

Remedies (LAWS50036) 2018 SEM 2

Agricultural Land Management v Jackson No 2 (2014, WASC; Edelman J)	Reparative and substitutive compensation
<p>Goff and Jackson were both directors of Agricultural and Bunbury and Goff was also B's company secretary. A was a related party of B pursuant to <i>Cas s 208</i> as both entities shared the same parent company.</p> <p>B purchased land in Kalgoorlie in 1999. In June 2002, B entered into a contract to sell the land to A for \$2.25 million. The contract was signed by Goff and Jackson on behalf of both parties. In addition, the contract provided that the vendor would grant the purchaser a non-exclusive licence to use all of the information and know-how in possession of the vendor for the development of the land.</p> <p>It was alleged that Goff and Jackson breached their fiduciary duties to Agricultural to avoid placing themselves in a position in which their duties to Agricultural conflicted with their duties to their other principal, B.</p> <p>Although the court found a breach of fiduciary duty, no order for substitute or reparative compensation was made.</p> <p>[333] A has failed to prove that either or both of the promised purchase price or the promised licence fee under the contract were at an undervalue in relation to the rights which A obtained in exchange.</p> <p>[334] The manner in which an account was taken reflected the nature of the ultimate remedy which might be sought: (i) the account of administration in common form, (ii) the account on the basis of wilful default, and (iii) the account of profits.</p> <ul style="list-style-type: none"> • [349] Dr Elliott has suggested the use of the labels 'substitutive compensation' and 'reparative compensation' to differentiate the two types of claim. The former, based on the common account, describes a claim for the substituted value of the asset dissipated without authority: it demands that the trustee perform his duty to maintain the assets of fund. The latter, based on the account on the basis of wilful default, describes a claim for reparation for the loss suffered by breach of duty. • [375] Reparation: loss suffered by the principal caused by breach of duty. Substitutive: asset dissipated without authority <p>[336] When an account in common form was sought, it did not matter whether the dissipation of the asset would have occurred without the unauthorised act. The analogy for an account in common form is with specific performance or a common law action in debt.</p> <ul style="list-style-type: none"> • [338] The 'compensation' order following the common account required the D to perform his duty to maintain the trust fund in an authorised manner. • [341] (citing <i>Libertarian Investments v Hall</i> per Lord Millett) Where the D is ordered to make good the deficit by the payment of money, the award is sometimes as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative. • [342] The orders which followed the common account were not concerned with whether the P had suffered loss. They required the D to pay the money equivalent of the performance of his duty. 	

Commented [HD1]: Can be sought as of right and not dependent on any wrong

- Unauthorised dispersal of trust fund ⇒ an order of falsification
- The amount that the trustee owes to the trust fund ⇒ akin to **debt**
- **Substitutive** instead of reparative: limiting principles do not apply

Commented [HD2]: The trust has failed to bring into the trust what ought to have brought into the trust ⇒ breach of equitable duty of skill and care

- The newly appointed trustee's failure to get into the trust
- Failure to bring the money / property in ⇒ an order of surcharge
- Explicitly treated as a **loss** ⇒ **reparative** compensation
 - But for analysis applies
 - But not clear which remoteness principle applies
 - In practice, more akin to direct consequences instead of reasonable foreseeability

Commented [HD3]: Cases involving conflict of interests

- Traditionally monetary remedy
- Claimant may seek equitable compensation ⇒ go to second category

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just and fair (citing *Alati v Kruger*).

368: Where the loss is said to be the very entry into a series of contractual obligations, it does not follow that release therefrom is the inevitably appropriate remedy.

- A misrepresentation may have touched only a minor aspect of the total arrangement.
- The remedial response should be proportionate to the wrong, without necessarily having to reflect the extent of the P's likely loss or damage.
 - 369: The misrepresentation went to a discrete part of the transaction which could be precisely valued
 - 369: The investors had reaped the intended tax benefit under the scheme

Rejected Akron's submission that the trial judge's order avoiding the investment contracts ought to have been made subject to repayment of the loan principal by the investors.

- The loan monies had, in substance, gone directly to Akron and the scheme manager for the purposes of the scheme, rather than having been enjoyed personally by the investors. To impose a requirement of counter-restitution would add to the loss or damage suffered by the investors.

Alati v Kruger (1995, HCA; Dixon CJ, Webb, Kitto and Taylor JJ; Fullagar J (from 227))

Rescission in integrum

Kruger sought to rescind a transaction for the purchase of a fruit business brought about as a result of Alati's fraudulent misrepresentation as to the takings of the business.

222: Kruger cannot sue for damages for fraud / breach of warranty and rescind the contract for misrepresentation. ... Thirdly, provided that Kruger was in a position to restore to Alati **substantially** that which he had received under the contract, he might avoid the purchase and sue to recover his purchase money back from Alati, with interest and also with **damages for any loss which he may have suffered through carrying on the business in the meantime**.

