minter Ellison were the solicitors, and it held Youyang's $500,000 on trust.[67] It was instructed to deposit half the money to get the certificate, then release the other half for use on the speculative investments.[68] However, Minter Ellison deposited the first half without getting the certificate.[69] This meant Youyang never got a security to entitle it to $500,000 in 10 years. The other half was then released for speculative investments. In the end, both the bank deposit and speculative investments were lost by the investment company.[70]

As Minter Ellison did not get a certificate, the $500,000 was paid out in breach and Youyang wanted it repaid. The trial judge, however, adopted the "but-for" test from *Target*.[71] If Minter Ellison had obtained the certificate, it would have been worth $400,000 at the time of judgment since it had not been 10 years. This meant Youyang was awarded $400,000.[72] At appeal, the New South Wales Court of Appeal also adopted *Target*,[73] but it thought that if Minter Ellison had obtained the certificate, the investment company would have lost it anyway. This meant the breach caused no loss, and Youyang was awarded nothing.[74]

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[63] *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15, (2003) 212 CLR 484.
[64] At [7].
[65] At [7].
[66] At [8].
[67] At [11] and [16].
[68] At [13] and [17].
[69] At [21]-[22].
[70] At [26] and [58].
[71] *Youyang Pty Ltd v Alexander* [2000] NSWSC 698 at [27]-[28].
[72] At [29].
[73] *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 at [15]-[16] and [78].
[74] At [17]-[19] and [79].

The High Court of Australia, however, took a different approach.[75] The Court appeared to adopt *Target* at several parts,[76] but the decision it reached was inconsistent with *Target*. It held that Minter Ellison paid out $500,000 in breach, so it was liable to repay the $500,000.[77] This result seemed more consistent with the pre-*Target* approach where it did not matter what loss the breach actually caused. It therefore led to confusion over whether *Youyang* had adopted *Target* or not.[78] At least some Australian cases have explained *Youyang* as rejecting *Target*,[79] so Australia may have stuck to the old approach.

Other jurisdictions have not had cases where this issue affected the result. However, *Target* has still been affirmed in these jurisdictions. In New Zealand, *Bank of New Zealand* set out the causation requirements for different types of breaches by fiduciaries.[80] For breaches involving loss to trust property, it took the same approach as *Target* by saying a "but-for" test of causation was required, though remoteness was still irrelevant. There are also cases affirming *Target* in Hong Kong and Singapore.[81] Thus, most jurisdictions likely now require "but-for" causation for breaches involving loss to trust property.

This dissertation will consider why this change happened in a later chapter.[82] Before that, the next chapter must first look at the change itself in more detail.

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[75] *Youyang*, above n 63.
[76] At [35] and [44]-[50].
[77] At [69] and [71].
[78] See Matthew Conaglen "Equitable Compensation for Breach of Trust: Off Target" (2016) 40(1) MelbULawRw 126 at 128 and 162-164; and Jamie Glister "Equitable Compensation" in Jamie Glister and Pauline Ridge (eds) Fault Lines in Equity (Hart Publishing, Oxford, 2012) 143 at 153-155.
[79] See *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102, (2014) 48 WAR 1 at [357]-[359].
[80] *Bank of New Zealand*, above n 3.
[81] For Hong Kong, see *Libertarian Investments v Hall*, above n 4, where Ribeiro PJ adopted *Bank of New Zealand* and *Target* at [75]-[76], though Millett NPJ explained the old approach at [167]-[168]; and *Zhang Hong Li v DBS Bank*, above n 4, where Ribeiro PJ adopted *Bank of New Zealand* and *Target* at [115]-[120]. For Singapore, see *Then Khek Koon v Arjun Permanand Samtani*, above n 4, where *Target* was adopted at [108], though the issue was left open in *Sim Poh Ping v Winsta Holding*, above n 4.
[82] See Chapter V.

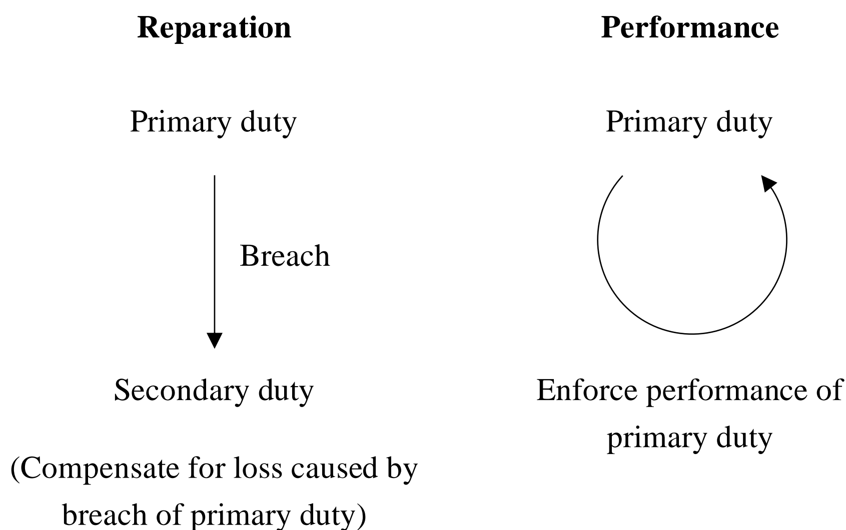
III The Change in Principles

At first glance, the change from the old approach to *Target* may look like a change in policy. It might be thought that the law took a strict approach to custodial fiduciaries by not allowing a lack of causation defence, with this policy being relaxed over time. The issue, however, is that this is not actually what happened. The change in approach reflects a change in underlying principles, and to understand these principles, this chapter must first explain the difference between reparation and performance claims.

A Reparation vs Performance

In reparation claims, the defendant is alleged to have breached a primary duty, and this triggers a secondary duty to compensate for losses caused by their breach of primary duty. This is how damages for torts and breaches of contract are awarded.[83] The goal is to use money to put the plaintiff in the position they would have been in without the breach.

In contrast, performance claims are different. The defendant again owes a primary duty, but they are sued to enforce performance of this primary duty. An example is an order for specific performance. In these cases, the focus is not on what position the plaintiff would have been in if the duty were performed. The defendant just has to perform their duty now.



[83] This may differ depending on the type of damages. See Burrows, above n 1, at 48-50.

A reparation claim requires the defendant to have *breached* a primary duty, and the secondary duty to compensate requires the plaintiff to have suffered *loss*. It follows that there must be some *causal connection* between the breach and the loss. This is why the "but-for" test is used to determine what losses were caused by the breach.[84]

In contrast, performance claims do not require these. Firstly, there is no need for the defendant to have *breached* their primary duty before the court can order performance of it,[85] though in practice a breach is what motivates the plaintiff to sue. Secondly, the sole focus is whether the defendant has a primary duty to perform, so there is no need for the plaintiff to have suffered *loss*.[86] As there is no need for any breach or loss, there is no need for any breach to have *caused* loss.[87] Again, the defendant is simply ordered to perform their primary duty now.

There is, however, a further complication. Sometimes, performance of primary duties can be ordered in a different way than what the duty required. For example, if a plaintiff seeks specific performance of a contract to transfer property, the defendant can be ordered to transfer a sum of money that represents the value of that property instead.[88] This is sometimes called "substitutive performance",[89] but it is still an order for performance. This means it is ordered without regard to whether the breach, if there is one, caused any loss.[90]

The consequence of this is that "compensation" can refer to two different things. Firstly, it can refer to compensation for loss in a reparation claim, known as "reparative compensation".[91] This is limited to losses caused by the breach. Alternatively, it can refer to compensation as a substitute for performance in a performance claim, known as "substitutive compensation".[92] Causation would then be irrelevant when the defendant just has to perform.[93]

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[84] See Elliot, above n 6, at 39-40.

[85] See ICF Spry *The principles of equitable remedies: specific performance, injunctions, rectification and equitable damages* (9th ed, Lawbook Co, Pyrmont, 2014) at 80-81. See *Roy v Kloepfer Wholesale Hardware and Automotive Corp* [1952] 2 SCR 465 for a specific performance case.

[86] See *Semelhago v Paramadevan* [1996] 2 SCR 415 for a specific performance case. See *Jervis v Harris* [1996] Ch 195 (CA) at 202-203 for a discussion on how debts are primary duties that require no loss.

[87] See *Semelhago*, above n 86.

[88] See *Semelhago*, above n 86.

[89] See Elliot, above n 6, at 43-44.

[90] See *Semelhago*, above n 86. See also *Todd v Gee* (1810) 34 ER 106 (Ch); and *King v Poggioli* (1923) 32 CLR 222.

[91] See Elliot, above n 6, at 50-51.

[92] See Elliot, above n 6, at 51.

[93] See *Semelhago*, above n 86.

An example of causation being irrelevant in substitutive performance is the Canadian Supreme Court case of *Semelhago v Paramadevan*.[94] This was about a contract for the sale of land. The vendor refused to settle so the purchaser sought specific performance, in this case through a monetary substitute for the land.[95] The purchaser had agreed to pay $205,000 for the land, and by trial, the land had risen in value to $325,000.[96] Substitutive performance therefore required the purchaser to pay $205,000 and the vendor to return $325,000 as a substitute for the land. This worked out to giving the purchaser the difference of $120,000.[97]

The issue was that the purchaser planned to sell his own land after getting the vendor's land.[98] Yet, because the vendor refused to settle, the purchaser kept his own land which then rose in value by $110,000.[99] This meant the vendor's breach caused the purchaser to lose out on $120,000 from the vendor's land, but also gain $110,000 from his own land. The vendor therefore argued his breach only caused the purchaser a loss of $10,000.[100]

The Court, however, thought the loss caused was irrelevant. The only relevant figure was the $120,000 substitute for performance, with Sopinka J saying:[101]

> If the respondent had received a decree of specific performance, he would have had the property contracted for and retained the amount of the rise in value of his own property. Damages are to be substituted for the decree of specific performance.

As this dissertation will show, the same principles were behind the irrelevance of causation for losses to trust property. While some claims for loss to trust property were reparation claims,[102] others were performance claims which did not involve causation.[103] To understand this, the next part of this chapter must explain trustees' accounting duties.

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[94] See *Semelhago*, above n 86.
[95] At [1].
[96] At [3]-[4].
[97] At [4].
[98] At [3].
[99] At [3].
[100] At [4] and [8].
[101] At [19].
[102] See Chapter III B 2.
[103] See Chapter III B 1.

