Compensatory Remedies for Breach of Trust

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This article considers compensatory remedies for breach of trust. The first part of analysis considers the important recent decision of the UK Supreme Court in AIB Group (UK) v Mark Redler & Co Solicitors, and explores its significance and potential impact. The second part examines more closely what is meant by 'equitable compensation', and what remedial rules might develop to govern 'equitable compensation' following a breach of trust.

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I. Introduction

In the important decision of the United Kingdom Supreme Court in *AIB Group (UK) v Mark Redler & Co Solicitors*[1] ("*AIB*"), Lord Toulson observed that "[t]he debate [that] has followed *Target Holdings Ltd v Redferns*[2] ("*Target*") is part of a wider debate, or series of debates, about equitable doctrines and remedies and their inter-relationship with common law principles and remedies, particularly in a commercial context".[3] As regards compensatory remedies for breach of trust, the scope of the debate has effectively been narrowed — at least in England and Wales — by the decision in *AIB*: nothing is to be gained by falsifying and surcharging the account, which is the traditional approach in equity, and the court can simply award compensation for loss caused by the trustee's

1. [2014] UKSC 58 [*AIB*].
2. [1996] AC 421 (Eng) [*Target*].
3. *AIB, supra* note 1 at para 47.

breach of duty.[4] Lord Toulson thought that "in circumstances such as those in *Target,* the extent of equitable compensation should be the same as if damages for breach of contract were sought at common law".[5] In a similar vein, in *Thanakharn Kasikhorn Thai Chamkat (Mahachon) v Akai Holdings Ltd (in liquidation)*[6] ("*Akai*"), Lord Neuberger, sitting as a non-permanent judge of the Hong Kong Court of Final Appeal, commented that:

> even if the principles … had suggested that Akai was entitled to equitable compensation in an amount greater than it should recover by way of common law damages, I would have been very sympathetic to the notion that the equitable remedy would have to be refashioned so as to equate the amount of such compensation with the common law damages.[7]

This suggests that the common law rules may have some impact upon the principles of equitable compensation.

The decision in *AIB* accelerates the need to establish clear principles that can be employed when awarding equitable compensation for breach of trust. It is suggested that there are good reasons for equity to adopt its own particular approach, but the comments of Lord Toulson and Lord Neuberger are likely to prove to be influential. It is therefore worth considering whether the rules of equitable compensation should mirror those available for breach of contract, or for tort (although if the latter it would need to be determined whether an analogy should be made with negligence, deceit, or some other tortious wrong). However, before examining the principles of equitable compensation in greater depth, the

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4. John Heydon, Mark Leeming & Peter Turner, *Meagher Gummow and Lehane's Equity: Doctrines and Remedies*, 5d (London: LexisNexis Butterworths, 2015), as the editors of Meagher, Gummow and Lehane have recently observed "[t]he advent of the term "equitable compensation" in the last two to three decades supplied a name to a form of relief which derived from the principles of account, but was awarded without the accounting procedures" at 23-30.
5. *AIB*, *supra* note 1 at para 71.
6. [2010] HKCFA 64 [*Akai*].
7. *Ibid* at para 155. See also *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at 585-87 [*Canson*].

decision in *AIB* should first be explained.[8]

II. The Demise of Falsification?

"The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law".[9] The traditional means used to ensure the proper administration of the trust was for the beneficiary to take an account. Upon discovering a breach of trust, a beneficiary might falsify or surcharge the account. If the trustee had failed to exercise due care and skill leading to the fund not being worth as much as it would have been if managed by a reasonably prudent trustee, the account could be surcharged.[10] If the trustee misapplied trust monies in breach of trust, then the beneficiary was entitled to falsify that disbursement.[11] As Lord Sumption explained in *Williams v Central Bank of Nigeria,*[12] "[i]f the trustee misapplied the assets, equity would ignore the misapplication and simply hold him to account for the assets as if he had acted in accordance with his trust".[13]

A good example was provided by the case of *Re Dawson.*[14] In 1939, a trustee paid away NZ£4,700 in breach of trust. At the time of the improper disbursement, there was parity between the New Zealand

8. See Lusina Ho, "Equitable Compensation on the Road to Damascus?" (2015) 131 Law Quarterly Review 213; Peter Turner, "The New Fundamental Norm of Recovery for Losses to Express Trusts" (2015) 74:2 Cambridge Law Journal 188; Paul Davies, "Remedies for Breach of Trust" (2015) 78:4 Modern Law Review 681; Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) 1 Lloyd's Maritime and Commercial Law Quarterly 118.
9. *Target*, *supra* note 2 at 434; see also *AIB*, *supra* note 1 at para 64.
10. *Bristol & West Building Society v Mothew*, [1998] Ch 1 (CA (Civ)(Eng)) at 17 [*Mothew*]; *Fry v Fry* (1859), 27 Beav 144 (Ch (Eng)); *Nestle v National Westminster Bank plc*, [1993] 1 WLR 1260 (CA (Civ)(Eng)) [*Nestle*]; *Re Mulligan*, [1998] 1 NZLR 481 (HC) [*Mulligan*].
11. *Knott v Cottee* (1852), 16 Beav 77 (Ch (Eng)) [*Knott*]; *Re Massingberd's Settlement* (1890), 63 LT 296 (CA (Eng)); *Re Dawson (dec'd)*, [1966] NSWR 211 (SC (Austl)) [*Re Dawson*].
12. [2014] UKSC 10.
13. *Ibid* at para 13.
14. *Re Dawson*, *supra* note 11.

pound and Australian pound. However, by the time the claim was made against the trustee to restore the trust estate, NZ£4,700 was worth nearly A£6,000. In a judgment which has been influential throughout the Commonwealth, Justice Street held that the defaulting trustee was under a strict liability to make good the trust fund. In order to restore the trust fund to the position it would have been in had the money not wrongly been paid away, the trustee was required to pay A£6,000. Street J reviewed the authorities[15] and concluded that:

> [t]he cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract.[16]

Indeed, the judge held that "[c]onsiderations of causation, foreseeability and remoteness do not readily enter the matter".[17]

In effect, the wrongdoing trustee in *Re Dawson* was taken to have paid away his own monies rather than the monies of the trust fund, since equity would not countenance the possibility that the trustee acted badly when it could insist that the trustee acted properly. The trustee was held up to his primary obligation to act as a reasonable and honest trustee. As a trustee was still under a primary obligation to account for NZ£4,700 to the trust fund, and this the trustee could still do. Upon the beneficiary falsifying the account to delete the unauthorised disbursement, the trustee had the option of restoring the relevant trust property *in specie* — in other words the particular monies paid away — or the money

15. Including *Caffrey v Darby* (1801), 6 Ves Jr 488 (Ch (Eng)); *Clough v Bond* (1838), 3 My & C 490 (Ch (Eng)).
16. *Re Dawson*, *supra* note 11 at 216.
17. *Ibid* at 215.

substitute,[18] out of the trustee's own funds.[19] This is a different approach from that taken by the common law. As Lord Millett has explained, extra-judicially:

> Lord Diplock has said that a contracting party is under a primary obligation to perform his contract and a secondary obligation to pay damages if he does not. It is tempting, but wrong, to assume that a trustee is likewise under a primary obligation to perform the trust and a secondary obligation to pay equitable compensation if he does not. The primary obligation of a trustee is to account for his stewardship. The primary remedy of the beneficiary – any beneficiary no matter how limited his interest – is to have the account taken, to surcharge and falsify the account, and to require the trustee to restore to the trust estate any deficiency which may appear when the account is taken. The liability is strict. The account must be taken down to the date on which it is rendered. That is why there is no question of "stopping the clock".[20]

However, the House of Lords shifted away from this approach, at least in the context of "commercial" trusts, in *Target*. Redferns was a firm of solicitors acting for both the borrowers and the lender, Target Holdings. Redferns held the mortgage advance of £1.5 million on a bare trust for Target Holdings, with authority to release the money to the borrowers only upon receipt of the executed conveyance and mortgage of the property. In breach of trust, Redferns released the money before the documents were executed. The property was in due course found to be worth only £500,000. Target Holdings argued that Redferns should reconstitute the trust fund by paying the difference between the value of the property and the money advanced to the borrowers. This was accepted by the

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18. It is for this reason that the language of "substitutive compensation" is sometimes used: see Steven Elliott, *Compensation Claims Against Trustees* (PhD Dissertation, Oxford University Faculty of Law Library, 2002 [unpublished]; Steven Elliott & James Edelman, "Money Remedies Against Trustees" (2004) 18:3 Tolley's Trust Law International 116; *Agricultural Land Management Ltd v Jackson [No 2]*, [2014] WASC 102 (Austl) at paras 334-49 [*Jackson (No 2)*].
19. *Knott*, *supra* note 11 at paras 79, 80; *Re Bennison* (1889), 60 LT 859 (Ch (Eng); *Re Salmon* (1889), 42 Ch D 351 (CA (Eng)) at 357 [*Salmon*].
20. Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 Law Quarterly Review 214 at 255.

Court of Appeal,[21] but rejected by Lord Browne-Wilkinson, who gave the only reasoned speech in the House of Lords. Lord Browne-Wilkinson effectively reasoned in terms of the trustee being under a "secondary obligation" to compensate the beneficiary for losses caused by the breach of trust — precisely the approach criticised by Lord Millett in the passage quoted above.

Yet even the decision in *Target* did not necessarily mean that the "traditional" approach to falsification of the account was moribund, as Lord Browne-Wilkinson also said:

> I have no doubt that, until the underlying commercial transaction has been completed, the solicitor can be required to restore to client account moneys wrongly paid away. But to import into such a trust an obligation to restore the trust fund once the transaction has been completed would be entirely artificial.[22]

Significantly, in *Target* the relevant mortgage documents were subsequently executed and received by Redferns. Since Redferns remained trustees even after their breach of trust, Redferns still had the authority to receive those mortgage documents as trustees on behalf of the trust.[23] The trust fund had therefore been reconstituted and there was nothing wrong with the state of the trust fund at the time the account was taken: Target Holdings was entitled to see *either* £1.5 million *or* the mortgage documents in the trust fund. The latter was present, so there was no defect in the fund. Remedies in equity are assessed at the date of judgment, not the date of breach.[24] Using the language of Lord Browne-Wilkinson, it might be said that the transaction had been "completed" upon receipt of the mortgage documents.

