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Judicature and Accounts

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THIS CHAPTER IS concerned with identifying some of the effects of the Judicature reforms in the realm of accounts. The first is one lingering consequence of the Judicature reforms for the application of fiduciary principles to agents. The second concerns the recognition of a claim for equitable compensation for breach of trust without any need for an account to be taken. The third is whether that separate claim for equitable compensation should operate on principles different from those that would otherwise govern the taking of accounts in equity. Those topics appear somewhat disparate at first glance, but they are related in the sense that the Judicature reforms have caused us to forget important aspects of the history of equitable accounting. While that history does not necessarily provide the only available answers to questions that arise nowadays, it is in the nature of a common law system that its principles are anchored by reference to what our forebears did and so it is, at the very least, useful to understand that history.

I. ACCOUNTS, AGENTS AND FIDUCIARIES

Prior to the Judicature reforms, common law courts and courts of equity exercised a concurrent jurisdiction to take accounts. Without delving too deeply into the history of accounting,[1] by the nineteenth century it was relatively uncommon for an account to be ordered at common law.[2] Accounts were more commonly taken in the equitable jurisdiction 'because, in certain cases, it has better means of ascertaining the rights of the parties'.[3] That concurrent jurisdiction meant the courts exercising equitable

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[1] For a 930-year history, see J Watson, *The Duty to Account* (Sydney, Federation Press, 2016).

[2] This was not, however, completely unknown: eg, in *Baxter v Hozier* (1839) 5 Bing (NC) 288, 300; 132 ER 1115, 1117, Tindal CJ gave judgment in the Court of Common Pleas against the defendant '*quòd computet*' (which was an order requiring the defendant to account: see Watson (n 1) paras [169] and [173]) – the defendant was a co-owner of linen, which he sold in the Caribbean as a bailiff or agent for all of the co-owners; the plaintiff (another of the co-owners) was successful in forcing the defendant to account at law.

[3] *North-Eastern Railway Co v Martin* (1848) 2 Ph 758, 762; 41 ER 1136, 1138 (Cottenham LC).

jurisdiction had to develop principles to determine whether a particular account should be taken in equity or the parties left to their remedies at common law. It is those principles which generate the point noted here, as they apparently assert that some agents do not owe fiduciary duties, which seems inconsistent with the modern view that 'every agent owes fiduciary duties to his principal'.[4]

It is suggested here that we misunderstand these nineteenth-century dicta if we divorce them from the context in which they were decided, and that the Judicature reforms are part of the reason for us now misunderstanding them because those reforms removed that context. From 1 November 1875, when the Judicature Acts 1873 and 1875 came into force,[5] '[a]ll causes and matters for … the taking of … accounts'[6] were assigned to the Chancery Division of the High Court of Justice. Also from that date, Rules of Court provided that where an account was sought, if no preliminary questions needed to be tried, the court should forthwith make 'an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases'.[7] The combined effect of these changes was that common law accounting had received its final *coup de grâce*, replaced by equitable accounting principles.[8]

That might suggest the topic is no longer noteworthy. Somewhat counter-intuitively, however, that is not the case because the equitable cases prior to the Judicature reforms have left a lasting legacy in the form of rather cryptic references to non-fiduciary agents, which do not sit easily with the widespread modern view of agency as a recognised category of fiduciary relationship. Indeed, the inconsistency between these nineteenth-century dicta and the modern view of agency as a fiduciary relationship has led one commentator to argue that the dicta are mere 'misconceived [and] unsupported assertion'[9] which should be confined to the dustbin of history. It is a small misfortune of the Judicature reforms that they led to this case law being forgotten for a considerable period, in a way that left it poorly explained in modern terms and thus potentially confusing to modern readers. It is suggested here that these dicta can be explained in a way that makes sense of the approach the equitable courts were taking to accounts before the Judicature reforms, and in a way that leaves modern principles regarding the fiduciary status of agents intact.

A. Case Law

The key question in the cases which generate the confusing dicta regarding non-fiduciary agency was whether a defendant's role as agent was sufficient reason to

[4] *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA) 416 (Millett LJ). See also *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 (HCA) 96.

[5] Judicature Act 1875, s 2.

[6] Judicature Act 1873, s 34(3). See now Senior Courts Act 1981, Sch 1, para 1(f).

[7] Judicature Act 1875, Sch 1, order XV, r 1. See also Supreme Court of Judicature Act 1873, Sch 1, para 8, but this was replaced by the 1875 Act provisions before the 1873 Act came into force: see 1875 Act, s 16. See also Rules of the Supreme Court ('RSC') 1883 (SI 1983/1181) order XV, r 1.

[8] J Story and AE Randall, *Commentaries on Equity Jurisprudence*, 3rd edn (London, Sweet & Maxwell, 1920) 184.

[9] R Flannigan, 'Fiduciary Agency Denied' [2021] *Journal of Business Law* 50, 51.

justify an account being taken in equity, or whether the parties should instead be left to their remedies at common law. There were cases where the defendant's role as an agent for the plaintiff justified an account being taken in equity, particularly where the defendant was a 'confidential agent and steward',[10] whose obligation was to receive rents and manage the estates owned by his principal. And an agency relationship was considered sufficient to justify an equitable accounting in other cases: in *Mackenzie v Johnston*, Leach VC said, 'wherever such a relation exists, a bill will lie [in equity] for an account.'[11]

However, other cases indicate that the mere fact that the case concerned an agency relationship did not necessarily mean that an equitable account would be ordered. In *Hirst v Peirse*, for example, an agent was sued at law on a promissory note, and filed a bill seeking to restrain the legal action and have an account taken in equity, arguing that he was owed a considerable sum for work he had done as agent. Richards CB rejected this bill because it did not involve a mutual account (one where both parties to the arrangement made and received payments on behalf of the other),[12] adding: 'I never yet heard that agency merely was matter of account.'[13] This decision could potentially be explained on the basis that the agent sought the equitable account, rather than the principal: as Turner VC said in *Padwick v Stanley*, '[t]he right of the principal rests upon the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal',[14] so one can understand why an agent might be refused an equitable accounting, whereas the principal in the agency relationship could perhaps expect one. However, less than four months earlier, in *Phillips v Phillips*,[15] Turner VC had himself refused an equitable accounting where it was the principal who sought it, and who relied on that very status as justification for the account being taken in equity.

The equity courts would also take the account where it was complicated.[16] But where a case was relatively straightforward, so the liabilities could be dealt with adequately at law, a demurrer would be allowed against a bill seeking to have the account taken in equity, including in cases involving agency.[17] Indeed, in *Fluker v Taylor*[18] Kindersley VC indicated that even a mutual account would not necessarily justify an equitable accounting if it was not complicated; although in *Padwick v Hurst*, Romilly MR seemed to consider mutuality as an *alternative* justification to complexity for an equitable accounting.[19]

[10] *Beaumont v Boultbee* (1800) 5 Ves 485, 492; 31 ER 695, 698 (Lord Loughborough LC); affirmed on re-hearing: (1802) 7 Ves 599, 32 ER 241.

[11] *Mackenzie v Johnston* (1819) 4 Madd 373, 375; 56 ER 742, 743 (Sir John Leach VC). See also *Lord Hardwicke v Vernon* (1798) 4 Ves 411, 31 ER 209 and (1808) 14 Ves 504, 33 ER 614; *Massey v Banner* (1819) 4 Madd 413, 417; 56 ER 757, 759; *Smith v Pococke* (1854) 2 Drew 197, 203; 61 ER 694, 696.

