TOPIC 3: PERSONAL REMEDIES

Account of Profits

Available for: Breach of Confidence, Breach of Fiduciary Duty, Third Party Liability.

Disgorgement principle: Remedy is measured by reference to the defendant's gains –
If the defendant has made a simple gain: That gain will be stripped from them ***(Regal)***.
If the defendant created a stream of profits: Account of profits will be created for the 'head start period' i.e. the period during which the defendant used the principal's funding to begin generating an income stream. The 'head start period' ceases once profits begin to flow from the defendant's own entrepreneurial endeavours (***Warman***).

Considerations:
1. *Allowances* – allowance needs to be made for the time and effort contributed by the defendant to make the profit ***(Warman; VUT)***.
2. *Election principle* – there can be no double recovery. The principal must choose between account of profits and equitable compensation ***(Warman; Club of the Clubs)***.

Outcome: Creates a debt between the parties. There is no alteration of property rights, and quantum is unaffected by changes in value of the property.

Equitable Compensation

Available for: Breach of Confidence, Breach of Fiduciary Duty, Third Party Liability.

Compensation principle: The remedy is designed to compensate the principal for losses incurred or anticipated from the defendant's wrongdoing. However, there is no need for a contract to prove loss ***(Nocton)***.
Other Considerations:
1. *Loss at time of judgment* – compensation is awarded to restore the principal for loss suffered at time of judgment ***(Re Dawson; W v G)***.
2. *Causation* – causation is calculated by reference to '20/20 hindsight net the consequences of loss' ***(AIB)***, not per the 'but-for' test ***(Youyang)***.
Ask: *What was the net consequence?* 'But for' Minter's mistake, the money would have been paid into the principal's account. This did not happen, so they had to restore the value of the trust asset ***(Youyang)***. **Cf.:** money was paid out in breach because the security was defective. The defect was rectified, but less valuable than originally intended. The plaintiff was not entitled to complete restoration, only to the difference between the asset's initial and current values ***(AIB)***.
3. *Financial Losses* – compensation can be awarded for downstream economic consequences (i.e. anticipated future losses) **(Nocton)** and for future liabilities caused by the fiduciary's wrongdoing ***(W v G)***.
4. *Non-pecuniary loss (i.e. mental and emotional distress)* – compensation can be awarded for emotional distress, but is usually limited to breaches of confidence with a personal or human dignity value ***(Jane Doe; Giller; Wilson)***, BUT NOT fiduciary wrongdoing. It would be difficult for a plaintiff to establish a legal and practical interest in emotional distress.
5. *Election principle* – there can be no double recovery. The principal must choose between account of profits and equitable compensation ***(Warman; Club of the Clubs)***.
6. *Limitations* –
(a) **Mitigation** – is not a factor in calculating compensation, but if the plaintiff could have been compensated by taking action after a reasonable period of time, they will not be able to claim consequential loss after that period. Further, loss caused by the plaintiff will not be considered 'caused by breach' ***(CBA v Smith)***.
(b) **Foreseeability/Remoteness** – is not a concern, but common sense causation ('but for…') is essential in determining whether loss was caused by breach ***(Canson; AIB)***.

Specific Performance

Available for: Breach of Confidence, Breach of Fiduciary Duty, Third Party Liability.

CONTRACT REQUIRED: An award of specific performance will only be given where there is a specifically enforceable contract and damages would be inadequate. An oral contract accompanied by part performance is sufficient, but award is discretionary ***(JC Williamson)***.
Other Considerations:
1. *Fairness to both parties* – A court will not hold one party to their side of the bargain in circumstances where the other has yet to perform or is not ready or willing to perform their obligations. Parties must be ready, willing and able to perform ***(JC Williamson)***.
2. *Supervision requirement* – An order for specific performance is not available if the court's continued supervision would be necessary to ensure the contract is fulfilled ***(JC Williamson)***.
3. *Personal service contracts* – specific performance is not available for personal service contracts ***(JC Williamson)***.

Injunction

Available for: Breach of Confidence, Breach of Fiduciary Duty, Third Party Liability.

Right and Convenient: Court will only award an injunction where it is *right and convenient* to do so ***(Foster; Lenah)***.
Right – having a serious question to be tried;
Convenient – the balance of convenience between the plaintiff's desire and the defendant's burden favours grating an injunction. 'Balance of convenience' includes taking into account:
(a) Delay by the plaintiff in bringing the action – *tends against*;
(b) The effect an injunction would have on third parties – *tends against*;
(c) Whether other compensation would be adequate – *tends against*;
(d) Commercial factors, including the effect an injunction would have on the running of a business – *tends against*.