Such reasoning meant that, even after *Target,* some courts continued to employ the strict approach of falsifying the account, awarding substantial relief even where the trustee's breach of duty did not cause any

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21. This claim succeeded in the Court of Appeal: *Target Holdings v Redferns*, [1994] 1 WLR 1089 (CA (Civ)(Eng)).
22. *Target*, *supra* note 2 at 436.
23. Millett, *supra* note 20; Matthew Conaglen, "Explaining *Target Holdings* v *Redferns*" (2010) 4:3 Journal of Equity 288.
24. *Target*, *supra* note 2 at 437; see too *AIB*, *supra* note 1 at para 140.

loss. For example, in *Knight v Haynes Duffell Kentish & Co*[25] ("*Knight*"), the claimants advanced monies to its solicitors, Linnels. Linnels was to pay the monies to a company on completion of a transaction. Upon completion, a trade name was to be assigned to the claimants. In breach of trust, Linnels paid away the monies without ensuring the assignment of the trade name. The claimants therefore instructed the defendant firm of solicitors (HDK) to recover its losses from Linnels, but HDK delayed the litigation to such an extent that it was ultimately struck out for want of prosecution. The claimants therefore sued HDK for the lost opportunity to sue Linnels in breach of trust. Even though the trademark was actually worthless, the Court of Appeal held that such facts did not affect the remedy to be awarded. The Court was not concerned with compensating losses caused by Linnels' breach of trust, but rather with falsifying the disbursement made in breach of trust. As Lord Justice Aldous said:

> First, in the present case the breach was the release of the money. The trust required the money to be held against provision of both the shares and the assignment. As there had been no assignment, the money should not have been paid out. Second, the principle in *Target* only applies where the underlying transaction covered by the trust had been completed.[26]

In *Knight,* the transaction had not been completed. The Court of Appeal therefore decided that the facts fell outside the scope of Lord Browne-Wilkinson's causal analysis in *Target.*

The decision in *Knight* seems to be consistent with the traditional approach to the accounting process, but has perhaps now been undermined by the decision in *AIB.* Mark Redler & Co is a firm of solicitors which was retained to act for the Sondhi family and AIB, a bank, on the re-mortgage of the Sondhis' family home. AIB advanced £3.3 million to Redler for this purpose. The letter of instruction incorporated the Council of Mortgage Lenders' Handbook for England and Wales,[27] by virtue of which the mortgage lender required a fully enforceable first charge over the property and that all existing charges be redeemed on or

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25. [2003] EWCA Civ 223.
26. *Ibid* at para 38.
27. Council of Mortgage Lenders, "CML lenders' handbook for conveyances" (2015), online: <www.cml.org.uk/cml/handbook>.

before completion. The handbook also stated: "You [Redler] must hold the loan on trust for us [AIB] until completion. If completion is delayed, you must return it to us when and how we tell you".

The Sondhis' property was already subject to a charge in favour of Barclays Bank Plc. The Barclays charge secured borrowings of about £1.5 million on two accounts. Unfortunately, Redler only paid to Barclays enough money to pay off one of the two accounts (about £1.2 million), which was insufficient to redeem the Barclays charge. £309,000 remained outstanding. Barclays refused to release its charge unless the debt was paid in full. The borrowers, who had received the balance of the £3.3 million, initially promised to do so, but never did. Redler tried to resolve its error without involving AIB but eventually told the bank of the breach of duty; AIB then negotiated directly with Barclays, and AIB's charge was registered as a second charge. The Sondhis subsequently defaulted on the loan and declared bankruptcy. The property was sold by Barclays for £1.2 million. AIB as second chargee received £867, 697.

By paying away the mortgage monies without obtaining a first legal charge over the property, Redler acted in breach of trust.[28] AIB argued that completion had not yet occurred, so Redler remained under a duty to hold the mortgage advance on trust for AIB. AIB therefore sought £3.3 million in order to reconstitute the trust fund.[29] Redler, on the other hand, argued that its liability should be limited to the difference in value of the bank's security caused by Redler's failure to pay off the entirety of the Barclays charge; this was only around £300,000 (the sum received by Barclays as first chargee).

Redler's argument succeeded at every level. A unanimous Supreme

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28. *AIB*, *supra* note 1 at para 140 Lord Reed was attracted by the idea that the breach of trust only involved the misapplication of the £309,000 paid to the Sondhi's rather than Barclays, but this had been rejected by the Court of Appeal and was not challenged in the Supreme Court; the breach of trust was paying away the entire £3.3 million.
29. Strictly the claim was for £3.3 million minus the £867,697 actually received from the sale of the property.

Court[30] insisted that a causal link between Redler's breach of duty and AIB's loss needed to be established, regardless of whether the claim was brought at common law or in equity.

There was one potentially important difference between *Target* and *AIB*. In *Target,* the relevant mortgage documents were subsequently executed and received by Redferns. In *AIB,* Redler *never* obtained a first legal charge over the property in favour of AIB. AIB thought that since completion required there to be a first legal charge in its favour, and this never eventuated, completion had not occurred, and that as a result Redler was required to restore the monies wrongly paid away. Yet Lord Toulson side-stepped such arguments because:

> as a commercial matter the transaction was executed or 'completed' when the loan monies were released to the borrowers. At that moment the relationship between the borrowers and the bank became one of contractual borrower and lender.[31]

This pragmatic approach is perhaps understandable given the context of the dispute in question. AIB was anxious to push through the Sondhis' remortgage of the property, which was "driven by the need to facilitate business lending which the bank was very keen to make".[32] But the result very much broadens the scope of "completion". The Supreme Court was prepared to find that there was completion upon satisfaction of the commercial purpose, but this is less certain than insisting upon compliance with the terms of the solicitor's instructions. Redler's breach of trust meant that there was no completion in accordance with the requirements of Redler's instructions. The decision in *AIB* makes it more difficult for a lender — or any settlor — to set the terms of completion. A court might find there to be completion even if the beneficiary would not agree. Indeed, AIB did not simply seek the relationship of lender-borrower; AIB wanted to be a secured lender with priority over other chargees. It might be thought that this commercial purpose was not fulfilled.

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30. Lord Toulson and Lord Reed gave reasoned speeches; Lord Neuberger, Lady Hale, and Lord Wilson agreed with both speeches.
31. *AIB*, *supra* note 1 at para 74.
32. See *e.g. AIB*, *supra* note 1 at para 14.

It is suggested that the approach taken in *AIB* may be unfortunate. It restricts the ability of settlors to define completion according to their wishes. For instance, imagine that, in breach of trust, a trustee purchased a second-hand car rather than a new car. Has the transaction been completed? On the approach of the Supreme Court in *AIB,* it might be tempting to conclude that, since the trustee has purchased a car, the beneficiary should simply sue for the difference in value between the second-hand car he now has rather than the new car he was entitled to under the terms of the trust. Yet it seems unsatisfactory for the wrong type of car to be the beneficiary's problem, rather than the trustee's problem.

There was a clear logic behind equity's traditional recognition of the beneficiary's ability to choose to falsify the disbursement made and treat the car as having been purchased with the trustee's own money; on that approach, the unwanted second-hand car was the trustee's problem to deal with. The hassle of selling it to realise its value, for example, lay with the wrongdoing trustee rather than the innocent beneficiary. This is admittedly different from the approach at common law, but, as Lord Millett explained,[33] this might be justified by the higher standards demanded by equity. A trustee holds particular power over a beneficiary and a beneficiary's assets, and should be held to a higher standard. It is important that a trustee complies with the terms of the trust instrument.

A second-hand car can never become a new car, whereas a second charge could become a first charge in circumstances akin to *AIB*. The two cases might therefore be distinguished. At first instance in *AIB*, His Honour Judge David Cooke observed:

> [t]here is no parallel between a charge which is, at the moment of creation, a second ranking security but can be (and is intended and required to be) promoted into a first ranking security by redeeming a prior charge, and a second hand car which can never be transmuted into a new one. The former is what the solicitors were authorised and instructed to obtain in this case and the latter is, on [counsel's] hypothesis, an unauthorised purchase.[34]

This analogy was not pursued on appeal, but the more expansive approach

33. Millett, *supra* note 20.
34. *AIB Group (UK) v Mark Redler & Co*, [2012] EWHC 35 (Ch) at para 30.

of Lord Toulson in particular suggests that the focus should be upon the loss caused by the breach of duty in both instances.

Lord Toulson clearly favoured a shift away from what might have been considered to be earlier orthodoxy. His Lordship thought that treating the trustee solicitors as having paid away their own monies in *AIB* was simply "fairy tales".[35] It might nonetheless be thought that since the solicitors had no authority to pay the money away without obtaining a first legal charge in return, any "fiction" that might be introduced could be tolerated. But in any event, even if the monies paid away are considered to be trust monies that does not inevitably lead to the conclusion that the court should only award compensation for loss. As Lord Justice Longmore recently observed: "[e]quity's response to the breach of this trust is not to give redress for the breach in the form of equitable compensation but to enforce the duty".[36] The means by which the trustee's duty is enforced is through an action in debt.

The action for the agreed sum, or debt claim, is obviously not peculiar to equity. It is not a claim for loss, or concerned with any secondary obligations that might arise after a breach of duty. Rather, the action for the agreed sum seeks to enforce the primary obligations voluntarily assumed by the defendant in the action. The action for an "equitable debt" was apparently accepted by earlier cases. For example, in *ex parte Adamson, In re Collie*,[37] Lord Justice of Appeal James and Lord Justice of Appeal Baggallay noted that relief in such cases was by way of "a suit … for equitable debt or liability in the nature of a debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated".[38] This also explains the outcome of cases such as *Re Dawson* and *Knight*.

In *AIB* Lord Toulson dismissed the analysis based upon debt. He recognised that the authorities do refer to "an equitable debt, or liability

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35. *AIB*, *supra* note 1 at para 69.
36. *Novoship (UK) Ltd v Nikitin*, [2014] EWCA Civ 908 at para 104.
37. (1878), 8 Ch D 807 (CA (Eng)) [*Collie*].
38. *Ibid* at 819. See also *In re Smith, Fleming & Co* (1879), 11 Ch D 306 (CA (Eng)) at 311, per James LJ; *Webb v Stenton* (1883), 11 QBD 518 (CA (Eng)) at 530, per Fry LJ.

in the nature of a debt",[39] but thought that the language of debt was only used because it was necessary "long before the expression 'equitable compensation' entered the vocabulary".[40] Lord Toulson concluded that equity only ever really awarded compensation which was "clothed by the court in the literary costume of equitable debt, the debt being for the amount of the loss caused by the fraud".[41] The evocative rhetoric is not, however, entirely convincing. It is not apparent from such earlier cases that the language of debt was simply a "literary costume". Indeed, an action for the agreed sum may appear particularly appropriate in a situation where the trustee has undertaken to return trust monies to the beneficiary if completion according to the instructions does not occur.[42] This was precisely the case in *AIB*. After all, the bank had stipulated that "You [Redler] must hold the loan on trust for us [AIB] until completion. If completion is delayed, you must return it to us when and how we tell you".[43] It is possible to view this as having created an obligation for Redler to pay AIB £3.3 million. This debt could be discharged either by Redler's paying over £3.3 million to AIB, or by ensuring completion of the transaction. The completion of the transaction would have discharged the obligation to pay the debt. This analysis was rejected by Lord Toulson, who said that "a monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal".[44] This would mean that all debt claims, even those brought at common law,[45] should be considered penal in nature. That would be a startling conclusion. It is not penal to hold a party — particularly a trustee — up to the duties to which he or she voluntarily assented.[46] This cannot be the view which

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39. *AIB*, *supra* note 1 at para 61, citing *Collie*, *supra* note 37.
40. *AIB*, *supra* note 1 at para 61.
41. *Ibid*. See also Ho, *supra* note 8 at 215-16.
42. *AIB, supra* note 1 at para 4.
43. See text following note 27.
44. *AIB*, *supra* note 1 at para 64.
45. Common law claims are not at all uncommon: see, notoriously, *White & Carter (Councils) Ltd v McGregor*, [1962] AC 413 (HL).
46. Thus the remedies of specific performance and injunction – which similarly enforce the primary obligations owed – should also not be considered to be penal.

Lord Toulson truly intended to express.

