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Equitable Damages

THE HONOURABLE JUSTICE EDELMAN

In a legal world that is 150 years post-Judicature, the primary point of this chapter is simple. Lawyers should abandon their nervous reluctance to describe money awards for equitable wrongs as 'damages'. That reluctance continues to frustrate the coherent development of the law of damages. The secondary point is to explain two matters. First, like common law damages, there are different species of damages in equity. Secondly, also like the common law, some money awards in equity are more properly described as equitable debt rather than as damages.

I. THE OLD LANGUAGE: EQUITABLE ACCOUNTING

Historically, it was legal heresy for 'equitable' to be used as an adjective to qualify 'damages'. In 1998, Millett LJ spoke of this historical attitude, saying extrajudicially: 'Woe betide a Chancery Junior who spoke of "damages for breach of trust" or "damages for breach of fiduciary duty"'.[1] A reason for this attitude was that historically the jury was seen as the proper mechanism for assessing and awarding damages but judges in Chancery sat without juries. So the procedures and the language developed by the Court of Chancery, borrowed from the common law account against receivers which had fallen into desuetude, were the procedures and language of 'accounting'.

In 1868, Edmund Snell spoke of account in equity in the classic terms of asking whether the parties were in a relationship that permitted equity to order an account. The relationships included: those that were fiduciary, such as a principal seeking an account from an agent or a beneficiary from a trustee; relationships where each of two parties has paid money on the other's account; or where an account is too complicated for the cumbersome procedures of the common law courts.[2] There were three types of account.[3] As Kindersley VC put the first two:[4] the first was an account of

[1] P Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *LQR* 214, 225.

[2] E Snell, *The Principles of Equity* (London, Stevens and Haynes, 1868) 411–12.

[3] See the discussion in *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102, (2014) 48 WAR 1 [334]–[349].

[4] *Partington v Reynolds* (1858) Drew 253, 255–56; (1858) 62 ER 98, 98–99 (Kindersley VC).

administration, 'a decree compelling [the accounting party] to account only for what he has received'; the second, which was 'entirely grounded on misconduct', was an account on the basis of wilful default 'for what he might, without his wilful neglect or default, have received, although he has not received it'. The liability for 'wilful default' required only a 'lack of ordinary prudence or due diligence'.[5] Upon showing a lack of prudence, the court would surcharge the account by the amount that should have been received or it would falsify the account to remove a claimed expense.[6] The third type of account was the account of profits. As the Lord Chancellor said in *Jegon v Vivian (No 2)*,[7] the Court of Chancery considered that it never allowed a person 'to make profit by a wrong'. Most commonly, where the person was in a relationship in which they had expressly or impliedly undertaken to act in the interests of another then the court would order that an account of any profits be made by the principal from the relationship.[8]

The problem with the language and procedure of account, however, was that it concealed the reason that the accounting party was required to make the payment after the taking of the account. In the case of a common account of administration the focus was only upon the suitor's need to prove the existence of the relationship that gave rise to the duty to account. Once that relationship was proved the accounting party was liable to account for the value of the rights for which the other party was a custodian. In instances where there had been no unauthorised dispositions from the trust the accounting would simply require recognition or payment of that which was held. In that sense the common account was thought to be what James and Bagallay LJJ called 'an equitable debt or liability in the nature of debt'.[9] But the common account went further than that. If a deficiency was found on the accounting the accounting party was required to reconstitute the trust fund. As Dr Lushington said in *Doss v Doss*,[10] the decree ordering the defendant to account was made on the basis that they are liable to pay anything that is found to be due. The reason why an amount was due – because the accounting party had failed to establish that a disbursement was authorised – was seen only as part of the mechanism of the accounting process.

In cases of an accounting on the basis of wilful default or an accounting for profits, the accounts, respectively, of the compensation required to be paid to the claimant and of the profit required to be paid to the defendant were not of the amounts which had been unauthorised payments. The language of account in these two cases concealed the wrongdoing which was the basis for that liability to compensate or disgorge profits. The law of accounting 'went far beyond the mere quantification of profit and loss'.[11] But the account was presented by equity as a *fait accompli* without

[5] See *Pit v Cholmondeley* (1754) 2 Ves Sen 565, 566; 28 ER 360, 360–61.
[6] Millett (n 1) 225–26. See *Re Chapman* [1896] 2 Ch 763 (CA) 776 (Lindley LJ).
[7] (1871) LR 6 Ch App 742 (CA) 761.
[8] *Keech v Sandford* (1726) Sel Cas Temp King 61, 62; 25 ER 223, 223–24; *The Governor and Company of Undertakers for Raising Thames Water in York Buildings v MacKenzie* (1795) 8 Bro PC 42, 66; 3 ER 432, 447.
[9] *Ex parte Adamson* (1878) 8 Ch D 807 (CA) 819.
[10] (1843) 3 Moo Ind App 175, 196–97; 18 ER 464, 472.
[11] P Birks, *Unjust Enrichment*, 2nd edn (Oxford, Clarendon Press, 2005) 294.

any analysis into why the accounting party was required to disgorge the profits or compensate for the losses found on the account.

For a long time, neither equitable accounting nor the order for payment upon the taking of the account was thought of as comparable to 'damages'. The primary reason for this was that at common law the calculation of damages was generally a matter for the jury, subject to control by the judge only in cases of gross excess or gross inadequacy.[12] But in Chancery the judges sat without juries. The perception of difference between the order following the account and the common law jury award began to break down following the introduction of Lord Cairns' Act and the Judicature reforms.