- 223: upon discovering the falsity of the representation which had been made to him Kruger had acted promptly and without having done anything which could amount to an affirmation of the purchase. The validity of his rescission depended, therefore, only upon the question whether restitution in integrum was possible in the circumstances as they existed at the commencement of the action.
- 223: **Kruger still continued to carry on the business for a while, but when the case was called for judgment**, the judge was informed before he made his order that Kruger had closed down the business and left the premises, and that the landlord had re-entered.

223: It might have been argued that at the date when Kruger issued his writ he was not entitled to rescind the purchase, because he was not then in a position to return to Alati in specie that which he had received under the contract, in the same plight as that in which he had received it (citing *Clarke v Dickson*).

- 223-24: Equity has always regarded as valid the disaffirmance of a contract induced by fraud even though precise restitution in integrum is not possible, if the situation is such that, by the exercise of its powers, including the power to take accounts of

Commented [HD7]: Common law rescission

- ⇔ as soon as the P elects to rescind at common law, he gets legal title immediately; if the D uses the property, the D is guilty of conversion or trespass

- Fraud
- Duress

Equitable rescission

- ⇔ equitable bars
- ⇔ the P has mere equity up until the election to rescind; where the P decides to elect the D holds the property on CT for the P

- Misrepresentation (deliberate / innocent)
- Unilateral mistake
- Duress
- Undue influence
- Breach of fiduciary duty

Bar for both cases: it **must be possible** for both parties to effect mutual restitution in integrum

- At common law, the good must not have been used / changed ⇒ not possible in *Alati* because the property has been used

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clause of a loan agreement. David Securities argued that the payments were made in ignorance of a statutory provision which rendered the provision void. The bank argued, inter alia, that any mistake made by David Securities was a mistake of law and thus could not constitute a ground for restitution of the payments.

Any causative mistake is sufficient to give rise to a prima facie right to restitution for unjust enrichment, subject to defences such as change of position.

378: There is no place for a further requirement that the causative mistake be **fundamental**; insistence on that factor would only serve to focus attention in a non-specific way on the nature of the mistake, rather than the fact of enrichment. If a strict approach is taken towards the issue of mistake so that a P bears the burden of establishing on the balance of probabilities that a causative mistake has been made, there would also be no need to appeal to the element of fundamentality as a limiting factor.

379: It is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair and unconscionable. Instead, recovery depends on the existence of a quantifying or vitiating factor such as mistake, duress or illegality.

Dawson (1966, NSWSC; Street J)	Substitutive compensation (restoration of trust estate)
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In breach of trust, Dawson, a trustee made payments from trust funds in NZ pounds at a time when there was parity between NZ and Australian pounds. The trust moneys were lost and the trustee was under an admitted duty to restore the trust money to the trust estate.

At the time of enforcement, the NZ pound was worth more than Australian pound. The then rule of common law was that damages for conversion were assessed at the date of breach and that the rate of exchange then prevailing applied.

214: **Where a defaulting trustee is required to make good to a trust estate moneys or assets which he has wrongfully extracted from it, this obligation is in a different and higher category than a claim which merely sounds in damages at common law. ⇒ characterised as Debt**

- 214: The obligation of the defaulting trustee is essentially one of effecting a restitution to the estate. **The obligation is of a personal character and its extent is not limited by common law principles governing remoteness of damage** (citing *Caffrey v Darby*).
- 215: Necessity, which includes the regular course of business in administering the property will, in equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable although the person possession it to be co-executor or co-administrator.
- 216: The obligation to make restitution ... is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract.
 - The form of relief is couched in terms appropriate to require the defaulting trustee to restore the estate the assets of which he deprived it. **Increases in market values between the date of breach and the date of recoupment are for the trustee's account.**
 - The obligation to restore to the estate the assets of which he deprived it

Commented [HD34]: Street J deviated in considering whether the beneficiary would have authorised the payment anyway

Was the money paid out in an unauthorised way? If so, it is an equitable debt. The money is to be repaid with the full benefit of hindsight

Commented [HD35]: Any appreciation in the money which has been unauthorisedly disbursed is for the benefit of the trust account. The sum is to be assessed at the time when the account is falsified.