Nevertheless, there are clearly significant differences between the old orthodoxy and the new approach. For instance, in *Hall v Libertarian Investments Ltd*[47] ("*Libertarian*"), Lord Millett, sitting as a non-permanent judge of the Hong Kong Court of Final Appeal, emphasised that after an unauthorised disbursement has been falsified, the trustee must make good the deficit in the trust fund either *in specie* or in money, but that this is "not compensation for loss".[48] Yet in *AIB,* Lord Reed thought that "[i]f the property cannot be restored *in specie*, the trustee must restore the trust fund to the position it would have been in but for the breach, by paying into the fund sufficient pecuniary compensation to meet that objective".[49] Shifting away from an action for the agreed sum towards compensation allows scope for arguments surrounding consequential loss which are simply irrelevant in a debt claim. After all, if a builder completes his or her work for a client and then sues the client for the agreed sum, it does not matter that the builder did not really suffer any loss at all (because if he had not done the work he would have suffered even greater losses) or that the builder suffered much more extensive losses (because the work was much more expensive than envisaged). The client would simply have to pay the builder the agreed sum.

However, according to the decision in *AIB,* this analysis based upon the liquidated sum should no longer be employed when trustees pay away money in breach of trust. The focus should instead be upon awarding compensation for loss. Before analysing how equitable compensation should be understood in greater detail, it is important to highlight some further limitations and difficulties with the decision in *AIB* which might restrict its impact elsewhere in the common law world.

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47. [2013] HKCFA 93 [*Libertarian*].
48. *Ibid* at 168.
49. *AIB*, *supra* note 1 at para 90.

III. The Scope of *AIB*

A. Geographical Scope

In *FHR European Ventures LLP v Cedar Capital Partners LLC*[50] ("*FHR*"), Lord Neuberger, speaking for the Supreme Court, stated: "it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world".[51] This was picked up by Lord Reed in *AIB*,[52] and Lord Toulson also relied upon decisions elsewhere in the common law world in favouring a compensatory approach. However, it is uncertain whether the reasoning in *AIB* will convince the highest courts in other jurisdictions.[53] Lord Reed thought that there exists:

> a broad measure of consensus across a number of common law jurisdictions that the correct general approach to the assessment of equitable compensation for breach of trust is that described by Justice McLachlin (as she then was) in *Canson*[54] and endorsed by Lord Browne-Wilkinson in *Target.*[55]

However, it is unclear how broad any measure of consensus really is. *Canson* is a much-cited decision, but concerned a lawyer's conflict of duty rather than a breach of trust.[56] The lawyer did not hold any property on trust, so there was no breach of any custodial duty. Indeed, the court in *Canson* explicitly recognised that breach of trust cases required reconstitution of trust funds and that equitable compensation was only appropriate where reconstitution was not possible. McLachlin J even said that "compensation is an equitable monetary remedy which

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50. [2014] UKSC 45 [*FHR*].
51. *Ibid* at para 45.
52. *AIB*, *supra* note 1 at para 121.
53. The question seems open in Singapore: see *e.g. Maryani Sadeli v Arjun Permanand Samtani*, [2014] SGCA 55; *Then Khek Koon v Arjun Permanand Samtani*, [2014] 1 SLR 245 (Sing (HC)).
54. *Canson, supra* note 7.
55. *AIB*, *supra* note 1 at para 133.
56. For thorough discussion, see Lionel Smith, "The Measurement of Compensation Claims Against Trustees and Fiduciaries" in Elise Bant & M Harding, eds, *Exploring Private Law* (Cambridge: Cambridge University Press, 2010) at 363.

is available when the equitable remedies of restitution and account are not appropriate".[57] Lord Reed cited subsequent decisions of the Supreme Court of Canada in support of McLachlin J's dissenting speech, but none concerned a misapplication of trust property.[58] Similarly, a trust was not at issue in the decision of the Supreme Court of New Zealand in *Premium Real Estate Ltd v Stevens.*[59]

There is, in principle, a distinction between breaches of the fiduciary duty of loyalty and breaches of the custodial duties of a trustee.[60] Yet by relying upon cases properly concerning breach of fiduciary duty as relevant to cases concerning breach of trust, the decisions in *Target* and *AIB* have blurred the boundaries. This might suggest a shift in approach, such that the principles relevant to claims for breach of fiduciary duty are also relevant to claims for breach of trust. That will be considered more fully below. But it is a little odd that there is no recognition in either *Target* or *AIB* that this is a potentially controversial step, and the lack of transparency over the moves made by the Supreme Court undermines the persuasiveness of its actions. Indeed, in *Target* — the origin of this shift in approach — Lord Browne-Wilkinson did not even mention the word "falsify", and instead relied upon cases concerned with surcharge[61] or breach of fiduciary duty[62] in support of his conclusion that

57. *Canson*, *supra* note 7 at 556.
58. *AIB*, *supra* note 1 at para 122, Lord Reed cited *M(K) v M(H)*, [1992] 3 SCR 6 (which concerned incest); *Cadbury Schweppes v FBI Foods*, [1999] 1 SCR 142 (which concerned breach of confidence); and *Hodgkinson v Simms*, [1994] 3 SCR 377 (which involved breach of fiduciary duty due to conflict of interest).
59. [2009] NZSC 15 cited in *AIB*, *supra* note 1 at para 126 Lord Reed explicitly recognised that the other New Zealand case upon which he relied, although a trust case, was essentially an example of surcharge rather than falsification: *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*, [1999] 1 NZLR 664 (CA) [*Bank of New Zealand*], cited at *AIB*, *supra* note 1 at para 127.
60. James Penner, "Distinguishing Fiduciary, Trust and Accounting Relationships" (2014) 8 Journal of Equity 203.
61. See *e.g. Nestle*, *supra* note 10; *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2)*, [1980] Ch 515 (Eng) [*Bartlett Nos 1 and 2*].
62. See notably *Canson*, *supra* note 7.

the only remedy open to Target Holdings was equitable compensation.[63] Nevertheless, this inclination to blur conceptual boundaries may be gathering sufficient steam that it is too late to reverse the trend. For instance, Lord Toulson in *AIB*,[64] and Permanent Judge Ribeiro in *Libertarian*[65] cited with approval the following schema of Justice Tipping in *BNZ v NZ Guardian Trust Co Ltd*:[66]

> [b]reaches of duty by trustees and other fiduciaries may broadly be of three different kinds. First, there are breaches leading directly to damage to or loss of the trust property; second, there are breaches involving an element of infidelity or disloyalty which engage the conscience of the fiduciary; third, there are breaches involving a lack of appropriate skill or care.[67]

Ribeiro PJ thought that the principles for quantifying loss were the same in the first two categories of case. This might provide some support for the approach taken in *AIB*.

However, it is important to note that the decision of the Hong Kong Court of Final Appeal in *Libertarian* essentially concerned surcharge rather than falsification. In *Libertarian,* the trustee held monies for the purpose of acquiring shares in a company on behalf of the beneficiary. In breach of trust, the trustee misappropriated the trust monies and falsely told the beneficiary that the relevant shares had been acquired. The value of the shares rose considerably. Faced with such facts, the beneficiary could have falsified the disbursement made and sought reconstitution of the trust fund through the trustee's paying back the money taken, but this was much less valuable than a reparative claim for the losses suffered through not acquiring the shares as instructed. The beneficiary therefore sued the trustee for the lost profits that would have been made if the trustee had acted in accordance with his duties. This was therefore a case of loss: the beneficiary sought the difference between the value of the trust fund at the date of judgment and the value that

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63. See *e.g.* Charles Mitchell "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66:1 Current Legal Problems 307 at 323-27.
64. *AIB*, *supra* note 1 at para 60.
65. *Libertarian*, *supra* note 47 at para 75.
66. *Bank of New Zealand, supra* note 59.
67. *Ibid* at 678.

the trust fund would have had had the trustee acted properly. However, Lord Millett also considered the basis of falsification and insisted that it was inappropriate to consider compensation for loss in instances of restoration following a misapplication of trust assets.[68] The two sides of the account — falsification and surcharge — rest on different bases.

Lord Millett's comments in *Libertarian* do not sit comfortably with the thrust of the reasoning in *AIB.* Nor does the judgment of the High Court of Australia in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*[69] ("*Youyang*") seem entirely consistent with that in *AIB.* In *Youyang,* a company paid over monies to solicitors for the purposes of an investment. Part of those monies were to be paid away by the solicitors in return for a bearer deposit certificate which would provide security for the investment. Upon receipt of that certificate, the solicitors would then pay the rest of the money to an investment company for investment in speculative market activities. In breach of trust, the solicitors paid the money away without receiving the bearer certificate. Lord Reed observed that *Youyang* was based on "broadly analogous facts" to *Target,* "with the important distinction that the security — which would have been good — was never provided".[70] This clearly enabled *Target* to be distinguished; the High Court in *Youyang* ordered the solicitors to repay the monies wrongly paid away in breach of trust. Lord Reed thought that this meant *Youyang* was consistent with *Target.* That must be right on the question of whether or not the fund was reconstituted. But it is less clear whether the reasoning in *Youyang* is truly consistent with *AIB.* The first legal charge over the Sondhis' property was not provided in *AIB,* just as the security in *Youyang* was never provided, yet Redler was not ordered to repay the monies advanced in breach of the trust. The High Court in *Youyang* was unconcerned with loss, and uninterested in the fact that the conduct of third parties meant that the loss suffered by the claimants would have happened anyway. As the High Court held that Youyang was not provided at any stage with the security for which it had bargained. It

68. *Libertarian*, *supra* note 47 at para 168.
69. [2003] HCA 15 [*Youyang*].
70. *AIB*, *supra* note 1 at para 124, per Lord Reed.

is not to the point that, in addition to the breaches of trust by Minters, there may also have been dishonest and discreditable subsequent acts by third parties which led to the loss of the funds.[71] To present the case by fixing upon those subsequent acts, to adopt the remarks of Bowen LJ in *Magnus*,[72] would be "an ocular illusion", because the loss of the trust funds occurred as soon as the trustee wrongly disbursed them, at the completion on 24 September 1993.[73]

The High Court insisted that trustees need to be "kept up to their duty".[74] In *AIB,* by contrast, the fact that the loss would have happened anyway *did* affect the compensatory remedy awarded. Perhaps the cases are distinguishable since the reason why the losses would have happened anyway in *Youyang* was the conduct of a third party, whereas in *AIB* the reason was a fall in the property market. The reasoning of *Youyang* is not obviously the same as that employed in *AIB.* The High Court of Australia did not focus upon loss caused by a breach of duty, whereas this was central to the decision in *AIB.*

B. Commercial Trusts

After *Target,* the scope of the compensatory approach was a little unclear given Lord Browne-Wilkinson's novel distinction between traditional and commercial trusts. His Lordship said:

> [t]he obligation to reconstitute the trust fund applicable in the case of traditional trusts reflects the fact that no one beneficiary is entitled to the trust property and the need to compensate all beneficiaries for the breach. That rationale has no application to a case such as the present. To impose such an obligation in order to enable the beneficiary solely entitled (*i.e.* the client) to recover from the solicitor more than the client has in fact lost flies in the face of common sense and is in direct conflict with the basic principles of equitable compensation. In my judgment, once a conveyancing transaction has been completed the client has no right to have the solicitor's client account

71. *McCann v Switzerland Insurance* [2000], 203 CLR 579 (HCA) at 18, 135; *Magnus v Queensland National Bank* (1888), 37 Ch D 466 (CA (Eng)) at 471-72, 477, 479-80 [*Magnus*] cited in *Youyang*, *supra* note 69 at para 63.
72. *Magnus*, *supra* note 71 at 480.
73. *Youyang*, *supra* note 69.
74. *Ibid.*

> reconstituted as a 'trust fund'.[75]