B Accounting

Historically, beneficiaries would check the state of a trust by going to court and seeking an accounting.[104] The court would make inquiries into what the trustees had done and then draw up an account. This was not itself a remedy, but it allowed determining what property the trustees had duties over, which could then be enforced.[105] The main type of accounting was the "common account", so this will be considered first.

1 Common accounts

If the beneficiaries sought a common account, then an account would be drawn up of all property the trustee received and disposed of in their trustee capacity.[106] Each item of property received was called a "charge", and these were listed on the incomings side of the account.[107] Property transferred to the trust, their exchange-products and any income earned would all be charges. On the other hand, each item of property disposed of was called a "discharge", and these were listed on the outgoings side of the account.[108]

It is the discharges that are important for present purposes. Trustees would only be allowed a discharge in certain situations. Firstly, they could show the property was disposed of in accordance with their duties. For example, an authorised payment to the beneficiaries or a third party would be allowed.[109] Administrative costs and remuneration for the trustee would also be allowed if within the terms of the trust.[110] Finally, trustees were allowed a discharge for property lost without their fault.[111] This included property stolen or destroyed,[112] as long as the trustee had not misapplied that property at any prior stage.[113]

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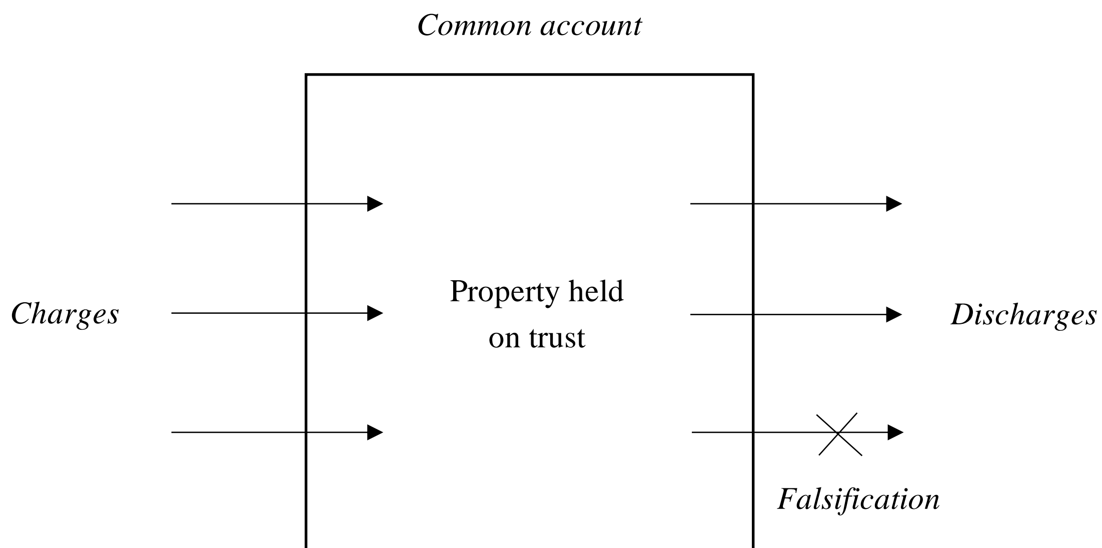
[104] See *Partington v Reynolds* (1858) 62 ER 98 (Ch) at 99; and Mitchell, above n 12, at 473.
[105] See *Libertarian Investments Ltd v Thomas Alexej Hall*, above n 4, at [167]
[106] See Elliot, above n 6, at 89; and Mitchell, above n 12, at 473.
[107] See Elliot, above n 6, at 89.
[108] See Elliot, above n 6, at 89.
[109] See *Nightingale v Lawson* (1784) 29 ER 1045 (Ch).
[110] See *Worral v Harford* (1802) 32 ER 250 at 252 (Ch).
[111] See *Morley v Morley* (1678) 22 ER 817 (Ch); *Knight v Earl of Plymouth* (1747) 21 ER 214 (Ch); *Ex parte Belchier* (1754) 27 ER 144 (Ch); and *Re Brier* (1884) 26 ChD 238 (CA). See also Elliot, above n 6, at 114; Mitchell, above n 12, at 458-459; and Glister, above n 78, at 145.
[112] See *Knight v Earl of Plymouth*, above n 111; *Morley v Morley*, above n 111; *Ex parte Belchier*, above n 111; *Re Brier*, above n 111; Elliot, above n 6, at 114; Mitchell, above n 12, at 458-459; and Glister, above n 78, at 145.
[113] See *Salway*, above n 15; and *Re Dawson*, above n 2.

Discharges that involved a breach, however, were not allowed. This meant all unauthorised dispositions of trust property, even if the trustee acted honestly and reasonably.[114] Examples include if the trustee misappropriated the property, transferred it to a stranger, or made an unauthorised investment.[115] It also included dispositions that were invalid due to problems with the trustee's decision-making, such as having an improper purpose.[116]

If the discharge was unauthorised, then the beneficiaries could choose to adopt it. However, they could alternatively falsify the discharge, in which case it would be struck off the account. The disposition would then be deemed to have never been made, or to have been made with the trustee's own money.[117] In other words, the property would still be treated as part of the trust, and the trustee would still owe duties over that property.

The trustee could then be ordered to perform their duties over that property.[118] Usually, this meant continuing to preserve the property as part of the trust, such as by keeping it in a separate fund or investing it. If the beneficiaries were entitled to the property, then the trustee could be ordered to hand it over. Notice, however, that these are all primary duties the trustee *always* had. There may have been a breach, as this is what leads to falsification,[119] but the breach does not trigger a secondary duty to compensate for loss. Instead, the trustee's primary duties persist and must now be performed, so causation of loss is irrelevant.



[114] See *Eaves v Hickson* (1861) 54 ER 840 (Ch).

[115] See *Eaves v Hickson*, above n 114; and *Knott v Cottee* (1852) 51 ER 705 (Ch).

[116] See *Re Beloved Wilkes' Charity* (1851) 42 ER 330 (Ch).

[117] See *Knott v Cottee*, above n 115.

[118] See Elliot, above n 6, at 102-104.

[119] The trustee has the onus of justifying the discharge. See *Bacon v Clarke* (1837) 40 ER 938 (Ch).

If the trustee still had the property, they could simply return it. However, if the property had been lost, the trustee would have to return a monetary substitute of its current value.[120] This is not reparative compensation but instead substitutive compensation, so causation of loss is still irrelevant. Sometimes it is referred to as "restoration" or "restitution" of the trust fund,[121] though this is equally vague about it being performance of a primary duty. It is also sometimes called an "equitable debt",[122] which is not totally accurate,[123] but it captures the idea that a debt is a primary duty that is unrelated to the other party's loss.

With this in mind, it is possible to understand the quote about causation from *Re Dawson*. For convenience, the quote was:[124]

> Considerations of causation, foreseeability and remoteness do not readily enter into the matter ... The principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach.

It makes sense to say that "causation, foreseeability and remoteness" are irrelevant, because the beneficiary is making a performance claim for the property and the trustee just has to return it. The next statement about whether the "loss would have happened" without the breach is harder to understand. It cannot refer to loss to the *overall position* of the trust fund, as causation of loss is irrelevant. However, it could refer to loss of the *specific property* through the breach, which is what allows the disposition to be falsified.

Re Dawson was a case about remoteness. A trustee had disposed of £NZ4,700 in breach, and years later an Australian court ordered it to be repaid. The issue was that it could only award Australian currency. When the £NZ4,700 was paid away, it was worth £AU4,700, but by the time of trial, £NZ4,700 was worth AU£5,800. The Court therefore had to choose between the exchange rate at the time of breach and trial. The common law used the time of breach, as exchange rate fluctuations were too remote.[125] However, the Court reasoned that the trustee had to return £NZ4,700 now, so it used the time of trial and awarded AU£5,800.

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[120] Elliot, above n 6, at 104, *Libertarian Investments*, above n 4, at [168].

[121] See *Re Dawson*, above n 2; and Libertarian *Investments*, above n 4, at [168].

[122] See *Ex parte Adamson* (1878) 8 Ch App 807 (CA), cited in *AIB*, above n 23.

[123] See Conaglen, above n 78, at 141-142.

[124] *Re Dawson*, above n 2.

[125] Courts can now award foreign currency, and in any event, currency fluctuations are unlikely to be seen as too remote today. See *The Despina R* [1979] AC 685 (HL).

This shows that, whenever trustees made unauthorised dispositions of trust property, the beneficiaries could falsify it and make a performance claim for the property. However, this is only half the story, as falsification would not always be available.

Firstly, a trustee could make an authorised disposition of trust property, but the property could still be lost due to carelessness. For example, a trustee could make an authorised investment which is then lost because they carelessly selected it or failed to monitor it. A trustee could also make an authorised transfer of trust property to an agent, but again lose the property due to careless selection or monitoring. Provided the disposition was authorised, it appears the trust would be bound by it, so it could not be falsified.[126]

Secondly, a trustee could put the trust in a worse position without any disposition of property. This could be because the trustee imprudently manages the trust, and the property declines in value or does not grow as much as it should. It could also be because the trustee fails to receive property for the trust. For example, they could fail to recover a debt owed to the trust, or they could fail to earn income for the trust, such as by not investing the trust funds. The trust would then be worse off, but there would be no disposition to falsify.[127]

In these cases, the beneficiary had to seek a different type of accounting known as an "account for wilful default". This will therefore be considered next.

2 *Accounts for wilful default*

Beneficiaries could get an account for wilful default by showing there was "wilful default" by the trustee. This is misleading though, as the "default" did not need to be "wilful". Instead, it included any breach that made the trust fund worse off.[128] If such a breach were shown, the beneficiaries could surcharge the account, which meant adding property to the incomings side. The property added was to put the trust in the position it would have been in without the breach, and the trustee would be liable for the extra property.[129]

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[126] For an imprudent investment, see *Re Salmon* (1889) 42 ChD 351 (CA) where Cotton LJ said it becomes part of the trust, unlike unauthorised investments where the beneficiary can accept or reject it. This is supported by Elliot, above n 6, at 119; and Mitchell, above n 12, at 468. Compare Conaglen, above n 78, at 142.

[127] See Elliot, above n 6, at 193-195.

[128] See Elliot, above n 6, at 181-186.

[129] See Elliot, above n 6, at 192.