II. SHIFTING UNDERSTANDINGS

A. Lord Cairns' Act and the Judicature Reforms

The first explicit recognition that money awards in equity could be described as damages came in the Chancery Amendment Act 1858, promoted by Sir Hugh Cairns, later Lord Cairns, as Solicitor-General. The Act became known as Lord Cairns' Act. If the Court of Chancery had power to order specific performance or to grant an injunction 'for breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act', Lord Cairns' Act provided, in section 2, an additional power for the Court of Chancery, with a purpose of doing 'complete justice',[13] to 'award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct'. Despite some contrary views,[14] it came to be accepted that equitable damages could be awarded even where equity would not have awarded a remedy of specific performance or injunction, provided that it had the *power* to do so or, on a slightly different approach, that there was a real possibility that it might have done so.[15] Lord Cairns' Act was thus used from an early stage to avoid the extreme consequences of a mandatory injunction, such as requiring waste by demolition of valuable buildings.[16]

Prior to Lord Cairns' Act, the Common Law Procedure Act 1854[17] had provided for a power for the common law courts to make an order for an injunction.

[12] *Ash v Ash* (1697) Comb 357, 90 ER 526; *Chambers v Robinson* (1726) 2 Stra 691, 93 ER 787; *Sharpe v Brice* (1774) 2 Black W 942, 96 ER 557. Compare F Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (London, Strahan and Woodfall, 1806) 327: 'the jury are the sole judges of the damages'.

[13] JA Jolowicz, 'Damages in Equity – A Study of Lord Cairns' Act' (1975) 34 *CLJ* 224, 225.

[14] *Aynsley v Glover* (1875) LR 18 Eq 544 (Ch) 558; *Smith v Smith* (1875) LR 20 Eq 500 (Ch) 505; *Holland v Worley* (1884) 26 Ch D 578 (Ch) 584. Discussed in Jolowicz (n 13) 240–41.

[15] *City of London Brewery Co v Tennant* (1873) LR 9 Ch App 212 (CA); *Hooper v Rogers* [1975] Ch 43 (CA). Discussed in Jololwicz (n 13) 240–41. See also *Lavery v Pursell* (1888) 39 Ch D 508 (Ch) 519; *Jaggard v Sawyer* [1995] 1 WLR 269 (CA) 285.

[16] *Isenberg v East India House Estate Co* (1863) 3 De G J & S 263, 273; 46 ER 637, 641; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch). *cf Krehl v Burrell* (1878) 7 Ch D 551 (Ch) 554 (Jessel MR): 'the Court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation'.

[17] s 79.

Lord Brougham thought the new Chancery power to order damages was merely 'the converse' of that common law power.[18] In other words, if the common law could make a specific award like an injunction to avoid a litigant having to commence a separate action in Chancery then equity should have the power to make a money award like damages to avoid a separate action at common law.

On this view of Lord Cairns' Act, the Act was really just designed to avoid circuity of action.[19] As the Commissioners, chaired by Romilly MR, explained in the Report that was the instigator for Lord Cairns' Act the goal was to extend the jurisdiction of equity to allow the Court of Chancery to provide a final settlement of the parties' dispute. The example they gave was where a person injured by a wrongful act was entitled to damages at common law and an injunction in equity. The Court of Equity, they recommended, should have the power to award damages to avoid the claimant having to return to common law.[20] This included cases where the claimant had been entitled to equitable relief, such as specific performance, at the time the Bill was commenced although some later change in circumstances meant that specific performance was no longer available but damages remained available.[21] In that respect, Lord Cairns' Act was a limited forerunner to the Judicature reforms by aiming to 'put into one hand the remedies theretofore held in two'.[22] But in two respects it made significant changes to the procedures for an award of damages at common law.

The first significant departure was from the assessment of damages by a jury. The money award of damages under Lord Cairns' Act could be assessed by a judge, or arguably in some cases a Master or Chief Clerk.[23] Although the Court of Chancery had the power, by section 3, to call for the assessment of damages by a jury (and the Commissioners' Report thought that in many cases it would be expedient to do so),[24] it was not required to do so. This significant change led Lord St Leonards, a man who generally opposed any sweeping legal innovation,[25] to object to the power in the Act for damages to be assessed by a judge. But as Chelmsford LC observed, on this point Lord St Leonards 'stood alone' in the House of Lords.[26]

The second significant departure from the common law model of damages was in the jurisdiction that it was held to confer upon the Court of Chancery to award damages in cases where no damages would have been available at common law. Two extensions can be noted. First, Lord Cairns' Act damages were available in lieu of an injunction to restrain an anticipated wrong that had not yet occurred.[27] But at

[18] HL Deb, 8 June 1858, vol 150, col 1690.

[19] See K Barnett and M Bryan, 'Lord Cairns' Act: A Case Study in the Unintended Consequences of Legislation' (2015) 9 *Journal of Equity* 150, 153.

[20] Chancery Commission, *Third Report of the Commissioners Appointed to Inquire into the Practice of Chancery* (London, Houses of Parliament, 1856) 3.

[21] For instance, *Cory v Thames Ironworks & Shipbuilding Co Ltd* (1863) 8 LT 237, decided by Wood VC who had been one of the Chancery Commissioners that produced the Third Report.

[22] *Slack v Leeds Industrial Co-operative Society Ltd* [1924] AC 851 (HL) 872.

[23] The possibility of a non-judge assessing the damages was a matter about which Lord Brougham objected: HL Deb, 8 June 1858, vol 150, cols 1690–91.

[24] Chancery Commission (n 20) 4.

[25] See J Getzler, 'Sugden, Edward Burtenshaw, Baron St Leonards (1781–1875)' in B Harrison, L Goldman and D Cannadine (eds), *Oxford Dictionary of National Biography* (Oxford, OUP, 2004).

[26] HL Deb, 8 June 1858, vol 150, col 1690.