This distinction between "traditional" and "commercial" trusts has been questioned.[76] For example, in *Bairstow v Queens Moat Houses Plc,*[77] Lord Justice Robert Walker said:

> [i]t may be that a more satisfactory dividing line is not that between the traditional trust and the commercial trust, but between a breach of fiduciary duty in the wrongful disbursement of funds of which the fiduciary has this sort of trustee-like stewardship and a breach of fiduciary duty of a different character (for instance a solicitor's failure to disclose a conflict of interest as in Canson).[78]

In *AIB,* Lord Reed noted this controversy, and said "[t]hat it is not to say that there is a categorical distinction between trusts in commercial and non-commercial relationships".[79] The duties and liabilities of trustees depend upon the terms of the trust and relationship between the parties. Lord Toulson held that "it is a fact that a commercial trust differs from a typical traditional trust in that it arises out of a contract rather than the transfer of property by way of gift. The contract defines the parameters of the trust".[80] In such circumstances, the duties of the trustee are "likely to be closely defined and may be of limited duration".[81]

Lord Toulson cited with approval an article by Professor Hayton.[82]

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75. *Target*, *supra* note 2 at 436.
76. See also *Youyang*, *supra* note 69 where the High Court of Australia considered it preferable to focus on "the scope and purpose of the trust" at para 49. It may be that an account should only be available where there is continuous and custodial trusteeship: Joshua Getzler, "Equitable Compensation and the Regulation of Fiduciary Relationships" in Peter Birks & Francis Rose, eds, *Restitution and Equity Volume 1: Resulting Trusts and Equitable Compensation* (London: Mansfield Press, 2000) 249 at 249-50.
77. [2001] EWCA Civ 712.
78. *Ibid* at para 53.
79. *AIB*, *supra* note 1 at para 102.
80. *Ibid* at para 70.
81. *Ibid*. See also *AIB*, *supra* note 1 at paras 33, 67.
82. *Ibid* at para 71, citing David Hayton "Unique Rules for the Unique Institution, the Trust" in Simone Degeling & James Edelman, eds, *Equity in Commercial Law* (Sydney: Lawbook Co, 2005).

Hayton argued that "where a bare trust is mere incidental machinery in the furtherance of a contractual agreement it seems that there are sufficient policy reasons to oust traditional trust law principles as to consequential losses".[83] It might therefore be arguable that the Supreme Court in *AIB* was essentially focused upon the remedies that flow from a breach of a bare, commercial trust. If so, the traditional approach towards falsification may be maintained in the context of traditional trusts. After all, the departure from the general, traditional approach in one particular area does not necessarily undermine the more general rule. Yet the tenor of the judgment in *AIB* suggests that the same rules should apply regardless of whether a "commercial" or "traditional" trust is at issue.[84] Indeed, the contrary would be somewhat strange: a lay trustee acting gratuitously for a traditional trust might be subject to more stringent liability than a professional who is paid for his services. This may be specially odd since professional trustees are more likely to enjoy the benefit of an exemption clause.[85] It is suggested that *AIB* is likely to lead to a focus upon loss caused by a breach of trust, regardless of the type of trust at issue. There is perhaps a certain irony in this conclusion. Some commentators forcefully argued that no distinction should be drawn between commercial trusts and traditional trusts in order to maintain the traditional approach of falsification in all contexts.[86] Those arguments against a commercial-traditional trust divide are persuasive, but are now likely to be used to focus attention upon equitable compensation for loss caused in respect of breaches of all types of trust.

IV. Principles of Equitable Compensation

The scope and meaning of "equitable compensation" remains unclear. It was used in *FHR* to cover a personal claim for an account of profits

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83. Hayton, *supra* note 82 at 305; see also *Akai*, *supra* note 6.
84. Peter Turner, "The New Fundamental Norm of Recovery for Losses to Express Trusts" (2015) 74:2 Cambridge Law Journal 188.
85. See *e.g. Armitage v Nurse*, [1998] Ch 241 (CA (Civ)(Eng)); *Walker v Stones*, [2001] QBD 902 (CA (Civ)(Eng)).
86. See *e.g.* Millett, *supra* note 20 at 224-25.

made in breach of fiduciary duty.[87] That remedy is probably best seen as restitutionary or gain-based rather than compensatory, since the claimant need not suffer any loss.[88] Equitable compensation should exclusively denote loss-based claims. It is important to consider the principles that inform an award of equitable compensation.

It appears that similar principles might now apply to both "falsification" and "surcharge" cases. In *Target,* Lord Browne-Wilkinson relied upon cases of surcharge in the context of a claim which was really based upon falsification,[89] and the elision between the two appears to now be complete since Lord Toulson concluded that "in a practical sense both are reparative compensation".[90] It will therefore be important to consider the principles underpinning "reparative compensation" or "surcharge" since they appear to underpin the award of equitable compensation for breach of trust more generally.

Beneficiaries have often sought to surcharge the trust fund where the trustee has failed to comply with his duties of care, meaning that the fund is not worth as much as it would have been had the trustee not breached his duties. At times, the principles of surcharge have developed by reference to the principles of falsification.[91] For instance, in *Re Mulligan* Justice Panckhurst cited cases such as *Re Dawson* before saying:

> I accept that the obligation to make restitution imposed on defaulting trustees and fiduciaries is more absolute than the common law obligation to pay damages for tort or breach of contract, and the considerations of causation, foreseeability or remoteness are not of great moment […] [92]

However, the language of restitution or restoration seems inapt in the context of reparative compensation. As the editors of Meagher, Gummow and Lehane have pointed out: "it stretches belief to speak of restoration — suggesting restoration to a *prior* position — when the relief is designed to place the trust or the fiduciary's principal in the *presently*

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87. See *e.g. FHR*, *supra* note 50 at para 1, per Lord Neuberger.
88. *Cf. FHR*, *supra* note 50 at para 120, per Lord Reed.
89. See *e.g. Nestle*, *supra* note 10; *Bartlett Nos 1 and 2*, *supra* note 61.
90. *AIB*, *supra* note 1 at para 54.
91. Mitchell, *supra* note 63 at 320-27.
92. *Mulligan*, *supra* note 10 at 507-509.

correct position".[93] As Lord Justice Brightman put it in *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2)*, "the so-called restitution which the defendant must now make … is in reality compensation for loss suffered by the plaintiffs".[94]

It therefore does not seem appropriate to look across to the falsification cases based upon an "equitable debt" when developing principles of equitable compensation in the context of surcharge. The better view is that principles of reparative compensation have traditionally been considered to be distinct from those underpinning falsification. Yet in the wake of *AIB,* it would seem that the principles underpinning reparative compensation are relevant to equitable compensation more generally, even in the context of misapplied trust property.

In *Bristol & West Building Society v Mothew*[95] ("*Mothew*") Lord Justice Millett said:

> [e]quitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case.[96]

This now seems to be the orthodox approach in England and Wales, even though in *AIB* Lord Reed noted that this "dictum has been questioned, or given a restrictive application, in a number of other jurisdictions".[97] However, it would seem to follow from this passage that the common law rules on damages are only applied by analogy. The equitable rules exist independently of their common law counterparts. Indeed, there is obviously no monolithic concept of the common law rules on damages.[98] The principles differ depending on the nature of the wrong involved — breach of contract, the tort of negligence, and the tort of deceit all have different rules, for example — and it is important to be clear to

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93. Heydon, *supra* note 4 at 23-170.
94. *Bartlett Nos 1 and 2*, *supra* note 61 at 545.
95. *Mothew*, *supra* note 10.
96. *Ibid* at para 17.
97. *AIB*, *supra* note 1 at para 119.
98. *Ibid*.

what common law wrong an analogy should be made when elucidating equitable principles.

Where the breach of duty in question concerns the failure to exercise the necessary degree of care and diligence, the view of Millett LJ that a stricter approach of equity is not required has some attraction.[99] However, the drawing of an analogy with common law notions has not been met with universal acceptance. For instance, in *Youyang,* the High Court of Australia said:

> [h]owever, there must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.[100]

As McLachlin J insisted in *Canson,* the relationship at issue has "trust, not self-interest, at its core, and when the breach occurs, the balance favours the person wronged".[101] Given the control the trustee has over the beneficiary's property, leading to a sense of "vulnerability" about the beneficiary, there are strong arguments in favour of stricter rules in equity which might be employed in order to protect further the beneficiary.[102]

Upon taking an account, the focus was very clearly upon the state of the trust fund. This is why it has been said that "the relevant loss is the loss suffered by the trust estate or the trust fund, not by the beneficiaries or objects as such".[103] Yet in *Mothew*, Millett LJ stated that "[e]quitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation *to the plaintiff for his loss*".[104] In a similar vein, in *Target,* Lord Browne-Wilkinson appeared

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99. *NZ Guardian Trust, Permanent Building Society (in liq) v Wheeler* (1994), 11 WAR 187 (HCA), per Ipp J.
100. *AIB*, *supra* note 1 at para 39.
101. *Canson*, *supra* note 7 at 543. See Heydon, *supra* note 4 at 23-265, 23-350.
102. See Part V, below.
103. Heydon, *supra* note 4 at 23-360. See *e.g. Re Dawson*, *supra* note 11; *Salmon*, *supra* note 19 at 371.
104. *Mothew*, *supra* note 10 at 17 [emphasis added].

to state that compensation should be paid to the beneficiary directly; this approach was endorsed in *AIB.*[105] Such comments might be limited to circumstances where there is a bare trust with a sole beneficiary, but could conceivably lead to a focus on a particular beneficiary's loss, including consequential losses.[106] This would be another significant development brought about by the *Target* line of cases. However, it is suggested that the view expressed by Lord Reed in *AIB* — that the same remedy should be available regardless of whether an account is taken or short-circuited by "equitable compensation"[107] — tends to indicate that the focus should still be on loss suffered by the trust fund, even though analogies drawn with the common law may lead to different outcomes.

In any event, it seems sensible to consider how the requirements recognised to be relevant to compensation at common law might apply in equity.[108] As Lord Steyn observed in *Smith New Court Securities Ltd v Citibank NA*[109] ("*Smith New Court*"):

> [i]t is now necessary to consider separately the three limiting principles which, even in a case of deceit, serve to keep wrongdoers' liability within practical and sensible limits. The three concepts are causation, remoteness and mitigation. In practice the inquiries under these headings overlap. But they are distinct legal concepts.[110]

In addition, considerations such as contributory negligence and the nature of recoverable loss will be considered.

A. Concurrent Liability

Most claims for breach of trust will be "stand-alone" claims in the sense that the only possible claim a beneficiary has against the trustee will be for breach of trust. But it is possible for there to be concurrent claims in contract and tort as well. Indeed, there was such concurrent liability on

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105. See *e.g. AIB*, *supra* note 1 at para 91, per Lord Reed.
106. Jamie Glister, "Breach of Trust and Consequential Loss" (2014) 8:3 Journal of Equity 235.
107. See *e.g. AIB*, *supra* note 1 at para 91; *Libertarian*, *supra* note 47. *Target, supra* note 2.
108. See *e.g. AIB*, *supra* note 1 at para 81, per Lord Reed.
109. [1997] AC 254 (HL) [*Smith New Court*].
110. *Ibid* at 284.

the facts of *AIB.* Nevertheless, it is important that the equitable principles of compensation should not be distorted by considerations regarding concurrent liability, when in most instances concurrent liability simply will not arise.