A surcharge for wilful default therefore had the following features. The trustee had to breach their duties, the breach had to cause loss to the trust fund, and the trustee was liable for the loss. In other words, a surcharge was effectively a reparation claim for loss.[130] It was not exactly the same as common law damages since it would add property to the trust,[131] but if the beneficiaries were entitled to the property then it could be paid to them like damages.[132]

Since it is a reparation claim, the cases have always said the trustee's breach had to cause the loss. This is shown in *Re Brogden*, *Re Miller's Deed Trusts*, *Bartlett v Barclay's Bank Trust Co Ltd*, and *Nestle v National Westminster Bank Plc*.[133]

In *Re Brogden*, the trustee did not take steps to recover a debt owed to the trust.[134] This was a breach, but the trustee argued their breach did not cause any loss, claiming that even if they took the required steps, it would not have led to recovery of the debt. The Court agreed this would be a defence, but it said the trustee had to prove it:[135]

> When the *cestui que trust* has shewn that the trustee has made default in the performance of his duty … the *cestui que trust* has made out, in my judgment, a *primâ facie* case of liability upon the trustee, and if the trustee desire to repel that by saying that if he had done his duty no good would have flowed from it, the burden of sustaining that argument is plainly upon the trustee.

The trustee had not shown that taking steps to recover the debt would be futile. Thus, it was held that the debt could have been recovered and the trustee's breach caused the loss.[136] This meant the trustee was liable to pay the amount of the debt to the trust.

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[130] See Elliot, above n 6, at 178-179; Mitchell, above n 12, at 475; *Agricultural Land Management*, above n 79, at [349]; and *Libertarian Investments*, above n 4, at [170] where Lord Millett says it is "akin to the payment of damages as compensation for loss". See also Jamie Glister "Breach of Trust and Consequential Loss" (2014) 8(3) J Eq 235.

[131] See Elliot, above n 6, at 191. See also Glister, above n 130.

[132] It still notionally goes through the trust first. See Elliot, above n 6, at 191. This could matter if the trustee indemnifies themselves from the trust fund before making distributions. See Trusts Act, s 81.

[133] *Re Brogden* (1888) 38 ChD 546 (CA); *Re Miller's Deed Trusts* (1978) LSG 454 (Ch); *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 (Ch); and *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260 (CA). See also *Spencer v Spencer* [2013] NZCA 449, [2014] 2 NZLR 190.

[134] *Re Brogden*, above n 133.

[135] At 572-573 per Fry LJ.

[136] At 573-574.

The next case is *Re Miller's Deed Trusts*.[137] The trustees held shares in a company on trust, but they left management of the company to a co-trustee. The company then collapsed and the trust suffered losses. The Court held the trustees were in breach by not inquiring into the company. However, the Court also thought that inquiries would not have revealed anything, so the breach did not cause the loss and the trustees were not liable.[138]

Bartlett v Barclay's Bank has similar facts.[139] The trustee held company shares on trust, and the company engaged in risky projects which led to major losses. The trustee was in breach by not inquiring into the company,[140] but the Court again asked whether the breach caused the loss.[141] This time, it found that making inquiries would have stopped the risky projects, so the breach caused the loss and the trustee was liable.[142]

The last case is *Nestle v National Westminster Bank*.[143] The trustee mistook the scope of their investment powers and did not diversify their investments. The beneficiary sued the trustee for not growing the trust fund enough,[144] but it could not be shown that diversified investments would have grown the trust fund by more, so there was no causation of loss.[145]

As a final point, notice how an unauthorised disposition of trust property is itself a breach. This means an unauthorised disposition can lead to *both* a falsification and a surcharge.[146] The beneficiaries could falsify it and make a performance claim for the property, or they could surcharge and make a reparation claim for losses caused by the breach. If the beneficiaries only wanted the property back, then falsification would be better as they would not need to show causation of loss. However, this would only recover the value of the property.[147] If the breach caused greater losses, they would have to surcharge for those.[148]

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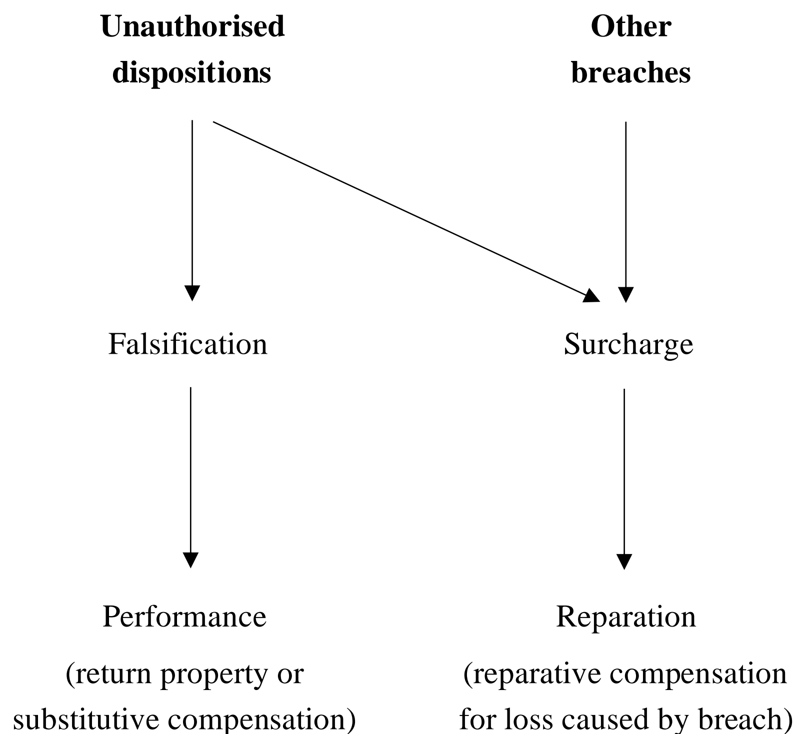
[137] *Re Miller's Deed Trusts*, above n 133. The facts are summarised in Elliot, above n 6, at 210.
[138] See Elliot, above n 6, at 210.
[139] *Bartlett v Barclays Bank*, above n 133.
[140] At 534-535.
[141] At 530.
[142] At 530 and 535.
[143] *Nestle v National Westminster Bank*, above n 133.
[144] At 1263.
[145] At 1274 and 1283.
[146] See Elliot, above n 6, at 98 and 200.
[147] See Elliot, above n 6, at 169.
[148] See Elliot, above n 6, at 201.

The Hong Kong case of *Libertarian Investments Ltd v Hall* shows this well.[149] The trustee held £5 million on trust for buying shares,[150] but decided to take the £5 million for himself.[151] The beneficiary could have falsified this to recover £5 million. However, if the shares had been bought, they would have risen in value to £19 million.[152] The beneficiary therefore surcharged to recover the £19 million they would have had without the breach.[153]



C Applying to the Cases

The cases do not always use terms like "falsifying" and "surcharging". However, the distinction between performance and reparation claims provides a framework for understanding what changed from *Cocker* and *Salway* to *Target* and *AIB*.

In *Cocker* and *Salway*, the trust funds were paid away in breach. This meant the beneficiaries could falsify the disposition and make a performance claim for the trust funds. It did not matter what losses the breach caused, as it was not a reparation claim.

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149 *Libertarian Investments*, above n 4.
150 At [30] and [107].
151 At [30], [36]-[37] and [112]-[113].
152 At [126] and [129].
153 At [122] and [140]. Not all judges used these terms.

In *Target*, the solicitors also paid away trust funds in breach, so the lender made a claim for those trust funds.[154] The Court of Appeal allowed the claim without considering what losses the breach caused, as is consistent with a performance claim. However, the House of Lords held that only losses caused by the breach could be recovered. In other words, it treated the claim as if it were for reparation and not performance.[155]

Some commentators then attempted to reconcile the result in *Target* with a performance claim. Writing extrajudicially, Lord Millett noted how trustees who made unauthorised dispositions of trust property could avoid liability by restoring the property to the trust.[156] By extension, he argued that trustees should be allowed to restore the property in any authorised form.[157] In *Target*, the solicitors were authorised to exchange the trust funds for a security. Thus, when they later received the security, it should count as restoring the trust property.[158]

This approach has some attraction, as it would allow the result in *Target* without requiring major changes to the law. It would also explain the difference between *Target* and *Youyang*. The solicitors in *Youyang* never got the security, so they did not restore the trust property and were liable in a performance claim for all the trust funds paid out in breach.[159]

There does not, however, appear to be any authority to support Lord Millett's approach.[160] The approach has also been criticised by Edelman J extrajudicially.[161] According to him, the solicitors in *Target* were not authorised to receive a security *after* the trust funds were paid away, so the lenders could not be forced to accept the security as restoration of the trust funds.[162] Certainly on the facts of *Target*, it is debatable whether a trustee who pays away £1.5 million can restore the trust funds with a security worth £500,000.[163]

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[154] Subtracting the amount already recovered from the security.

[155] See Elliot, above n 6, at 169; and Conaglen, above n 78, at 151-160.

[156] Peter Millett "Equity's Place in the Law of Commerce" (1998) 114 LQR 214.

[157] At 227.

[158] At 227.

[159] See Conaglen, above n 78, at 160-164.

[160] See Elliot, above n 6, at 172.

[161] James Edelman "Money Awards of the Cost of Performance" (2010) 4 J Eq 122; and James Edelman "An English Misturning with Equitable Compensation" in Simone Degeling and Jason Varuhas (eds) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, Oxford, 2017) 91 at 102-103.

[162] See Edelman "An English Misturning with Equitable Compensation", above n 161, at 103.

[163] See Elliot, above n 6, at 172.

In any event, this debate has been ended by *AIB* as the solicitors in that case never got the security they were required to. The lenders argued that *Target* should be limited to cases where the security was received,[164] but the Supreme Court rejected this, saying that the breach had to cause the loss in every case. This means the English approach is now entirely reparative,[165] and non-Australia jurisdictions have followed the reparative approach.[166]

This dissertation will discuss why the law changed from a performative to reparative approach in Chapter V. Before that though, the next chapter will take a detour and look at breaches of the fiduciary duty of loyalty. This is not the focus of this dissertation, but it necessary for understanding the bigger picture and making comparisons with loss to trust property.

[164] At [39]-[40].

[165] See Conaglen, above n 78, at 159-160; Edelman "An English Misturning with Equitable Compensation", above n 161, at 103; and Ruo Yu Tan "Substitutive performance claims for breach of trust: final nail in the coffin? *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58" (2015) 21(5) Trusts Trustees 565. This last paper claims the lender in *AIB* adopted the unauthorised disposition by using the second charge. However, an alternative view is that they wanted to use it as partial satisfaction of their claim for the whole amount.

[166] See Chapter II C.

