Breach of trust and consequential loss

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This article discusses the recovery of consequential loss following a breach of trust. The traditional method of enforcing trustee duties — the account — cannot accommodate consequential recovery. However, the position may be changing because cases now short-circuit the accounting process and simply award equitable compensation for breach of trust. The article also discusses consequential recovery for breach of fiduciary duty and various common-law claims, and explains when those claims will lie in the alternative to a claim for breach of trust.

Introduction

This article discusses when and how recovery is available for consequential losses suffered as a result of a breach of trust. I use 'consequential losses' to mean losses that go beyond harm suffered to the trust estate itself. There is no doubt that a beneficiary can recover the difference in value if a trustee's breach causes a trust fund to be worth less than it should have been worth. But what if that breach had knock-on effects? What if, because of the underperforming trust fund, the beneficiary had to take out a loan? What if, because of the underperforming trust fund, the beneficiary lost the opportunity to purchase an asset that would have appreciated in value?

Consequential loss cannot be accommodated within the trustee accounting mechanism. This means that consequential recovery is not available for a straightforward breach of trust, at least on a conventional analysis. However, it appears that consequential loss can be recovered for breach of fiduciary duty. Consequential loss can also be recovered under common law claims, and some of those claims may be available concurrently with a claim for breach of trust. For that reason the article discusses the rules on remoteness of damage that apply to breaches of contract and to various torts, and then outlines when these concurrent claims at common law will be available. In the final section of the article I discuss how developments in the area of third-party liability for breach of trust and fiduciary duty might presage changes in the area of compensation for consequential loss.

Duty to account

The traditional position is that trustee breaches are addressed by the taking of accounts in respect of the trust property.[1] As Austin J explained in *Glazier v*

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1 See, eg, W M C Gummow, 'Compensation for Breach of Fiduciary Duty' in *Equity, Fiduciaries and Trusts*, T Youdan (Ed), Carswell, Toronto, 1989, pp 57, 64; R Meagher, J D Heydon and M Leeming, *Meagher, Gummow & Lehane's Equity: Doctrine and Remedies*, 4th ed, Butterworths LexisNexis, Chatswood, 2002, at [2-155].

Australian Men's Health (No 2),[2] there are three types of accounting order: the order for a common account, the order for account on the basis of wilful default, and the order for an account of profits. In relation to the first two, Austin J said:

> The usual form of order, referred to as an order in common form or for common accounts, requires the defendant to account only for what he or she has actually received, and his or her disbursement and distribution of it. The defendant prepares accounts and it is open to the other parties to surcharge or falsify items in those accounts. A surcharge is the showing of an omission for which credit ought to have been given, while a falsification is the showing of a charge which has been wrongly inserted, the falsifying party alleging that money shown in the account as paid was either not paid or improperly paid. . . . Sometimes the court orders that accounts be taken on the basis of wilful default (or in the earlier cases, wilful neglect or default). The order is 'entirely grounded on misconduct', the defendant being required to account not only for what he or she has received, but also for what he or she might have received had it not been for the default.[3]

The ability to falsify or adopt a disbursement on the taking of a common account is a powerful tool for a beneficiary.[4] However, since the common account is only concerned with assets that have actually been received or disbursed, there is a relatively limited role for surcharging. It would only be appropriate to surcharge a common account if the trustee had acquired an asset but for some reason had not included the asset in the account. It is much more likely that a plaintiff would complain of a wrongful *failure* to acquire an asset. Here the beneficiary's claim may still involve surcharging an account, but it would be an account taken on the footing of wilful default. As Lord Millett NPJ recently said in *Libertarian Investments Ltd v Hall*:

> [If] the account is shown to be defective because it does not include property which the defendant in breach of his duty failed to obtain for the benefit of the trust, the plaintiff can surcharge the account by asking for it to be taken on the basis of 'wilful default', that is to say on the basis that the property should be treated as if the defendant had performed his duty and obtained it for the benefit of the trust. Since ex hypothesi the property has not been acquired, the defendant will be ordered to make good the deficiency by the payment of money, and in this case the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss.[5]

If a beneficiary is successful in an attempt to falsify or surcharge an account, the net effect will normally be that the account does not tally with the funds available. The trustee will then be liable to make up the shortfall by a payment of money. As Lord Millett indicates, this order to pay may be called an award of 'equitable compensation'.[6] However, it may be helpful to say a

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2 [2001] NSWSC 6; BC200100163 (reversed on appeal but not disagreeing on this point: see (2002) 54 NSWLR 146; [2002] NSWCA 22; BC200200709 at [13]–[15]).

3 [2001] NSWSC 6; BC200100163 at [38]–[39] (citations omitted).

4 Especially in a falling market: see J Glister, 'Breach of Trust and Conversion in a Falling Market' [2014] *LMCLQ* 511.

5 [2013] HKCFA 93 at [170].

6 The phrase 'equitable compensation' is used in both narrow and wide senses. In England, it has recently been said that liability to render an account of profits is remedied by an award of equitable compensation: *FHR European Ventures LLP v Cedar Capital Partners LLC*

little more about the closeness of the analogy with damages.

It is of course correct that the basic aim of surcharging an account is to compensate for loss suffered by the beneficiary because of the trustee's breach of duty. It is also probably true that trustees will be held to a tort-like reasonableness standard in deciding whether or not they have breached their equitable duty of skill and care.[7] But the comparison between equitable compensation and damages cannot be taken much further than that. Equitable compensation for breach of trust is both more generous and more restrictive than common law damages. The first point is well-known, but the second may be less so.

Equitable compensation is more generous because of the beneficiary's ability to falsify the account and 'recover' a wrongful disbursement even if loss would have been suffered anyway. A good example is *Cocker v Quayle*,[8] where trustees of a marriage settlement were empowered to lend the trust assets to the husband in return for his bond. In breach of trust the trustees lent the money without taking any bond, and the husband then became bankrupt. The trust would have been in no better position even if the bond had been taken, since it would not have given any greater priority on the husband's bankruptcy than a simple claim in debt. Nonetheless, the trustees were liable to replace the trust fund.[9] In the famous case of *Re Dawson*, Street J said that 'the obligation of a defaulting trustee is essentially one of effecting a restitution to the estate'.[10] *Youyang v Minter Ellison* is also an example of this type of restitutionary or restorative equitable compensation,[11] although the case was not actually put on falsification/accounting grounds.[12]

However, the accounting mechanism can also mean that equitable compensation yields a *lower* level of recovery. Importantly for this article, the interposal of the account means that the trustee's liability is limited to the assets under management. Although surcharging an account has a compensatory aim, and although it can result in the payment of equitable

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[2014] UKSC 45; [2014] 4 All ER 79; [2014] 3 WLR 535. This is consistent with the notion of equitable compensation as the mechanism to remedy shortfalls in accounts, but it does sound jarring. Compare *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908 at [104], another English case decided in the same month.

7 *Re Speight* (1883) 22 ChD 727; *Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] Ch 515 at 529–31; [1980] 1 All ER 139; [1980] 2 WLR 430; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187; 14 ACSR 109; (1994) 12 ACLC 674; BC9406797; *ASC v As Nominees Ltd* (1995) 62 FCR 504; 133 ALR 1; 18 ACSR 459; BC9501547 at [42]–[52]; *Bristol and West Building Society v Mothew* [1998] Ch 1; [1996] 4 All ER 698; [1997] 2 WLR 436; *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 285 FLR 121; 98 ACSR 615; [2014] WASC 102; BC201402755 at [210]. Note the debate referred to in n 27 below.

8 (1830) 1 Russ & M 535; 39 ER 206.

9 It was held that if the husband survived the wife, the trustees would be entitled to impound his life interest.

10 *Re Dawson (dec'd)* [1966] 2 NSWR 211 at 214.

11 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484; 196 ALR 482; [2003] HCA 15; BC200301373. The award was called 'restitutionary or restorative' in *Alexander v Perpetual Trustees WA Ltd*(2003) 216 CLR 109; 204 ALR 417; [2004] HCA 7; BC200400244; BC200400244 at [44].

12 See *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 285 FLR 121; 98 ACSR 615; [2014] WASC 102; BC201402755 at [210]. In argument, Gummow J did comment that *Youyang* was really seeking an account: [2002] HCATrans 577.

compensation, it may therefore be misleading to short-circuit the process and go straight from the 'wrong' of breach of trust to the 'remedy' of equitable compensation. Put simply, under the accounting mechanism, equitable compensation for breach of trust cannot extend to consequential losses.[13]

Breach of fiduciary duty

The first section outlined why the orthodox accounting view of equitable compensation for breach of trust does not allow for recovery of consequential loss. The question asked in this section is whether or not equitable compensation for breach of fiduciary duty (as distinct from breach of trust) can extend to the recovery of consequential loss. If consequential recovery is available for breach of fiduciary duty, then consequential recovery for breach of trust may be indirectly effected if the claimant can instead put the case on the grounds of breach of fiduciary duty.