On one interpretation of the judgment of Lord Neuberger in *Akai,*[111] along with that of Lord Toulson in *AIB*,[112] it may be that the equitable rules of compensation should be the same as those which apply at common law. On another view, the thrust of their Lordships' reasoning may be that, in the commercial context at least, the claimant should not recover more through an equitable claim than would be available at common law. In some respects, this is unsurprising. Even in the context of concurrent claims in contract and tort, there are strong calls for the contractual rules to trump the tortious rules, since the parties were not strangers and had the opportunity to negotiate as is the case in any contractual relationship.[113] Following this approach, there may be a hierarchy within the law of obligations which could determine which set of rules should apply to a claim for compensation on any given set of facts. At the pinnacle would be contractual rules, and these should govern the particular dispute, regardless of whether the same facts are then framed to ground a claim in tort or equity.[114]

However, this type of approach does not seem likely to prevail. Orthodoxy currently insists that where the claimant has a choice about whether to sue in contract, tort or equity, he can exercise that choice freely, taking into account which claim is likely to benefit him

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111. *Akai, supra* note 7.
112. *Canson, supra* note 6.
113. See *e.g.* Andrew Burrows, *Remedies for Torts and Breach of Contract*, 3d (Oxford: Oxford University Press, 2004) at 88-94; Andrew Burrows, "Comparing Compensatory Damages in Contract and Tort: Some Problematic Issues" in Simone Degeling, James Edelman & James Goudkamp, eds, *Torts in Commercial Law* (Sydney: Thomson Reuters, 2011) 3 at 3-7. And see also the recent decision of the Court of Appeal in *Wellesley Partners LLP v Withers LLP,* [2015] EWCA Civ 1146.
114. *Cf.* Hayton, *supra* note 82.

the most.[115] This was recognised by Lord Reed in *AIB*,[116] and seems well-established.[117] Indeed, it was also accepted by Lord Neuberger in *Akai*.[118] It is suggested that the real issue is the extent to which common law notions should influence equitable reasoning. This is how best to understand the following remarks of Justice La Forest in *Canson*:

> I have no doubt that policies underlying concepts like remoteness and mitigation might have developed from an equitable perspective. However, given the paucity of authority in the field, it is scarcely surprising that courts will deal with a case falling properly within the ambit of equity as if it were a common law matter or as justifying the use of its mode of analysis.[119]

As has already been noted, *Canson* was a case concerning breach of fiduciary duty not breach of trust. But given the use of *Canson* and other cases which did not concern trusts in both *Target* and *AIB,* some of the comments made regarding breach of fiduciary duty may be exploited when determining the principles of compensation that apply in the trust context.[120] Indeed, in *Swindle v Harrison*[121] ("*Swindle*"), Lord Justice Mummery thought that "fiduciary duties are equitable extensions of trustee duties" and similar principles might apply.[122] If so, this is something of a departure from what was said by La Forest J in *Canson*:

> [w]e have been given no case where the principles applicable to trusts have been applied to a breach of a fiduciary duty of the type in question here, and for reasons already given, I see no reason why they should be transposed here. The harshness of the result is reason alone, but apart from this, I do not think that the claim for the harm resulting from the actions of third parties can fairly be looked upon as falling within what is encompassed in restoration for the harm

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115. *Henderson v Merrett Syndicates Ltd*, [1995] 2 AC 145 (HL).
116. See *e.g. AIB*, *supra* note 1 at para 136.
117. Canson, *supra* note 7, per La Forest J ("[w]here concurrent liability lies in tort and contract and in equity, the appellants may sue in whatever manner they find most advantageous" at 565); see *Central Trust Co v Rafuse*, [1986] 2 SCR 147 at 206; *Bartlett Nos 1* and *2*, *supra* note 61 at 95-96.
118. *Akai*, *supra* note 6 at paras 130, 131.
119. *Canson*, *supra* note 7 at 580.
120. *Cf.* Mitchell, *supra* note 63; Penner, *supra* note 60.
121. [1997] 4 All ER 705 (CA) [*Swindle*]
122. *Ibid* at 723.

suffered from the breach.[123]

The departure may be justified by no longer seeking to "restore" the trust fund through an action in equitable debt, but rather awarding compensation for all breaches of trust. Concurrent liability at common law and equity has often arisen in the context of fiduciaries. In the leading case of *Nocton v Lord Ashburton*[124] ("*Nocton*"), Lord Chancellor Viscount Haldane examined the historical development of an action brought by a client against his solicitor for negligence in breach of a duty to be skilful and careful. After the development of the action of assumpsit, the Lord Chancellor thought "it probable that a demurrer for want of equity would always have lain to a bill which did no more than seek to enforce a claim for damages for negligence against a solicitor".[125] However, it is important to appreciate the limits of such comments. They only concern breach of a duty of skill and care. They do not extend to breaches of loyalty which are peculiarly fiduciary.[126]

Shortly before his judgment in *Target,* Lord Browne-Wilkinson had already expressed the view that where the claimant sought a remedy for professional negligence, the law ought to arrive at the same conclusion regardless of whether the claim was brought for breach of contract, tort, or an equitable duty of care.[127] The historical roots of the duties of care apparently made little difference to the compensatory remedies available.

However, some care should be exercised before wholeheartedly adopting such an approach to concurrent claims. As Lord Justice Evans pointed out in *Swindle,* claims in equity might be seen to differ from those in tort[128] because the aim in equity — traditionally, at least — is not to put the parties into the position they would have been in had no wrong occurred. Rather, in equity, the concern is to restore the claimant to the position he was in before the defendant committed the

123. *Canson*, *supra* note 7 at 580.
124. [1914] AC 932 (HL) [*Nocton*].
125. *Ibid* at 956.
126. *Mothew*, *supra* note 10.
127. See *e.g. Target*, *supra* note 2 at 205. See also Somer J in *Day v Mead*, [1987] 2 NZLR 443 (CA) at 458.
128. See *e.g. Livingstone v Rawyards Coal Co* (1880), 5 App Cas 25 (HL).

wrong. The different approach might be justified by the need to offer stronger protection to a beneficiary who was vulnerable under a trust and not inclined towards self-seeking behaviour.[129] As McLachlin J put it, "[i]n short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart".[130]

It is suggested that there are good reasons why equitable rules might differ from those at common law.[131] In *Canson,* McLachlin J went on to say:

> Cooter and Freedman[132] go on to point out that because the fiduciary has superior information concerning his or her acts, it will be difficult to detect and prove breach of these wide obligations; and because the fiduciary has control based on the notion of implicit trust, there is a substantial potential for gain through such wrongdoing. This may justify more stringent remedies than for negligence or breach of contract. As Lord Dunedin put it in *Nocton* … at p. 963: "there was a jurisdiction in equity to keep persons in a fiduciary capacity up to their duty.[133]

The stricter approach in equity might extend not only to stripping wrongdoing trustees of their gains, but also to a stricter approach to compensation for loss. The key question to consider is the nature of any particular obligation owed.[134] As Lord Reed said in *AIB,* "[t]o the extent that the same underlying principles apply, the rules should be consistent".[135] This echoes the comments of McLachlin J in *Canson*: "[i]n so far as the same goals are shared by tort and breach of fiduciary duty, remedies may coincide. But they may also differ".[136] After all, equitable remedies are qualified in character in ways which are not paralleled in the common law. For instance, equitable remedies are always "discretionary"

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129. *Canson*, *supra* note 7 at 543, per McLachlin J; *Vercoe v Rutland Fund Management Ltd,* [2010] EWHC 424 (Ch) at para 343, per Sales J.
130. *Canson*, *supra* note 7 at 543.
131. *AIB*, *supra* note 1 at para 137, per Lord Reed.
132. Robert Cooter & Bradley Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991) 66 New York University Law Review 1045.
133. *Canson*, *supra* note 7 at 543.
134. *AIB*, *supra* note 1 at paras 92-93, per Lord Reed.
135. *Ibid* at para 138.
136. *Canson*, *supra* note 7 at 545.

and may be withheld on the basis of delay or laches, so there exists a system of checks and balances within the equitable system which is absent at common law. As Gummow has pointed out:

> [a]ny effort to import common law concepts must be considered against this background and with an awareness that the common law has developed with an appreciation that in a court of law we cannot impose terms on the party suing; if he be entitled to a verdict, the law must take its course.[137]

Indeed, in *AIB,* Lord Reed observed that "the liability of a trustee for breach of trust, even where the trust arises in the context of a commercial transaction which is otherwise regulated by contract, is not generally the same as a liability in damages for tort or breach of contract".[138] The rules of equitable compensation deserve distinct consideration.

V. Quantifying the Loss

A. Scope of Duty

The result in *AIB* might be explained on a "scope of duty" basis: the fall in the property market and probable over-valuation of the property were outside the scope of the solicitors' duty to the bank. This parallels the development of the "scope of duty" requirement in tort.[139] Indeed, in *Nationwide Building Society v Balmer Radmore*[140] ("*Balmer Radmore*"), Mr Justice Blackburne referred to a need to have regard to the "scope of the duty which was broken" when considering equitable compensation for breach of fiduciary duty.[141]

Use of a "scope of duty" analysis strengthens the link between equitable compensation and compensation at common law. However, the concept of "scope of duty" has proven to be very difficult at common

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137. William Gummow, "Compensation for Breach of Fiduciary Duty" in Timothy Youdan, ed, *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 75, citing *Deeks v Strutt* (1794), 5 Term Rep 690 (KB (Eng)) at 693.
138. *AIB*, *supra* note 1 at para 136. See also paras 84-85.
139. *South Australia Asset Management Corporation* v *York Montague Ltd*, [1997] AC 191 (HL) [*SAAMCO*].
140. [1999] PNLR 606 (Ch (Eng)) [*Balmer Radmore*].
141. *Ibid* at 671.

law.[142] It is a malleable concept, and judges are able to mould the scope of duty analysis as they see fit.[143] Although it now appears often to be considered as an element of the remoteness enquiry,[144] this is dubious: whereas the amount of damages is often capped at a foreseeable level by the rules of remoteness, the scope of duty analysis is only able to include or exclude types of loss in a binary fashion.[145] This seems unnecessarily rigid in the context of breaches of trust and fiduciary duty. Thus in *Caffrey v Darby*[146] the Master of the Rolls thought that any other approach:

> would be an encouragement to bad motives; and it may be impossible to detect undue motives. If we get the length of neglect in not recovering this money by taking possession of the property, will they be relieved from that by the circumstance, that the loss has ultimately happened by something, that is not a direct and immediate consequence of their negligence: viz. the decision of a doubtful question of law? Even supposing, they are right in saying, this was a very doubtful question, and they could not look to the possibility of its being so decided, yet, if they have been already guilty of negligence, they must be responsible for any loss in any way to that property: for whatever may be the immediate cause, the property would not have been in a situation to sustain that loss, if it had not been for their negligence. If they had taken possession of the property, it would not have been in his possession. If the loss had happened by fire, lightning, or any other accident, that would not be an excuse for them, if guilty of previous negligence. That was their fault.[147]

This tough approach might conceivably still be defended in the equitable sphere given the flexibility of the court to excuse the trustee from personal

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142. Edwin Peel, "SAAMCO Revisited" in Andrew Burrows & Edwin Peel, eds, *Commercial Remedies: Current Issues and Problems* (Oxford: Oxford University Press, 2003) 55; Jane Stapleton, "Negligent Valuers and Falls in the Property Market" (1997) 113 Law Quarterly Review 1.
143. See *e.g. Aneco Reinsurance Underwriting Limited v Johnson & Higgins Limited*, [2001] UKHL 51.
144. *Cf. Transfield Shipping Inc v Mercator Shipping Inc* [*The Achilleas*], [2008] UKHL 48 [*The Achilleas*]; see Andrew Burrows, "Lord Hoffmann and Remoteness in Contract" in Paul Davies & Justine Pila, eds, *The Jurisprudence of Lord Hoffmann* (Oxford: Hart Publishing, 2015).
145. Mark Stiggelbout, "Contractual Remoteness, 'Scope of Duty' and Intention" (2012) Lloyd's Maritime and Commercial Law Quarterly 97.
146. (1801), 6 Ves Jr 488 (Ch (Eng)).
147. Ibid at 495-96.

liability under section 61 of the *Trustee Act* 1925[148] ("*Trustee Act*"). But it seems unlikely that such a strict approach is consistent with the tenor of the decision of the Supreme Court in *AIB*. However, this does not mean that all the problems with scope of duty should be assimilated into equitable compensation: it is an unnecessary complication. Appropriate outcomes could be reached by instead relying on principles of causation and remoteness.[149] Where the breach of duty is deliberate there is less reason to restrict the scope of duty at common law,[150] and the higher standards generally demanded of trustees might suggest that this should be mirrored in equity.