IV Disloyalty

This chapter considers the second type of breach in *Bank of New Zealand*, which are breaches of the fiduciary duty of loyalty when there is no loss to trust property. A duty of loyalty is owed when a fiduciary acts for a principal in circumstances giving rise to trust and confidence.[167] This means it can be owed by custodial fiduciaries, such as trustees to their beneficiaries, and non-custodial fiduciaries, such as solicitors to their clients.

The duty of loyalty involves the no-conflict rule, which prohibits the fiduciary from acting when there is a conflict between their own interests and their duty to the principal, or between their duty to two principals.[168] It also involves the no-profit rule, which prohibits the fiduciary from making a profit using their position or in the scope of their position.[169] If the fiduciary still wanted to proceed, they would have to get informed consent from their principal.

Traditionally, if a fiduciary breached the duty of loyalty, the principal could get an account of profits or rescind transactions.[170] Today, however, if a fiduciary breached the duty of loyalty, the principal can also get equitable compensation for loss.[171] This is a reparation claim, so the fiduciary's breach should have to cause the principal's loss. Yet, at least for some types of breaches, it was previously not necessary to show "but-for" causation.

A The Brickenden Rule

The initial case rejecting "but-for" causation was the Canadian case of *Brickenden v London Loan & Savings Co*.[172] The plaintiff was a finance company that made a loan to a borrower. The defendant was the finance company's solicitor who acted in the transaction. The problem was that the borrower owed money to the solicitor, which was able to be repaid with the loan. This meant the solicitor had a personal conflict, but it was never disclosed.

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[167] See *Mothew*, above n 7.

[168] See *Boardman*, above n 8. See also McGhee and Elliot, above n 12, at 160-162 and 176-178.

[169] See *Boardman*, above n 8. See also McGhee and Elliot, above n 12, at 180-181.

[170] For an account of profits, see *Boardman*, above n 8; and *Chirnside v Fay* [2006] NZSC 68 [2007] 1 NZLR 433. For rescission, see *Maguire v Makaronis* (1997) 188 CLR 449 (HCA) at [45]-[49] and [60]. See also Charles Mitchell "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 Curr Leg Prob 307 at 316-320.

[171] See *Nocton v Lord Ashburton* [1914] AC 932 (HL). Compensation was historically not available because the duty of loyalty was viewed as a disability. See Mitchell, above n 170, at 316.

[172] *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 (PC).

When the borrower defaulted, the finance company sued the solicitor for breach of fiduciary duty and sought to recover their losses. In response, the solicitor argued his breach did not cause the finance company any loss, as even if he disclosed his conflict, the finance company would still have made the loan and suffered the same loss.

The Privy Council, however, rejected the solicitor's argument. It held that what the finance company would have done was irrelevant, with Lord Thankerton saying:[173]

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction ... speculation as to what course the constituent, on disclosure, would have taken is not relevant.

The *Brickenden* rule was adopted in most jurisdictions.[174] Its scope was never clear,[175] but that is not a concern for this dissertation. At the very least, it prevented fiduciaries from arguing about what their principal would have done, and it applied where the fiduciary failed to disclose material facts about a conflict or failed to recommend independent advice, both of which can be necessary to get the principal's informed consent to the conflict.[176]

B The New Zealand Change

New Zealand was an early jurisdiction to relax the *Brickenden* rule. This happened in a series of cases where the fiduciary's lack of causation argument got rejected. Initially, courts said that *any* argument about what the principal would have done was speculation. However, later courts started saying the fiduciary had *no evidence* of what the principal would have done, and *therefore* their arguments were speculation.[177] This implied that if a fiduciary had evidence of what their principal would have done, the rule would no longer apply.

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[173] At 469.

[174] See *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 (CA); *Bristol and West Building Society v May May & Merrimans (a firm)* [1996] 2 All ER 801 (Ch); *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390 (FCA); and *Then Khek Koon*, above n 4.

[175] See Glister, above n 78, at 158-160; and Matthew Conaglen "*Brickenden*" in Simone Degeling and Jason Varuhas (eds) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, Oxford, 2017) 112.

[176] See Conaglen, above n 175, at 130, who says disclosure is to avoid a breach of the no-conflict rule. Compare Lionel Smith "Prescriptive Fiduciary Duties" (2018) 37 UQLawJl 261, who says disclosure is a standalone duty.

[177] See *Haira v Burbery Mortgage Finance & Savings Ltd (in rec)* [1995] 3 NZLR 396 (CA) at 408; and *Everist v McEvedy* [1996] 3 NZLR 348 (HC) at 353.

This change then made a difference in *Gilbert v Shanahan*.[178] The plaintiff signed a guarantee for a company and became liable under it.[179] The defendants were solicitors who acted for both the guarantor and the company.[180] The solicitors therefore had conflicting duties, but they did not recommend that the guarantor get independent advice.[181] The guarantor sued the solicitors for breach of fiduciary duty and sought to recover the loss.[182]

The Court, however, thought New Zealand had departed from the *Brickenden* rule.[183] This meant the solicitor would not be liable if the guarantor would have done the same thing without the breach. On the facts, the Court was satisfied the guarantor would have rejected independent advice because he always rejected it in the past, so the failure to recommend independent advice caused no loss and the solicitors were not liable.[184]

The next case was *Bank of New Zealand*, where the Court set out the causation criteria for different types of breaches by fiduciaries.[185] For breaches involving disloyalty, the Court adopted *Gilbert v Shanahan* and said "but-for" causation was required.

Most recently, the New Zealand Supreme Court considered the issue in *Premium Real Estate v Stevens*.[186] The plaintiffs, the Stevens, wanted to sell their house. They hired Premium Real Estate to be their agent, which is a type of fiduciary.[187] The Stevens eventually accepted a $2.5 million offer from a man named Larsen.[188] However, this was far below market value and Larsen later resold the house for $3.5 million.[189] It turned out Premium Real Estate knew Larsen wanted to resell the house,[190] and they hoped to act for Larsen in his later sale, which they did.[191] This was clearly a conflict, but they did not disclose it to the Stevens.

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[178] *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA).
[179] At 530.
[180] At 530.
[181] At 532.
[182] At 532.
[183] At 535-536.
[184] At 535-536.
[185] *Bank of New Zealand*, above n 3.
[186] *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384.
[187] At [23]-[25] and [68]-[72].
[188] At [60].
[189] At [63].
[190] At [59].
[191] At [62].

When the Stevens found out, they sued Premium Real Estate for breach of fiduciary duty. The allegation was that if Premium Real Estate disclosed the material facts, the Stevens would have realised the house was worth more and would not have sold it for $2.5 million.

By this stage, there was no dispute that a "but-for" test would be applied to determine whether the breach caused any loss. Accordingly, the Supreme Court said:[192]

> It was once the strict rule that when a fiduciary committed a breach of duty by non-disclosure of material facts … the fiduciary could not be heard to maintain that the disclosure would not have altered the decision to proceed … The strict rule could sometimes lead to unfair results and has been modified in this country by an approach which affords the fiduciary a limited opportunity of showing that all or some of the loss would have occurred even if disclosure had been made.

All courts agreed the Stevens would not have sold for $2.5 million, but they disagreed on what the Stevens would have done. The High Court thought they would have kept the house, which was valued at $3.25 million, so the loss was the difference between $2.5 million and $3.25 million.[193] The Court of Appeal thought the Stevens would have sold the house for $2.8 million as they made an offer like that in the past, so it used that to calculate the loss.[194] The majority of the Supreme Court, however, thought the Stevens would have kept trying until they sold for $3.25 million, so it calculated the loss with that instead.[195]

C Other Jurisdictions

Brickenden has since been abandoned in other jurisdictions too. In England, this occurred in *Swindle v Harrison*.[196] Harrison agreed to purchase a hotel, with part of the money borrowed from a loan company. After the purchase, this loan was to be secured over her house. However, she still lacked money for settlement, so she got a second loan from her solicitor. This enabled her to complete the purchase, and the first loan became secured over her house. Harrison later defaulted on the first loan, and the loan company took her house.

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[192] At [85].
[193] *Stevens v Premium Real Estate Ltd* (2006) 11 TCLR 854 (HC).
[194] *Premium Real Estate Ltd v Stevens* [2009] NZCA 82, 1 NZLR 148.
[195] At [86]. Elias CJ dissented at [22] and [45]-[47]. Glister, above n 78, thinks the judges used a different standard of proof, while Mitchell, above n 170, thinks they disagreed on the facts.
[196] *Swindle v Harrison* [1997] 4 All ER 705 (CA).

It turned out the solicitor was making money on the second loan, which was a conflict, but this was not disclosed. Harrison therefore sued the solicitor for breach of fiduciary duty for the second loan. Without the second loan, she would not have completed the purchase and lost her house. She therefore sought to recover the value of her house.

The Court of Appeal, however, rejected her claim. It held that *Brickenden* should not apply and the breach had to cause the loss.[197] On the facts, the Court thought that if her solicitor made the disclosure, Harrison would still have taken the second loan as otherwise she would have had to forfeit her deposit,[198] so the breach caused no loss.

Other jurisdictions have also retreated from *Brickenden*, including Australia, Canada, Hong Kong and Singapore.[199] It is thus likely that equitable compensation for breaches involving disloyalty will now always require "but-for" causation.

D Remoteness

The last part of this chapter will briefly consider the role of remoteness, as there have also been important cases on this. At common law, reparation claims are not only limited to losses caused by the breach, but those losses must not be too remote either. The common law has used various tests of remoteness, including whether the loss was foreseeable, direct, due to an intervening act, or within the scope of the defendant's duty.[200]

For breaches of the duty of loyalty, the role of remoteness is less clear. In *Bank of New Zealand*, it was said the fiduciary would be liable for all losses their breach caused in a "but-for" sense, *without* regard to remoteness.[201] However, such an approach could expose the fiduciary to unlimited liability. The breach could cause a chain of events that went on forever, with each event providing the opportunity for the next. It is thus no surprise that courts have sometimes allowed fiduciaries to argue that a loss they caused was too remote.

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[197] Evans LJ left open whether a case of fraud would be different, at 717. See also Conaglen, above n 175.
[198] At 711, 718, 722 and 735.
[199] See *Hodgkinson v Simms* [1994] 3 SCR 377; *Watson v Ebsworth & Ebsworth* [2010] VSCA 335, (2010) 31 VR 123; *Zhang Hong Li v DBS Bank*, above n 4; and *Sim Poh Ping v Winsta Holding*, above n 4.
[200] See *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1961] AC 388 (PC). For scope of duty, see *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL), which could be part of remoteness after *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48, [2009] AC 61.
[201] *Bank of New Zealand*, above n 3.