Is consequential loss recoverable?

Consequential loss does appear to be recoverable for breach of fiduciary duty, but there are few cases directly on the point. To go back a step, it is easy to find cases where, in effect, a plaintiff's reliance loss was compensated. For example, in *Catt v Marac Australia Ltd*,[14] the plaintiffs were awarded equitable compensation calculated to reimburse their expenses in a failed business venture. A similar result can be seen in *Commonwealth Bank of Australia v Smith*,[15] but that case is instructive because a claim in respect of consequential loss was made but not proved. In *CBA v Smith*, the plaintiffs bought a hotel on the recommendation of their bank. The bank's advice in respect of the value and financial viability of the hotel was wrong. In addition to giving rise to liability in negligence and under the Trade Practices Act 1974 (Cth), this incorrect advice amounted to a breach of fiduciary duty because the bank was also acting for the vendors of the hotel. At trial in the Federal Court, von Doussa J awarded $60,000 as the difference between the actual value of the hotel and the amount the plaintiffs paid, and $42,500 in compound interest.[16] This award (including the interest component) was the same under the TPA, negligence and breach of fiduciary duty heads. The Full Court of the Federal Court dismissed the bank's appeal and the plaintiffs' cross-appeal.

The cross-appeal was about consequential loss. In addition to damages based on the overvaluation of the hotel, the plaintiffs had claimed in respect of salaries they had given up when they resigned from their jobs after buying the hotel. The Full Court simply endorsed von Doussa J's finding that this loss had not been proved on the facts.[17] However, both courts apparently assumed that such recovery was theoretically available under the equitable compensation head (in addition to the negligence and TPA heads).

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13 I assume that damages under Lord Cairns' Act are not available for breach of trust, although their apparent availability for equitable breach of confidence makes this less certain: see *Giller v Procopets* (2008) 24 VR 1; 40 Fam LR 378; 79 IPR 489; [2008] VSCA 236.

14 (1986) 9 NSWLR 639.

15 (1991) 42 FCR 390; 102 ALR 453.

16 *Smith v Commonwealth Bank of Australia* (1991) ASC 56-056; (1991) ATPR 46-070; BC9103070.

17 (1991) 42 FCR 390 at 396; 102 ALR 453 at 481.

I have only found two cases where consequential equitable compensation was actually awarded. In *Fico v O'Leary*,[18] a case that was factually similar to *CBA v Smith*, the consequential loss was proved and recovered as equitable compensation. More interesting is *Aequitas v AEFC*,[19] where company promoters and corporate advisers breached their fiduciary duties by failing to make full disclosure in a situation where they had a duty-interest conflict. The principals claimed for various categories of loss, including some consequential losses.[20] Austin J found some losses (including some consequential losses) to be recoverable in contract and tort, but went on to find all the losses recoverable in equity. Unlike the position in contract and tort, recovery for breach of fiduciary duty was not limited to foreseeable losses.[21] Not only was consequential loss recoverable, the remoteness test was looser than in contract or negligence.[22]

Breach of trust as breach of fiduciary duty

If consequential loss is recoverable for breach of fiduciary duty, can this provide an indirect route to recovery for a breach of trust claimant? If the relevant breach of trust can be characterised as a breach of fiduciary duty then the answer should be yes. Something that looks like a straightforward breach of the trustee's duty to exercise skill and care may on closer inspection be an example of the trustee acting in a position where there is a duty-interest or a duty-duty conflict. And even if the trustee is authorised to act in what would otherwise be a duty-duty conflict, the 'no inhibition principle' can still apply.[23] In *Bristol and West Building Society v Mothew*, Millett LJ said:

> Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other. I shall call this 'the duty of good faith'. But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.
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> Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care. This is because the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively

18 (2004) ATPR (Digest) 46-259; [2004] WASC 215; BC200406677 at [282].

19 (2001) 19 ACLC 1006; [2001] NSWSC 14; BC200101950; see also *Stewart v Layton (t/as B M Salmon Layton & Co)* (1992) 111 ALR 687 at 714–15.

20 (2001) 19 ACLC 1006; [2001] NSWSC 14; BC200101950 at [434].

21 Ibid, at [436]–[439], [448]–[453].

22 Although see *Cassis v Kalfus (No 2)* [2004] NSWCA 315; BC200406210 at [99]–[113], recognising that the *Re Dawson* principles do not apply generally to breaches of fiduciary duty. The case may be seen as another consequential recovery case. Several 'but for' heads of loss were calculated, but only 10% of that amount was awarded because the losses were 'too remote except to the extent that [they] include the value of the chance that the loss may have been avoided'.

23 For analysis of the no inhibition principle, see M Conaglen, 'Fiduciary Regulation of Conflicts Between Duties' (2009) 125 *LQR* 111 at 127–40.

> as if he were the only employer. I shall call this 'the no inhibition principle'. Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment.[24]

In short, the no inhibition principle is contravened when a fiduciary breaches one set of non-fiduciary duties with the intention of preferring the other principal.[25] In this context, the duties to obey the terms of the trust and use skill and care in the management of trust assets can be seen as non-fiduciary duties.[26] It follows that if a trustee disbursed property in breach of trust, or failed to discharge the duty of care when selecting investments, and this was because the trustee was consciously preferring the interests of another beneficiary, then those 'simple' breaches of trust may amount to fiduciary breaches of the no inhibition principle. This is important because the ability to characterise those breaches of trust as breaches of fiduciary duty may remove the restriction on consequential loss being awarded.

A more fundamental point is whether all of a trustee's duties in respect of the trust property may properly be termed 'fiduciary', including the duty of skill and care. That debate has been extensively rehearsed elsewhere.[27] It can be noted here that, even if the argument is right, it may not follow that those duties are relevantly fiduciary (or relevantly the same as the no conflict duty) for the purposes of recovery of consequential loss.

Compound interest

Compound interest is recoverable in respect of equitable claims, and this may also provide a limited route to recover consequential loss. But the area is complicated. First, it is often said that compound interest in equity is aimed at stripping the fiduciary of a notional gain. If it can only be awarded on this disgorgement basis then obviously it cannot be said to remedy the principal's consequential loss. Second, accepting that compound interest is also available in equity on a compensatory basis, it appears to be awarded only rarely. The historical division between 'trustee' and 'mercantile' rates of simple interest,[28] and the availability of simple interest under statute, confuse things here. The

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24 [1998] Ch 1 at 19 (citations omitted); [1996] 4 All ER 698; [1997] 2 WLR 436. For approval in Australia see *Re Moage Ltd (in liq)* (1998) 153 ALR 711 at 718–21; BC9801047; *Rigg v Sheridan* [2008] NSWCA 79; BC200803092 at [46]; *McCourt v Cranston* [2009] WASC 56; BC200901574 at [160].

25 Conaglen, above n 23, at 132.

26 In that they are not particular to fiduciaries: see sources cited in the footnote immediately below.

27 See *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187; 14 ACSR 109; (1994) 12 ACLC 674; BC9406797; *Bristol and West Building Society v Mothew* [1998] Ch 1; [1996] 4 All ER 698; [1997] 2 WLR 436; P Birks, 'The Content of Fiduciary Obligation' (2000) 34 *Israel Law Rev* 3; J Getzler, 'Duty of Care' in *Breach of Trust*, P Birks and A Pretto (Eds), Hart, Oxford, 2002, p 41; J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary' and J Getzler, 'Am I My Beneficiary's Keeper?' both in *Equity in Commercial Law*, S Degeling and J Edelman (Eds), LawBook Co, Sydney, 2005, p 185 and p 239 respectively; M Conaglen, *Fiduciary Loyalty*, Hart, Oxford, 2010, esp Ch 3.

28 See *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45; BC9703755 (NSW CA); discussed in J Edelman and D Cassidy, *Interest Awards in Australia*, LexisNexis, Chatswood, 2003, at [4.5].

nature of the trustee's breach as negligent or grossly negligent may also be relevant,[29] even though that does not automatically affect either the beneficiary's loss or the trustee's gain. Finally, there are also specific analytical difficulties involved in awards of compound interest for breach of trust (as opposed to other equitable claims).