B. Cost of Cure

An interesting question arises about whether the principles of equitable compensation require the trustee to compensate the trust fund (or possibly beneficiary) for the diminution in value suffered as a result of the breach of duty or for the cost of cure in repairing the breach of duty. In *Brudenell-Bruce v Moore & Cotton*[151] ("*Brudnell-Bruce*"), Justice Newey held that the answer to this question should reflect that given at common law. *Brudenell-Bruce* concerned the estate of the Earl of Cardigan. Lord Cardigan is the beneficiary of a bare trust administered by professional trustees. Lord Cardigan claimed that the trustees failed to maintain the Stable Block of Tottenham House, the seat of the Cardigan family. On the facts, the judge rejected the claim that the trustees had acted in breach of trust, but nevertheless went on to consider what the appropriate remedy would have been had there been a breach of trust.

The beneficiary argued that the full cost of repair should be awarded, contending that even if "it is going to cost £5 million to restore the Stable Block but fully restored it is only going to be worth £4 million, that is just the price that the trustees pay for allowing this collapse to have occurred in the first place".[152] Newey J rejected that argument. The judge

148. *Trustee Act*, 1925 (UK), 15 & 16 Geo V c 19, s 61.
149. *Cf.* Stapleton, *supra* note 142; Burrows, *supra* note 144.
150. *SAAMCO*, *supra* note 139 at 214.
151. [2014] EWHC 3679 (Ch) [*Brudenell-Bruce*].
152. *Ibid* at para 147.

could "see no reason why the Courts should be more willing to award compensation based on cost of reinstatement in circumstances such as those in the present case than they would be to measure damages in that way for breach of contract or a tort".[153] Newey J relied upon common law decisions such as *Ruxley Electronics and Construction Ltd v Forsyth*[154] and *In Southampton Container Terminals Ltd v Schiffahrtsgesellschaft "Hansa Australia" GmbH*[155] (*The "Maersk Colombo"*) to conclude that the full cost of cure measure should not be awarded where that would be unreasonable.

Equitable awards should not be unreasonable. But it is not obvious that this is an area where equity should "follow the law". The restrictions on the full cost of cure remedy in English law are controversial. For example, they have not been followed in Australia.[156] If what the claimant really wants is performance of the bargain or transaction, why should the courts not protect that performance interest?[157] This question might be thought to be particularly difficult to answer in the context of breach of trust. After all, it is important that equity hold trustees up to their primary obligations to perform the trust properly, which would suggest that the cost of reinstatement be the *prima facie* remedy available. Yet Newey J only thought that this "may be the case where equitable compensation is awarded as a substitute for performance of a trustee's obligation to deliver up trust assets in specie".[158]

Newey J relied upon *AIB* to justify his approach:

> [i]n AIB, Lord Reed explained that equitable compensation for breach of trust "aims to provide the pecuniary equivalent of performance of the trust" (paragraph 93) and that the measure of compensation for a breach of trust "will generally be based upon the diminution in the value of the fund caused by the trustee's default" (paragraph 94). The present case is, in my view, plainly one where, had a relevant breach of trust been established, it would have been

153. *Ibid* at para 152.
154. [1996] AC 344 (HL).
155. [2001] EWCA Civ 717.
156. *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*, [2009] HCA 8.
157. See generally James Edelman, "Money Awards for the Cost of Performance" (2010) 4 Journal of Equity 122.
158. *Brudenell-Bruce*, *supra* note 151 at para 151.

> appropriate to measure compensation by the resulting 'diminution in the value of the fund,' not by the cost of reinstating the Stable Block.[159]

It is not clear whether *AIB* fully supports such restrictions on the cost of cure remedy. Equitable compensation will generally be the diminution in value, because this will generally also equate the cost of cure remedy. But where the two measures differ — as in, for example, *Ruxley* and *Brudenell-Bruce* — then a choice has to be made, and Lord Reed's insistence on "the pecuniary equivalent of performance" might favour a cost of cure award. It is suggested that the cost of cure remedy has been unduly restricted at common law, and that equity should not be bound to follow suit.[160]

C. Presumption of Cheapest Means of Performance

At common law, it seems that when assessing the value of chances — and indeed of compensation generally — it should be borne in mind that the court should assess damages on the basis that the contract-breaker performed in a manner most advantageous to himself.[161] This is a sensible rule. It accords with the need for the defendant to protect its own position. Nevertheless, in *Durham Tees Valley Airport v BMI Baby*,[162] the Court of Appeal held that, where the defendant has a wide discretion about how to perform its obligations, the court should ascertain how the defendant would, in fact, have performed. That may have been a pragmatic decision on the facts of the case, given the difficulties involved in determining the minimum performance required (about operating flights from an airport), but it is suggested that the decision should be treated with some caution; the established rule that the defendant perform in the manner most advantageous to himself should be maintained at common law.

At common law, the defendant owes no duty to the claimant to look after the latter's interests. The same is not true in equity. There is therefore no room for a similar presumption to apply in equity. Indeed, the contrary presumption seems more appropriate; there should be a "presumption

159. *Ibid* at 155.
160. See *Elder's Trustee and Executor Co v Higgins* (1963), 113 CLR 426 (HCA) at 473 [*Elder's*].
161. *Lavarack v Woods of Colchester Ltd*, [1967] 1 QB 278 (CA (Eng)).
162. [2010] EWCA Civ 485.

that trust funds will be put to the most profitable use",[163] and the burden should shift to the trustee to prove that that is not the case.[164] At the very least, the court should have regard to what a reasonable, prudent trustee would have managed to obtain for the trust fund, rather than the very minimum which would have been achieved without there being a breach.[165]

D. Date of Assessment

The date of assessment of loss at common law is a matter of some controversy. Orthodoxy suggests that damages are assessed at the date of breach. This has the advantage of providing commercial certainty and allows the victim of the wrong to assess its losses immediately upon breach in order to determine what steps it should take to mitigate its loss and whether or not to settle and compromise its claim against the defendant.[166] This has recently been challenged,[167] but, in any event, the position in equity is clear and different from the traditional understanding of the common law. In equity, compensation is assessed at the date of judgment, not breach.[168] The breach of duty does not "stop the clock";[169] since the trustee must continue to act as a good trustee unless and until he is removed from office. The trustee is unable simply to breach his trust obligations and then walk away from his duties upon compensating the trust fund or beneficiary. It may be that at the date of breach no losses occurred, yet substantial losses have arisen by the date of judgment.[170] A "breach-date rule" would be inapt in such circumstances.

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163. Canson, *supra* note 7 at 545, per McLachlin J; see also Heydon, *supra* note 4 at 23-260, 23-330.
164. *Mulligan*, *supra* note 10 at 508.
165. *Nestle*, *supra* note 10 at 1280, per Staughton LJ.
166. See *e.g. Golden Strait Corp v Nippon Yusen Kubishika Kaisha*, [2007] UKHL 12 at paras 10, 11, per Lord Bingham.
167. Andrew Dyson & Adam Kramer, "There is No Breach Date Rule: Mitigation, Difference in Value and Date of Assessment" (2014) 130 Law Quarterly Review 259.
168. *Target*, *supra* note 2 at 437; *AIB*, *supra* note 1 at para 140, per Lord Reed.
169. *Target*, *supra* note 2 at 437.
170. *Cf. Youyang*, *supra* note 69.

However, the general rule that losses are assessed at the date of judgment need not be rigidly applied. In some situations it may be appropriate to demand that the trustee pay compensation assessed on the basis of the highest intermediate value of the property which was improperly sold, for example.[171] This is justified because of the continuing duties owed by trustees, and flexible approach that equity should be prepared to adopt.

E. Causation

On a traditional approach, as has been seen above, causation was irrelevant to claims of falsification. Thus Justice Edelman has said that "when payment was sought following an account in common form there was a direct analogy with an order for specific performance or payment of a liquidated debt which was due. In each case it is no answer for the defendant to allege that the plaintiff had suffered no loss".[172] This helps to explain why the appeal was allowed in *Youyang*. The Court of Appeal had held that the beneficiary's claim should fail since "the acceptance of the defective deposit certificate was a breach of trust which nevertheless did not cause any loss of Youyang's funds".[173] The High Court of Australia, on the other hand, insisted that it was "not to the point"[174] that the conduct of third parties would have caused the loss anyway "because the loss of the trust funds occurred as soon as the trustee wrongly disbursed them".[175]

Although it has also been suggested that a strict approach to causation should be adopted in the context of equitable compensation for breach of

171. *Libertarian*, *supra* note 47 at para 171, per Lord Millett; see generally Glister, *supra* note 106 at 529-34. See also *Elder's*, *supra* note 160 at 473.
172. *Jackson (No 2)*, *supra* note 18 at para 337.
173. *Youyang*, *supra* note 69 at para 29.
174. *Ibid* at para 63.
175. *Ibid*.

fiduciary duty,[176] it has since become clear[177] that there is no "equitable by-pass" of the need to prove a causal link.[178] The same now appears to be true in the context of all claims for breach of trust. As Lord Reed pointed out in *AIB*:

> since the concept of loss necessarily involves the concept of causation, and that concept in turn inevitably involves a consideration of the necessary connection between the breach of duty and a postulated consequence (and therefore of such questions as whether a consequence flows 'directly' from the breach of duty, and whether loss should be attributed to the conduct of third parties, or to the conduct of the person to whom the duty was owed), there are some structural similarities between the assessment of equitable compensation and the assessment of common law damages.[179]

Indeed, Lord Toulson thought that a remedy that did not reflect the loss caused (or gain caused) by a breach of duty would be penal. It is therefore necessary to be clear about what causal link is required. In both *Canson*[180] and *Target*,[181] reference was made to some sort of "common sense" test of causation; yet, as Lord Reed commented in *AIB*, "[d]ifficult questions of causation do not however always have an intuitively obvious answer".[182] In some areas, equity has favoured rather claimant-friendly approaches. For instance, in the context of account of profits for breach of fiduciary duty, only "some reasonable connection" between the gain and the breach is required;[183] and a misrepresentation only needs to be one reason, but not necessarily a "but-for" reason, for the claimant's entering into the