It is generally convenient to restore the status quo i.e. **delivery up** (eg. to return a physical possession) (***Atkins; Franklin v Giddins***). However, an injunction will not be awarded where it has the same effect as specific performance in circumstances where specific performance is not available (eg. a contract for personal service) (***Atlas Steel cf. Lumley***).

Declarations (s. 23.05, SCR)

Available for: Do not require a cause of action. May be made in relation to proposed activities. The Court may declare future activities breach of contract or law, but will not ordinarily make a declaration in criminal matters. But if 2 parties are able to come to a working agreement on their own, a declaration will not be made ***(Sterling-Nicholas)***.

Other Considerations:
1. *Relevance* – must be relevant to the defendant party. The Court will ask whether the parties are likely to adhere to the declaration. Declarations are potentially available to large firms (i.e. law, accounting)

Rescission

Available for: Breach of Confidence, Breach of Fiduciary Duty, Third Party Liability – *but there must be a contract. Rescission is commonly awarded where the principal has contract with or sold an asset to the fiduciary, and the fiduciary breaches or misappropriates.*

Ab initio v partial rescission: In its strictest sense, rescission allows for setting aside a transaction *ab initio* ('from the beginning'), restoring the parties to their initial positions. But *partial rescission* may be awarded where the defendant has only misrepresented part of an agreement, preventing one party from obtaining an unwarranted benefit over the other ***(Vadasz)***.
Tainted transactions & complete rescission (re fiduciaries): If a fiduciary enters into a contract in conflict, they likely taint the whole transaction. In those circumstances, complete rescission is possible, because it is not able to separate parts of the tainted contract (***Maguire***).

Other Considerations:
1. *Election* – once equitable rescission is granted, the transaction is voidable. Until the election is made, the defendant holds the transaction on constructive trust for the plaintiff ***(Daly)***.
2. *Pecuniary rescission* – is only available when the subject of the transaction is on-sold to a BFPFVWN (***Maguire*, per Dixon J; *Mckenzie***).

Equitable Damages (s. 38, SCA)

Available for: Breach of Confidence; Breach of Fiduciary Duty; Third Party Liability.

Generally sought: In lieu of an injunction or specific performance where they were available but now aren't ***(JC Williamson; Mills)***.

Measure: Assessed at time of judgment (***Mills***).

Emotional harm – LCA damages will be calculated to equate with equitable compensation damages ***(Giller)***.

Common Law Principles – Limits to Remedies

Exemplary/Aggravated Damages – equity cannot award exemplary damages. "Equity does not have an appetite for revenge" ***(Harris v Digital Pulse)***. Aggravated damages may be available for ***breach of confidence*** in circumstances of spitefulness, scorn, vicious disregard or contempt for the plaintiff's rights and dignity (*Giller*). It also may be possible for ***breaches of fiduciary duty*** where the defendant 'crushes' (i.e. deliberately financially ruins) the principal.
Limitations: *Mitigation* – equity will not consider mitigation, but will only award damages where caused by the fiduciary ***(CBA v Smith)***. Once harm stops being caused by the fiduciary, damages may be limited ***(Nocton; W v G)***. ***Contributory negligence*** – not available in equity ***(Pilmer)***. ***Causation*** – the 'but for…' (*Nocton; W v G*) and 'common sense' tests apply. Common sense can limit causation completely ***(Canson)***. **EG: AIB** – plaintiff would have had a bad investment regardless of breach.
Defences: *Delay* – where the plaintiff unreasonably delays and case has a 'different complexion' (***Baburin***); ***Unclean Hands*** – where the plaintiff's conduct is questionable (*Black Uhlans*); ***Hardship*** – unreasonable hardship to defendant (not financial) ***(Patel)***.

TOPIC 4B: TRACING

To gain an equitable proprietary remedy, the plaintiff must **make out the grounds for relief** (eg. have a constructive trust by virtue of breach of fiduciary duty in either (a) misappropriation of an asset or opportunity; OR b) receipt of bribes or secret commissions) **and be able to identify the subject property in the defendant's hands. This means the property must be ascertainable and not dissipated. Tracing also cannot be done in the hands of a BFPFVWN. Note the following:** 1) The principal *follows* their asset as it changes hands (eg. painting changing hands) **(*Foskett*);** 2) The principal *traces* their asset as it changes form (painting → money → shares) **(*Foskett*);** 3) Money is also an asset that can be traced and followed.