At common law, an award of compound interest can properly be seen as a remedy in respect of a discrete head of compensable loss — that of being kept out of your money.[30] In such cases the award of compound interest is not an add-on to the damages award; instead it is part of the damages award. By contrast, in *Fico v O'Leary*, E M Heenan J said that compound interest in equity depended on the wrongdoer making a gain:

> When it comes to interest on money compensation awarded in a case of breach of fiduciary duty I consider that the cases in which interest is invariably allowed, at commercial rates, and sometimes a compound interest are those in which the fiduciary has made a gain, or is presumed to have made a gain, from his improper use of property or opportunities derived from his fiduciary position. On the other hand, where the remedy which is being awarded by the court is not to strip the fiduciary of any gain made at his beneficiaries' expense, or to account for profits which he should have earned for his beneficiary, different considerations apply. Where, as in the present case, equitable compensation is being awarded to restore the beneficiary to the position in which he would have been had the loss not occurred, the principle is . . . to restore the plaintiff as far as possible to his original situation. In my view, in these circumstances this requires no more than an award of simple interest at or near market rates to compensate the plaintiff for the loss of the opportunity to apply the moneys which he had lost in other income producing endeavours.[31]

The last sentence rather gives the game away, since it is clear that simple interest does not adequately compensate a plaintiff for being out of his or her money. While there is no doubt that a profit-stripping rationale can justify an award of compound interest, it should also be possible for a beneficiary to employ the same 'loss of use' analysis that is applied at common law.[32] That is, compound interest should be available on a compensatory basis too. There

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29 See *Wilkinson v Feldworth Financial Services Pty Ltd* (1998) 29 ACSR 642 at 708; (1999) 17 ACLC 220; BC9806306.

30 *Hungerfords v Walker* (1989) 171 CLR 125; 84 ALR 119; [1989] HCA 8; BC8908050. In *Commissioner of Taxation v Interhealth Energies Pty Ltd (No 2)* (2012) 204 FCR 423; 132 ALD 442; [2012] FCA 516; BC201210570, Logan J held that compound interest may be awarded to 'compensate' for breach of an undertaking within the meaning of the Superannuation Industry (Supervision) Act 1993 (Cth) s 262A. See also *Sempra Metals Ltd v IRC* [2008] 1 AC 561; [2007] 4 All ER 657; [2007] 3 WLR 354; [2007] UKHL 34.

31 (2004) ATPR (Digest) 46-259; [2004] WASC 215; BC200406677 at [280] (note that compound interest was awarded on very similar facts in *Smith v Commonwealth Bank of Australia* (1991) ASC 56-056; (1991) ATPR 46-070; BC9103070. See also *Docker v Somes* (1834) 2 My & K 655 at 663–6; 39 ER 1095 at 1098–9; *Wallersteiner v Moir (No 2)* [1975] QB 373 at 397; [1975] 1 All ER 849; [1975] 2 WLR 389 (CA); *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 393; *Talacko v Talacko* [2009] VSC 579; BC200911222 at [25]; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [551]; P Ridge, 'Pre-judgment Compound Interest' (2010) 126 *LQR* 279 at 296–300.

32 See S Elliott, 'Rethinking interest on withheld and misapplied trust money' [2001] *Conv* 313; Edelman and Cassidy, above n 28, at [3.5], [4.4]–[4.5] (both suggesting that compensatory compound interest should be available as part of the compensatory award); cf

are Australian cases supporting this, but the position is not clear. In *Duke Group Ltd (in liq) v Pilmer*,[33] a case concerning breach of fiduciary duty, the Full Court of the Supreme Court of South Australia discussed the issue at some length and concluded that compound interest could be awarded on a compensatory basis. The Full Court's decision was, of course, reversed in the High Court,[34] but nothing was said to undermine the Full Court's reasoning on compound interest. Owen J also awarded compound interest as a remedy for loss in the *Bell Group* case,[35] although on appeal the Court of Appeal seemed to prefer the notional profit-stripping rationale.[36] In New South Wales, Giles JA said in awarding compound interest for breach of fiduciary duty in *Harrison v Schipp* that 'a defendant whose breach of equitable obligation has deprived the plaintiff of money must make restitution by payment of not only the money but also interest representing what the plaintiff could have obtained from use of the money'.[37] However, more recently two awards of compound interest have been overturned by the NSW Court of Appeal.[38] Although the principle of compensatory compound interest was not specifically doubted in either case, the court did not seem particularly receptive of the idea.[39] It seems that compensatory compound interest can be awarded in Australia, but it is certainly not clear when it will be.

If compound interest is to be awarded specifically in response to a breach of *trust*, care must be taken to avoid over-compensation and inconsistency of remedies. It would not be appropriate to surcharge an account by reference to the proper value at judgment while also awarding compound interest since breach. If that compound interest was compensatory then the surcharge and the interest would be directed to remedying the same loss. (Indeed, even pre-judgment simple interest is difficult to square with a surcharge based on judgment values.) If the interest was profit-stripping, then surcharging and awarding compound interest would be the equivalent of awarding both equitable compensation and an account of profits.[40] For the reasons that follow

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J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia*, 7th ed, LexisNexis, Chatswood, 2006, at [2209]; W M C Gummow, 'The equitable duties of company directors' (2013) 87 *ALJ* 753 at 758–9 (both preferring that the discretion to award compound interest remain in the court).

33 (1999) 73 SASR 64; 31 ACSR 213; [1999] SASC 97; BC9902601 at [805]-[820].

34 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; 180 ALR 249; [2001] HCA 31; BC200102754.

35 *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1; 70 ACSR 1; [2008] WASC 239; BC200809492 at [9716].

36 *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1; 89 ACSR 1; [2012] WASCA 157; BC201206001 at [1235]; [2678]; [3567]–[3572].

37 [2001] NSWCA 13; BC200100344 at [130].

38 *Thomas v SMP (International) (No 6)* [2010] NSWSC 1311; BC201008599 (appeal allowed on the interest point *Willett v Thomas* [2012] NSWCA 97; BC201208961); *Tadrous v Tadrous* [2010] NSWSC 1388; BC201009128 (appeal allowed on the interest point [2012] NSWCA 16; BC201200772).

39 As noted by D Raphael (2012) 86 *ALJ* 369. Compare the enthusiastic reception in *Ben v Suva City Council* [2008] FJSC 17, where the Fiji Supreme Court was constituted by Mason, Handley and Sackville JJ.

40 Those remedies appear to be inconsistent, although it is not entirely clear why this is so: see *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 521; [1996] 1 All ER 193; [1996] 2 WLR 192; P Birks (1996) 112 LQR 375; A Burrows, *The Law of Restitution*, 3rd ed, Oxford, OUP, 2011, pp 628–9.

it should be possible *within* the surcharging exercise to claim for loss of use, but the claim would not then be in respect of *consequential* loss.

The claim when surcharging is for what the trustee ought to have received, absent wilful neglect and default. Say that a trustee made a wrongful disbursement of trust property some time ago. That disbursement can be falsified, but the beneficiary does not only want the wrongfully-disbursed money returned. That money should have been put to profitable use in the interim, so the beneficiary wants to falsify *and* surcharge. In such a situation, awarding compound interest since breach may be one (cheap) way of surcharging the account. The point can also be put slightly differently: since there is no doubt that a beneficiary can surcharge an account, it should be open to him or her to claim compound interest since breach instead, as a rough approximation of loss, as long as the facts allow it.[41] There is also a procedural reason why it may be advantageous to claim compound interest since breach instead of surcharging on the basis of judgment values: an award of compound interest is available under a common account, notwithstanding that the common account is primarily directed at assets actually received.[42] There is a procedural advantage because it is easier to get an order for common account than an order for an account on the footing of wilful default.[43]

That all said, it is important to notice that consequential loss is not being recovered. If compound interest may be used as a proxy for surcharging, any interest award would be *within* the account, which, as we have seen, is only an account in respect of the assets under management.

Consequential damages at common law

Consequential damages are available at common law, subject of course to principles of causation and remoteness. The application of these principles to a particular case may be extremely difficult, but the basic position is that recovery of consequential losses is possible if that recovery is necessary for the proper operation of the compensatory principle; that is, necessary to put the plaintiff in the same position as if the contract had been performed or as if the tort had not been committed. If the facts that give rise to a claim for breach of trust also give rise to a claim at common law, there will be a choice about which to pursue. In some circumstances the equitable claim will be more fruitful. For example, rather than sue for breach of contract it will be better to falsify a disbursement made in breach of trust if even a correctly-made disbursement would still have caused loss. On the other hand, in the area of consequential loss it may be more advantageous to bring a claim at common law.