The Canadian case of *Canson Enterprises Ltd v Boughton & Co* is a good example.[202] The plaintiff was the purchaser of land, and the defendant was a solicitor who acted for both the purchaser and vendor. The vendor was engaged in a scheme where, unknown to the purchaser, the land would be sold through an intermediary to raise its price.[203] The solicitor therefore had a conflict, but he did not disclose this to the purchaser.[204]

After acquiring the land, the purchaser hired builders to construct a building on it. The building was constructed negligently, and the purchaser suffered major losses.[205] The purchaser could not recover those losses from the builders, so it sued the solicitor for breach of fiduciary duty.[206] It claimed that if the solicitor made the required disclosures, it would not have purchased the land and so would not have constructed the building that led to the loss. The solicitor accepted this, but argued that losses from the building were too remote.[207]

In response, the purchaser tried to argue that remoteness was irrelevant for *all* breaches of fiduciary duty, like in *Re Dawson*.[208] However, the Supreme Court rejected the comparison to trust cases, with La Forest J saying:[209]

> In the case of a trust relationship, the trustee's obligation is to hold the *res* or object of the trust for his *cestui que trust*, and on breach the concern of equity is that it be restored to the *cestui que trust* or if that cannot be done to afford compensation for what the object would be worth. In the case of a mere breach of duty, the concern of equity is to ascertain the loss resulting from the breach of the particular duty.

The Court essentially distinguished between performance claims for property and reparation claims for loss. As this case involved a reparation claim, the Court thought remoteness *was* relevant. Furthermore, as the purchaser's loss from the building was due to unrelated third-party negligence after the breach, it was too remote.[210]

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[202] *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534. See also *Hodgkinson v Simms*, above n 199.
[203] At 559.
[204] At 559-560 and 572. Glister, above n 78, claims Canada imposes a broader duty of disclosure on fiduciaries. See also *Hodgkinson v Simms*, above n 199.
[205] At 560.
[206] At 560.
[207] At 568.
[208] At 565-566. See also *Re Dawson*, above n 2.
[209] At 578.
[210] At 563-564 and 588-590. McLachlin J, speaking for the minority, reached the same conclusion by applying a "common sense view of causation" at 556-557.

In conclusion, this chapter has shown that losses from breaches involving disloyalty lead to reparation claims, though there used to be an irrebuttable presumption of causation. In contrast, loss to trust property used to involve performance claims where causation was irrelevant. The results may look similar, but the principles are very different. With this in mind, the rest of this dissertation will continue looking at loss to trust property. In the next chapter, it will consider why *Target* and *AIB* changed the performative approach to a reparative approach.

V Why Did the Change Occur?

As explained, unauthorised dispositions of trust property previously used a performative approach. The beneficiaries could falsify the disposition and make a performance claim for the property, or claim substitutive compensation for its value. However, *Target* and *AIB* changed this so that an unauthorised disposition could only lead to a reparation claim.

To understand why this change occurred, this chapter will first look at relevant changes to the procedure and language that preceded the substantive change. It will then look at how courts were confused by this into making the substantive change.

A Procedure and Language

Historically, beneficiaries making claims against trustees had to go through the accounting procedure.[211] They had to seek a common account and falsify an unauthorised disposition, or seek an account for wilful default and surcharge for losses caused by a breach. These were the only ways to make claims, so the distinctions were well understood.

Over time, the accounting procedure began to break down. Beneficiaries were then allowed to skip the accounting and make direct claims against trustees.[212] This was a procedural change that was not meant to affect accounting principles.[213] However, direct claims became the usual practice, and accounting language fell into disuse. With it, the distinction between falsification being performative and surcharges being reparative became obscured.

In recent decades, there was yet another change in the language. Courts started using the term "equitable compensation" when referring to compensation for breaches of fiduciary duty.[214] However, this was used for both losses to trust property and breaches of the duty of loyalty,[215] which led to courts conflating their principles despite the latter being reparative.[216]

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[211] See Conaglen, above n 78, at 146-150.

[212] This happened around the same time the Judicature reforms simplified other procedures of trust claims. See Elliot, above n 6, at 78-93. However, the historical order is unclear. See Conaglen, above n 78, at 146-150.

[213] See Conaglen, above n 78, at 149.

[214] See Conaglen, above n 78, at 146-150; Elliot, above n 6, at 62-63; and Edelman, above n 161, at 92.

[215] See Mitchell, above n 170, at 325-326; and Elliot, above n 6, at 62-63.

[216] See Mitchell, above n 170, at 325-326.

Equitable compensation for all types of breaches therefore fell in a state of confusion.[217] Courts still cited *Re Dawson* to say causation was irrelevant, but rather than exploring the principles behind this, they left it to a vague idea that equity did things differently.[218] This resulted in confusing statements about causation, such as when Ipp J said:[219]

> I am required by the rules of equity, in assessing compensation, to leave aside questions of causation (save that compensation will only be awarded for losses caused by the breach of fiduciary duties)

As this dissertation will show, it was this confusion that led to the changes in *Target* and *AIB*.[220] These cases treated claims for equitable compensation as always reparative, so they introduced a causation requirement where there previously was none.

B Target and AIB

In *Target*, Lord Browne-Wilkinson clearly thought the lenders could only make a reparation claim. This is shown by his statement of principle, which for convenience said:[221]

> At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put "in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation:" … those two principles are applicable as much in equity as at common law.

This describes the breach of a primary duty that triggers a secondary duty to compensate, and it focuses on the position of the plaintiff, both of which only apply to reparation claims.[222] Lord Browne-Wilkinson also said that "compensation" must mean "to make good a loss",[223] which ignores how compensation can be either reparative or substitutive.[224]

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[217] See generally Mitchell, above n 170.

[218] See Mitchell, above n 170, at 326.

[219] *Biala Pty Ltd v Mallina Holdings Ltd* (1993) 13 WAR 11 (SC) at 77–78.

[220] *Target*, above n 23; and *AIB*, above n 23.

[221] At 432.

[222] See Chapter III A.

[223] At 439.

[224] See Chapter III A.

Lord Browne-Wilkinson then cited several cases to show that causation was relevant for equitable compensation. However, these were all cases involving reparation claims. For example, he cited *Re Miller's Deed Trusts*, *Bartlett v Barclay's Bank* and *Nestle v National Westminster Bank*,[225] but these would traditionally have been surcharges. He also cited *Canson Enterprises v Boughton*,[226] but this was about the duty of loyalty, and the Court in *Canson* explicitly rejected the approach from trusts cases.[227]

Lord Browne-Wilkinson also relied on *Re Dawson* as authority that events after the breach could affect liability.[228] However, *Re Dawson* held that the property had to be returned, and events after the breach only affected its value.[229] It rejected that events after the breach could be used to show the property would have been lost anyway.[230] Thus, Lord Browne-Wilkinson relied on *Re Dawson* for the opposite of what it stood for.

Finally, the lenders in *Target* did argue they were seeking restoration of the trust fund, which meant a performance claim for the property.[231] However, Lord Browne-Wilkinson thought the lenders were claiming the trust fund *still existed*.[232] As the trust had ended, any compensation would be paid to the lenders directly, so the argument of restoring the trust fund was rejected on procedural grounds.[233] This could also be why it was stressed that the trust was a commercial trust,[234] as the commercial transaction being over meant the trust fund had ended.[235]

Whatever the case, it is clear Lord Browne-Wilkinson did not intend to make any changes to the principles behind the claim.[236] He thought these claims were always reparative, hence there had to be causation between the breach and the loss.

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[225] At 434-435. See also *Re Miller's Deed Trusts*, above n 133; *Bartlett v Barclay's Bank*, above n 133; and *Nestle v National Westminster Bank*, above n 133.

[226] At 438-439. Lord Browne-Wilkinson cited McLachlin J's minority judgment in *Canson Enterprises v Boughton*, but said there was no need to choose between the majority and minority's approaches. See also *Canson Enterprises v Boughton*, above n 202.

[227] See *Canson Enterprises v Boughton*, above n 202, at 578.

[228] At 437. See also *Re Dawson*, above n 2.

[229] See *Re Dawson*, above n 2.

[230] *Re Dawson* also cited *Salway v Salway* with approval. See also *Salway*, above n 15.

[231] At 433. For the terminology, see Chapter III B.

[232] At 433.

[233] At 433-436.

[234] At 435-436. See also Chapter II B 3.

[235] At 435-436.

[236] *Salway v Salway* was cited in argument but not considered. See *Salway*, above n 15.

AIB was a chance to clarify the performative and reparative distinction. However, the Supreme Court ended up conflating the two even more. Firstly, Lord Toulson and Lord Reed made confusing comments about it. Lord Toulson said that reparative compensation and substitutive compensation were *both* reparative "in a practical sense",[237] while Lord Reed said that *Target* was *not* reparative at all.[238] Despite these statements, both judges then proceeded to treat the claim as reparative along the same lines as *Target*.[239]

Lord Reed cited several cases to show that the approach in *Target* had been used elsewhere. However, most of these cases involved reparation claims. For example, he cited *Libertarian Investments v Hall*,[240] which would traditionally have been a surcharge case, and Lord Millett NPJ even gave a judgment in that case explaining how falsification would be a performance claim.[241] Lord Reed cited *Premium Real Estate v Stevens* too,[242] which was a duty of loyalty case, so it shows nothing about trusts.

Lord Reed then cited *Youyang* to claim that *Target* was adopted in Australia.[243] He thought *Youyang* had a different outcome to *Target* because the solicitors in *Youyang* released the trust funds without later getting the security. However, the outcome in *Youyang* was inconsistent with a reparative approach. If "but-for" causation was used, the lender would have received a security worth $400,000. Instead, the Court ordered the $500,000 of trust funds to be returned, which was more consistent with a performance claim for the property.[244]

It is unclear to what extent each judge appreciated that *Target* changed the law. Lord Toulson said the claim was always reparative,[245] but he also said it would be a "backward step" to reject *Target*,[246] which suggests he agreed with the change. Lord Reed, on the other hand, said that he thought *Target* did *not* change the "orthodox view".[247] Either way, both judges then treated the claim as if it could only be reparative, so there had to be causation.