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176. *Brickenden* v *London Loan & Savings Co*, [1934] 3 DLR 465 (PC (Canada)).
177. At least in England and Wales: for comparative discussion see Jamie Glister, "Equitable Compensation" in Jamie Glister & Pauline Ridge, eds, *Fault Lines in Equity* (Oxford: Hart Publishing, 2012).
178. *Swindle*, *supra* note 121; see also *Gwembe Valley Development Co Ltd v Koshy (No 3)*, [2003] EWCA Civ 1048 at para 147.
179. *AIB*, *supra* note 1 at para 136.
180. *Canson*, *supra* note 7 at 163, per McLachlin J.
181. *Target*, *supra* note 2 at 439, per Lord Browne-Wilkinson.
182. *AIB*, *supra* note 1 at para 95.
183. *CMS Dolphin Ltd v Simonet*, [2001] 2 BCLC 704 (Ch (Eng)) at para 97, per Lawrence Collins J.

contract to ground a claim for rescission.[184] Nevertheless, *AIB* appears to demand the familiar "but-for" test,[185] and this seems sensible when focusing on a trustee's responsibility for loss.[186] It is clearly insufficient that the wrongdoing trustee simply provided an opportunity for the loss to occur; the trustee must cause the loss.[187] However, as in *AIB*, this may lead to different outcomes than the traditional approach. Ho has given the example of a trustee who wrongfully disposes of a seaside bungalow shortly before a tsunami would have destroyed it in any event.[188] Traditionally, a beneficiary would still be able to falsify the wrongful misapplication of trust property. Yet it is difficult to see how the wrongful act of the trustee causes the beneficiary's loss, when that loss would have been suffered in any event.[189]

In *Libertarian*, Ribeiro PJ held that:

> [w]here the plaintiff provides evidence of loss flowing from the relevant breach of duty, the onus lies on a defaulting fiduciary to disprove the apparent causal connection between the breach of duty and the loss (or particular aspects of the loss) apparently flowing therefrom.[190]

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184. See *e.g. Attwood v Small*, [1838] 6 Cl & F 232 (HL); *Reynell v Spyre* (1852), 1 De G M & G 660 (Ch (Eng)) at 708, per Cranworth LJ.
185. See *e.g. AIB*, *supra* note 1 at paras 73, 132, per Lord Toulson & Lord Reed. See also *Target*, *supra* note 2 at 431 (this is perhaps what Lord Justice Patten meant when he spoke of "a proper causal connection between the breach and eventual loss" in the Court of Appeal in *AIB Group (UK) v Mark Redler & Co Solicitors*, [2013] EWCA Civ 45 at para 47).
186. *Cf.* John Cartwright, *Misrepresentation*, *Mistake and Non-Disclosure,* 3d (London: Sweet & Maxwell, 2012) at 5-38; Ken Handley, "Causation in Misrepresentation" (2015) 131 Law Quarterly Review 275.
187. *Swindle*, *supra* 121 at 727, per Hobhouse LJ.
188. Ho, *supra* note 8 at 217.
189. *Ibid,* Ho recognises that this result might not be desirable, and suggests that "the court will need to adjust the causal test to deal with multiple sufficient causes such as these". It is not clear how this should be done, and given the complexities of causation at common law it is unlikely that causation in equity will prove to be simple.
190. *Libertanan*, *supra* note 47 at para 93. See too *Stevens v Premium Real Estate Ltd*, [2009] NZSC 15 at para 85 [*Stevens*].

Given the control over the trust property that the trustee enjoys, and the consequent difficulties that a beneficiary faces when seeking to establish and prove a breach of duty, it seems entirely appropriate to put the onus on the trustee to disprove an apparent causal connection.[191] However, it will not be sufficient for a trustee to show that if he had not committed a breach of trust the same loss would have been caused by some other third party's dishonest conduct.[192] Moreover, it is difficult to see much scope for the principle of *novus actus interveniens* in the context of equitable compensation, since rarely will anything happen to trust property which is truly independent of a breach of the duty to safeguard it. For instance, imagine that one trustee carelessly allows trust property to come exclusively under the control of another trustee. [193] The latter then misappropriates the trust assets. The first trustee, who only breached a duty of care, is nonetheless liable for all losses suffered, even though the immediate cause of the loss is the latter trustee's misappropriation of the trust assets.

F. Remoteness

Compensation requires some rules of remoteness. Whilst issues of remoteness are irrelevant to actions for an agreed upon sum,[194] equitable compensation must establish principles of remoteness. If the "the relentless contractualisation of trust law"[195] continues apace, and the principles of equitable compensation mirror the contractual principles,[196] then cases such as *Hadley v Baxendale*[197] and *C.f. Transfield Shipping Inc v Mercator Shipping Inc*[198] might be thought to be relevant in equity. But that is surely misguided. The point of the contractual rules is that

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191. See also *Re Brogden* (1888), 38 Ch D 546 (CA)(Eng)) at 567-68, 572-73.
192. *AIB*, *supra* note 1 at para 58, per Lord Toulson. *Cf. Youyang*, *supra* note 69 at 23-170.
193. Heydon, *supra* note 4 at [23-340].
194. *Re Dawson*, *supra* note 11 at 215, per Street J.
195. Getzler, *supra* note 76 at 257.
196. *Ibid*.
197. (1854), 9 Exch 341 (Eng).
198. *The Achilleas*, *supra* note 144.

there exists an agreement between the parties and when making that agreement each party could bring the risk of certain losses to the other party's attention. Yet in the trust context, the beneficiary may not always have a contract with the trustee. Additionally, the trustee at the time of the dispute may not be the same person that originally agreed to the terms of the trust instrument. In most commercial trusts, admittedly, there will be a concurrent contractual claim, but that contractual claim should stand apart. It may be that the contractual claim should trump the equitable claim, but the equitable claim — and certainly any free-standing equitable claim — should not adopt the contractual principles of remoteness. Under the contractual approach, foreseeability is assessed at the date of entering into the contract.[199] But given the higher standard expected of trustees, and the different situations that can evolve over the course of a trust relationship, it is surely more appropriate for any foreseeability requirement to be assessed at the date of breach.

If an analogy is to be drawn to the common law, it would be more sensible to look across to tort law. There is a split between the "reasonable foreseeability" approach of *Overseas Tankship (U.K.) Ltd v Morts Dock and Engineering Co. Ltd*[200] (*The Wagon Mound*) in the tort of negligence and the "direct" approach[201] adopted in the context of the intentional torts, such as deceit.[202] It would be possible for equity similarly to adopt different approaches depending on whether or not the breach of duty was deliberate, and this differentiation may be evolving in the context of breach of fiduciary duty.[203] Given the higher standards demanded in equity, there is a strong argument for a stricter approach to be taken for all breaches of equitable duty.[204] As McLachlin J commented in *Canson*:

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199. See *e.g. Jackson v Royal Bank of Scotland*, [2005] UKHL 3.
200. [1961] AC 388 (PC (Austl)).
201. *Re Polemis & Furness, Withy & Co Ltd*, [1921] 3 KB 560 (CA (Eng)).
202. *Smith New Court*, *supra* note 109.
203. See the differing judgments in *Swindle*, *supra* note 121. For a common law analogy in the tort of conversion, see *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, [2002] UKHL 19 at paras 100-104, per Lord Nicholls.
204. *Cf.* Steven Elliott, "Remoteness Criteria in Equity" (2002) 65:4 Modern Law Review 588.

> [i]n negligence, we wish to protect reasonable freedom of action of the defendant, and the reasonableness of his or her action may be judged by what consequences can be foreseen. In the case of a breach of fiduciary duty, as in deceit, we do not have to look to the consequences to judge the reasonableness of the actions. A breach of fiduciary duty is a wrong in itself, regardless of whether a loss can be foreseen. Moreover the high duty assumed and the difficulty of detecting such breaches makes it fair and practical to adopt a measure of compensation calculated to ensure that fiduciaries are kept 'up to their duty'.[205]

This passage was cited with approval in *Libertarian*,[206] and surely applies equally to breach of trust. Indeed, *Canson* was a case where the claim failed because the losses suffered were too remote from the breach of fiduciary duty on any test.[207]

In *AIB,* Lord Reed said that "the foreseeability of loss is generally irrelevant, but the loss must be caused by the breach of trust, in the sense that it must flow directly from it".[208] It is suggested that foreseeability of loss should be irrelevant in the context of the misapplication of trust property.[209] The risk of unforeseeable consequential loss should be visited upon the wrongdoing fiduciary rather than the vulnerable beneficiary.[210] Perhaps foreseeability may be relevant where a duty to take reasonable care has been breached such that — in traditional language — the

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205. *Canson*, *supra* note 7 at 553. See also *Stevens*, *supra* note 191 paras 24, 34, per Elias CJ.
206. *Libertarian*, *supra* note 47 at para 80.
207. *Canson*, *supra* note 7 at 590, per Stevenson J.
208. *AIB*, *supra* note 1 at para 135.
209. *Clough v Bond*, (1838), 3 My & C 490 (Ch (Eng)) at 496, per Cottenham LC; *Re Dawson*, *supra* note 11 at 215, per Street J; *Canson*, *supra* note 7 at 555-56, per McLachlin J; *Target*, *supra* note 2 at 438-39, per Lord Browne-Wilkinson; *Bank of New Zealand*, *supra* note 59 at 687, per Tipping J.
210. *Cf. Smith New Court*, *supra* note 109.

account could be surcharged,[211] and this may explain the qualification of "generally" in Lord Reed's statement. This depends upon how the nature of the trustee's obligation is explained. If it is akin to a duty to take care in tort, then foreseeability should be relevant. If a higher standard is demanded of the trustee as a fiduciary, then foreseeability should not limit the recoverable losses.

G. Mitigation

Mitigation is a general principle that might reduce the amount of compensation a claimant can recover. It even applies in the context of deceit. As Lord Steyn commented in *Smith New Court*: "[t]he third limiting principle is the duty to mitigate. The plaintiff is not entitled to damages in respect of loss which he could reasonably have avoided. This limiting principle has no special features in the context of deceit".[212] The victim of a wrong must not act in an unreasonable manner which would exacerbate his losses.

A common justification for mitigation is that it helps to avoid waste and promote efficient outcomes. Concerns of efficiency may be more important in the context of contracts than trusts. This might explain why McLachlin J said in *Canson* that "[t]he plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach".[213] However, the essence of this difficult passage is essentially to introduce a requirement

211. See *e.g. Mothew*, *supra* note 10 at para 17, per Millett LJ; *Libertarian*, *supra* note 47; *cf. Youyang*, *supra* note 69 at para 39. See further Darryn Jensen, "Compensation for Breach of Trust — the Remoteness Impasse" in Charles Rickett, ed, *Justifying Private Law Remedies* (Oxford: Hart Publishing, 2008); Joshua Getzler, "Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies" in Simone Degeling & James Edelman, eds, *Equity in Commercial Law* (Sydney: Lawbook Co, 2005); John Heydon, "Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?" in Simone Degeling & James Edelman, eds, *Equity in Commercial Law* (Sydney: Lawbook Co, 2005).
212. *Smith New Court*, *supra* note 109 at 285.
213. *Canson*, *supra* note 7 at 554.

that the beneficiary acted reasonably after learning of the breach of trust, which seems tantamount to mitigation.[214] This view gains some support from Lord Reed in *AIB*,[215] and is consistent with the majority view in *Canson*.[216] Once the beneficiary knows of the breach of trust, he should take reasonable steps to minimise his loss.