Not all common law causes of action can exist concurrently with a claim for breach of trust. This is most clearly seen with conversion, where beneficiaries cannot have legal rights to possession of property superior to those of

41 The facts may not allow it if, eg, there was a general market collapse between breach and judgment. In that case the beneficiary could still falsify a wrongful disbursement.

42 *Partington v Reynolds* (1858) 4 Drew 253 at 258; 62 ER 98 at 100.

43 *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146; [2002] NSWCA 22; BC200200709.

trustees.[44] This means that beneficiaries cannot sue their trustees in conversion. But there can often be concurrent claims in breach of trust and breach of contract, and more rarely there may be a concurrent claim in deceit. The position of negligence is particularly interesting: the tortious and equitable duties of care are often compared, and for various purposes said to be the same. But analogy does not equal concurrency. It is one thing to say that the trustee's equitable duty of skill and care is comparable (or even equal) in content to the tortious duty, but it is another to say that a trustee actually owes his or her beneficiary a duty of care in tort. I return to this point in the next section. First, it is worth briefly outlining the common law positions in respect of consequential loss.

Contract

Consider a straightforward example where a financial adviser's breach of contract has resulted in loss to an investor, and where the investor can further show that, as a result of the poor return on that first investment, the investor had to forego another lucrative investment opportunity. There is no doubt that the initial, first-generation loss was caused by the adviser's breach. The second-generation loss is trickier, because it might have been reasonable for the investor to borrow extra money from someone else and still take up the second opportunity. In that case, the failure to mitigate by taking out that extra loan would mean that the second-generation investment losses were not caused by the adviser's breach.[45] Nonetheless, if it was reasonable not to borrow money to make up the shortfall, the second-generation losses would indeed have been caused by the adviser's initial breach.

Even if the second-generation losses *were* caused by the adviser's breach, they may still not be recoverable. They may be too remote. In *Hadley v Baxendale*, Alderson B said:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally.[46]

It has often been said that there is really just one principle at work in *Hadley*

44 *Barker v Furlong* [1891] 2 Ch 172 (ChD); *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675 (CA).

45 This example shows why the duty to mitigate is really just an aspect of causation. Of course, if it was reasonable to borrow money, the interest cost of that borrowing (or notional borrowing) would be recoverable.

46 (1854) 9 Exch 341 at 354–5; 156 ER 145 at 151.

v Baxendale, and that the first limb is simply one example of the second limb.[47] Where loss is suffered according to the usual course of things, that loss will automatically be within the reasonable contemplation of the parties. Other loss can be brought within the parties' reasonable contemplation if the relevant special circumstances are actually known. As Asquith LJ said in the *Victoria Laundry* case, putting it in terms of imputed knowledge and actual knowledge:

> Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things', of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.[48]

Consequential losses may be suffered in the normal course of things (where the knowledge that they may be suffered is imputed to the defendant and he or she is liable accordingly), or they may be suffered because of special circumstances (in which case the defendant's liability will turn on actual knowledge).[49] To put it another way, consequential losses may fall within either limb of *Hadley v Baxendale*. In *Victoria Laundry*, the plaintiffs bought an industrial boiler from the defendants to use for commercial laundering and dyeing. The boiler required repairs and delivery was delayed by 5 months. The question was whether the plaintiffs could claim for lost profits that they would have made within that period. The Court of Appeal held that lost profits were recoverable in a general sense,[50] but not those relating to some particularly lucrative lost contracts of which the defendant was unaware.

What losses are within the reasonable contemplation of the parties, whether because of imputed or actual knowledge, is therefore a very fact-dependent question. However, it is clear that *some* consequential losses will very often be foreseeable.[51] When a breach of the duty in question would lead, in the normal

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47 Eg, *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 at 385, 421; [1967] 3 All ER 686; [1967] 3 WLR 1491 (HL); *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep 175 (QBD) at 182; *Commonwealth v Amann Aviation Pty Ltd* (1992) 174 CLR 64 at 92; 104 ALR 1; [1991] HCA 54; BC9102617; *European Bank Ltd v Robb Evans of Robb Evans & Associates* (2010) 240 CLR 432; 264 ALR 1; [2010] HCA 6; BC201001148 at [13]. Kramer points out that the distinction between the rules may be relevant to the interpretation of exclusion clauses: A Kramer, *The Law of Contract Damages*, Hart, Oxford, 2014, p 298.

48 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 539; [1949] 1 All ER 997; (1949) 65 TLR 274 (CA); referred to with approval in *Hungerfords v Walker* (1989) 171 CLR 125; 84 ALR 119; [1989] HCA 8; BC8908050 at [22].

49 It may be too simplistic to say that liability depends only on *knowledge* of special circumstances: see D Harris et al, *Remedies in Contract & Tort*, 2nd ed, Butterworths, London, 2002, p 97: 'if I tell my taxi driver that I will miss the opportunity of making a profit of £1 million if I fail to reach an appointment on time, his acceptance of me as a passenger should not lead to the inference that he accepts the risk.' For discussion see Kramer, above n 47, pp 299–302 and the sources cited.

50 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 543; [1949] 1 All ER 997; (1949) 65 TLR 274.

51 Generally, it is only the type of loss that needs to be foreseeable, not its extent: *H Parsons*

course of things, to the plaintiff having less money than he or she would otherwise have (as in the example above), then it should be within the defendant's reasonable contemplation that a breach may lead to consequential losses. Money obviously has a use value. If D contracts to do something that, if done wrongly, would in the ordinary course of things mean that P has less money, then it will also be in the ordinary course of things that P will suffer from the loss of use of the shortfall money.[52] The precise 'loss of use' harm that P suffers will vary, and some singular uses to which P would have put the money may not have been within D's reasonable contemplation. But some loss of use will almost always be foreseeable, and so recoverable.

Negligence

Consequential losses are also recoverable in negligence as long as they are not too remote.[53] A professional person's duty to take reasonable care may exist co-extensively in tort and contract,[54] and for many practical purposes it will not matter whether a claim is brought in one or the other. That said, some differences can be mentioned.

First, and most obviously, a non-party to the contract can only sue in tort. Second, different limitation periods may apply. Both points were seen in *Henderson v Merrett Syndicates*, where some plaintiffs could only sue in tort because they were not parties to the relevant contract and where the rest also had to sue in tort because their contract claims were time-barred. Third, in tort the harm must only be foreseeable at the time of the breach, rather than at the time of the making of the contract.[55] Fourth, the concept of 'reasonable foreseeability' in negligence is wider than 'reasonable contemplation' in contract, in that the harm has to be less likely to occur in order to be

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(Livestock) Ltd v Uttley Ingham & Co Ltd [1978] QB 791; [1978] 1 All ER 525; [1977] 3 WLR 990 (CA). However, in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2009] AC 61; [2008] 4 All ER 159; [2008] UKHL 48 at [22], Lord Hoffmann warned against being misled by notions of the 'same type', pointing out that 'types' of harm need to be understood in the context of what a contracting party would reasonably have understood as significant for the purposes of the risk he was undertaking. The point is particularly relevant in a world of CFD trading, spread-betting and other high-risk investments.

52 *Hungerfords v Walker* (1989) 171 CLR 125; 84 ALR 119; [1989] HCA 8; BC8908050; *Sempra Metals Ltd v IRC* [2008] 1 AC 561; [2007] 4 All ER 657; [2007] 3 WLR 354; [2007] UKHL 34.

53 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126 (PC). I assume, probably naïvely, that in cases of negligent advice a scope of liability analysis under s 5D(1)(b) of the Civil Liability Act 2002 (NSW) would usually produce the same result as a reasonable foreseeability test.

54 *Hawkins v Clayton* (1988) 164 CLR 539; 78 ALR 69; [1988] HCA 15; BC8802597; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 193–4; [1994] 3 All ER 506; [1994] 3 WLR 761 (HL); *Astley v Austrust Ltd* (2000) 197 CLR 1; 161 ALR 155; [1999] HCA 6; BC9900546 at [47]; *Barclay v Penberthy* (2012) 246 CLR 258; 291 ALR 608; [2012] HCA 40; BC201207490 at [47], [170].