[27] *Slack* (n 22) 863; *Johnson v Agnew* [1980] AC 367 (HL) 400.

common law, damages were not available for future wrongs. Secondly, by what was described as a 'beneficient interpretation',[28] Lord Cairns' Act damages were available for wrongdoing that was purely equitable such as the breach of a restrictive covenant by a subsequent purchaser[29] or breach of confidence.[30] This extension was controversial. It plainly took Lord Cairns' Act beyond any purpose of merely avoiding circuity of action by providing for damages in Chancery for a common law wrong. The words 'any wrongful act' in section 2 of Lord Cairns' Act, were an expression used in section 83 of the Common Law Procedure Act 1854 to refer only to torts.[31]

If the effect of Lord Cairns' Act had only been to avoid circuity of action then the introduction of the Judicature Acts from 1873, which fused the administration of the common law and equity, would have made Lord Cairns' Act redundant. Indeed, in 1883, Lord Cairns' Act was repealed[32] apparently on the footing that 'the Judicature Acts re-enacted the powers, and therefore that Lord Cairns' Act had become obsolete'.[33] But as Viscount Findlay, with whom Lord Birkenhead and Lord Dunedin agreed, later explained, the repeal on this basis had involved a 'misapprehension' that Lord Cairns' Act gave jurisdiction only for the award of common law damages.[34]

The repeal of Lord Cairns' Act did not, however, have the effect of removing the equitable jurisdiction to award damages that the Act had created. The repealing Act contained a saving clause preserving any jurisdiction conferred under a repealed Act.[35] The effect of the saving clause was that the only consequence of the repeal was the omission of Lord Cairns' Act from the formal statute book.[36] The jurisdiction that was originally conferred by Lord Cairns' Act is now back in the statute book and contained in section 50 of the Senior Courts Act 1981. That provision is still commonly described as Lord Cairns' Act and the damages are still called Lord Cairns' Act damages. Section 50 provides that '[w]here the Court of Appeal or High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance'.

B. Lord Cairns' Act Provided a New Way of Thinking

In fact, the innovation was not as radical as Lord St Leonards had supposed. It just provided the possibility of a new way of thinking about Chancery awards. As for the awarding of damages by judges rather than juries, Chancery judges already assessed and awarded damages, describing them as such, upon an undertaking to

[28] *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL) 286.

[29] See *Eastwood v Lever* (1863) 4 De G J & S 114, 128; 46 ER 859, 865; *Johnson v Agnew* (n 27) 400.

[30] *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] 2 All ER 620 (Ch) 633; *Talbot v General Television Corp Ltd* [1980] VR 224 (Supreme Court of Victoria) 242–44; *Attorney General v Guardian Newspapers Ltd (No 2)* (n 28) 286.

[31] See the discussion in Barnett and Bryan (n 19) 160–63.

[32] Statute Law Revision and Civil Procedure Act 1883, s 5(b).

[33] *Chapman, Morson & Co v Guardians of Auckland Union* (1889) 23 QBD 294 (CA) 299.

[34] *Slack* (n 22) 863.

[35] Statute Law Revision and Civil Procedure Act 1883, s 5(b).

[36] *Slack* (n 22) 863.

pay damages in circumstances in which the claimant was not ultimately entitled to relief.[37] And even prior to the amendments to jury trials in the County Courts Act 1846 and the Common Law Procedure Act 1854, common law judges had sometimes assessed damages without a jury in exceptional cases such as upon a writ of inquiry of damages where a jury had omitted to do so or where judgment was given in default, on demurrer or by confession.[38]

As for the possibility of damages for purely equitable wrongs or in other circumstances where common law would not have recognised damages, the change provided a potential lens through which to view many of the existing money awards in equity. The language of 'damages' used in relation to Lord Cairns' Act led some to start thinking about whether requirements to pay money after an accounting should be thought of as substantive matters of liability rather than a merely formal accounting. As Gummow J said, 'long before the birth of Lord Cairns, delinquent trustees were brought to book in Chancery and … were obliged to make up from their own pockets the value of trust funds which had been lost'.[39] An early observation was by Washington who noticed that in the accounting process to ascertain loss, 'the auditors see to what extent the party is damaged, and place all in the arrearages, so that in effect he recovers damages'.[40] Much later, Brightman J in *Bartlett v Barclays Bank Trust Co Ltd (No 2)*,[41] responded to a submission that it was 'heretical' to treat a bank's liability to compensate for a breach of trust as damages, saying that an account based on wilful default was 'not readily distinguishable from damages except with the aid of a powerful legal microscope'.[42]

In *Johnson v Agnew*, after recognising that Lord Cairns' Act damages applied to causes of action that were purely equitable, Lord Wilberforce said that the assessment of damages under Lord Cairns' Act is no different in substance from the assessment of common law damages.[43] Lord Reed has more recently cautioned that these remarks must be treated with care since Lord Cairns' Act damages are available on a different basis, in different circumstances, and in respect of different types of wrong.[44] That may be so but those differences may rarely affect methods of assessment of damages. For instance, as Lord Wilberforce recognised in relation to the date of assessment of damages – the issue in *Johnson v Agnew* – neither the common law nor equity inflexibly insists upon either the date of breach or the date of judgment. Lord Wilberforce's central point is that the difference between a money awards for loss caused by wrongdoing at common law and a money awards for loss for the same wrongdoing in equity is not a difference of principle.

Although a claim can still be brought in the form of an account in equity, since Lord Cairns' Act and the Judicature reforms there has been a slow development of

[37] A point made in Chancery Commission (n 20).

[38] eg, *East v Eastington* (1702) 3 Salk 400, 91 ER 896.

[39] *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 (FCA) 83.

[40] G Washington, 'Damages in Contract at Common Law: Part 1' (1931) 47 *LQR* 345, 370.

[41] [1980] Ch 515 (Ch).

[42] ibid 545.

[43] *Johnson v Agnew* (n 27) 400. Thus the possibility of aggravated damages in equity under Lord Cairns' Act is canvassed in *Cardwell v Walker* [2003] EWHC 3117 (Ch), [2004] 2 P & CR 9 [66]ff.

[44] *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649 [47].

understanding that equity can perform a role that is functionally identical to the awarding of damages at common law. English courts now refer sporadically to equitable 'damages' as a synonym for compensation for loss in equity.[45] For example, in *Swindle v Harrison*,[46] where Hobhouse LJ described the claim for breach of fiduciary duty as one that sought 'damages or "equitable compensation" of the character of damages for breach of duty'. Further, more and more often cases are presented by counsel on all sides on the assumption that the rules such as those of causation, scope of duty and remoteness that govern recovery for equitable and common law compensation for loss were to be treated in the same manner.[47] Such language and approach is to be applauded, with the proviso that equitable damages must be separated from the distinct concept of debt.