[12] *Padwick v Hurst* (1854) 18 Beav 575, 579–80, 52 ER 225, 227.

[13] *Hirst v Peirse* (1817) 4 Price 339, 345; 146 ER 483, 485. Similarly, see *Dinwiddie v Bailey* (1801) 6 Ves 136, 31 ER 979.

[14] *Padwick v Stanley* (1852) 9 Hare 627, 628; 68 ER 664, 664.

[15] *Phillips v Phillips* (1852) 9 Hare 471, 68 ER 596.

[16] *Taff Vale Railway Co v Nixon* (1847) 1 HLC 111, 121–22; 9 ER 695, 699; *O'Connor v Spaight* (1804) 1 Sch & Lef 305, 309.

[17] See, eg, *Freitas v Dos Santos* (1827) 1 Y & J 574, 148 ER 800; *Mare v Lewis* (1869) 4 IR Eq 219, 239.

[18] (1855) 3 Drew 183, 192; 61 ER 873, 876.

[19] *Padwick v Hurst* (n 12) 579, 227. See also *Smith v Leveaux* (1863) 2 De GJ & S 1, 5; 46 ER 274, 275.

The case law contained inconsistent indications as to whether the fiduciary status of an agent could provide a different basis – separate from mutuality and complexity – for ordering an equitable accounting. In *King v Rossett*,[20] for example, a principal sought to have its agent account in equity, relying on what would now be termed the fiduciary nature of the relationship: 'This bill is filed by the principal against his agents, which distinguishes it from the cases cited, which were those of agents against their principal: in the one case, a confidence is reposed; in the other, all the circumstances must be within the knowledge of the party.'[21] Consistently with the approach that Turner VC would later take in *Phillips v Phillips*,[22] Alexander LCB expressly rejected that argument:

> Undoubtedly, a principal is entitled to an account from his agent, and may apply to a Court of Equity for that purpose; but, as I conceive, before that Court will interfere, a ground for its interposition must be laid, by showing an account which cannot fairly be investigated by a Court of Law.[23]

Similarly, in *Navulshaw v Brownrigg*, Lord Cranworth VC rejected an argument that the mere fact of a relationship of agency was sufficient justification for an account being taken in equity:

> [I]n a case in which there is no fraud, not only all the authorities but all the text-books shew that this Court will not decree an agent to account to his principal, unless the case is one which is not capable of being conveniently inquired into in a Court of law.[24]

But there were indications elsewhere in the cases that the fiduciary status of an agent would justify an account being taken in equity. In *Foley v Hill*,[25] for example, in explaining that a customer is not entitled to an equitable account against his banker, Lord Cottenham LC referred to the fact that the banker

> does not hold [a] fiduciary character, and therefore there is no such original jurisdiction; and if there be no such original jurisdiction growing out of the relative situations of the parties, then, to see if the account is of such a nature that it cannot be taken at law, we are to look to the account itself […] We find no complicated account at all here.[26]

The banker's relationship with his client was contrasted with that of an agent or factor,[27] suggesting that the fiduciary character of the latter types of relationships could justify an account being taken in equity. Similarly, in *Padwick v Hurst*, having referred to mutuality and complexity as bases for accounts being taken in equity, Romilly MR separated these from 'the fiduciary relation and the trust reposed by the

[20] *King v Rossett* (1827) 2 Y & J 33, 148 ER 820.
[21] ibid 35, 820.
[22] See n 15 above.
[23] *King v Rossett* (n 20) 35, 821.
[24] *Navulshaw v Brownrigg* (1851) 1 Sim NS 573, 584–85; 61 ER 221, 226. Affirmed on appeal: (1852) 2 De GM & G 441, 42 ER 943. See also *Barry v Stevens* (1862) 31 Beav 258, 268–69; 54 ER 1137, 1141; *Blyth v Whiffin* (1872) 27 LT (NS) 330 (VC) 334.
[25] *Foley v Hill* (1848) 2 HL Cas 28, 9 ER 1002.
[26] ibid 39–40, 1007.
[27] ibid 35–36, 37 and 43; 1005 and 1008.

principal in the agent' as different justifications for 'bills for an account by a principal against his agent'.[28]

In other cases, decided at around the same time, the courts continued to recognise the fiduciary status of the agent as a separate basis for an account being taken in equity, but did so in a way that suggested that agents are not always fiduciaries and so the agency relationship would not always justify an equitable accounting. These cases further embed the suggestion that an agent was not necessarily a fiduciary. In *Hemings v Pugh*,[29] for example, Stuart VC allowed a demurrer against a bill seeking an equitable account, but emphasised that mutuality was not the only justification for an equitable accounting:

> *[W]henever an agency partakes of a fiduciary character this Court has jurisdiction*, and will direct an account, although the receipts and payments are all on one side, and there are no mutual payments between the parties. That rule has not been shaken by the decision in *Phillips v Phillips*.[30] (emphasis added)

Importantly for present purposes, the demurrer was allowed because Stuart VC considered that 'there is no allegation of any mutual dealings, or of *anything fiduciary* in the relation of the parties, who on the bill are stated as *mere principal and agent*.'[31] (emphasis added)

Consistently with *Hemings v Pugh*, in *Makepeace v Rogers*,[32] in the Court of Appeal in Chancery, Knight Bruce LJ said that he did not think Turner VC had intended, in *Phillips v Phillips*, to suggest that a bill for an account in equity could lie only where there were mutual accounts:

> The existence of a fiduciary relation between the parties, as, for example (as was the case here) that of principal and agent, was sufficient to confer jurisdiction on this Court, and allegations of fraud or special circumstances were unnecessary.[33]

Turner LJ himself explained in *Makepeace v Rogers* that he had decided *Phillips v Phillips* as he did because 'the bill made no case of general agency, alleging only an isolated agency transaction connected with the sale by the Defendant of some railway shares belonging to the Plaintiff'.[34] This again suggested that the fiduciary nature of an agency relationship could justify an account being taken in equity, as a separate basis from mutuality or complexity, but at the same time these cases suggest that not all agencies involve a fiduciary relationship of the relevant kind.

B. Explanations

These dicta are confusing, but they can be understood if one bears in mind that 'vocabulary can stay the same over hundreds of years, even as its meaning

[28] *Padwick v Hurst* (n 12) 579, 227.
[29] (1863) 4 Giff 456, 66 ER 785.
[30] ibid 459, 787.
[31] ibid.
[32] (1865) 4 De GJ & S 649, 46 ER 1070.
[33] ibid 653, 1072.
[34] ibid 654, 1072.

changes'.[35] That is definitely so for the 'fiduciary' concept, which had a range of meanings, particularly in the Victorian period.[36] In the present context, the cases seem to deploy the fiduciary descriptor in two subtly different senses, each of which links to different aspects of the equitable jurisdiction. Understood in this way, these dicta from the pre-Judicature agency cases can be squared with modern principles regarding the fiduciary status of agents.

i. General Agency

First, the fiduciary label was sometimes used, as Turner LJ did in *Makepeace v Rogers*, to reflect the idea of a general agency, contrasting with a special or isolated agency transaction.[37] The concept of general agency was used in the nineteenth century to refer

> not merely [to] a person substituted in the place of another for transacting all manner of business (since there are few instances in common use of an agency of that description), but a person whom a man puts in his place to transact all his business of a particular kind. [In contrast,] a special agent [is] employed about one specific act, or certain specific acts only.[38]

The Court of Chancery did not have a large judicial manpower,[39] and so it is understandable that it would restrict access to its accounting processes in the concurrent jurisdiction – where other remedies were available at common law – to cases where it could offer advantages over the common law. A 'special' agency would not normally be as complicated as a general agency, and so might not justify deploying equity's machinery. To describe that distinction using fiduciary terminology is somewhat confusing to modern readers, but it seems this was one sense in which the nineteenth-century judges used the fiduciary label when identifying whether an account would be taken in equity.

ii. Trust-Like Arrangements

A second, more central, sense in which the fiduciary descriptor was used in these cases referred to the defendant's management of *property* for the plaintiff. As Jeremy said, describing the circumstances in which an account would be taken in equity:

> The relation of principal and agent generally is one of great extent. It seems to comprise all cases in which one is authorized to act for another; but *with reference to the subject*

[35] A Televantos, 'Losing the Fiduciary Requirement for Equitable Tracing Claims' (2017) 133 *LQR* 492, 492.