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[237] At [54] and [66].
[238] At [115]-[116].
[239] At [54], [62], [64], [66], [73], [90], [94], [105], [107], [115]-[116] and [136].
[240] At [129]-[132]. See also *Libertarian Investments v Hall*, above n 4.
[241] *Libertarian Investments v Hall*, above n 4, at [167]-[170] per Lord Millett NPJ.
[242] At [126]. See *Premium Real Estate v Stevens*, above n 186.
[243] At [124]. See *Youyang*, above n 63.
[244] See Conaglen, above n 78, at 162-164; and Glister, above n 78, at 153-155.
[245] At [54], [66] and [73].
[246] At [63].
[247] At [115]-[116].

The English cases then caused confusion in other jurisdictions. In Australia, *Youyang* had a performative outcome but appeared to adopt *Target* and use reparative language,[248] perhaps because the High Court was unsure of how to reconcile *Target*. In New Zealand, *Bank of New Zealand* simply accepted the reparative approach without mentioning the old approach,[249] and in Hong Kong and Singapore, all the cases adopting *Target* either did not mention the old approach or treated it as always reparative.[250]

This means most jurisdictions changed to a reparative approach due to confusion over the old approach, which is a problem. On one hand, it could mean the old approach should be used again. However, most cases now also support a new approach, so neither approach should be decisive based on its use alone. Instead, this dissertation will have to take a closer look at both approaches, and decide whether the change is desirable.

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[248] See *Youyang*, above n 63, at [35], [44], [46] and [50]. See also *Agricultural Land Management Ltd v Jackson (No 2)*, above n 79, at [357]-[359].

[249] *Bank of New Zealand*, above n 3.

[250] For Hong Kong, see *Libertarian Investments v Hall*, above n 4, where Ribeiro PJ adopted *Bank of New Zealand* and *Target* at [75]-[76]; and *Zhang Hong Li v DBS Bank*, above n 4, at [115]-[120]. For Singapore, see *Then Khek Koon v Arjun Permanand Samtani*, above n 4, which used the *Bank of New Zealand* categorisation and adopted *Target* at [108]. Compare *Sim Poh Ping v Winsta Holding*, above n 4, which adopted *Bank of New Zealand* at [87] but left the *Target* issue open.

VI Is the Change Desirable?

This chapter gets to the heart of this dissertation, which is whether the change to a reparative approach is desirable. This analysis will be done in three parts. First, it will evaluate policies for the old approach. Second, it will evaluate policies for the new approach. Third, it will revisit the old approach to see if there are any deeper principles at play.

A Policies for Old Approach

Two main policies have been advanced for the performative approach. The first is that the trustee assumed liability for it, and the second is that it better protects the beneficiaries.

1 Assumption of liability

The first policy is based on the trustee's assumption of liability. The trustee assumed a duty to preserve the trust property, so it is often said they should be liable for that trust property.[251] This argument could, however, have a strong and a weak version.

The strong version is that the trustee assumed a duty to preserve the trust property, so they should be liable for it no matter what happens.[252] The problem though, is that this has never been true. Even under the old approach, trustees were allowed a discharge for property lost without their fault,[253] so trustees have never been insurers for the trust property.

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[251] See Davies, above n 56, at 77; Jack Davies "Once More unto the Breach [of a Trust]: An Analysis of the Academic Battle over Available Remedies for a Misapplication of Trust Funds" (2017) 23 Auckland U L Rev 171 at 190; Matthew Hoyle "'Where there is discord, may we bring harmony': *AIB Group (UK) v Mark Redler* and the Perils Facing Equity" (2016) 4 OUULJ 22 at 30; and Lusina Ho "Causation in the Restoration of a Misapplied Trust Fund: Fundamental Norm or Red Herring?" in Simone Degeling and Jason Varuhas (eds) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, Oxford, 2017) 159 at 168.

[252] The strong version is apparently taken by Davies, above n 56, at 77; Davies, above n 251, at 190; and Hoyle, above n 251, at 30.

[253] See Chapter III B 1. See also *Morley v Morley*, above n 111; *Knight v Earl of Plymouth*, above n 111; *Ex parte Belchier*, above n 111; *Re Brier*, above n 111; Elliot, above n 6, at 114; Mitchell, above n 12, at 458-459; and Glister, above n 78, at 145.

The weak version is that the trustee assumed a duty to preserve the trust property, so they should be liable for it if they make an unauthorised disposition. Yet, if there is an unauthorised disposition, the trustee could be liable under either a performative or a reparative approach. The argument would therefore have to be that the trustee assumed liability under a performative approach. If so, then there are again two things this could mean.

First, it could mean the trustee *actually* assumed liability under a performative approach, but this is doubtful as most trustees would not know how the old approach worked. Second, it could mean the trustee is *deemed* to assume liability under a performative approach, as that was the law. However, this also cannot work as the law has changed to a reparative approach. If it were based on the law, trustees would now be assuming liability under the reparative approach.[254]

As such, the old approach cannot be justified by the trustee's assumption of liability. While trustees assume a duty to preserve the trust property, they have never assumed liability for the property no matter what happens. They are only liable for unauthorised dispositions, and it is not clear why they must assume liability under the performative approach.

2 *Protecting beneficiaries*

The second policy is based on protecting beneficiaries. Trustees have control over the trust property, and beneficiaries are vulnerable to what the trustees do. Thus, it is often said that a performative approach would better protect the beneficiaries.[255]

However, this raises the question of what a performative approach is meant to protect the beneficiaries from. It cannot be to protect them from losses caused by the trustee's breaches, as that is what a reparative approach does. The advantage of a performative approach is that the beneficiaries can claim property that would have been lost even if the trustee performed their duties. Yet, it is doubtful whether beneficiaries should expect more property than they would have received from proper performance of the trustee's duties.[256]

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[254] Perhaps a third meaning is that the trustee *must* assume liability under the performative approach due to some deeper principle. This is considered in Chapter VI C.

[255] See Hoyle, above n 251, at 30; and Paul Davies and Graham Virgo *Equity & Trusts: Texts, Cases and Materials* (2nd ed, Oxford University Press, Oxford, 2016) at 830.

[256] Compare Hoyle, above n 251, at 31; and Matthew Harding "An Argument for Limited Fission" in John Goldberg, Henry Smith and PG Turner (eds) *Equity and Law: Fusion and Fission* (Cambridge University Press, Cambridge, 2019) 374.

Sometimes, it is said that a performative approach better protects the beneficiaries by deterring the trustee from breaching their duties.[257] This is because it ensures the trustee is liable for the value of the property, even if their breach causes no loss.

The problem though, is that the old approach does not work well as a deterrent. On one end, trustees who act honestly and reasonably would still be liable, and it is questionable whether trustees acting honestly and reasonably can be consciously deterred. On the other end, trustees who dishonestly pay away trust property would *not* be liable as long as they later get the property back,[258] so there would be little deterrent for them.

Furthermore, if the goal was deterrence, there are better ways to achieve this. For example, the court could award exemplary damages. The amount could then be based on the trustee's moral culpability or the seriousness of the breach. This would also have no upper limit, so it would allow greater deterrence. Yet, exemplary damages are controversial in equity, which suggests too much deterrence may be disproportionate.[259]

Finally, any argument that a performative approach is needed to protect beneficiaries faces the problem that equity uses a reparative approach in other areas. After all, surcharges have always been reparative, and breaches of the duty of loyalty also lead to reparation claims. It is true that these claims can *only* be reparative, but it does not follow that they must have causation. The duty of loyalty once used the *Brickenden* rule, but this has been abandoned and there does not appear to be a lack of protection in any of these areas.

This means the old approach cannot be justified as necessary to protect beneficiaries. As a result, both policies for the old approach are unpersuasive. The next question is whether the policies for the new approach are better.

B Policies for New Approach

Two policies have been advanced for a reparative approach with causation. The first is that it would be fairer, and the second is that it would be simpler.

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[257] See Ho, above n 251, at 168; and Hoyle, above n 251, at 30.

[258] This was also how Lord Millett reconciled the result in *Target* with the old approach. See Millett, above n 156.

[259] See generally David Morgan "*Harris v Digital Pulse*: The Availability of Exemplary Damages in Equity" (2003) 29 Monash U L Rev 377.

1 Fairness

The first policy is that the new approach would be fairer.[260] This has a trustee side and a beneficiary side, which are considered below.

On the trustee side, it is said that trustees should only be liable for losses caused by their breach. If trustees were liable for losses that would have happened with proper performance of their duties, then they are being made liable for losses that are due to the terms of the trust.[261]

On the beneficiary side, it is said that beneficiaries should only recover losses caused by the trustee's breach. If the beneficiaries could recover losses that would have happened with proper performance of the trustee's duties, then the beneficiaries would *benefit* from the breach.

Of course, there would be nothing unfair about this if the trustee assumed liability for it. However, it has already been shown that trustees cannot be said to have assumed liability under a performative approach. It would also not be unfair if it were needed to protect beneficiaries, but it has again been shown that a performative approach is not needed for this.

Sometimes, proponents of the old approach admit it can lead to unfair results, but they say the court can use its power to relieve the trustee from liability.[262] Most jurisdictions have a "Trusts Act" or "Trustee Act" which allows courts to relieve trustees from liability if they acted honestly and reasonably.[263] The argument is that this could be used in unfair cases.

However, this has several problems. The court's power under these Acts is to relieve trustees from liability for "breach". In contrast, falsification under the old approach pretends the breach did not happen,[264] so the trustee must keep performing their duties over the property. On a literal reading, there is no "breach" to relieve liability for.

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[260] See Ho, above n 251, at 168-169.

[261] One exception to this could if the loss would have been caused by a third-party wrongdoer. At common law, the "but-for" test is modified so that when two wrongdoers are individually sufficient, the earlier wrongdoer is still liable, or if both wrongdoers acted concurrently, then both are liable. See *Crossley & Sons v Lightowler* (1867) 2 Ch App 478 (CA); and *Baker v Willoughby* [1970] AC 476 (HL). See also Burrows, above n 1, at 52-55.

[262] See Mitchell, above n 11, at 227; and Davies, above n 56, at 111-112. Compare Ho, above n 251, at 169.

[263] See Trusts Act, s 131; and Trustee Act 1925 (UK), s 61.

[264] See Chapter III B 1. See also *Knott v Cottee*, above n 115.

Furthermore, even if these Acts applied, relieving liability for causation reasons would just be bringing in causation through the backdoor. In fact, it would be leaving it to individual judges' discretion, in which case it would be better to have a principled rule.

In summary, the new approach generally leads to fairer results. The unfairness of the old approach cannot be justified by saying the trustee assumed liability for it or that it is needed to protect beneficiaries, and using the court's power to relieve liability would be unprincipled. This policy therefore supports the new approach.