III. EQUITABLE DEBT IS NOT EQUITABLE DAMAGES

In *AIB Group (UK) Plc v Mark Redler & Co Solicitors*,[48] Lord Toulson observed that in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*,[49] Tipping J had:

> … rightly observed that while historically the law has tended to place emphasis on the legal characterisation of the relationship between the parties in delineating the remedies available for breach of an obligation, the nature of the duty which has been breached can often be more important, when considering issues of causation and remoteness, than the classification or historical source of the obligation.

Relevantly, an order to pay a sum of money in response to a duty which is in the nature of a voluntarily undertaken debt is not damages and is not governed by the rules concerning damages. But claims for a debt in equity and claims that can properly be described as equitable damages are not always separated. A decision from each of the House of Lords and the Supreme Court of the United Kingdom illustrate the difference even though the cases were not argued in a manner that clearly demarcated debt from damages.

The first case is the decision of the House of Lords in *Target Holdings Ltd v Redferns*.[50] On the assumed facts for the purposes of the summary judgment application, Target Holdings lent £1.5 million to a purchaser of property and paid the money to the purchasers' solicitors, Redferns. Redferns agreed to hold the money on trust and not to distribute it until Redferns had obtained a mortgage over

[45] *ABCI v Banque Franco-Tunisienne* [2003] EWCA Civ 205, [2003] 2 Lloyds' Rep 146 [16]–[17]; *P & O Nedlloyd BV v Arab Metals Co* [2006] EWCA Civ 1717, [2007] 1 WLR 2288 [39]; *Danilina v Chernukhin* [2018] EWHC 39 (Comm) [87]; *Gresport Finance Ltd v Battaglia* [2018] EWCA Civ 540 [25]; *Davies v Ford* [2021] EWHC 2550 (Ch); *Umbrella Care Ltd v Nisa* [2022] EWHC 86 (Ch) [144].

[46] [1997] 4 All ER 705 (CA) 722.

[47] See, for instance, *Sharp v Blank* [2019] EWHC 3096 (Ch) [891] (causation and remoteness); *LIV Bridging Finance Ltd v EAD Solicitors LLP (In Administration)* [2020] EWHC 1590 (Ch), [2020] PNLR 24 [35] (scope of duty).

[48] [2014] UKSC 58, [2015] AC 1503 [59]. *cf* Lord Reed SPJ at [136]–[137]. See also *Daniel v Tee* [2016] EWHC 1538 (Ch), [2016] 4 WLR 115.

[49] [1999] 1 NZLR 664 (NZCA).

[50] [1996] AC 421 (HL).

the property. In breach of the terms of the trust agreement, Redferns disbursed most of the money before the mortgage was executed. After the purchaser defaulted, Target sold the property for £450,000 and claimed the difference from Redferns. Redferns defended the claim on the basis that the property had been overvalued as a result of fraud, alleging that Target Holdings would have lost the difference in any event. On these facts, Target Holdings should have succeeded against Redferns in a simple claim for debt. Whether the claim was expressed as a debt arising at common law from the agreement or in equity from the undertaking in the trust deed, the result would be the same. Redferns had promised to hold the money for Target Holdings and to repay it to Target Holdings unless a mortgage over the property was obtained. It is no answer to a claim for debt at common law for the debtor to claim that, on a counterfactual analysis, if some unfulfilled condition had been fulfilled then the debtor would not have been required to repay. If a debt is subject to defeasance by a condition and the condition is not fulfilled then the debt does not disappear. The same is true in equity.

But the assumed facts of *Target Holdings* were a little more complex. Although Redferns disbursed the trust money without first having obtained a mortgage, the mortgage was later obtained by Redferns. The simple answer to the claim for common law or equitable debt may have been that on the proper construction of the agreement by which the money was paid on trust to the solicitors, the debt that the solicitors owed to Redferns was defeasible by the solicitors obtaining the mortgage, even if they obtained the mortgage after disbursing the money. This was perhaps why Target Holdings never pleaded a claim for debt. But we will never know because the claim brought by Target Holdings against Redferns for the full amount of the money wrongfully disbursed was not brought as a claim for debt.

Another case that might have been brought as a claim for debt is the decision of the Supreme Court of the United Kingdom in *AIB Group (UK) plc v Redler*.[51] In that case, AIB lent £3.3 million to borrowers to remortgage their property. AIB paid the £3.3 million to its solicitors to hold on trust pending completion of settlement. AIB intended the solicitors to take, for AIB, the security of a first charge over the property to be re-mortgaged before the solicitors released the funds. The solicitors should have paid out £1.5 million to discharge the existing legal charge held by Barclays. But, by mistake, they only paid out around £1.2 million and paid the rest to the borrowers. So Barclays kept the first charge. As the Court of Appeal held, on a point that was not challenged in the Supreme Court, the transaction between AIB and the borrowers did not complete.[52] The borrowers later defaulted and Barclays sold the property for £1.2 million, taking the remainder which it was owed and leaving the rest to AIB (£867,697). If the solicitors had completed the transaction by paying £1.5 million to Barclays then AIB would have had a first charge and, on the sale of the property, AIB would have received around £300,000 more than the proceeds it received.

The claim for debt would have been a very simple claim that AIB could have brought against its solicitors. There was no doubt that AIB and its solicitors had

[51] (n 48).