TRACING RULE 1: Exchanging one an asset for another

– if a fiduciary/third party holds an asset on trust (CT) and exchanges it for another asset, the principal may elect to **(*Foskett*):**

Follow the title in the asset as it moves in the exchange. BUT -

Following is defeated by: A BFPFVWN (*bona fide purchaser for value without notice*) – *of the principals' rights in the asset*

Trace title in the newly acquired asset. BUT -

Tracing is defeated by: The asset being wasted, dissipated, consumer or no longer identifiable to the plaintiff.

No equitable proprietary remedy possible – only personal is available.

NOTE: No tracing is required when –
(a) The fiduciary still holds the asset, unmixed – no issues of identification arise; OR
(b) A third party holds the asset, unmixed in circumstances (i) where they did not give value (i.e. volunteer, not BFPFVWN) or (ii) has no notice of the equitable claim. NB: *Notice is satisfied by Baden level 5 'constructive notice'* **(*Foskett*).**
In this second circumstance, the third party holds the asset <u>subject to the claimant's equitable rights</u>.

RE DEBTS: If the principal's money is used to discharge a debt, tracing comes to an end. Discharging a debt is akin to wasting/consuming it **(*Re Diplock*)**

TRACING RULE 2: Mixing in acquisition of an asset

– where a fiduciary deposits a principal's money into their own account, mixing with their money, withdraws it all and purchases an asset (*eg. shares*):

Where acquired asset is in a bundle of <u>indistinguishable</u> things/rights (eg. shares) with an <u>innocent volunteer</u> or the <u>defendant</u>: Principal and innocent volunteer/third party hold title to the asset *in proportion to their initial contribution* **(*Brady v Stapleton*).**

Where parts of this <u>indistinguishable</u> bundle can no longer be identified (*Re Hallett's Estate*):
Mixing = Principal + Innocent Volunteer: Principal and innocent volunteer still hold the asset *in proportion, but the bundles shrink and the same proportion is held*. The principal can seek equitable compensation against the defendant for the amount lost.
Mixing = Principal + Defendant: Assets *wasted* deemed to belong to defendant first, until their share runs out.
Assets *improved* deemed to belong to principal first, until their share runs out.

Where the acquired asset is a <u>single tangible thing</u> held:
Principal + Defendant/Innocent Volunteer - Plaintiff and defendant/innocent volunteer hold title to the asset *in proportion to their initial contribution* (***Scott v Scott***).

TRACING RULE 3: MIXING BY WAY OF IMPROVEMENT

– where a fiduciary takes the principal's money out of a trust fund and uses it to upgrade his/her car OR places money into their own account:

RE Intangible Assets (Bank Accounts/Choses in Action): the principal and defendant/innocent volunteer hold title in proportion to their initial contributions **(*Foskett;***

RE Tangible Assets (Car/Painting): <u>Tracing comes to an end</u>. Principal can still seek. *personal remedy* (EC/AoC) *secured by equitable lien.*

TRACING RULE 4: Tracing into hands of <u>third parties</u>

If the third party is a BFPFVWN (i.e. paid consideration for the property): Tracing is defeated **(*Foskett*).**

A principal is not entitled to a personal remedy (EC; AoC) against an innocent volunteer (*Re Diplock*)

If the third party is a volunteer (i.e. does not provide consideration): Tracing continues...

If the third party <u>improves an existing tangible asset</u> using principal's assets: Tracing is brought to an end (***Re Diplock***).

Operating Bank Account Rules: An operating bank account is one in which money is coming in and out -
FIFO (*Clayton's Case*): The first money deposited is the first withdrawn.
Exceptions to FIFO:
1. *Mixing with the defendant's money in an operating bank account* – outcome determined by destination of money: **if money was wasted, it is deemed to be have belonged to the defendant; if money was used to improve an asset, it is deemed to be money belonging to the defendant (*Re Hallett*).**
2. *Multiple innocent parties mixed into one account with the defendant's money* – ***Re Hallett***: Invested funds are deemed to be theirs, not defendants; ***Re French Caledonia***: Parties can assert rights to withdrawn funds in the same proportion as they were held in the account.
3. *Lowest Intermediate Balance Rule*: A principal cannot assert entitlement to any part of the bank account bigger than the lowest possible amount they could have claimed at a past time **(*RE French Caledonia*).** If P1s money is wasted and funds from P2 are the added and combined for investment, P1's upper limit is the proportion *after run down but before P2's money was mixed.*