55 This is potentially a significant point, since I have seen it advised that you tell a breaching party your plans in the hope that this will give them special knowledge and bring any loss within the second limb of *Hadley v Baxendale*. This should not work with contract: see *Paillas v Loans Plus Pty Ltd* [2008] NSWSC 849; BC200807346 at [25].

recoverable.[56] The remoteness test in tort is therefore slightly easier for a plaintiff to satisfy, although it has been suggested that if a plaintiff has concurrent actions in contract and tort then damages will be assessed on whichever is the more favourable test.[57] The better view may even be that where the tortious duty of care arises out of an 'assumption of responsibility' the remoteness tests in tort and contract ought to be the same.[58] Fifth, immediately after *Astley v Austrust Ltd* there was an advantage to suing in contract because contributory negligence did not operate to limit the contract claim. However, amendments to apportionment legislation have removed this advantage and contributory negligence now applies to contract claims if the contract and tort duties are 'concurrent and co-extensive'.[59]

Deceit

Consequential losses are also recoverable for the tort of deceit, where the remoteness test is not limited to reasonable contemplation or reasonable foreseeability. Instead, 'the defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement'.[60] In *Henville v Walker*, while referring to the remoteness rules in deceit, McHugh J said: 'loss that the plaintiff can recover includes consequential losses flowing directly from the misrepresentation including losses from opportunities forgone'.[61]

A nice example can be seen in the English case of *Parabola Investments*, where an investor's broker told lies about the state of the client's investments.[62] The broker falsely told the investor that his trades had been profitable and lied about how much money was in the investor's account. The

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56 *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350; [1967] 3 All ER 686; [1967] 3 WLR 1491 (esp at AC 385–6); *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617; [1966] 2 All ER 709; [1966] 3 WLR 498 (PC); *National Australia Bank Ltd v Nemur Varity Pty Ltd* (2002) 4 VR 252; (2002) Aust Torts Reports 81-645; [2002] VSCA 18; BC200200672 at [43]–[44]. In *Cadoks Pty Ltd v Wallace Westley & Vigar Pty Ltd* (2000) 2 VR 569; [2000] VSC 167; BC200002336, Ashley J found a loss of commercial opportunity to be foreseeable in tort but too remote in contract (the tort damages were also reduced by 10% for contributory negligence).

57 See J W Carter, *Contract Law in Australia*, 6th ed, LexisNexis Butterworths, Chatswood, 2013, at [35-04], [35-26], discussing *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791; [1978] 1 All ER 525; [1977] 3 WLR 990.

58 See J Cartwright, 'Remoteness of Damage in Contract and Tort: A Reconsideration' [1996] *CLJ* 488; R Stevens, *Torts and Rights*, OUP, Oxford, 2007, pp 206–8; A Kramer, 'Remoteness: New Problems with the Old Test' in *Contract Damages: Domestic and International Perspectives*, D Saidov and R Cunnington (Eds), Hart, Oxford, 2008, p 277.

59 See, eg, the Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s 8. For the position in England, see *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488; [1986] 2 Lloyd's Rep 179 per Hobhouse J, aff'd [1989] AC 852; (1989) 5 ANZ Ins Cas 60-904; [1988] 2 All ER 43; [1988] 1 Lloyd's Rep 19 (CA).

60 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 at 167; [1969] 2 All ER 119; [1969] 2 WLR 673 (CA). See also *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 264–5, 281–2; (1996) 22 ACSR 656; [1996] 4 All ER 769; [1996] 3 WLR 1051 (HL); *Palmer-Bruyn and Parker Pty Ltd v Parsons* (2001) 208 CLR 388; 185 ALR 280; [2001] HCA 69; BC200107591 at [13] per Gleeson CJ, [64]–[65] per Gummow J (approving the first two cases).

61 *Henville v Walker* (2001) 206 CLR 459; 182 ALR 37; [2001] HCA 52; BC200105241 at [133] (citations omitted).

62 *Parabola Investments Ltd v Browallia Cal Ltd* [2011] QB 477; [2010] 3 WLR 1266; [2011]

investor brought an action in deceit and sought damages for the 'lost opportunity to trade' both during the period of his relationship with the broker (stage 1) and during the period between the termination of that relationship and the trial (stage 2). The investor recovered all losses in respect of stage 1 and many in respect of stage 2, although the judge thought some pleaded stage 2 losses were too speculative. Since the investor had an incredible track record, and was investing in very high-risk products, the total damages bill was £20 million.

Conversion

Consequential damages are available in conversion, and the claim is not limited to lost increases in the value of the relevant asset between breach and judgment. These lost increases in value are sometimes treated as consequential losses, whereas at other times the point is hidden under the guise of choosing a later assessment date for 'value of the goods' damages. But there is no doubt that other, discrete consequential losses are also recoverable.[63] For example, in *Davis v Oswell*,[64] the plaintiff recovered the cost of hiring a replacement horse in addition to the value of his converted horse. In *Bunnings v CHEP*,[65] which concerned the conversion and detinue of wooden pallets, the plaintiff recovered damages for lost profits.

At least when conversion is committed innocently, a stringent remoteness test applies to the recoverability of consequential loss. In *National Australia Bank v Nemur Varity Pty Ltd*,[66] fraudsters intercepted cheques made payable to RCA, an insurance underwriter, and presented them for payment. This interception of funds meant that insurance which the plaintiff brokers thought they were purchasing for their clients was in fact not being acquired. This in turn led the plaintiff's clients to take their business elsewhere. The plaintiffs sued the collecting bank, NAB, for conversion of the cheques. In addition to the face value of those cheques,[67] the plaintiffs also claimed damages for loss of business income. This second claim succeeded at trial but failed on appeal. Callaway JA said that the consequential loss of business income could either be seen as not caused by the bank's conversion in the first place, or

1 All ER (Comm) 210; [2010] EWCA Civ 486 (following *Hungerfords v Walker* (1989) 171 CLR 125; 84 ALR 119; [1989] HCA 8; BC8908050).

63 Consequential loss is also recoverable in detinue: *John Gallagher Panel Beating v Palmer* [2007] NSWSC 627; BC200704792 at [23]. In England, consequential damages are recoverable for statutory conversion (which replaced detinue) under the Torts (Interference with Goods) Act 1977 s 3(2), and are also available for conversion at common law: *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 at 649; [1963] 2 All ER 314 (CA); *Saleslease Ltd v Davis* [1999] EWCA Civ 1138; [1999] 1 WLR 1664; [2000] 1 All ER (Comm) 883. England applies a less restrictive remoteness test (reasonable foreseeability) than does Australia to conversions at the innocent end of the culpability spectrum.

64 (1837) 7 Car & P 804; 173 ER 351.

65 *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420; [2011] NSWCA 342; BC201108756. On the interesting point of why the calculation took account of a discount available to a wrongdoer, see [184]–[185].

66 (2002) 4 VR 252; (2002) Aust Torts Reports 81-645; [2002] VSCA 18; BC200200672.

67 On the face value rule generally, see A Goymour, 'Conversion of contractual rights' [2011] *LMCLQ* 67.

alternatively it could be seen as too remote. Expressing a preference for the remoteness analysis, he continued:

> the measure of damages for consequential loss in conversion is not reasonable foreseeability. Liability in conversion is strict: like liability for breach of contract, which is also strict, it lies at the opposite end of the spectrum from deceit and is quite unlike negligence. The ordinary measure is the value of the chattel and consequential damages require some knowledge (or express notice) on the part of the defendant of facts whereby additional loss of the relevant kind is likely to result. To put the point another way, the consequential loss must be of a kind that should have been within the contemplation of the defendant as a likely consequence having regard to the defendant's knowledge (or express notice) of the facts. There is, to that extent, a closer analogy with damages for breach of contract than with damages for negligence.[68]

This stringent test was soon applied in New South Wales in *Macrocom v City West*,[69] a case where the plaintiff sued for conversion of telecommunications equipment. The equipment itself was returned after initial judgment, but a further hearing was required to deal with consequential damages claimed in respect of a lost ability to sell unused satellite transponder capacity. Master Macready considered 'whether the consequential loss was of a kind that should have been within the contemplation of the defendant having regard to the facts it knew', and found that it was.[70]

Misleading or deceptive conduct

The statutory prohibition on misleading or deceptive conduct is now found in s 18 of the Australian Consumer Law, with the right to damages being in s 236. However, the old jurisprudence relating to ss 52 and 82 of the Trade Practices Act remains relevant.[71] This means that recovery in respect of consequential losses will still be available, although it is not possible to frame a general remoteness test along the lines of 'reasonable foreseeability' or 'all natural and probable consequences'. The statute itself does not make reference to a remoteness criterion, so the question ought to be seen in terms of causation.[72] Beyond that, as Balkin and Davis say, it is simply a matter of applying the words of the statute to the facts at hand.[73]

The discussion above shows that — although the remoteness tests vary — the basic position at common law and under the ACL is that consequential loss is just another type of loss that can be pleaded, proved and recovered. Indeed,

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68 (2002) 4 VR 252; (2002) Aust Torts Reports 81-645; [2002] VSCA 18; BC200200672 at [8]–[9] (references omitted). This is probably not ratio, since Phillips JA preferred to see the issue as one of causation (at [4]), and Batt JA expressed the point slightly differently, concluding that 'express notice or special knowledge' was required (at [58]–[64]). But the test has been applied in subsequent cases.