[52] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2013] EWCA Civ 45, [2013] PNLR 19 [43]. The Supreme Court spoke loosely of completion as a 'commercial' matter but recognised that there was no completion according to legal requirements: see *AIB Group* (n 48) [74].

entered an enforceable contract as well as having created a trust. Under that contract, the solicitors owed a common law debt of £2,432,303 (being the £3.3 million less £867,697 that AIB had accepted in discharge of that debt, which included the proceeds of the sale of the property). The contract between AIB and its solicitors provided: 'You [the solicitors] must hold the loan on trust for us [AIB] until completion. If completion is delayed, you must return it to us when and how we tell you.'[53] A delay in completion must include a delay that arises when it is known that completion will not occur. If the borrowers had terminated their contract with AIB prior to settlement then after the proposed date of completion the solicitors could not have kept the £3.3 million that they held on trust for AIB. The clause concerning return of the funds therefore contemplated that if completion did not or could not occur the solicitors would be required to return the £3.3 million when and how they were told to do so by AIB. So why were they not required to do so?

The answer is that AIB brought four claims: breach of trust, breach of fiduciary duty, breach of contract and negligence. Breach of contract and negligence were admitted by the solicitors.[54] But AIB never brought a claim for a common law debt, a claim which was of the form 'repay the money which you promised to repay under the conditions which occurred'. The obvious advantage of a claim in AIB for debt is that matters concerning causation, loss and remoteness would have been irrelevant. As Millett LJ (Otton LJ and Sir Stephen Brown P agreeing) said in *Jervis v Harris*,[55] there is a clear distinction between a claim for payment of a debt and a claim for damages for breach of contract. A plaintiff 'who claims payment of a debt need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt became due. He need prove no loss; the rules as to remoteness of damage and mitigation of loss are irrelevant'.

AIB made two errors. It tried to litigate a common law debt claim as an equitable claim. There was no room left for an equitable debt if a common law debt existed. Such an equitable debt would be functionally identical to the unpleaded common law debt claim. The second error was that AIB tried to make this equitable debt argument as a claim based on breach of trust. AIB argued that the solicitors held the money on trust and were under a duty maintain the funds, for which they were required to account in a common form accounting process. But AIB's case was pleaded and presented at trial as one involving compensation for the wrong of breach of contract or breach of trust. 'By focusing on the wrong' it can be said, AIB 'took their eyes off the right'.[56] The Supreme Court therefore, correctly, held that Mark Redler was not required to pay £2,432,303 to AIB. Lord Toulson JSC said that to have ordered payment of that new amount would involve:[57]

> effectively treating the unauthorised application of trust funds as creating an immediate debt between the trustee and the beneficiary, rather than conduct meriting equitable compensation for any loss thereby caused.

[53] *AIB Group* (n 48) [4].
[54] ibid [9].
[55] [1996] Ch 195 (CA) 202.
[56] See *Smethurst v Commissioner of Police* [2020] HCA 14, (2020) 376 ALR 575 [245] (Edelman J).
[57] AIB Group (n 48) [61].

IV. TWO TYPES OF DAMAGES TO COMPENSATE IN EQUITY

A. The Two Types of Compensation at Common Law Revisited

Whether compensation in equity is described as 'equitable compensation' or as 'equitable damages', as is observed in *Snell's Equity*,[58] it is necessary to distinguish between two different forms of compensation. These two forms of compensation in equity follow the same underlying premises as the two purposes of compensation at common law. At common law the two types of damages to compensate are sometimes described as normal loss and consequential loss.[59] The distinction is between what Lord Dunedin in *Admiralty Commissioners v SS Susquehanna*[60] described as damages to compensate 'for the wrongful act' and damages to compensate for the 'consequences of the wrongful act'.[61] The normal loss is that which is required to rectify or undo the wrongful act. Further, consequential losses arising from the wrong can be recovered separately. In *Lewis v Australian Capital Territory*,[62] I distinguished between court orders that aim to rectify or correct a wrongful act and those that respond to its consequences.

Common law damages can aim to rectify a wrongful act, independently of its consequences. Since these orders are not concerned with consequences, issues such as causation of consequences, remoteness of consequences or the scope of duty concerning the consequences are irrelevant. The damages aim only to rectify the wrongful act by providing a substitute. Orders of this nature can appear to be similar to claims for debt because of their lack of concern with consequences. But unlike debt they do not require the (late) performance of the duty. Rather, they are concerned with substituting for the primary duty, by rectifying the failure to perform the duty. By contrast, damages for consequential loss, which are the most commonly understood at common law, are concerned with repairing losses suffered as a consequence of the wrong. They are subject to well-known rules for recovery based on principles such as causation and remoteness of damage which are designed to establish the extent to which a defendant is responsible for adverse consequences suffered by a claimant.

An example of the common law aiming to rectify a wrongful act rather than its consequences is the wrong of conversion of goods by a bailee. If damages are inadequate, such as because the goods are unique[63] or because they are needed urgently and there is not a ready market,[64] the most perfect means of rectifying that wrongful

[58] J McGhee and S Elliott (eds), *Snell's Equity*, 34th edn (London, Sweet & Maxwell, 2020) 613–15 paras [20-028]–[20-035].

[59] J Edelman, *McGregor on Damages*, 21st edn (London, Sweet & Maxwell, 2021) para 3-008.

[60] [1926] AC 655 (HL) 661. Compare, as to 'natural and direct', *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty ("The Wagon Mound (No 2)")* [1967] 1 AC 617 (PC).

[61] See also *Lewis v The Australian Capital Territory* [2020] HCA 26, (2020) 271 CLR 192 [140]–[152].

[62] ibid [140]–[152].

[63] *Pusey v Pusey* (1684) 1 Vern 273, 23 ER 465; *Duke of Somerset v Cookson* (1735) 3 P Wms 390, 24 ER 1114; *Saville v Tankred* (1748) 1 Ves Sen 101, 27 ER 918; *Fells v Read* (1796) 3 Ves 70, 30 ER 899; *Lloyd v Loaring* (1802) 6 Ves 773, 31 ER 1302; *Lowther v Lowther* (1806) 13 Ves 95, 33 ER 230.