2 Simplicity

The second policy for the new approach is that it would be simpler. This will require another look at what made the old approach complicated, followed by why this matters.

At the highest level, there was the difference between common law and equity. Since damages for torts and breaches of contract work in a reparative way,[265] it was often assumed that equitable compensation was always reparative.

Even within equity, there were complicated differences. Firstly, there was confusion over the different types of breaches of fiduciary duty. Breaches involving loss to trust property were often conflated with breaches involving disloyalty.[266] Within breaches involving loss to trust property, unauthorised dispositions and other breaches were conflated.[267] There has also been confusion over how to treat dispositions that were authorised but carelessly made.[268]

The large number of distinctions drawn made the old approach highly complicated. While proponents of the old approach have tried to argue it was not complicated,[269] it clearly was too complicated since courts repeatedly got it wrong.

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[265] This may depend on the type of damages. See Burrows, above n 1, at 48-50.

[266] Especially when disloyalty still used the *Brickenden* rule. See Chapter IV.

[267] This went both ways, as breaches that would traditionally have led to surcharges were sometimes said to not require causation. See *Re Mulligan* [1998] 1 NZLR 481 (HC).

[268] Some cases and commentators suggest this cannot be falsified. See *Re Salmon*, above n 126; Elliot, above n 6, at 119; and Mitchell, above n 12, at 468. Others say this can be falsified. See Conaglen, above n 78, at 142.

[269] See Hoyle, above n 251, at 27.

In contrast, the new approach has the potential to avoid these problems. *Target* and *AIB* are not clear on what they changed the new approach to, which will be dealt with later.[270] However, a single reparative approach for every type of breach would be far simpler.

If there is a simpler alternative for the law, then it is legitimate to favour the simpler version.[271] It makes it easier for parties to understand their rights, and it makes it easier for courts to apply the law, which reduces the chances of judicial error.

This means simplicity supports the new approach. As such, both policies for the new approach are persuasive, whereas both policies for the old approach are not. If it were based on these policies, then the change to the new approach would be desirable.

It is, however, not enough to merely look at these policies. This is because there could still be deeper principles behind the law that affect which approach should be used. The next part of this chapter will therefore return to the old approach to see if there are any deeper principles at play, and if so, whether these principles would be lost in any change.

C Deeper Principles

The starting point is to find which part of the old approach made it performative. It was not the accounting itself, as that only gave information. It was not all of the accounting remedies either, as surcharges were reparative. Instead, the old approach was performative due to falsification, so the inquiry is into the deeper principles behind falsification.

Falsification works in a fundamentally different way to most of the law. When a trustee makes an unauthorised disposition of property, falsification allows pretending it *did not happen*.[272] This is why the trustee is deemed to still hold the property on trust, and why they can be ordered to continue performing their duties over that property. Yet, if there clearly was a disposition, the key question is why falsification pretends there was not.

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[270] See Chapter VI A.

[271] For example, New Zealand replaced its judge-made law on misrepresentation with a single standard that did not differ between common law and equity or between contract and tort. See Contract and Commercial Law Act 2017, s 35.

[272] See Chapter III B 1. See also *Knott v Cottee*, above n 115.

One explanation for this is said to be the "good man" theory of equity. According to this theory, equity and the common law treat defendants in fundamentally different ways. The common law treats defendants as wrongdoers and makes them pay reparation for loss, whereas equity treats defendants as if they can only do good, and it makes them perform as if they did.[273] As Lord Millett has written extrajudicially:[274]

> If a trustee or fiduciary has committed a breach of trust or fiduciary duty, Equity makes him account as if he had not done so … This is a radically different approach [to the Common law]; indeed it is the converse approach. It does not treat the defendant as a wrongdoer; it disregards his wrongdoing, makes him account as if he has acted properly throughout, and does not permit him to deny that he has done so.

Applied to falsification, the trustee cannot say they made an unauthorised disposition and just pay reparation for loss. Instead, equity treats the trustee as if they never made the disposition, and it makes them perform as if that were the case by returning the property. As Hayton J said in his extrajudicial writings:[275]

> …where T makes an unauthorized dissipation of trust money … the beneficiaries do not claim that this is wrongdoing that entitles them to compensation for loss caused by a breach of trust. Instead, they avoid causation problems by taking a hypothetical specific performance approach as if T had acted as a good person should.

The "good man" theory can then explain falsification. However, it runs into another problem, which is that it cannot explain all of equity. After all, surcharges have always been reparative,[276] and Hayton J himself has said that surcharges are about wrongdoing.[277] Breaches of the duty of loyalty use a reparative approach as well.[278] If equity does not always use the "good man" theory, then there is no reason why it must be used for falsification.

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[273] One example is treating bribes received by fiduciaries as held on constructive trust. See *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] 1 AC 250. Another example is the tracing rule that trustees spend their own money from a mixed fund, though this is more limited than falsification since it is subject to the lowest intermediate balance rule. See *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62 (Ch).

[274] Peter Millett "Proprietary Restitution" in Simone Degeling and James Edelman (eds) *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) at 310.

[275] David Hayton "The development of equity and the "good person" philosophy in common law systems" [2012] Conv 263 at 266.

[276] Hayton, above n 275, at 267.

[277] See Chapter III B 2.

[278] See Chapter IV.

Those who defend the "good man" theory sometimes avoid this problem. Lord Millett, for example, said extrajudicially that falsification and surcharges *both* use the "good man" theory.[279] However, he did not explain why this is true for surcharges, especially as he himself said in *Libertarian Investments* that surcharges are reparative.[280]

Perhaps surcharges fall under the "good man" theory because they put the trust in the position it would have been in without the breach. This could be another way of pretending the trustee acted as a "good man" all along. Yet, if surcharges fall under the "good man" theory, then the theory would no longer justify the need for falsification.[281]

Furthermore, falsification could actually be *inconsistent* with the "good man" theory in some situations. These situations would occur when a trustee makes an unauthorised disposition of trust property, and the *only* way they could have performed their duties would have led to the same loss. This problem can be shown by the following two examples.

(a) Example one: unsecured loan

In this example, a trust deed imposes a duty on the trustee to make a loan with the trust funds after getting a security. The trust deed also requires this to be done by a certain date. The trustee makes the loan, but they forget to get the security. The borrower then defaults and the trust funds are lost. It later turns out the security would have been worthless.[282]

As the disposition was unauthorised, the beneficiaries could falsify it. This would pretend the disposition did not happen, and the trustee would be deemed to still hold the funds. However, this would then create a problem. The trustee had a duty to make a loan by a certain date, so the only way they could still be holding the funds is if they breached that duty by not making the loan. If falsification is meant to create a fiction where the trustee acted as a "good man", it cannot do this by creating a fiction where the trustee breached another duty.

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[279] Millett, above n 274, at 310.

[280] See *Libertarian Investments*, above n 4, at [170], where Lord Millett NPJ said surcharges are "akin to the payment of damages as compensation for loss".

[281] Surcharges also apply to unauthorised dispositions. See Chapter III B 2. See also *Libertarian Investments*, above n 4.

[282] A modified version of the facts from *Cocker*, *Target*, and *AIB*. See *Cocker*, above n 15; *Target*, above n 23; and *AIB*, above n 23.

(b) Example two: bank failure

In this example, a trustee is required to hold trust funds in a designated bank account, and the trustee is not authorised to withdraw the funds from that account. However, the trustee makes an unauthorised transfer by moving the funds into another account at the same bank. The bank then fails and the trust funds are lost.[283]

Again, the disposition could be falsified to pretend it did not happen, and the trustee would be deemed to still hold the funds. However, this would create a similar problem to the one above. The only way the trustee could still be holding the funds is if they withdrew the funds from the bank before it failed, and that would be an unauthorised withdrawal. Again, falsification cannot create a "good man" fiction when it involves another breach.

The only way falsification could be consistent with the "good man" theory in these examples is to create more fictions. A fiction would have to be created to say the beneficiaries,[284] or perhaps the court,[285] varied the trust deed to cancel the loan or require the withdrawal. However, these additional fictions could not be justified by the "good man" theory itself, since they have nothing to do with being a "good man".

In contrast, a reparative approach would deal with these examples differently. The trustee would only be liable for losses caused by their breach, and as the loss would have happened if they performed their duties, they would not be liable for anything. This would put the trust in the only position it could have been in if there had been no breach, so in a way, a reparative approach would be *more* consistent with the "good man" theory.

Notice, however, that this only applies to situations where *any* way the trustee could have performed their duties would have led to the same loss. The analysis becomes more complex when the trustee had a *discretion* over how to perform, and only *some* ways they could have performed would have led to the same loss. Even in these discretionary cases though, there are still situations where falsification could be inconsistent with the "good man" theory. This can be shown by a third example below.

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[283] A modified version of the facts from *Salway*. See *Salway*, above n 15.

[284] See generally *Saunders v Vautier* (1841) 41 ER 482 (Ch).

[285] See Trusts Act, s 130.

(c) Example three: bank failure (discretion)

In this example, the trustee again holds trust funds in a designated bank account, but they have discretion to withdraw the funds. The trustee does not, however, have authority to transfer the funds into their personal account at that bank. The trustee proceeds to transfer the funds into their personal account, then the bank fails and the funds are lost.

The disposition could be falsified to pretend it did not happen, and the trustee would be deemed to still hold the funds. This would, however, still create a problem. If the disposition did not happen, the funds would have remained in the designated bank account where they would have been lost when the bank failed. The only way to make falsification work is to create a fiction where the trustee withdrew the funds. Yet, if the trustee was under no duty to withdraw the funds, there is no reason the "good man" theory must pretend that they did.

Again, a reparative approach would deal with this differently. The reparative approach looks at what would have happened if the trustee performed their duties, but the trustee could have either made the withdrawal or not, so the reparative approach uses what the trustee most likely would have done.[286] This could be a better way to apply the "good man" theory, as the trustee cannot object when they actually would have performed their duties in that way.

In summary, the "good man" theory is not a good justification of falsification. Either equity's reparative approaches fall outside the "good man" theory, in which case there is no reason to apply it here, or reparative approaches fall in the "good man" theory, in which case there is no need for falsification. Indeed, falsification is often inconsistent with the "good man" theory. No other deeper principles have been offered for falsification, so it could only be justified by policies, but as shown, policies favour the new approach.

As a result, the change to the new approach is desirable and can be justified after the fact. It also means there is no need to draw distinctions based on whether the trust was "commercial", whether the trust had ended, whether the security was later received or anything else. For every unauthorised disposition, a reparative approach would lead to the best result.