69 [2003] NSWSC 898; BC200305806. The stringent remoteness test was also approved in obiter dicta in *Rapid Roofing Pty Ltd v Natalise Pty Ltd* [2007] 2 Qd R 335; [2007] QCA 094; BC200701865 at [9], [71]–[74].

70 [2003] NSWSC 898; BC200305806 at [45]–[52].

71 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth).

72 *Henville v Walker* (2001) 206 CLR 459; 182 ALR 37; [2001] HCA 52; BC200105241.

73 R P Balkin and J L R Davis, *Law of Torts*, 5th ed, LexisNexis Butterworths, Chatswood, 2013, at [22.49].

it may be appropriate to link the remoteness test to the nature of the breach alleged rather than to the cause of action. Professor Burrows has suggested that the 'all natural and probable consequences' test should apply to all torts dishonestly committed,[74] and in the *Kuwait Airways* case Lord Nicholls agreed that the deceit test should be the test for dishonest conversion.[75] At the other end, an innocently-committed conversion should obviously have a very restrictive remoteness test. Either way, the relevant point for this discussion is that damages for consequential loss are recoverable.

Concurrent and analogous actions

The previous section outlined how the common law deals with consequential loss in situations that are, more or less, analogous to breaches of trust. This section discusses when these common law claims will be available as alternatives to breach of trust, and when the only value of the comparison is that of analogy.

Contract, deceit, and misleading and deceptive conduct

It is clear that breaches of trust can also be breaches of contract, although it should be remembered that not every contractual provision will be elevated into a trust term,[76] and that trust beneficiaries will not always be parties to a relevant contract. While less common, it is also possible for a claim in deceit to lie in the alternative to breach of trust. Deceit was an alternative to breach of fiduciary duty in *Nocton v Lord Ashburton*,[77] and the claim was successful in the Court of Appeal before being rejected on the facts in the House of Lords. Similarly in *McKenzie v McDonald*,[78] claims in deceit and negligence failed on the facts but in theory were available alongside the successful action for breach of fiduciary duty.

While deceit claims against trustees (as opposed to other fiduciaries) appear to be uncommon, they are possible.[79] Deceit is not concerned with legal interests in the same way that conversion is. This is shown by the fact that deceit claims are quite regularly brought in the alternative against third parties who participate in breaches of trust.[80] *Parabola Investments* involved an 'execution only' contract between investor and broker, but it is not hard to imagine the arrangement structured as a trust and with essentially-identical

74 A Burrows, *Remedies for Torts and Breach of Contract*, 3rd ed, OUP, Oxford, 2004, pp 81–3; see also R Edwards, 'Same bank, different capacities: knowledge, remoteness and measure of damages' (2002) 14 *Bond LR* 372 at 389–90; K Barnett and S Harder, *Remedies in Australian Private Law*, CUP, Melbourne, 2014, pp 145–52.

75 *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 1098; [2002] 3 All ER 209; [2002] 2 WLR 1353; [2002] UKHL 19 at [104].

76 *Bristol and West Building Society v Mothew* [1998] Ch 1; [1996] 4 All ER 698; [1997] 2 WLR 436.

77 [1914] AC 932; [1914] All ER Rep 45; (1914) 30 TLR 602.

78 [1927] VLR 134; (1926) 33 ALR 51.

79 In the recent *Watts v Watts* (unreported, Ch Div, 27 August 2014, Strauss QC), the beneficiary successfully sued for both breach of trust and deceit. But I have not found another case where deceit and breach of trust were pleaded together against the trustee.

80 A recent example is *Roadchef (Employee Benefits Trustees) Ltd v Hill* [2014] EWHC 109 (Ch).

facts about the broker's misstatements and the investor's reliance on them. The reason that there are few deceit claims against trustees is probably that the existing causes of action cover most of the ground. A straightforward claim in breach of trust is fine unless there is consequential loss. Deceit also requires a dishonest representation, which means it will normally be easier to sue a 'deceiving' trustee for breach of fiduciary duty.[81] After all, it is hard to imagine someone making a statement they know to be false in a situation where they are *not* preferring their own interests or those of another principal. If consequential loss is available for breach of fiduciary duty, little would be gained by suing in deceit. This will especially be so if the remoteness tests are similar. Nonetheless, as we have seen, there are not many fiduciary cases on consequential loss. The operation of trustee exclusion/'conflict consent' clauses may also mean that a fiduciary claim is unattractive. So it may be that a claim in deceit is still worthwhile.

For similar reasons there should be no objection to a misleading or deceptive conduct action being brought against a trustee. In *Wilkinson v Feldworth Financial Services Pty Ltd*,[82] Rolfe J held that Minter Ellison, a firm of solicitors who were relevantly acting as trustees, had engaged in misleading and deceptive conduct. That case concerned the same failed investment scheme as *Youyang v Minter Ellison*. The solicitors then conceded the substance of a misleading and deceptive conduct claim in *Youyang* itself,[83] although they successfully argued that it had become time-barred. It should be noted that the Australian Consumer Law does not apply to activities outside trade or commerce, and within trade or commerce it does not apply to the supply of financial services and financial products.[84] These are covered instead by the ASIC Act, which has relevantly similar provisions.[85] Depending on the facts, a trust arrangement could presumably fall outside trade or commerce entirely, or within the Australian Consumer Law, or within the ASIC Act.

Negligence

The position of negligence is particularly difficult. If a trust is contractual and the beneficiaries are parties, then duties to take care can exist both in contract and under trust law. A duty of care in tort can also exist concurrently with a contractual duty of care in a contract for professional services.[86] Does this mean, in an appropriate case involving fund management, that a trust beneficiary can have all three? More importantly, will a tortious duty exist

81 Depending on the trustee's insurance scheme, it may be advisable not to sue in deceit.

82 (1998) 29 ACSR 642; (1999) 17 ACLC 220; BC9806306 (the trial decision in *Alexander v Perpetual Trustees WA Ltd* (2003) 216 CLR 109; 204 ALR 417; [2004] HCA 7; BC200400244).

83 *Youyang v Alexander* [2000] NSWSC 698; BC200004265.

84 Competition and Consumer Act 2010 (Cth) s 131A. For summary of damages under the Australian Consumer Law, see Barnett and Harder, above n 74, Ch 8.

85 Australian Securities and Investments Commission Act 2001 (Cth) s 12DA.

86 *Hawkins v Clayton* (1988) 164 CLR 539; 78 ALR 69; [1988] HCA 15; BC8802597; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 193–4; [1994] 3 All ER 506; [1994] 3 WLR 761 (HL); *Astley v Austrust Ltd* (2000) 197 CLR 1; 161 ALR 155; [1999] HCA 6; BC9900546 at [47]; *Barclay v Penberthy* (2012) 246 CLR 258; 291 ALR 608; [2012] HCA 40; BC201207490 at [47], [170].

alongside the equitable duty of skill and care even in a non-contractual case? If so, will the content and scope of those duties be the same, or will they differ?