[64] *Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd* [1965] NSWR 581 (NSWSC) 589; *Doulton Potteries Ltd v Bronotte* [1971] 1 NSWLR 591 (NSWSC) 598–99.

act, the 'complete remedy',[65] would be a specific order in equity for delivery up of the goods. But common law courts could also rectify that wrongful act by recognising that the claimant is entitled to payment of the objective value of the goods as a substitute being an alternative way to undo the wrong. In the sixteenth century, the bailee at common law could be made liable in this way through the action for an account.[66] Until the eighteenth century, the bailee was strictly liable for the value of the goods bailed to them even if the goods had been lost or stolen without the fault of the bailee, unless there was an express stipulation against such liability.[67] But even as the strict liability was ameliorated and the remedy of account disappeared at common law, the bailor was still entitled in a claim of detinue (now absorbed into conversion)[68] to the value of the goods carelessly lost by the bailee even if, for example, the bailor suffered no loss because the goods would have been lost in any event. Thus it was said that detinue is

> a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action for detinue … [the defendant] was estopped from asserting that he had wrongfully delivered the chattel to a third person or had negligently lost it before demand for delivery up.[69]

It will not, however, always be possible for an award of money damages at common law to be made in order to rectify a wrongful act. In *Lewis v Australian Capital Territory*, Mr Lewis effectively sought such an award for a period of his false imprisonment. The High Court of Australia considered cases where a defendant was required to pay the amount that would have represented a licence fee in order to rectify the wrongful taking of an opportunity to use. But those cases did not apply in circumstances of false imprisonment where the claimant's liberty was not a commodity that could be licensed. There was simply no manner in which the wrong could be undone or rectified. Only its consequences and effect on Mr Lewis could be compensated.

B. The Same Two Types of Compensation in Equity

Compensation in equity, whether under Lord Cairns' Act or in equity's inherent jurisdiction, is also best understood as divided into the same two species. In equity these two forms of compensation have been described by Dr Elliott as substitutive compensation and reparative compensation.[70]

[65] J Mitford and JW Smith, *A Treatise on the Pleadings in Suits in The Court of Chancery, by English Bill*, 5th edn (London, V & R Stevens and GS Norton, 1847) 138–39; *North v Great Northern Railway Co* (1860) 2 Giff 64, 68; 66 ER 28, 30.

[66] *Woodlife's Case* (1597) Moo 462, 72 ER 696.

[67] See OW Holmes, *The Common Law* (Boston, Little, Brown, 1881) 179.

[68] Torts (Interference with Goods) Act 1977, s 3.

[69] *General & Finance Facilities v Cooks Cars (Romford)* [1963] 1 WLR 644 (CA) 648–49.

[70] See S Elliott and C Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 *MLR* 16 approved in *Agricultural Land Management Ltd* (n 3) [348]. See also C Mitchell, 'Equitable Compensation for Breach of Fiduciary Duty' (2013) 66 *Current Legal Problems* 307, 322.

i. Substitutive Compensation

Substitutive compensation seeks to repair or substitute as a way of undoing the wrongdoing itself. In the common accounting process, if no unauthorised dispositions are found then the rights of the beneficiaries are, as we have seen, akin to a debt. There is nothing to substitute or rectify. But where there is an unauthorised disposition the trustee has always been required to reconstitute the trust fund by a 'substitute' unless the unauthorised transaction can be excused. The rules concerning causation, remoteness of consequences or scope of duty that are concerned with consequential loss do not apply to the rectification of this unauthorised transaction. But substitutive compensation is not a claim for a debt. To simplify the facts of *AIB Group (UK) Plc v Mark Redler & Co*,[71] consider a solicitor trustee who holds money on trust for a financier beneficiary, with a promise in the contractual trust deed between them to pay the money to the financier beneficiary if completion of a transaction does not occur. If the completion does not occur but the solicitor trustee pays the money to the wrong party then the financier beneficiary can bring a claim for the debt. The unauthorised payment to the wrong party is irrelevant.

In a claim for substitutive compensation based on an unauthorised disposition the claimant does not need to establish a promise by the defendant to pay the amount. Rather, it is a claim for the payment in money of a substitute for, or to rectify, the unauthorised payment. It is therefore assessed at the date at which the unauthorised event occurred. For instance, in a judgment on a strike-out claim in *Rahman v Rahman*,[72] Master Clark held that Lord Cairns' Act damages for a claim for breach of an oral agreement to allot shares were to be assessed at the date of judgment since that was the date at which the claimant's 'entitlement to the shares is treated as coming to an end and being replaced by financial compensation'. And in his judgment in *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd*,[73] Mr Hugh Sims QC, referring to *Snell's Equity*,[74] described the two types of award of equitable compensation as making good a loss and compelling a defendant 'to perform an equitable duty substantively by paying an equivalent amount of money instead'.

The most common instance of substitutive compensation awards arises in relation to an unauthorised payment contrary to the duty of a trustee, as Lindley LJ put it, 'properly to preserve the trust fund'.[75] Just as a bailee at common law was historically required to account for the value of goods that had been lost or given away without authority, the order for payment following a deficiency on a common account required the trustee to pay for any deficiency in the trust assets that had been disbursed without authority. Although some older authorities held that it was not necessary to plead or prove a 'breach of duty', in cases where the claim is for a money substitute for the asset, it is not performance of a duty that is sought but rectification of a wrongful disposition; there must still be a 'wrongful payment' or

[71] (n 48).
[72] [2020] EWHC 2392 (Ch).
[73] [2021] EWHC 3015 (Ch) [299].
[74] McGhee and Elliott (n 58) 613–15 paras [20-028]–[20-035].
[75] *Low v Bouverie* [1891] 3 Ch 82 (CA) 99. See also *CGU Insurance Ltd v One.Tel Ltd (In Liq)* [2010] HCA 26, (2010) 242 CLR 174 [36].