[36] LS Sealy, 'Fiduciary Relationships' [1962] *CLJ* 69, 70–72; LS Sealy, 'The Director as Trustee' [1967] *CLJ* 83, 85–86; Televantos (n 35) 493, 513.

[37] See also *Mare v Lewis* (n 17) 240.

[38] W Paley, *The Law of Principal and Agent* (London, Butterworth, 1812) 139–40. See also, eg, J Story, *Law of Agency*, 5th edn (Boston, Little Brown & Co, 1857) 18, 146; JW Smith and GM Dowdeswell, *A Compendium of Mercantile Law*, 6th edn (London, Stevens & Norton, 1859) 134–35; CM Smith, *Master and Servant*, 2nd edn (London, H Sweet, 1860) 165, 168.

[39] JH Baker, *An Introduction to English Legal History*, 5th edn (Oxford, OUP, 2019) 122.

> *now before us, it is limited to those in which the control or management of property is so confided*.[40] (emphasis added)

A defendant's management or control of the plaintiff's property meant the defendant was operating in a way which bore similarities to the role of a trustee. It was clear that a trustee would be compelled to render an account in equity, in its exclusive jurisdiction, 'upon the mere fact of the relation which subsists between him and his *cestui que trust*'.[41] It is thus understandable that someone who controlled property of another could sensibly be subjected to a similar accounting regime, notwithstanding that the agency relationship meant that common law procedures and remedies could also apply. The words 'trust' and 'fiduciary' were much more fluid in their meanings in this period: this sort of fiduciary control of another's property was often described as a trust.[42] As that language became more precise, the fiduciary label came to be used to refer to relationships that, while not strictly trusts, were sufficiently trust-like to justify similar judicial treatment.

In other words, this approach reflects the function that the fiduciary concept served, particularly historically, in exporting the legal incidents of one form of relationship to other similar relationships; and the paradigm fiduciary relationship from which fiduciary duties were exported in this fashion is the relationship between trustee and beneficiary.[43] The 'fiduciary relationship has developed by analogy from the trust relationship.'[44] That analogical reasoning process can be seen at work in numerous cases.[45] In *Foley v Hill*, for example, in explaining why an equitable account would not be ordered against a banker, Lord Cottenham LC differentiated the banker's position from that of a factor or agent in the following way:

> [A]s between principal and factor, there is no question whatever that that description of case … has always been held to be within the jurisdiction of a Court of Equity, because the party *partakes of the character of a trustee*. … So it is with regard to *an agent dealing with any property*; … though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged; and therefore in these cases the Courts of Equity have assumed jurisdiction. But the *analogy* entirely fails, as it seems to me, when you come to consider the relative situation of a banker and his customer.[46] (emphasis added)

[40] G Jeremy, *A Treatise on the Equity Jurisdiction of the High Court of Chancery* (London, J & WT Clarke, 1828) 513. See also IP Cory, *A Practical Treatise on Accounts*, 2nd edn (London, W Pickering, 1839) 246–48.

[41] Jeremy (n 40) 523.

[42] Televantos (n 35) 497–98. See, eg, *Burdett v Willett* (1708) 2 Vern 638, 23 ER 1017; *Charitable Corp v Sutton* (1742) 2 Atk 400, 405–06; 26 ER 642, 644–45; and *Charitable Corp v Sutton* (1742) 9 Mod 349, 355; 88 ER 500, 503.

[43] *Re West of England & South Wales District Bank, ex p Dale & Co* (1879) 11 Ch D 772 (Ch) 778.

[44] *Gwembe Valley Devt Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131 [89] (Mummery LJ).

[45] In addition to the cases discussed in the text, see also *Spackman v Evans* (1868) LR 3 HL 171, 189–90; *Re Gresham Life Assurance Society* (1872) LR 8 Ch App 446 (CA) 449; *Re Lands Allotment Co* [1894] 1 Ch 616 (CA) 631, 638; *New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd* (1904) 1 CLR 524 (HCA) 541–42; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 (Ch) 1575; *Wallersteiner v Moir (No 2)* [1975] 1 QB 373 (CA) 397–98.

[46] *Foley v Hill* (n 25) 35–36, 1005.

It made sense to assert accounting control over relationships that were similar to those involved in trusts, while refusing to make those processes available in other agency cases where a remedy was available at law and where the facts were neither complicated nor similar to a trust arrangement. It is suggested that this is the core meaning of the statements in the cases that an agent would not be held to account in equity if he were not a fiduciary.

This explains Lord Hatherley LC's observation in *Moxon v Bright* that '[i]t was not every agent who held a fiduciary position'.[47] Immediately preceding that observation, he had noted that there

> were numerous cases shewing that where the relation of principal and agent had imposed a trust upon the agent, the Court would entertain a bill for an account, and the only difficulty was in determining what constituted this species of trust. … *Foley v Hill* shewed that though a banker was the agent of the customer for many purposes, they were not such as would constitute a trust. … [T]he sole point in this suit was whether there existed between them an agency in which a fiduciary position was created.[48]

Similarly, in *Hemings v Pugh*, Stuart VC indicated that an account could be obtained against an agent in equity *if* the agent were a fiduciary, even if the payments and receipts were not mutual; he gave the instance of a steward or land agent as an example of 'an agency [that] partakes of a fiduciary character'.[49] And in *Makepeace v Rogers* – which Knight Bruce and Turner LJJ both considered a clear case of 'fiduciary relation between the parties',[50] justifying an account in equity – the defendant had for many years been employed as the plaintiff's 'agent and manager of his estates'.[51]

The nineteenth-century dicta which suggest that agents are not necessarily fiduciary are best understood as reflecting the availability of an accounting in equity in the Court of Chancery's concurrent jurisdiction. Relief would be available against an agent at law, but an account could be taken in equity if (a) this was necessary because the common law process was not sufficiently nuanced to the case, as where the accounts were mutual or otherwise complicated (including in cases involving a general agency); or (b) the relationship between the principal and agent bore characteristics similar to those involved in a trust (in the form of control or management of the plaintiff's property). If there was no reason for the account to be taken in equity, the parties would be left to their remedies at law.

While this is a counter-intuitive example of the lasting impact of the Judicature reforms, what it illustrates is the importance of a recognition of the changes that those reforms wrought which are not so well noticed in modern times – in this case

[47] *Moxon v Bright* (1869) LR 4 Ch App 292 (CA) 294.

[48] ibid 294–95. Similarly, see *Massey v Banner* (n 11) 417, 759; *Burdick v Garrick* (1870) LR 5 Ch App 233 (CA) 240, 243; *Ex parte Cooke* (1876) 4 Ch D 123 (CA) 128; *Marris v Ingram* (1879) 13 Ch D 338 (Ch) 344, 345; *New Zealand and Australian Land Co v Watson* (1881) 7 QBD 374 (CA) 382, 383–84; *Piddocke v Burt* [1894] 1 Ch 343 (Ch) 346; *John v Dodwell & Co Ltd* [1918] AC 563 (PC) 569.