One argument is that a duty of care in tort should not be recognised because the area is adequately governed by equity. In *SAS Trustee Corporation v Cox*, McColl JA said:

> The issue of the appellant's obligations should be resolved by reference to its statutory functions and the duties imposed upon it as trustee both by the statutory scheme and by reference, if necessary, to principles of law and equity applying to trustees not ousted by that statutory scheme. This ensures conformity with 'the deliberate trend in courts of final appeal . . . to arrest on grounds of policy the expansion of the law of negligence into areas governed by contract, equity or statute'. That trend is grounded in concerns to ensure coherence of the law, in this case having regard to the different conceptual origins of tortious, contractual and equitable obligations.[87]

Another objection is that legal owners simply cannot owe others duties of care at law in respect of their own legal property. In *Wickstead v Browne*, a plaintiff beneficiary attempted to sue the trustee for negligence.[88] Handley and Cripps JJA said that 'the fundamental difficulty in the way of any such duty is that [the trustee company] was the legal owner of the moneys. A legal owner as such owes no common law duty of care to others in his management or administration of his own property.'[89] The case is approvingly discussed in Meagher, Gummow and Lehane on this point.[90] Nonetheless, principled arguments can also be marshalled in support of the opposite position. In the NSW Court of Appeal decision in *Youyang*, Young CJ in Eq said:

> In theory, there is a lot to be said for the proposition that as equity only gives a remedy where the common law is inadequate, if a person has a good remedy for damages in negligence, there is [no] cause for equity to intervene by the remedy of equitable compensation, except perhaps to the extent to which the common law damages are clearly inadequate.[91]

In *Youyang* it seems to have been assumed that a general duty of care was owed in tort, but the question at trial was whether that general duty manifested itself in a specific duty to inform the plaintiff of the defendants' failure to acquire the proper security certificate. Brownie AJ proceeded on the assumption that such a specific duty was owed.[92] But the point did not need to be decided because any tort damages would be reduced by 20% for contributory negligence. For this reason, the focus was on the amount of

87 (2011) 285 ALR 623; [2011] NSWCA 408; BC201110347 at [93], citing *National Australia Bank Ltd v Nemur Varity Pty Ltd* (2002) 4 VR 252; (2002) Aust Torts Reports 81-645; [2002] VSCA 18; BC200200672 at [47]; *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404; [2001] HCA 59; BC200106147 at [50]. Also see *Bank of Western Australia Ltd v Luo* [2010] NSWSC 733; BC201004659 at [70]–[74].

88 (1992) 30 NSWLR 1; [1992] NSWCA 272; BC9203970. In fact the suit was brought against the manager of the trustee company.

89 (1992) 30 NSWLR 1 at 17; [1992] NSWCA 272; BC9203970; cf Kirby P's doubts on the point at 5–7.

90 Meagher, Heydon and Leeming, above n 1, at [5-315].

91 *Youyang v Minter Ellison* [2001] NSWCA 198; BC200106132 at [50]. The word 'no' does not appear, but this must be a slip.

92 *Youyang v Alexander* [2000] NSWSC 698; BC200004265 at [38].

equitable compensation awarded under the breach of trust claim (which was also the focus in the Court of Appeal and High Court decisions).

Froese v Montreal Trust Co of Canada concerned the relationship between the beneficiaries and trustees of a pension fund.[93] The trustees did not manage the investment decisions of the fund, but acted as 'custodian-administrator' trustees. A majority of the British Columbia Court of Appeal held that the trustee had a duty to warn the beneficiaries that the employer had stopped making contributions to the plan, even though no contract existed between the trustee and the beneficiaries. That duty seemed to be present in both tort and equity, with the main emphasis being in tort. McEachern CJBC commented that, in the pensions context at least, 'a custodial trustee will almost invariably owe a common law duty of care to the beneficiaries, though such a duty of care is not unlimited. It arises only within the scope of the trustee's engagement'.[94]

If no duty of care is owed in tort then the matter is straightforward and only the equitable duty of care is relevant. However, if trustees do owe duties of care in tort, then the scope of those duties becomes very important. Remember that liability in negligence, generally speaking, extends to consequential loss that is reasonably foreseeable. It might therefore be possible for a trust beneficiary to avoid the restriction on consequential loss inherent in the accounting system by framing the claim in negligence. This point about concurrent duties of care in tort and equity has not yet been in sharp relief because the quantum of relief was either the same under both claims or was higher for breach of trust. But here the possibility is that quantum would be greater in negligence. For the following reasons I suggest that the scope of any tort duty should not extend to consequential loss. That is, there would be complete overlap between the equitable duty and the tort duty.

The relevant question is whether any tort duty ought to extend beyond the 'protection and augmentation'[95] of the trust fund. Absent other circumstances, this is what a trustee agrees to take on when he or she accepts appointment as a trustee. There is good reason for extending the scope of this duty in contractual cases: one party promises to do something, and reasonably contemplates that if it is not done then the promisee will suffer loss which may include consequential loss. A trust is involved, but that trust is found within the terms of the wider contract. As Lord Toulson recently said, '[t]he contract defines the parameters of the trust'.[96] The trust ought to mould itself or yield to the parties' promises. It may be too much to say that the *equitable* duty ought to extend to consequential losses,[97] but the *legal* duty should remain and should do so.

Where there is no contract, on the other hand, any interplay is between equity and tort. Here there is less reason to move beyond the default equitable position. It could be said that a trustee assumes responsibility in respect of the beneficiary's interests, and thereby assumes a duty of care to that beneficiary.

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93 (1996) 137 DLR (4th) 725 (BCCA).

94 Ibid, at [46]. See also [54]: 'duties in trust and tort may arise because of the close financial relationship between the beneficiaries and the defendant'.

95 Gummow, above n 1, p 64.

96 *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58 at [70].

97 Although see discussion below, text to n 99.

But how far does that assumption of responsibility extend? In the absence of express agreement to the contrary, I suggest that the content and scope of the assumption ought to be governed by the terms of the particular trust and by the general law of trusts. On this analysis the tort duty would not extend to consequential loss.

There is also another reason why any tort duty should not extend to consequential loss. In *Wickstead v Browne*, Handley and Cripps JJA noted that 'if the common law imposed a wider or different liability there would be a conflict with the rules of equity which would prevail'.[98] The point does not arise in contract cases because the contract itself contains the relationship that the law categorises as a trust. This means there is no relevant conflict in those cases. But the point does arise in respect of tort. If a tort duty was wider than the relevant equitable duty then that would rather emasculate the trustee accounting mechanism. It would be an example of conflict, or at least variance, between the rules of equity and the rules of common law relating to the same matter.[99]

Conversion

A claim in conversion is certainly not available concurrently with a claim for breach of trust. Even the solely-entitled beneficiary of a bare trust, who can call for the legal title under the principle in *Saunders v Vautier*,[100] does not have the immediate *legal* right to possession necessary for a conversion action. Beneficiaries cannot, therefore, sue their trustees in conversion.[101] Nonetheless, it may still be useful to consider the position in conversion as an analogy. Regardless of what remoteness test should apply to dishonest conversions, it is interesting to note that consequential loss is recoverable for innocently-committed conversions. This means that liability can be imposed in a situation where, realistically, no duty is being accepted or assumed. Liability for consequential loss for an innocently-committed conversion is therefore very different from liability in negligence, in the intentional torts, or even in breach of contract. In the case of an innocently-committed breach of contract, at least the defendant has agreed to the contract. Returning to conversion: it is true that all the world owes a duty not to interfere with my property, but that is a quite meaningless thing to say in this context. If the reason that equity does not allow consequential loss for breach of trust is because the nature of a trustee's duty is only to protect and augment the trust fund — that is, a scope of duty analysis — it is interesting that the common law will impose liability when it is rather hollow to talk of any duty being accepted at all.

98 (1992) 30 NSWLR 1 at 17–18; [1992] NSWCA 272; BC9203970.

99 Law Reform (Law and Equity) Act 1972 (NSW) s 5; Supreme Court of Judicature Act 1873 (UK) s 25(11).

100 (1841) 4 Beav 115; 49 ER 282.

101 If a third party converts trust property the beneficiary may sue and join the trustee, but the trustee is the proper plaintiff. An example is *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd* [1990] 1 WLR 409; [1991] 2 All ER 129 (PC).

The future?

At the start of the article I suggested that it may be misleading to go straight from the wrong of breach of trust to the remedy of equitable compensation, without reference to the accounting process. To do so would hide the point that a trustee's obligation is limited to the protection and management of the trust fund. But the use of words is changing and the law is developing. It may be that, in the future, we do see equitable compensation being awarded in respect of consequential loss. It should be emphasised immediately that only some of the discussion that follows is directly on that point. Instead, the aim is to show how developments in similar areas may presage changes in this one.

In the last decade or so there have been many important decisions, in both Australia and England, on the topic of third-party liability for breach of trust and fiduciary duty.[102] To my mind, two things are particularly interesting about this run of cases. The first is that both countries are struggling with the point that a knowing recipient of property in breach of trust does actually receive property subject to a prior equitable interest that is not overreached. That raises the question of whether there is something special about recipient liability (at least in breach of trust cases) that prevents it from joining assistance and inducement liability on a spectrum of equitable wrongdoing.[103] The second interesting thing is how courts are now seeing the liability for knowing receipt/inducement/assistance as a cause of action, with a separate remedy to follow.