'unlawful payments'.[76] A trustee was only required to make payments following the common account for dispositions that could not be shown to be authorised. The underlying reason for the order for payment was the breach of duty. And like the rule that developed for bailees, it would not be a wrongful payment, and thus there would be sufficient discharge, if the trustee could show that the money had been stolen without the fault of the trustee.[77]

Again, like damages for 'normal loss' against a bailee, the order for substitutive compensation did not compensate for loss. Rather, it compensated to rectify the failure of the trustee to perform as promised. For that reason, unlike reparative compensation or damages for consequential loss, notions of causation of loss or remoteness of loss are irrelevant. As Lord Millett explained in *Libertarian Investments Ltd v Hall*,[78] '[w]here 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'. The cost of performing the trust duty is usually calculated by the value of the notional trust assets at the date of trial because the trustee's undertaking usually continues until trial.[79] Hence, in *Main v Giambrone & Law (A Firm)*,[80] where solicitors released deposits paid by their clients, and held on trust, without fulfilling the requirement of receiving guarantees the solicitors were liable for equitable compensation. The equitable compensation was described as running in tandem with contractual damages to perform a promise for a 'breach of contract [that] consisted of wrongfully paying out deposit moneys which it had undertaken to keep safe'.[81]

A simple example is *Magnus v Queensland National Bank*.[82] In breach of trust, a bank transferred to a fraudulent beneficiary the purchase money that it held on trust for two other beneficiaries. The other beneficiaries claimed that the bank must account to them for the money. Lord Halsbury LC observed that the two other beneficiaries trusted the fraudster so much that 'he might have defrauded the trust in some other way',[83] an example of which might be if he had obtained the authority of the other beneficiaries for the money to be paid to him for the purposes of further investment. But whether or not the money would have been lost in any event did not matter. As Cotton LJ said, the bank 'must be held answerable to the trustees just as if the money was still in [the bank's] hands'.[84]

In *Bairstow v Queens Moat Houses plc*,[85] the Court of Appeal held that a director who had knowingly and wrongfully distributed dividends without authority was

[76] *Re Stevens* [1898] 1 Ch 162 (CA) 170; *Ahmed Angullia bin Hadjee Mohamed Salleh Angullia v Estate and Trust Agencies* (1927) Ltd [1938] AC 624 (PC) 637.

[77] *Jones v Lewis* (1750) 2 Ves Sen 240, 241; (1750) 28 ER 155, 155.

[78] [2013] HKCFA 93, [2014] 1 HKC 368 [168].

[79] *Re Dawson (deceased)*; *Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 (NSWSC); *Hagan v Waterhouse (No 2)* (1991) 34 NSWLR 308 (NSWSC) 345–46; *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534; *Target Holdings* (n 50) 437; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15, (2003) 212 CLR 484 [35].

[80] [2017] EWCA Civ 1193, [2018] PNLR 2. Applied in *LIV Bridging Finance* (n 47) [26]–[29].

[81] *Main* (n 80) [63] (Jackson LJ).

[82] (1888) 37 Ch D 466 (CA) 471–72 (Halsbury LC), 477 (Cotton LJ) and 480 (Bowen LJ).

[83] ibid 473. See also 477 (Cotton LJ) and 480 (Bowen LJ).

[84] ibid 477.

[85] [2001] EWCA Civ 712, [2002] BCC 91.

required to make compensation to the company of the value of the dividend payments. It did not matter that 'lawful dividends could and would have been paid'.[86] In the leading judgment, Robert Walker LJ said that the same principles should apply to directors as those that apply to trustees: custodial directors 'were not strictly speaking trustees, as title to the assets was not vested in them; but they had trustee-like responsibilities, because they had the power and the duty to manage the company's business in the interests of all its members'.[87]

Another example is the decision of the House of Lords in *Revenue and Customs Commissioners v Holland, In Re Paycheck Services 3 Ltd*.[88] In that case, in the course of discussing the liability of a director for the unlawful payment of a dividend, Rimer LJ (with whom Elias and Ward LJJ agreed on this point) described the liability to compensate as 'restitution', saying that 'directors of a company, if not trustees in the strict sense (because its assets are not vested in them), owe a like duty as a trustee not to misapply the company's assets and a like duty to make restitution to the company if they do'.[89] In the Supreme Court, the approach of Rimer LJ was endorsed by Lord Clarke[90] and Lord Walker.[91] Lord Hope also said that 'where dividends have been paid unlawfully, the directors' obligation is to account to the company for the full amount of those dividends'.[92]

Again, in *Interactive Technology Corp v Ferster*,[93] the substitutive compensation approach was taken when the respondent director dishonestly withdrew more than £4 million from the appellant company in unauthorised remuneration. The director argued that his services were worth the full value withdrawn. Before the Court of Appeal, the company sought to avoid any argument by the director that if the remuneration had not been unlawfully paid then it would have been lawfully paid. The company argued that only one species of equitable compensation, described as 'reparative compensation', was concerned with compensation for losses. David Richards LJ (with whom Newey LJ agreed) accepted this submission, concluding that the other species, 'substitutive compensation', akin to a claim for debt in equity, was not concerned with causation of loss but with 'claims for a money payment as a substitute for performance of the trustee's obligation'.[94]

Like compensation for normal loss that seeks to rectify a wrongful act at common law, it will not always be possible to rectify an act that is a breach in equity. In *Davies v Ford*,[95] the claimant sought equitable compensation for losses suffered from two directors who had breached their fiduciary duties including by diversion of business from the principal company in which they were directors to a new company in which they were the directors and shareholders. The judge of the trial as to quantum, David Holland QC, held that apart from funds from the principal company the claim

[86] ibid [54] (Robert Walker LJ).
[87] ibid [53].
[88] [2010] UKSC 51, [2010] 1 WLR 2793.
[89] *Re Paycheck Services 3 Ltd* [2009] EWCA Civ 625, [2010] Bus LR 259.
[90] *Re Paycheck Services 3 Ltd* (n 89) [146].
[91] ibid [124].
[92] ibid [49].
[93] [2018] EWCA Civ 1594, [2018] 2 P & CR DG22.
[94] ibid [17]–[21].
[95] (n 45).

did not involve any misapplication of pre-existing corporate assets.[96] The judge held that substitutive compensation applies to such cases of misapplication of existing company or trust property and that in such cases it is not open to the trustee or fiduciary in breach to 'argue the counterfactual, that is that the trust property would have been lost or paid away even if he or she had not been in breach'.[97] But since the central claim was not for misappropriation of existing company property, the equitable compensation fell to be assessed on 'the reparative basis', for which questions of causation of loss are relevant, and the directors succeeded in part by establishing that some of the loss suffered by the principal company would have been suffered in any event.[98]

ii. Reparative Compensation

Reparative compensation for loss in equity should follow the same principles for compensation for consequential loss as the common law. To return to the point made above that Lord Wilberforce recognised in relation to the date of assessment of damages in equity under Lord Cairns' Act: the principles for compensation for loss should not differ solely according to whether the origins of the wrong were in the Court of Chancery or a court of common law.