[286] This is used in contract law where the defendant has a discretion. See *Durham Tees Valley Airport Ltd v BMI Baby Ltd* [2010] EWCA Civ 485, [2011] 1 All ER (Comm) 731. Usually, defendants are presumed to perform in the least onerous way. A loss of chance approach is not used for the defendant's conduct. See Burrows, above n 1, at 68-72.

VII Broader Ramifications

This final chapter will consider the broader ramifications of adopting a reparative approach. It will first consider how this approach could be implemented, and how the option chosen could have flow-on effects. It will then consider how adopting a reparative approach could affect related areas of equity, as well as equity's relationship with the common law.

A Implementation

Target and *AIB* are clear that a "but-for" test is now used. The "but-for" test appears to be the same as the one in the common law, so even though *Target* and *AIB* say the test of causation is not the same as at common law,[287] it could well be the same. An important question is then how this test of causation will be implemented, and which of the accounting principles will be preserved. There are two main options, and both could have flow-on effects.

The first option is to abolish falsification, but to keep surcharges. If there is an unauthorised disposition, the beneficiaries would have to surcharge for losses caused by the breach. Davies, for example, thinks *Target* and *AIB* replaced falsification with surcharges.[288]

An immediate flow-on effect of this is how it could make remoteness relevant. Remoteness was previously not relevant under falsification, whereas the cases are unclear on if remoteness is relevant for surcharges. *Target* said that remoteness is still irrelevant,[289] but it did not say why, and this was not in issue. In contrast, some commentators have said that surcharges should use foreseeability or directness as a test of remoteness.[290]

Target and *AIB* may therefore allow a remoteness limit for unauthorised dispositions. There could be some unauthorised dispositions that cause the loss of the property, but it happens in an unforeseeable or indirect way and is too remote. Yet, even if remoteness would be possible, remoteness is a matter of policy and varies between different areas of the law.[291] Thus, policy could still prevent unauthorised dispositions from using remoteness.

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[287] *Target*, above n 23, at 432 and 434; and *AIB*, above n 23, at [17], [116] and [136]-[137].
[288] See Davies, above n 56, at 86.
[289] *Target*, above n 23, at 434.
[290] See Steven Elliot "Remoteness Criteria in Equity" (2002) 65(4) Mod Law Rev 588.
[291] See Burrows, above n 1, at 86-88.

A second option would be to abolish both falsification *and* surcharges, and to create a *new* remedy that is not limited by any of the old accounting principles. Penner, for example, thinks *Target* and *AIB* may have created a new non-accounting remedy.[292]

There could be an important difference between surcharges and a non-accounting remedy, and that is how they respond to consequential losses suffered by the beneficiaries. Traditionally, surcharges could only recover losses to the trust fund, not a beneficiary's consequential loss.[293] For example, if loss to the trust fund caused a beneficiary to not get a distribution on time, which caused them to miss an investment opportunity, this could not be recovered.[294]

The principles of surcharging therefore acted as an inherent limit on the trustee's liability.[295] If *Target* and *AIB* replaced surcharges with a non-accounting remedy, then a flow-on effect could be that this inherent limit is lost. Trustees could then be liable for consequential losses to the beneficiaries. Penner has in fact argued that *Target* and *AIB* opened the door to this.[296]

One the other hand, even in a non-accounting remedy, it does not follow that trustees *must* be liable for consequential losses to the beneficiaries. In other areas of law, a defendant's liability is limited by the scope of their duty.[297] In trusts, the scope of the trustee's duty is to look after the trust property, not the beneficiaries personally.[298] Thus, even in a non-accounting remedy, the scope of the trustee's duties may exclude consequential losses to beneficiaries.[299]

Of course, it is possible that *Target* and *AIB* have actually made trustees liable for consequential losses to beneficiaries. If so, then this could mean that trustees' duties over the trust property and their duties to beneficiaries personally have now been blurred.

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[292] See James Penner "Falsifying the Trust Account and Compensatory Equitable Compensation" in Simone Degeling and Jason Varuhas (eds) *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, Oxford, 2017) 143.
[293] See Glister, above n 130.
[294] See Glister, above n 130, at 235; and Penner, above n 292, at 155.
[295] See Glister, above n 130, at 235-236; and Penner, above n 292, at 155.
[296] See Penner, above n 292, at 155.
[297] See *South Australia Asset Management Corp v York Montague Ltd*, above n 200, which could be part of remoteness after *Transfield Shipping Inc v Mercator Shipping Inc*, above n 200.
[298] See Elliot, above n 6, at 231. One exception could be where the trustee assumes additional duties to look after the beneficiaries personally, such as in "commercial" trusts where the trustee has additional contractual duties under the wider transaction. See generally *Target*, above n 23; *AIB*, above n 23; and *Bank of New Zealand*, above n 3.
[299] See Elliot, above n 6, at 231.

How the new approach is implemented will ultimately depend on how future cases interpret *Target* and *AIB*. However, careful consideration is needed of which option is used, as well as what flow-on effects this will have.

B Related Areas of Equity

The next question is how the change to a reparative approach for equitable compensation could affect related areas of equity. Two related areas could be affected, which are an account of profits and specific performance.

The first area that could be affected is an account of profits, which is the other remedy for a breach of the duty of loyalty.[300] An account of profits does not involve "but-for" causation.[301] Thus, once the profits are shown to be earned due to the fiduciary's position or within the scope of their position, the fiduciary is liable even if they could have earned the profits in some other way, or if the principal would have consented if asked.[302]

There are two ways an account of profits could be analysed. One is to treat it as a primary duty not to profit, and if this is breached, there is a secondary duty to give up the profits. This could make it analogous to reparation claims, except for gains. The other way is to treat it as a primary duty to give up profits, like a performance claim. Alternatively, it may be that an account of profits could be either, depending on the situation.[303]

Like for equitable compensation, the way it is analysed could affect the relevance of causation. The change to a reparative approach for equitable compensation may also affect how an account of profits should work. That said, there is a big difference between making a fiduciary give up profits so they end up in their starting position,[304] versus making them liable for losses, so an account of profits is likely too different to reason by analogy.

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[300] See generally *Boardman*, above n 8; and *Chirnside v Fay*, above n 170.
[301] See Vicki Vann "Causation and Breach of Fiduciary Duty" [2006] SJLS 86.
[302] See Vicki Vann, above n 301.
[303] See Elliot, above n 6, at 38-39; Smith, above n 176, at 285-286; Mitchell, above n 170, at 314-315; and Paul Miller "Justifying Fiduciary Remedies" (2013) 62(4) UTLJ 570.
[304] See Dyson Heydon "Causal Relationships Between a Fiduciary's Default and the Principal's Loss" (1994) 110 LQR 328 at 332. This is especially the case when a fiduciary who has to give up profits can get an equitable allowance for skill and effort. See *Boardman*, above n 8; and *Chirnside v Fay*, above n 170.

An area more likely to be affected is equity's main performance remedy, which is specific performance. If performance claims are not allowed for equitable compensation, it might be wondered how this affects the availability of specific performance.

On one hand, specific performance works in a more limited way than performance claims for equitable compensation. Specific performance is only available when damages are inadequate, and there is a hardship defence.[305] Specific performance also does not involve fictions like falsification. Thus, it would generally not lead to the sort of unfair results that made *Target* and *AIB* remove performance claims for equitable compensation.

There are, however, still situations where similar problems arise. For example, in *Semelhago v Paramadevan*, the plaintiff sought a monetary substitute for specific performance greater than the loss caused by the breach.[306] In *AIB*, Lord Toulson said "a monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal".[307] If this is right, then the scope of specific performance may need to be reconsidered.[308]

C Fusion with Common Law

The final question is how the change to a reparative approach could affect equity's relationship with the common law. One way this could be affected is by furthering the fusion of common law and equity. Thus, this last part will explain what fusion is, the different views on fusion, and how the change to a reparative approach could support fusion.

Fusion is a movement that aims to make the common law and equity use the same rules in analogous areas.[309] Those who support fusion claim that common law and equity developed analogous areas, but these areas have inconsistent rules. They claim these inconsistencies make the law incoherent, so they should be removed by making the rules the same.

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[305] See generally Paul Davies "Being Specific About Specific Performance" [2018] Conv 324. Compare Jessica Freiheit "The Breakdown of Hierarchy: Damages at Law versus Damages in Equity" (1999) 27 Man LJ 185.

[306] See *Semelhago*, above n 86. See also Chapter III A.

[307] At [64].

[308] See generally Davies, above n 305.

[309] See Burrows "We Do This At Common Law But That In Equity" (2002) 22(1) Oxf J Leg Stud 1; Sarah Worthington "Integrating Equity and the Common Law" (2002) 55(1) Curr Leg Prob 223; Keith Mason "Fusion: Fallacy, Future or Finished?" in Simone Degeling and James Edelman (eds) *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) at 41.

The desirability of fusion is, however, debated. Those who oppose fusion claim the common law and equity merely developed similar areas that are not truly analogous. Any inconsistencies between the rules are said to reflect the different goals of common law and equity, so removing these inconsistences risks losing important differences.[310]

In this case, if equitable compensation for loss to trust property became purely reparative, it would become similar to common law damages for contract and tort.[311] This dissertation has shown that the change can be justified independently of any broader fusion movement,[312] so the merits of fusion stand apart from this dissertation. However, whether the change is justified or not, it may end up being an example of fusion within the heart of equity.

In summary, the change to a reparative approach may have broader ramifications than just introducing causation. There are different ways it could be implemented, with flow-on effects for trustee liability. It may also affect related areas of equity like account of profits and specific performance, and finally, it could further the fusion of common law and equity. Each of these topics would, however, require another dissertation of their own.

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[310] See Mason, above n 309.

[311] This could depend on the type of damages. See Burrows, above n 1, at 48-50.

[312] See Chapter VI.

Conclusion

This dissertation set out to answer the question of whether causation was different in equity, at least for breaches of fiduciary duty involving loss to trust property. It showed that loss to trust property did not always involve causation, because unauthorised dispositions could be falsified to make performance claims for the property. However, *Target* and *AIB*, and other jurisdictions following them, changed this to only allow reparation claims for loss.

This dissertation then showed that the change was based on confusion over the old approach, as falsification was confused with surcharges and breaches of the duty of loyalty. However, it was shown that this change may be desirable after all, as policies support the new approach, and the deeper principles offered for falsification cannot justify it. The issue is now how the new approach will be implemented and how it will affect equity as a whole. Depending on what happens next, there may be bigger changes than just to causation.

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