Cases now refer specifically to equitable compensation being awarded for knowing receipt,[104] rather than just to 'liability for knowing receipt' or 'liability to account as a constructive trustee'. At first glance that is not very novel: it is consistent with the received property being held on a notional (or even actual) trust, which is then breached when the recipient dissipates the money. However, equitable compensation could work in two ways here: it could be seen as a remedy for breach of the trust that covered the property when the recipient received it, or it could be seen as a remedy for the distinct equitable wrong of knowing receipt. The latter approach could allow recovery for the principal's loss independent of the value of property that was actually received by the recipient. Remember that, in cases of breach of trust, the problem with recovering consequential loss under the current law is not *causation*; it is *remoteness*. The idea is that liability is limited because the trustee only assumes responsibility for the management of the trust assets, not for the further risk of what mismanagement of those assets might do to the

102 Eg, *Fyffes Group Ltd v Templeman* [2000] EWHC 224 (Comm); *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621; *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] 2 All ER 489; [2014] 2 WLR 355; *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908; *Hasler v Singtel Optus Pty Ltd* (2014) 311 ALR 494; 101 ACSR 167; [2014] NSWCA 266; BC201406650.

103 See generally P Ridge, 'Participatory Liability for Breach of Trust or Fiduciary Duty' in *Fault Lines in Equity*, J Glister and P Ridge (Eds), Hart Publishing, Oxford, 2012, p 119.

104 Eg, *New Cap Reinsurance Corporation Ltd v General Cologne Re Australia Ltd* [2004] NSWSC 781; BC200405527 at [34]; *George v Webb* [2011] NSWSC 1608; BC201110449 at [263].

beneficiary's wider economic position. Yet it is not automatic that the same 'scope of duty' limitation ought to apply to third parties taking property in breach of trust.[105]

Accounts of profits may also be awarded against knowing recipients and assistants. The justification for this may be tricky, since it involves imposing a duty on the third party not to make a personal profit.[106] That imposition can easily be justified in some cases, but perhaps not all.[107] In *Novoship v Nikitin*, the English Court of Appeal recently confirmed the availability of the remedy but emphasised that the calculation of an account made against an assistant may differ from the calculation made against a wrongdoing fiduciary.[108] The case involved ship charterers paying bribes to a manager of the ship owning company. The manager was responsible for negotiating charters. The scheme was complicated and involved several parties, but in essence the manager breached his fiduciary duty to the ship owners and the bribing charterers dishonestly assisted him to do so. At trial, the charterers were ordered to account for the profits they had made under the charters. This was an enormous sum because the market had changed and the charterers were able to sub-charter their ships at great profit. However, the Court of Appeal reversed the award and held that those profits had not been caused by the act of dishonest assistance. Instead, 'the real or effective cause of the profits was the unexpected change in the market'.[109] Earlier, the court had said:

> In our case Mr Nikitin [one of the charterers] was not a fiduciary either as regards NOUK or the ship owning companies. He is not sued for a breach of fiduciary duty. He is sued because he has committed an equitable wrong. Where a claim based on equitable wrongdoing is made against one who is not a fiduciary, we consider that, as in the case of a fiduciary sued for breach of an equitable (but non-fiduciary) obligation, there is no reason why the common law rules of causation, remoteness and measure of damages should not be applied by analogy. We recognise that these rules do not apply to the case of a fiduciary sued for breach of a fiduciary duty; but that is because the two cases are different.[110]

The weight of this passage was that an assistant's account of profits would be calculated in a different way to the calculation that would be made against a true first party fiduciary. However, the comment appears wide enough to cover loss-based claims made against third parties as well. If that is true, it may be that third parties who assist in breaches of trust will be liable for the foreseeable consequences of their actions, including the beneficiary's

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105 See below, text following n 110.

106 If, in a case of receipt, the property still existed and the gain could be seen as an accretion to that property, a property claim would lie. But an account of profits presupposes a gain independent of any transferred property.

107 Compare the views expressed in: D Nicholls, 'Knowing Receipt: The Need for a New Landmark' in *Restitution Past, Present and Future*, W Cornish et al (Eds), Hart Publishing, Oxford, 1998, pp 231, 243–4; S B Elliott and C Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 *MLR* 16; P Ridge, 'Justifying the Remedies for Dishonest Assistance' (2008) 124 *LQR* 445; C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in *Constructive and Resulting Trusts*, C Mitchell (Ed), Hart Publishing, Oxford, 2010, pp 115, 142–4.

108 *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908 at [114]–[115].

109 Ibid, at [114].

110 Ibid, at [107].

consequential losses, without regard to the restricted liability that accompanies the breach of trust itself. We may then reach a stage where the third party is liable for more than the actual trustee (although it should be noted that cases involving third party liability will probably also involve a breach of fiduciary duty on the part of the trustee). That it turn may suggest that the reach of the trustee's basic liability ought to be extended.

It will be interesting to see if this *Novoship* approach is taken in Australia. The High Court noted in *Michael Wilson & Partners Ltd v Nicholls* that accounts made against a fiduciary and against a third party assistant could differ,[111] but the point being made was that they would factually differ, not that the principles for assessment would change. On the slightly different point of a plaintiff recovering multiple accounts of profits against several fiduciaries and third parties, Justice Gummow has recently (although before *Novoship*) written that the position is 'unsettled'.[112]

A recent case from South Australia shows what can happen when knowing receipt is treated as an independent wrong, although here the point was about the relationship with the trustee's breach rather than the remedies available. In *Artcraft Pty Ltd v Dickson*, a senior employee stole metal from his employer, sold it to scrap metal merchants, and kept the proceeds.[113] The employee sold the metal for around half of its market value, so the company sued him in conversion. The company also sued the employee's wife for knowing receipt of property in breach of a *Black v Freedman* constructive trust.[114] The company was successful on both grounds — conversion against the employee and knowing receipt against his wife — and apparently did not need to elect. This is particularly interesting, since the main claim against the employee was put on the alternative grounds of breach of contract, breach of fiduciary duty and breach of trust. The judge found that the damages or compensation payable on any of these heads would be the same. Yet, although it was clear that these causes of action against the husband were alternative and not cumulative, it was not appreciated that they could have different consequences for the liability of the wife. Subject to double recovery,[115] it would be appropriate to sue the husband for breach of trust or fiduciary duty while also suing the wife as a knowing recipient. But, regardless of the double recovery point, it is internally inconsistent to sue the husband for conversion, be awarded damages, and still be able to collect compensation from the wife for knowing receipt.

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111 (2011) 244 CLR 427; 282 ALR 685; [2011] HCA 48; BC201109206 at [106].

112 W M C Gummow, 'Knowing assistance' (2013) 87 *ALJ* 311 at 315.

113 [2014] SASC 108; BC201406475.

114 From *Black v S Freedman & Co* (1910) 12 CLR 105; see J Tarrant, 'Theft principle in private law' (2006) 80 *ALJ* 531. Tarrant also discusses *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426, which has similar facts but was apparently not cited to Kelly J in *Artcraft Pty Ltd v Dickson* [2014] SASC 108; BC201406475.

115 Which itself was not mentioned in the context of the husband/wife liability, although it was noted that damages already recovered from one of the scrap metal merchants must be taken into account.

Conclusion

This article has tried to show that, on a traditional analysis, consequential losses are not recoverable for breach of trust. In some cases, but not all, that same loss may be recovered by putting the claim on other grounds. Depending on the facts of a given case, those grounds may include breach of fiduciary duty, breach of contract, misleading and deceptive conduct, deceit, and possibly negligence.

Although accounting is the traditional way of enforcing trustee performance, it now seems to be rarely used. This is particularly so in the case of short-term trusts where there is really no question of reconstituting the fund.[116] It seems uncontroversial to say that, whether the accounting process is used or not, the amount of money actually payable following any breach ought to be the same.[117] However, the point of this article has been to show that the accounting procedure itself limits recovery to the value of the property under management. The scope of the trustee's duty and the enforcement mechanism are (or were) two sides of the same coin: they inform each other. If the accounting basis is removed, this will remove the inherent restriction on the recovery of consequential loss. This may bring welcome flexibility, but it will then be necessary to pay close attention to the scope of the trustee's duty in any give case. Perhaps more importantly, abandoning the accounting basis may also affect a beneficiary's ability to claim 'restitutionary or restorative' compensation in respect of a falsifiable disbursement made in breach of trust.

116 See *Target Holdings Ltd v Redferns* [1996] AC 421 at 434–5; (1995) 17 ACSR 582; [1995] 3 All ER 785; [1995] 3 WLR 352.

117 See *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58 at [90]–[91]; P G Turner, 'Measuring Equitable Compensation for Breach of Fiduciary Duty' [2014] *CLJ* 257 at 257.