[49] *Hemings v Pugh* (n 29) 459, 787.

[50] *Makepeace v Rogers* (n 32) 653, 1072.

[51] ibid 652, 1072.

removing the distinction between the principles governing accounting at common law and in equity – and an appreciation of the context of the case law preceding those changes. Failure to appreciate that context runs the risk of dicta in those cases being misunderstood in modern times. Despite the terminology used in these cases, these dicta were not concerned with whether the defendant agents owed duties of the kind that would, in modern legal parlance, be referred to as fiduciary duties.

II. ORIGINS OF DIRECT CLAIM FOR EQUITABLE COMPENSATION

The second and third aspects of the Judicature reforms addressed here are more directly concerned with the effect of those reforms on the state of the modern law. Both are also concerned with the way in which accounts were taken in equity, particularly against trustees, but they raise questions as to whether the modern claim for equitable compensation for breach of trust – without any account being taken – is or should be governed by different principles from those applied to the taking of trust accounts. The Judicature reforms are again part of that picture, albeit not the entire landscape.

In recent years, claims seeking a monetary remedy against trustees following a breach of trust have often been pleaded and considered as claims for equitable compensation for breach of trust, rather than as claims seeking an account and consequential remedies. The traditional accounting approach involved two steps, as Lord Millett NPJ explained in *Libertarian Investments v Hall*:

> an account does not in itself provide the plaintiff with a remedy; it is merely the first step in a process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good. Once the plaintiff has been provided with an account he can falsify and surcharge it.[52] If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. This will produce a deficit which the defendant must make good, either in specie or in money. Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative.[53]

[52] As Dr Turner has pointed out, these labels were strictly associated with challenges to settled (or stated) accounts: PG Turner, 'Want of Causation as a Defence to Liability for Misapplication of Trust Assets' in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Oxford, Hart, 2018) 155, 159–60. In an open account (one which had not yet been finalised and agreed, and so was not settled), the labels of 'charge' and 'discharge' were more appropriate. The trustee was charged with (the value of) assets that he had, or should have, received; and discharged where assets were legitimately transferred away or otherwise lost without a breach of duty: see also SB Elliott, *Compensation Claims Against Trustees* (Oxford DPhil, 2002) 107–15. However, as Turner also recognised, the labels of falsification and surcharge have become so prevalent in explaining the taking of accounts (largely because of the influence of Lord Millett: see PJ Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *LQR* 214, 225–26) that it is perhaps easier just to use those: see, eg, *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 [52]. Falsification is the equivalent of disputing a discharge, and surcharge involves an argument that the trustee either received something for which he did not account, or should have received an asset if he had been acting consistently with his duty.

[53] *Libertarian Investments Ltd v Hall* [2013] HKCFA 93, (2013) 16 HKCFAR 681 [168]. See also *Barnett v Creggy* [2016] EWCA Civ 1004, [2017] Ch 273 [22].

One question which the modern claim for equitable compensation generates is whether that different form of claim requires or justifies any difference in the principles which the court applies to calculate the quantum of compensation payable by the trustee. The genesis of the direct claim to equitable compensation could potentially provide part of – albeit not the whole – the answer to that question, but that genesis remains elusive. The discussion here identifies indicators in the case law of the genesis of the separate claim and the role that the Judicature reforms had in it.

As Heydon, Leeming and Turner say, it seems that '[i]n the nineteenth century a more direct means of recovering loss came about when it became possible to sue for particular breaches of trust in isolation without using the equity courts' accounting procedures at all'.[54] They cite *Coppard v Allen*, where Turner LJ explained that a claim could be brought against a trustee to establish a breach of trust without necessarily joining the other trustees, which contrasts with the situation where an accounting was sought, where all trustees would need to be joined.[55]

But there are other indications in the case law of the courts developing an ability to focus directly on the award necessary to rectify a breach of trust, and the Judicature reforms contributed to this development.

One example of this can be seen in the Judicature reforms loosening the previously sharp distinction between common accounts and accounts taken on the basis of wilful default: prior to the Judicature Acts, if a common accounting identified instances of wilful default, the trustees could not be charged with wilful default without a separate suit, which required leave from the court, unless the court's original order had reserved power to make further directions for a wilful default accounting.[56] 'But since the Judicature Act, the stringency of the rule has been somewhat relaxed',[57] to the point where 'under the new practice an order charging him with wilful default may be made at any time on a proper case being made'.[58] The ability to provide a remedy which directly addressed an identified breach of trust, without unnecessary procedural obstacles being thrown in the way, seems consistent with the development of the court's ability to provide a remedy for identified breaches directly without a full account needing to be taken.

At around the same time, the courts were given the ability to provide judicial advice on specific questions concerning the administration of a trust, without needing to take over the entire execution of the trust in order to resolve the particular point, as had previously been the case with an order for general administration of the trust.[59]

[54] JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th edn (Chatswood, LexisNexis, 2015) para [23-030].

[55] *Coppard v Allen* (1864) 2 De G J & S 173, 180–81; 46 ER 341, 344.

[56] *Hodson v Ball* (1842) 1 Ph 177, 41 ER 599; *Jones v Morrall* (1852) 2 Sim NS 241, 249–50; 61 ER 333, 336; *Partington v Reynolds* (1858) 4 Drew 253, 258–59; 62 ER 98, 100. For the difference between wilful default and common accounts, see M Conaglen, 'Equitable Compensation for Breach of Trust: Off *Target*' (2016) 40 *Melbourne University Law Review* 126, 129–35.

[57] HG Hanbury, 'Forms of Account Against Executors and Trustees' (1936) 52 *LQR* 365, 366.

[58] *Job v Job* (1877) 6 Ch D 562 (Ch) 564. An adequate pleading of wilful default was still necessary: *Mayer v Murray* (1878) 8 Ch D 424 (Ch) 426–27. See also *Re Symons* (1882) 21 Ch D 757 (Ch) 761; *Smith v Armitage* (1883) 24 Ch D 727 (Ch) 728–29; *Re Youngs* (1885) 30 Ch D 421 (CA) 431–32; HW Seton and others, *Forms of Judgments and Orders*, 7th edn (London, Stevens & Sons, 1912) 1121.

[59] *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 (NSWSC) 635.

This development began before the 1873–1875 Judicature reforms, with the enactment of section 30 of the Law of Property Amendment Act 1859,[60] which enabled a trustee to apply by petition or summons to a judge of the Court of Chancery 'for the opinion, advice, or direction of such judge on any question respecting the management or administration of the trust property'. However, this procedure could only be used where the question was not difficult and required no factual inquiries, and it was not available for questions of construction.[61] The ability to focus on particular questions was enhanced by the Rules of the Supreme Court 1883, promulgated in the wake of the 1873–1875 reforms. The 1883 rules included detailed rules regarding the work of the Chancery Division in Chambers, which had not been present in the initial rules in Schedule 1 to the Judicature Act 1875. Importantly, the new Rules included Order LV, rule 3 which enabled trustees or beneficiaries to take out an originating summons returnable in the chambers of a Chancery Division judge to determine questions without an administration; and they emphasised in Order LV, rule 10 that '[i]t shall not be obligatory on the Court or a judge to pronounce or make a judgment or order … for the administration of any trust … if the questions between the parties can be properly determined without such judgment or order'.