With the benefit of hindsight: in the nature of equitable debt

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Spigelman CJ; Heydon JA (from [291]) ⇔ Mason P (from [136]))	
Harris knowingly breached both his contractual and equitable, fiduciary duties to his employer by diverting business to himself and misusing information he had obtained in the course of his employment. The trial judge included an exemplary element in his award of damages to the employer in its action for the D's breach of fiduciary duty.	
<p>[15] The separation of equity and common law is of greater strength in Australian jurisprudence than appears to have become the case in other nations with similar traditions.</p> <ul style="list-style-type: none"> • [19] The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. • [20] The integrity of equity as a body of law is not well served by adopting a common law remedy developed over time in a different remedial context on a different conceptual foundation. • [353] The two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters. <p>[28] In Australia exemplary damages are not recoverable for breach of contract.</p> <ul style="list-style-type: none"> • [29] In his judgment, Mason P poses the question of whether the development of equity jurisprudence should proceed by way of analogy with tort or by way of analogy with contract. <ul style="list-style-type: none"> ◦ [33] In his reasons for preferring the tort analogy, Mason P has given insufficient weight to the historical development of the law of tort which was closely connected with the development of criminal law. ◦ [35] As Heydon JA notes, there was no such historical 'intermingling' between crime and either contract or equity. • [36] To the extent that reasoning by analogy at this level of generality is appropriate, I believe that the contract analogy is more appropriate. <ul style="list-style-type: none"> ◦ [36] The highest authority has described the imposition of fiduciary obligation in terms of 'undertaking' and 'agreement', albeit imputed by operation of law. ◦ [36] identify an expectation interest on the part of a beneficiary which is in terms reminiscent of contract law. <ul style="list-style-type: none"> ▪ [41] The purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. ◦ [44] Where the essential basis of the fiduciary duties is a contractual relationship this court should not develop for the first time a remedy which is not available in the law of contract. • [47] I place no reliance on the occasional references to punishment or deterrence in a number of equity judgments to which the court's attention was drawn. None of these references indicate anything in the nature of a principle that equitable remedies 	

Commented [HD49]: Prescriptive nature of duty in the law of fiduciary and tort

- Self-interested rather than other-interested
- Prescriptive rather than retrospective thinking

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- 813: assessed by reference to a reasonable wayleave fee
- 813: *Watson, Laidlaw & Co v Pott, Cassels and Williamson*
 - A patentee elected to sue an infringement for damages rather than for an AoP. Part of the infringement had taken place in Java. There was evidence that the patentee could not have competed successfully in Java.
 - It is not exactly the principle of restoration, either directly or expressly through compensation, but it is the principle underlying price or hire.
 - Lord Shaw's horse
- 815: No money awarded in substitution can be justly awarded, unless it is at any rate designed to be a preferable equivalent for an injunction and therefore an adequate substitute for it (citing *Leeds Industrial Cooperative v Slack* at 870 (Lord Sumner)).
 - 815: The general rule would be to measure damages by reference to that sum which would place the Ps in the same position as if the covenant had never been broken.
 - 815: **Factors:**
 - The lay-out covenant is not an asset which the estate owner ever contemplated he would have either the opportunity or the desire to turn to account. It has no commercial or even nuisance value.
 - The breach of the covenant which has actually taken place is over a very small area and the impact of this particular breach on the Wrotham Park Estate is insignificant.

<i>Youyang v MinterEllison</i> (2003, HCA; Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ)	Substitutive compensation (restoring trust estate)
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Youyang decided to subscribe for preference shares in a company. In order to subscribe, Youyang was required to provide to MinterEllison, solicitors for the promoters of the company, the sum of \$500,000. An express trust was formed when Youyang paid the money whereby the trustee (MinterEllison) was obliged to hold the money to the account of Youyang and only disburse the money pursuant to their powers and duties under the relevant subscription agreement and not otherwise.

Under the subscription agreement, the amount of \$256,800 was firstly to be disbursed by the trustee to a bank nominated by the company upon receipt of a bearer certificate of deposit issued by the bank in favour of Youyang. The bearer certificate of deposit would have provided security to Youyang in the sum of \$500,000 which was the amount the bank would have repaid after 10 years upon maturity of the sum deposited. MinterEllison was permitted to disburse the remainder of the \$500,000 only once the bearer certificate of deposit was received in the correct form.

In breach of trust MinterEllison made the disbursement of \$256,800 upon receipt of an acknowledgment of indebtedness (rather than a bearer certificate of deposit) made out in the name of the company which had the effect of securing their debt and not the debt of the appellant as was required. It followed that the remainder of the \$500,000 which was paid to the company to speculate with on the international stock market and to the respondent for

Commented [HD105]: Multi-factor consideration:

- Common law damages small / nominal (*Wrotham Park*; *Colls* cited in *Fen Tigers* [121])
- Subject matter of the injunction
- D's behaviour and attitude (*Fen Tigers* [149])
- Relevance of discretionary bars

Commented [HD106R105]: Quantification:

- Assessed at time of trial
- Damages in a unique equitable jurisdiction
 - Flexibility (*Morris-Garner* [43], [47], [56]) ⇒ accommodate the loss that the P is assumed to suffer in the future
 - Negotiating damages
 - Difference in value (*Morris-Garner* [70])
- Subject to reduction on basis of fairness

Commented [HD107]: Conflicting statement in the HCA: some suggested traditional approach ([38], [63], and the overall outcome) while other deviates to loss-based reparative compensation ([39], [50] (consider *Target*, put the trust estate back in the position as if the breach has not occurred) ⇒ commercial restraint in *AIB*; [60] (trustee bear the burden of proof to show that the beneficiary would have authorised the payment even without the certificate))