H. Contributory Negligence

The role of contributory negligence in equity is unclear.[217] This issue has mainly been discussed in the context of breach of fiduciary duty. Different jurisdictions have adopted different approaches. In *Day v Mead*,[218] the New Zealand Court of Appeal reduced the amount a principal could recover because he was partly the author of his own loss. Sir Robin Cooke thought this was the "obviously just course, especially now that law and equity have mingled or are interacting".[219] This approach to "fusion" is controversial. Other courts have not been so willing to recognise the influence of the common law in this area. For example, in *Pilmer v Duke Group Ltd*,[220] the High Court of Australia cited with approval the comments of McLachlin J in *Norberg v Wynrib*[221] which recognised the "conceptual and functional uniqueness" of fiduciary obligations, particularly since "one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other".[222] The High Court further noted, "the severe conceptual difficulties in the path of acceptance of notions of contributory negligence as applicable to diminish awards of equitable compensation for breach of

214. Smith, *supra* note 56 at 368.
215. *AIB*, *supra* note 1 at para 135.
216. *Canson*, *supra* note 7 at 581, LaForest J; Derk Davies, "Equitable Compensation: Causation, Foreseeability and Remoteness" in Donovan Waters, ed, *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1993) 317.
217. See generally *Balmer Radmore*, *supra* note 140 at 672-77, per Blackburne J and the academic commentary cited at 676.
218. [1987] 2 NZLR 443 (CA) [*Day*].
219. *Ibid* at 451.
220. [2001] HCA 31 [*Pilmer*].
221. [1992] 2 SCR 226 at 272.
222. *Pilmer*, *supra* note 220 at para 71.

fiduciary duty"[223] and that "the attempt to push common law notions of contributory negligence, as now modified by statute, into equitable remedies collapses in the face of insurmountable obstacles".[224]

In England and Wales, one obstacle is the *Law Reform (Contributory Negligence) Act 1945*[225] ("*1945 Act*"). That makes no provision for the operation of a defence of contributory negligence in the context of equitable claims. If the statute is to operate at all in this area, it could only be on the same basis as *Forsikringsaktieselskapet Vesta v Butcher*[226] ("*Vesta*") applies to claims in breach of contract, such that where an equitable duty of care overlaps with a tortious duty of care, then in those circumstances only might contributory negligence be a defence. This would be a very limited category of case and may mean that a trustee would be in a better position if able to establish a breach of a tortious duty of care as well a (potentially strict) duty imposed by the trust.[227]

It is suggested that the *1945 Act* does not provide any basis for a defence of contributory negligence in equity. Nor does section 61 of the *Trustee Act*, concerning the power of the court to relieve trustees from personal liability for breach of trust,[228] encompass contributory negligence. At first instance in *Markandan & Uddin,*[229] Roger Wyand QC, sitting as a Deputy High Court Judge, noted that there was nothing in *Vesta* which indicated that contributory negligence should be extended to instances of breach of trust.[230] The judge then went on to state that section 61 of the *Trustee Act* "could have provided for the conduct of

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223. *Ibid* at para 86, per McHugh, Gummow, Hayne & Callinan JJ.
224. *Ibid* at para 174, per Kirby J.
225. (UK), 8 & 9 Geo VI, c 28.
226. [1989] AC 852 (HL) [*Vesta*].
227. A similar oddity arises in the contractual context, since a defendant who breaches a strict contractual duty is actually better off (since the defence of contributory negligence applies) if he can establish that he also breached a tortious duty of care. Yet the innocent party will seek to avoid showing that the defendant acted negligently, in order to escape the ambit of contributory negligence.
228. See Part X below.
229. [2010] EWHC 2517 (Ch) [*Markandan*].
230. *Vesta*, *supra* note 226.

the beneficiary to be taken into account as the Defendant here wishes. It did not and it is not for the Court to extend the law in a way that was not done by the legislature".[231] The judge's conclusions on contributory negligence were not pursued on appeal,[232] and should be supported: the focus of section 61 is firmly placed on the trustee who has committed the breach of trust, not the beneficiary. Similarly, section 62 of the *Trustee Act*, concerning the power of the court to make the beneficiary indemnify the trustee for breach of trust, only applies if the beneficiary instigated or consented to the breach of trust, which does not cover the same ground as contributory negligence.

If contributory negligence is truly to be accepted in equity, then this is perhaps best explained on the basis that equity seeks a just result, and "he who seeks equity should do equity". It may be that insisting that a beneficiary is entitled to trust his trustee absolutely, without accepting any responsibility to safeguard his own position at all, is too harsh an approach in some instances (particularly in the commercial sphere). This may explain Lord Reed's comment that "losses resulting from unreasonable behaviour on the part of the claimant will be adjudged to flow from that behaviour and not from the breach".[233] This appears to present trustees with an opportunity to raise arguments on contributory negligence. Where a breach of trust is concerned, it could perhaps be expected that such arguments will find favour. After all, "the line between failure to take due care and mitigation could in some instances become a fine one and mitigation is certainly a defence in fiduciary law".[234]

However, this approach may not be universally popular. Indeed, Fleming has described contributory negligence as "an adventure of the common law which represents one of its outstanding failures"[235] and the unsatisfactory nature of the defence led Gummow to argue that it should not be recognised in equity: "[a]ll this suggests the unwisdom [of entangling the already complex law as to fiduciary duties with notions

231. *Markandan*, *supra* note 229 at para 42.
232. *Markandan & Uddin*, [2012] EWCA Civ 65 at para 7.
233. *AIB*, *supra* note 1 at para 135.
234. Davies, *supra* note 216 at 317.
235. *Law of Torts* 2d (Sydney: Law Book, 1961) 214.

of contributory negligence".[236] In England and Wales, it appears that contributory negligence is not a defence to claims for breach of fiduciary duty. The headnote to *Balmer Radmore* states that "no such reduction could be made where a breach of fiduciary duty was shown. Breach of fiduciary duty was not covered by the provisions of the 1945 Act".[237] However, this is perhaps slightly misleading. The *ratio* of the decision of Blackburne J is restricted to the rejection of contributory negligence in instances of "conscious disloyalty".[238] Blackburne J reasoned that even at common law, contributory negligence is no defence to an intentional tort, and in equity, it was equally important "to keep persons in a fiduciary capacity up to their duty".[239] But it is not yet entirely clear whether the same approach would be taken where the fiduciary committed a breach of duty negligently rather than deliberately. The need to hold such parties up to a higher standard might suggest that no defence of contributory negligence should be available.

In any event, even if contributory negligence were to be recognised in the equitable sphere, it will be very difficult to satisfy the court that the defence has been made out. As Justice Somers commented in *Day v Mead*:

> [o]f course, before reducing an award on the ground that the claimant has been partly the author of his or her own loss, the Court will have to give much weight to the well-established principle that, largely for exemplary purposes, high standards are expected of fiduciaries. A strong case is needed to relieve the fiduciary of complete responsibility.[240]

VI. Section 61 of *The Trustee Act* 1925

The fact that liability for breach of trust is strict makes it likely that claims for breach of trust will continue to prove attractive to claimants. Unlike common law claims for breach of a contractual or tortious duty of care, the claimant beneficiary does not need to prove that the trustee acted

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236. Gummow, *supra* note 137 at 86.
237. *Balmer Radmore*, *supra* note 140 at 610.
238. *Ibid* at 676-77.
239. *Ibid* at 677, citing *Nocton*, *supra* note 124 at 963, per Lord Dunedin.
240. *Day*, *supra* note 218 at 452.

negligently in failing to comply with the terms of the trust instrument.[241] Instead, the onus is clearly placed on the trustee to prove that he or she acted reasonably. This is obviously advantageous to the beneficiary, and it seems appropriate. After all, the trustee undertakes to act in the best interests of the beneficiary, and "[t]he beneficiary may not be in a position to know all that occurred in the chain of events leading to the breach of trust".[242] In some instances, holding the trustee liable when he or she acted wholly reasonably may be too harsh; this may explain the existence of section 61 of the *Trustee Act*. There is no counterpart of section 61 at common law.

Section 61 provides the courts with a statutory discretion to relieve trustees from personal liability for breach of trust where the trustee "has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach". Although, in *AIB,* Lord Toulson thought that section 61 might be used as a "*deus ex machina*",[243] it is suggested that relief under section 61 is guided by recognised principles.[244] In any event, the burden is clearly placed on the trustee to prove that he or she acted honestly and reasonably and ought fairly to be excused for the breach of trust.[245] This equitable approach has further advantages over common law claims if the beneficiary wishes to sue third parties to the breach of trust. This is because section 61 is personal to the trustee: it excuses the liability of the trustee, but does not mean that there

241. *Santander UK v RA Legal Solicitors*, [2014] EWCA Civ 183, per Briggs LJ ("[i]t is precisely because of the strictness of the solicitor's trust liability that lenders which are the victims of such fraud prefer to base their claims for recovery upon breach of trust rather than breach of contract or negligence, because both of those causes of action generally require the lender to prove that the solicitor has been guilty of a breach of a duty of care" at para 19) [*Santander*].
242. *Ibid* at para 111, per Count Etherton.
243. *AIB*, *supra* note 1 at para 69, per Lord Toulson.
244. See Paul Davies, "Section 61 of the Trustee Act 1925: *deus ex machina*?" (2015) 6:5 The Conveyancer and Property Lawyer 379-94.
245. *Santander*, *supra* note 241 at para 55, per Briggs LJ.

has been no breach of trust.[246] Thus a third party might still be liable for dishonestly assisting that breach of trust, or for knowingly receiving property in breach of trust. For example, in *Re Smith*,[247] the trustee was a widow who lived in the country and employed a firm of solicitors to act as her agents. The solicitor's clerk fraudulently obtained the trustee's signature on certain cheques and induced her to initial alterations to the cheques. He then absconded with the money. The trustee was held to have committed a breach of trust, but her liability was excused. If the clerk had been sued as an accessory to the breach of trust, the morally innocent quality of the trustee's breach of trust should clearly not afford him a defence.

VII. Conclusion

At the very start of his judgment in *AIB,* Lord Toulson said that "140 years after the *Judicature Act* 1873, the stitching together of equity and the common law continues to cause problems at the seams".[248] Even though the *Judicature Act 1873* was only concerned with the fusion of the administration of common law and equity, rather than the fusion of the substantive rules of each jurisdiction, there is now a need to analyse further the principles underpinning equitable compensation. As Lord Reed observed:

> a trust imposes different obligations from a contractual or tortious relationship"[249] but "[t]o the extent that the same underlying principles apply, the rules [of compensation] should be consistent. To the extent that the underlying principles are different, the rules should be understandably different.[250]

Clarity surrounding equitable compensation is required, both where equitable claims exist alongside common law claims and where the only

246. As section 61 itself says, "the court may relieve [the trustee] either wholly or partly from personal liability". *Cf. Perrins v Bellamy*, [1899] 1 Ch 797 (CA (Eng)) at 80, per Lindley MR.
247. (1902), 86 LT 401 (Ch (Eng)). *Cf. Re Stuart*, [1897] 2 Ch 583 (Eng) at 590.
248. *AIB*, *supra* note 1 at para 1.
249. *Ibid* at para 137.
250. *Ibid* at para 138.

claim available is for breach of trust. The need to hold trustees up to a high standard suggests that a strict approach to causation and remoteness, for example, will generally be appropriate, especially given the difficulties beneficiaries face in discovering breaches of trust.[251]

251. See *e.g. Santander*, *supra* note 241 at para 112, per Count Etherton.