Three decisions in the first half of 1885 demonstrate that the courts quickly appreciated the flexibility that the new Rules afforded them.[62] In *Re Wilson*, some of the beneficiaries and one trustee applied for a general administration order, which was opposed by the other trustees and beneficiaries. Pearson J made the order, as a number of the beneficiaries were 'infants who cannot examine [the] accounts for themselves',[63] but he observed that the new power to resolve questions without administration was 'very useful',[64] commenting that '[t]here were no means, according to the old practice, of bringing isolated questions under a will before the Court for its determination except by an administration suit',[65] which could involve unnecessary expense.

As Fry LJ said in *Re Blake*, '[t]he object of the orders is to prevent the general administration of the estate when the questions in controversy can otherwise be properly determined',[66] and if an application for general administration turned out to have been unnecessary because the questions could have been resolved by that more direct route then the party seeking the administration order could be made to pay costs. Further, as Cotton LJ observed:

> Where there are questions which cannot properly be determined without some accounts and inquiries or directions which would form part of an ordinary administration decree, then the right of the party to have the decree is not taken away, but the Court may direct

[60] 22 & 23 Vict, c 35. See also Law of Property Amendment Act 1860, s 9.

[61] *Re Mockett's Will* (1860) Johns 628, 630; 70 ER 571, 571; GO Morgan and EA Wurtzburg, *Morgan's Chancery Acts and Orders*, 6th edn (London, Stevens & Sons, 1885) 103.

[62] The Rules were also applied to administration actions commenced before, but tried after, they came into operation: *Re Llewellyn* (1883) 25 Ch D 66 (Ch).

[63] *Re Wilson* (1885) 28 Ch D 457 (Ch) 463.

[64] ibid 460.

[65] ibid.

[66] *Re Blake* (1885) 29 Ch D 913 (CA) 919.

> the order simply to those points which will enable the question which requires to be adjudicated upon to be settled.[67]

In *Re Gyhon*, the plaintiff had brought a claim for breach of trust against trustees of a deceased estate, alleging the trustees had sold part of the estate but not accounted for the proceeds of sale, and that one trustee had mortgaged part of the estate in breach of trust and applied the loan moneys to his own purposes. The plaintiff then took out a summons for an order for ordinary accounts and inquiries regarding the estate, as well as an inquiry into the mortgages. The Court of Appeal refused to make these orders because the specific inquiries turned on whether there had been a breach of trust, which could not yet be known, and the ordinary accounts may turn out to be unnecessary once the result of the claims for breach of trust was known.[68]

Campbell v Gillespie[69] provides an illustration of the court's use of the new Rules to provide direct relief for specific breaches. A debtor created a trust to pay creditors and later assigned his interest in the trust (essentially an interest in the surplus) to his wife for value. Three years after that, the trustee transferred the surplus trust assets to the wife, certifying that the trusts were fully executed. A further two years later, the trustee sent the trust account books away for destruction, unwisely but honestly believing them no longer to be needed. The wife filed proceedings the following month, claiming an account of all the trustee's dealings as trustee, on a wilful default footing. The trustee resisted that claim, but admitted three particular transactions that could be criticised. Cozens-Hardy J rejected the wilful default plea, but then turned to the question of what relief was justified. His approach again reflects the impact, and his approval, of the Judicature reforms:

> Under the old law I think it is plain that the [plaintiff[70]] would have been entitled, as a matter of right, to a common account against the defendant. There has been no release; there has been no settled account; there has been nothing upon which the defendant could rely by way of defence. But happily, under Order LV, r10, I have now a discretion, and I am not bound to give the plaintiff a decree for a common account if the questions between the parties can be properly determined without such a decree.[71]

Cozens-Hardy J noted that the trustee had kept proper accounts, had had them audited by accountants around the time of the transfer to the plaintiff, and the plaintiff had not asked for any further accounts until she instituted her suit. While he could not acquit the defendant trustee of all misconduct in respect of the three transactions, Cozens-Hardy J refused to order a full account of the entire period that the trust had operated, as 'I think I can properly determine the questions between the

[67] ibid 916. Similarly, even where an instance of wilful default was proven, the courts could order that an account be taken on a wilful default footing in respect of that breach *alone*, leaving the rest of the account to be taken on the usual basis, where there was nothing to suggest that other breaches of trust had occurred: *Re Tebbs (deceased)* [1976] 1 WLR 924 (Ch) 930.

[68] *Re Gyhon* (1885) 29 Ch D 834 (CA) 837–38.

[69] [1900] 1 Ch 225 (Ch).

[70] The report reads 'defendant' here, but that is clearly an error.

[71] *Campbell v Gillespie* (n 69) 228.

parties without giving the plaintiff a full decree.'[72] In each of the three improper transactions, the sums were clear and so judgment was given directly.

These cases are consistent with a judicial willingness – and, indeed, a growing desire and insistence – to focus attention on the issues that would resolve the dispute at hand. That attitude cannot be attributed solely to the Judicature reforms, as there is also evidence of the courts wanting to avoid unnecessary procedural complexity before those reforms came about.[73] But the Judicature reforms – particularly the changes to the procedural rules – provided the courts with a further string to that bow, which they grasped with both hands.

By the turn of the twentieth century,[74] Warrington J was able to say, in *Re Wrightson*, that '[i]n cases of breach of trust relief is given in respect of those specific breaches of trust which are proved, and in respect of those only.'[75] He also said that

> if wilful default is alleged and if an instance is proved, then the trustees are not in a position to claim to have against them the ordinary account only, but the account must be directed on the footing of wilful default. In my judgment that rule does not apply to cases of breach of trust.[76]

However, while these statements appear to indicate a separate claim for breach of trust, what Warrington J was referring to was the difference between the two traditional forms of account (common accounting and wilful default accounting), rather than between accounts and claims for equitable compensation. His point was to reject the proposition that proof of any breach of trust would necessarily lead to the 'roving inquiry' that a wilful default accounting entails,[77] rather than to show a difference between claims for equitable compensation for breach of trust and claims for accounts following a breach. Indeed, he said that 'in the case of a breach of trust there is no general form of account which is substituted for the common account'.[78]

The precise genesis of the distinct claim for equitable compensation for breach of trust, absent an accounting, is thus difficult to pinpoint, but it seems likely that it originated in cases where a specific breach of trust was proved and where it was sufficiently clear to the court what remedy was needed to repair that breach without

[72] ibid 229.

[73] See, eg, in the context of an account of profits argument, *Parker v McKenna* (1874–75) LR 10 Ch App 96 (Divisional Court) 122. See also TH Haddan, *The Administrative Jurisdiction of the Court of Chancery* (London, W Maxwell, 1862) 54.

[74] A provision equivalent to RSC 1883, Order LV, r 10 continued into the 20th century in RSC 1965 (SI 1965/1776), Order 85, r 5(1). That rule was, in turn, carried over into the Civil Procedure Rules 1998 by Pt 50 and Sch 1. However, RSC 1965, Order 85 was removed from the CPR when Pt 64 was introduced by the Civil Procedure (Amendment) Rules 2002, SI 2002/2058. Neither Pt 64 nor PDs 64A and 64B replicate the substance of r 5(1) of Order 85. Presumably it was thought that a statutory provision was no longer required to guide the courts' decision as to whether a general administration order was appropriate, given such orders had generally been considered unnecessary for so long.

[75] *Re Wrightson* [1908] 1 Ch 789 (Ch) 799–800.

[76] ibid 800.

[77] ibid 799.

[78] ibid. See also *Re Stevens* [1898] 1 Ch 162 (CA) 176–77.

needing to send the case off for an account to be taken of the trustee's management of the entire trust fund.[79] As Patten LJ said more recently:

> From the 19th century onwards one finds an increasing use of the Court of Chancery's power to entertain actions based on particular breaches of trust for which compensation would be awarded without going through the cumbersome and often extremely lengthy process of taking an account. The modern term for this is equitable compensation but it has its roots in a much older jurisdiction and practice.[80]

III. PRINCIPLES FOR CALCULATING EQUITABLE COMPENSATION

The third impact of the Judicature reforms to be noticed here links with the second: it concerns the degree to which those reforms might have altered the principles for calculating the sum of equitable compensation that a trustee or other fiduciary steward must pay following a breach of their stewardship duties. In particular, a question arises as to whether equitable compensation for breach of trust should be calculated by reference to the principles commonly applied in assessing damages for breaches of contract or for torts, or instead should be calculated in accordance with traditional accounting principles that were designed to restore the trust estate without considering issues such as causation, foreseeability and remoteness.[81]

As the previous section indicates, the recognition and development of a direct claim for equitable compensation – without seeking an account and consequential remedies – does not appear to have been intended to alter the outcome in individual cases. The difficulty in pinpointing the genesis of the separate claim for equitable compensation makes it hard to be categorical, but if the claim for equitable compensation was simply a more direct and focused way of redressing a breach of trust, without needing to go through the process of accounting because that was thought unnecessary in the instant case, the quantum of the remedy ought not to differ from what would have been ordered following an account being taken.[82] Further, insofar as the development of the separate equitable compensation remedy was assisted by the Judicature reforms, that further supports the view that a substantive change to the quantum of equitable compensation payable by a breaching trustee was not – at that stage, at least – intended. As Jessel MR said of the Judicature reforms:

> It is stated very plainly that the main object of the Act was to assimilate the transaction of Equity business and Common Law business by different Courts of Judicature. It has been

[79] See, eg, *Libertarian v Hall* (n 53) [130]–[140], [174].

[80] *Barnett v Creggy* (n 53) [22].

[81] *Re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 (NSWSC) 214–16.

[82] See, in a related context, *Conway v Fenton* (1888) 40 Ch D 512 (Ch) 515–16; *Re Medland* (1889) 41 Ch D 476 (CA) 480, 492. See also R Chambers, 'Liability' in PBH Birks & A Pretto (eds), *Breach of Trust* (Oxford, Hart, 2002) 1, 22; PG Turner, 'Measuring Equitable Compensation for Breach of Fiduciary Duty' [2014] *CLJ* 257, 257.

> sometimes inaccurately called 'the fusion of Law and Equity'; but it was not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of Law and Equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the Act. Then, as to that very small number of cases in which there is an actual conflict, it was decided that in all cases where the rules of Equity and Law were in conflict the rules of Equity should prevail.[83]

The last sentence of that passage refers to section 25(11) of the Judicature Act 1873, which effectively codified the outcome of the *Earl of Oxford's Case*.[84] 'In principle, the outcome of a dispute would be no different after the Judicature Acts from the result under the old divided jurisdictions of courts of common law and equity.'[85] Consistently with that, one would expect that the outcome of a claim for equitable compensation would not be substantively different from what the court would have ordered if an accounting process had been gone through before remedial orders were made. As Lord Reed JSC put it in *AIB Group (UK) plc v Mark Redler & Co Solicitors*, '[t]he measure of compensation is therefore the same as would be payable on an accounting, although the procedure is different'.[86]

It was, therefore, somewhat surprising to find Lord Toulson JSC open his judgment in that same case with the sentence: '140 years after the Judicature Act 1873 (36 & 37 Vict c 66), the stitching together of equity and the common law continues to cause problems at the seams.'[87] In *AIB*, the claimants had brought their claim as a suit for equitable compensation for breach of trust.[88] It is difficult to see how common law considerations arise in such a claim, as it would previously have been dealt with in the exclusively equitable jurisdiction, and so the Judicature Act 1873 should not have affected the case.

Despite that perhaps unfortunate choice of rhetorical flourish at the beginning of his judgment, the tenor of Lord Toulson's judgment suggests that what he had in mind was not so much the impact of the Judicature Act 1873 directly, but rather the development of legal and equitable principles over time. As Jessel MR said in *Re Hallett's Estate*:

> it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly

[83] *Salt v Cooper* (1880) 16 Ch D 544 (CA) 549. See also *Britain v Rossiter* (1879) 11 QBD 123 (CA) 129; *Joseph v Lyons* (1884) 15 QBD 280 (CA) 285–86, 287; R Evershed, 'Reflections on the Fusion of Law and Equity After 75 Years' (1954) 70 *LQR* 326, 327 and 329; MJ Leeming, 'Equity, the Judicature Acts and Restitution' (2011) 5 *Journal for Equity* 199, 213–15; MJW Lobban, 'What Did the Makers of the Judicature Acts Understand by "Fusion"?' in JCP Goldberg, HE Smith and PG Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge, CUP, 2019) 70. Jessel MR's apparently contradictory dicta, two years later in *Walsh v Lonsdale* (1882) 21 Ch D 9 (CA) 14, can be explained in a way that does not require treating the Judicature Acts as having eradicated the distinction between common law and equity: see *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 (HCA) 250–55.

[84] See (1615) 1 Ch Rep 1, 6–7, 10; 21 ER 485, 487; and see James I's proclamation of 18 July 1616: Cary 133–35, 21 ER 65.

[85] J McGhee and S Elliott (eds), *Snell's Equity*, 34th edn (London, Sweet & Maxwell, 2020) para [1-017]; and see paras [1-009]–[1-010], [1-021].

[86] *AIB Group* (n 52) [91]; see also [108].

[87] ibid [1].

[88] The preliminary issues dealt with in the case *solely* concerned breach of trust: see *AIB Group (UK) plc v Mark Redler & Co* [2012] EWHC 35 (Ch), [2012] PNLR 16 [4].

> well known that they have been established from time to time – altered, improved, and refined from time to time.[89]

Lord Toulson did not favour the traditional accounting principles that would have been used to determine the quantum of equitable compensation payable by a trustee, saying that '[t]here is something wrong with a state of the law which makes it necessary to create fairy tales'.[90] Instead, he preferred to apply causation concepts from contract law, calculating the compensation by reference to the position that would have been achieved had the trust been properly performed, rather than the traditional approach of restoring assets which were wrongfully disbursed from the trust fund.[91]

The point here is not to quibble with that policy decision, but to recognise that it is a policy decision to develop the law, and that it is one which was neither generated nor required by the Judicature Acts and their allied procedural reforms. The development has taken place because the traditional principles by which equity determined the quantum of equitable compensation payable by a trustee are considered unsuited to the modern dynamics of a trust that is used as part of a commercial transaction.[92] Lord Toulson made clear that he thought that equitable compensation should be calculated, in this sort of case at least, by the application of the same principles that would be applied if the claimant had sought damages for breach of contract at common law. That was, he said, not because of the Judicature Acts – which he recognised would have required the equitable rules to be applied if there was any conflict – but rather because the trust was created as part of the machinery for the performance of a contract, and it would be artificial to consider the trust as a distinct legal relationship, separate from the contractual context in which it arose.[93] In other words, the 'seam' between common law and equity that Lord Toulson had in mind in his opening sentence, arose from the fact that the trust was created in the context of performance of a contract, and the outcome of the claim needed to reflect that fact.

It has long been recognised that there is 'no dichotomy between [trust and contract because a] contractual relationship provides one of the most common bases for the establishment or implication and for the definition of a trust'.[94] However, it does not follow that the doctrines applicable to trusts necessarily need to change to match contract law. A trustee is holding property subject to onerous duties to devote that property to the benefit of another. That arrangement leaves the beneficiary vulnerable

[89] *Re Hallett's Estate* (1880) 13 Ch D 696 (CA) 710. See also *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30, (2012) 247 CLR 205 [62].

[90] *AIB Group* (n 52) [69].

[91] For examples of the traditional approach, see *Re Dawson (deceased)* (n 81); *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15, (2003) 212 CLR 484.

[92] *AIB Group* (n 52) [70]–[71].

[93] ibid [71].

[94] *Gosper v Sawyer* (1985) 160 CLR 548 (HCA) 568–69 (Mason and Deane JJ). See also FW Maitland, *Equity*, 2nd edn rev by J Brunyate (Cambridge, CUP, 1936) 54; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* [2000] HCA 25, (2000) 202 CLR 588 [27]–[28]; *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253 [59], [103]; *Prickly Bay Waterside Ltd v British American Insurance Co Ltd* [2022] UKPC 8, [2022] 1 WLR 2087 [47].

to misapplication of the property by the trustee. The duties of trustees (and other fiduciary stewards) were traditionally crafted with that vulnerability in mind, and were strictly enforced by remedies which refused to allow a trustee to be discharged from his responsibility to hold the trust assets safe unless there had been strict compliance with the trustee's duties. When the trust is created, the parties are free to alter that strictness, by extending the powers that the trustee has,[95] by abridging the duties that the trustee owes, or by providing the trustee with an exemption from liability for breaches of trust.[96] But if the parties have chosen not to take those routes, then their (contractual) choice to use a trust mechanism without modification appears a choice to protect the beneficiary by adopting the strictness of the traditional liability regime.

This view of the situation seems to underpin the Court of Appeal's decision in *Main v Giambrone & Law*, where a law firm released investment funds from its client account without having received the required documentation for release, and the funds could not now be recovered. Jackson LJ differentiated the case from *AIB* and *Target Holdings v Redferns*, on the basis that the solicitors' role in relation to the clients' funds in *Giambrone* was 'an obligation to act as custodians of the deposit monies indefinitely'.[97] That is the traditional view of a trustee's role, and the liability to replace wrongfully disbursed funds – as opposed to identifying what would have happened if the trust had been properly performed – is consistent with traditional trust principles. But the solicitors in *AIB* and *Target Holdings* had the same role – they also were to act as custodians for their client's money unless and until particular conditions had been satisfied.[98]

The traditional accounting process captures well the concern that the Court of Appeal had in *Giambrone* as it focuses attention on the trust property and the appropriateness of what the trustee did with it, rather than on what might have happened if the trustee had acted properly. If the trustee acted improperly by disbursing assets from the trust to persons who should not have them, or on terms that ought not to have been agreed to, the trustee was required to return to the trust the assets which were wrongfully disposed so that the trust could be properly administered. In *White v Baugh*, for example, the House of Lords held that a receiver who had paid money into a bank which failed was liable for the sum lost because he had placed improper restrictions on how the money could be withdrawn from the bank. Lord Lyndhurst considered it was 'altogether immaterial'[99] that it had not been shown that those restrictions caused the loss to be suffered. The receiver's attempt to avoid his liability to account, on the basis that the loss had been occasioned without any fault on his part, failed because his deposit of the funds on those terms was itself improper,[100]

[95] This was more important historically than it is now, given the wide powers that are included in trusts as default rules under statutory provisions: see, eg, Trustee Act 2000, s 3; Trustee Act 1925 (NSW), s 14.

[96] See *Armitage v Nurse* [1998] Ch 241 (CA).

[97] *Main v Giambrone & Law* [2017] EWCA Civ 1193, [2018] PNLR 2 [62].

[98] Similarly, see *Jessup v Lawyers Private Mortgages Ltd* [2006] QCA 432 [47]–[48].

[99] *White v Baugh* (1835) 3 Cl & Fin 44, 65; 6 ER 1354, 1362.

[100] ibid 63, 65–66; 1361–62. See also *Salway v Salway* (1831) 2 Russ & M 215, 220; 39 ER 376, 378; Cory (n 40) 278.

irrespective of whether those terms had caused the loss of the funds. The trustee had to be able to point to a relevant power, or other justification,[101] if he sought to justify a disposal of trust property:[102] the trustee was expected to have the trust property in his control unless it was disposed of in an authorised fashion and in accordance with any relevant duties. If the trustee disposed of an asset without authority, the beneficiaries could falsify the unauthorised entry and hold the trustee to his fundamental duty to produce the trust property.

> A trustee … can only discharge himself by showing that he has paid the trust fund to the right person. … [W]hen an account is taken at the instance of the beneficiary, he will be charged, as still being in his hands, with any trust money which he cannot prove to have been properly disbursed by him.[103]

As Stebbings said:

> Whatever the reason underlying the breach, the law held transgressing trustees liable to replace any money lost. *This position reflected the paramount safety of the trust fund*. … The orthodox uncompromising attitude of the law was … and always had been, promoted with the object of ensuring the highest standards of behaviour by trustees to emphasise that anything falling short in relation to the administration of trusts would not be tolerated and thereby to discourage breaches of trust.[104] (emphasis added)

The focus was on restoring to the trust fund the assets which were wrongfully removed from it, in order then to give effect to the trustee's fundamental duty to hold those assets and deal with them in accordance with the terms of the trust; it was not on attempting to determine what would have happened if the trustee had not acted in breach of trust. As the Privy Council's decision in *British American Elevator Co Ltd v Bank of British North America* demonstrates, a failure to appreciate that difference can lead courts into error. The defendant bank had knowingly allowed the plaintiff's agent improperly to withdraw funds from the plaintiff's bank account for the agent's personal use. At first instance, Galt J required the defendant to return the misapplied money, but the Manitoba Court of Appeal varied that order, directing a reference to ascertain what loss the plaintiffs had suffered by reason of the wrongful withdrawals. The Privy Council reinstated Galt J's judgment. Viscount Haldane explained that the Court of Appeal appeared to have treated the action as one for damages for breach of the agreement between the plaintiffs and the defendant bank, an approach that was 'quite inadequate'.[105] He surmised that the Court of Appeal may have been led into error by the fact that the claim was pleaded as one for specific sums, rather than for an account of the sums misapplied in breach of trust.[106] 'The Court of Appeal

[101] eg, a trustee can justify the loss of the trust property if he or she proves it was stolen without fault on the part of the trustee: *Morley v Morley* (1678) 2 Ch Cas 2, 22 ER 817; *Jones v Lewis* (1751) 2 Ves Sen 240, 241; 28 ER 155, 155; Cory (n 40) 277. The trustee is not an insurer: *Re Chapman* [1896] 2 Ch 763 (CA) 775.

[102] *Pickering v Pickering* (1839) 4 My & Cr 289, 298–99; 41 ER 113, 116.

[103] *Re Windsor Steam Coal Co (1901) Ltd* [1929] 1 Ch 151 (CA) 166. See also *Re Anglo-French Co-operative Society, Ex parte Pelly* (1882) 21 Ch D 492 (CA) 506; *Re Hulkes* (1886) 33 Ch D 552 (Ch) 557.

[104] C Stebbings, *The Private Trustee in Victorian England* (Cambridge, CUP, 2002) 169, 172.

[105] *British America Elevator Co Ltd v Bank of British North America* [1919] AC 658 (PC) 663.

[106] ibid 663–64.

should have treated the claim as one for replacement of trust funds, and not for damages';[107] their failure to do so led them into error as it was misleading to think about a trustee's liability to restore misapplied funds in terms of causation.[108] As the New South Wales Court of Appeal put it more recently, 'what is called "equitable compensation" is a shorthand for requiring a fiduciary to account … This is quite different from the liability to pay common law damages'.[109]

The position in England appears to be set by the Supreme Court's decision in *AIB*, in favour of a shift towards aligning the claim for breach of trust with claims for damages for breach of contract, at least where the trust is a commercial trust created in the performance of a contractual agreement. The precise contours of that shift are still being worked out, as the decision in *Giambrone* highlights – as the Court of Appeal said in another case, this is 'a developing area of the law'.[110] But the Court of Appeal's attempt in *Giambrone* to distinguish *AIB*, in order to justify its decision, is not compelling. The supposed distinction between (i) a trustee who released trust funds without receiving the appropriate documentation to justify release (as in *Giambrone*); and (ii) a trustee who was obliged actively to seek out particular documentation but released the trust funds without receiving the appropriate documentation to justify release (as in *Target* and *AIB*),[111] is a distinction without a difference: in each situation, the breach of trust lies in disbursing trust assets without authority, and the trust fund suffers loss as soon as that wrongful disbursement takes place.[112]

In circumstances where leading exponents of nineteenth-century Chancery doctrine regarding accounts stand accused of having been fabulists, engaged in creating 'fairy tales', it is appropriate to recall the point Lord Simonds LC made in a different context: 'It is even possible that we are not wiser than our ancestors.'[113] It remains to be seen whether *AIB* will be followed in other jurisdictions. In Australia, for example, the High Court's decision in *Youyang v Minter Ellison*[114] includes statements which appear to endorse the approach in *Target Holdings*, but the result appears more consistent with the outcome one would expect from a traditional accounting. The facts in *Youyang* were closer to those in *AIB* and *Giambrone* than *Target Holdings*, as the trustees never received the documentation that was required before

[107] ibid 666 (Viscount Haldane).

[108] See also *Magnus v Queensland National Bank* (1888) 37 Ch D 466 (CA) 472, 477–78 and 479–80; Millett (n 52) 225.

[109] *Cassaniti v RCG CBD Pty Ltd* [2022] NSWCA 161 [117].

[110] *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291, [2020] BCC 316 [64]. Other points include: (1) whether the causal counterfactual can only consider the position that the trustee was *duty-bound* to reach, or whether it can also include options that the trustee *could* have chosen to take: as to which, see, eg, *Auden v Patel* [47], [49] and [59]; and *Hynes v Redington* (1844) 1 Jo & Lat 589, 600–01; 68 RR 349, 350; and (2) whether the causal rules for other fiduciary custodians of property – like company directors – will follow the same approach as *AIB* requires for trusts: as to which, see, eg, *Re Lands Allotment Co* (n 45) 638; *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 (NSWCA) 277–78; *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531 [53]–[54]; *Interactive Technology Corp Ltd v Ferster* [2018] EWCA Civ 1594, [2021] WTLR 561 [30]; *Auden v Patel* [57]–[58].

[111] *Giambrone* (n 97) [60]–[61].

[112] *Magnus* (n 108) 472–73, 477–78 and 480.

[113] *Chapman v Chapman* [1954] AC 429 (HL) 444.

[114] *Youyang* (n 91).

the investment funds could be released from the trust, whereas the relevant documents were received in *Target Holdings* at a later date. The decision in *Youyang* was reached before *AIB* was decided, and so without being able to consider the Supreme Court's reasoning in that case. It is always difficult to predict – and perhaps foolish to do so – but there are indications in Australia that *Youyang* does not herald a causal analysis of the sort adopted in *AIB*. In *Crossman v Sheahan*, for example, Ward JA treated (albeit in obiter) the High Court's decision in *Youyang* as adopting the view that the remedy of equitable compensation following an unauthorised disbursement of trust funds 'is not dependent on any "loss" being established beyond the fact of the unauthorised disbursement'.[115] That is more consistent with the claim for equitable compensation being analysed in accordance with traditional equitable accounting principles than with the principles that govern common law claims for damages for breach of contract. Whether that continues to hold true when the High Court is faced with a case like *AIB* remains to be seen. What is clear is that any shift in that view will not be attributable to the Judicature Acts – at least, not directly.

IV. CONCLUSION

This chapter has been concerned with identifying some of the lasting impacts of the Judicature reforms in the context of accounts, particularly equitable accounts. Somewhat counter-intuitively, those lasting impacts lie in aspects of equitable accounting which have largely been forgotten because of the success of the Judicature reforms in removing procedural obstacles to sensible outcomes in particular cases, but which ought to be remembered if we are to make sound decisions about the direction of modern equitable jurisprudence.

One is the meaning of dicta in nineteenth-century cases prior to the Judicature reforms which suggested that agents were not always in a fiduciary position. The meaning of these dicta came to be confusing, at least to modern ears, as the fiduciary concept developed into its modern shape and as the reason for the dicta being uttered in the first place disappeared with the advent of the Judicature reforms. These judges were, I suggest, using the fiduciary label in a way that was more common in that era, to refer to the question whether an agent occupied a position like that of a trustee, as if that were the case then an account could sensibly be taken in equity, but if it were not then the parties would be left to their accounting and other remedies at law. That distinction evaporated after the Judicature reforms because thereafter all claims for accounts were sent to the Chancery Division, which was instructed by the new procedural Rules to conduct that account in accordance with the practices of the Court of Chancery. So, the reason for making the point about non-fiduciary agency disappeared, and its explanation became confused over the years; but it is important to recall the history in order to understand that eminent Chancery judges who referred to agents who do not owe fiduciary duties were referring to something

[115] *Crossman v Sheahan* [2016] NSWCA 200, (2016) 115 ACSR 130 [313]; see also [316]. And see *Jessup v Lawyers Private Mortgages Ltd* [2006] QSC 3 [79]–[84] and [2006] QCA 432 [56]–[64].

quite different from what we would mean today if we were to say that someone does not owe fiduciary duties.

The second impact of the Judicature reforms which this chapter has considered is the effect those reforms had on the claim for equitable compensation for breach of trust. Although the precise genesis of that claim is difficult to pinpoint, it seems clear from the case law that the procedural reforms associated with the Judicature Acts provided a considerable impetus for the recognition of an ability in the court to award a direct remedy of equitable compensation for a particular breach of trust without the matter needing to be sent for an account to be taken as would have happened in the past. That in turn suggests, when coupled with recognition that the Judicature Acts were only intended (at the time, at least) to achieve a 'fusion' of procedure in the one court, that the new remedy of equitable compensation for breach of trust was not intended to provide a different outcome from that which would have obtained pre-Judicature, but merely a more streamlined procedure to achieve that outcome. However, case law in England in the last 25 years or so indicates a shift in the jurisprudence, caused not so much by the fusion of the Judicature reforms as by a belief that, where commercial parties adopt a trust as part of the mechanism for their transaction, the concerns of those parties are more appropriately reflected in a remedy for a breach of that trust which applies concepts of causation more commonly associated with the assessment of damages for breach of contract. While questions remain regarding how that more recent view will be applied in practice, the position appears set in England now; but it has been suggested that there are legitimate reasons why other common law jurisdictions may not follow this particular development in English equitable jurisprudence.