The point can be illustrated outside Lord Cairns' Act in the context of fraud. As Snell observed from the first edition of his work, even in cases where 'the common law affords complete and adequate relief' there was a 'general and perhaps a universal concurrent jurisdiction' in Chancery in relation to fraud.[99] In 1873, in *Peek v Gurney*,[100] by a Bill in equity the claimant had sought orders including declarations that various directors were 'jointly and severally liable to make good to the Plaintiff or indemnify him against the loss which he had sustained and might sustain'.[101] Lord Chelmsford remarked that a suit in Chancery based on actual fraud was 'precisely analogous to the common law action for deceit' and that it was 'a suit instituted to recover damages'.[102] It is hard to see why the common law and equity should differ in their application of the rules for the calculation of the same loss, based on the same fraud, with the same cause of action. The same point can be made about negligence of a company director causing loss to the company. Although such an action was traditionally brought in the Court of Chancery rather than at common law, it is now well recognised that the same principles apply as those for negligence at common law when assessing whether the director was negligent and whether loss is recoverable.[103] Directors are not in a different legal position as regards negligent behaviour from, for example, an accountant or a bailee at common law.[104]

[96] ibid [109].
[97] ibid [100], [103], [106].
[98] ibid [109]–[110], [272].
[99] *Snell* (n 2) 359.
[100] (1873) LR 6 HL 377.
[101] *Peek v Gurney* (1871) LR 13 Eq 79 (Ch) 88 (Lord Romilly MR).
[102] *Peek v Gurney* (n 101) 390, 393. And, more recently, see the endorsement of this in *Talacko v Talacko* [2021] HCA 15, (2021) 389 ALR 178 [27].
[103] *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 17.
[104] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) 205.

The same reparative compensation approach should apply where the loss arises from a fiduciary duty. The scope and terms of a fiduciary duty must conform to the terms of a contract where the fiduciary duty arises in the contractual context. Even outside that contractual context, where the same express or implied undertaking to act in the interests of another exists, but unilaterally rather than contractually, the fiduciary duty has been described as 'equivalent to contract'.[105] Hence, it has been said that principles of damages in contract such as those concerning 'transferred loss'[106] should be applied to the breach of the equitable obligation in the same way. And the order for compensation against a director in breach of fiduciary duty has thus been referred to interchangeably as equitable compensation and damages.[107]

iii. Difficult Cases

We have seen above that in the House of Lords and Supreme Court decisions of *Target Holdings Ltd v Redferns*[108] and *AIB Group (UK) Plc v Mark Redler & Co*,[109] it was held that the only compensation available was reparative compensation for the losses that had been caused by the solicitor's negligence. In the leading speech in *Target Holdings Ltd*, Lord Browne-Wilkinson acknowledged that the traditional substitutive (or rectifying) equitable approach required the trustee to account for the money that it held and that 'the common law rules of remoteness and causation do not apply'.[110] But Lord Browne-Wilkinson sought to distinguish the traditional equitable approach of the common account on the basis that it should not usually apply in a commercial situation such as a bare trust where the beneficiary is absolutely entitled to the trust fund.[111]

Lord Browne-Wilkinson's basis for distinguishing traditional trust accounting principles has not been met with subsequent favour. Lower courts have sometimes applied the restrictive approach taken in *Target Holdings* without emphasis on this rationale[112] but in some cases discussed below, *Target Holdings* has been distinguished entirely, again without reference to Lord Browne-Wilkinson's distinction.[113] In *Bairstow v Queens Moat Houses plc*,[114] Robert Walker LJ suggested that a more satisfactory dividing line might not be between the traditional trust and the commercial trust but between 'a breach of fiduciary duty in the wrongful disbursement of funds of which the fiduciary has this sort of trustee-like stewardship and a breach of fiduciary duty of a different character'. In *AIB Group (UK) plc v Mark Redler & Co*,[115] in the leading

[105] *Nocton v Lord Ashburton* [1914] AC 932 (HL) 972 (Lord Shaw).
[106] *Argos Pereira Espana SL v Athenian Marine Ltd* [2021] EWHC 554 (Comm), [2022] 1 All ER (Comm) 345 [24] (Sir Michael Burton CBE).
[107] *Umbrella Care* (n 45) [144].
[108] (n 50).
[109] (n 48).
[110] *Target Holdings* (n 50) 434.
[111] ibid 435–36.
[112] See, for instance *Wessely v White* [2018] EWHC 1499 (Ch), [2019] BCC 289 [45]–[46]; *LIV Bridging Finance Ltd* (n 47).
[113] For other jurisdictions see in Australia, *Agricultural Land Management* (n 3), and in the Singapore Court of Appeal, *Ping v Winsta Holding Pte Ltd* [2020] SGCA 35.
[114] (n 85) [53].
[115] (n 48) [71].

judgment, Lord Toulson rejected the notion that the principles of equity could vary according to the nature of the trust, and said that 'the fact that the trust was part of the machinery for the performance of a contract is relevant as a fact in looking at what loss the bank suffered by reason of the breach of trust because it would be artificial and unreal to look at the trust in isolation from the obligations for which it was brought into being'.

Nevertheless, the result in *Target Holdings* is justified. It was explained on traditional principles by Sir Peter Millett who argued that 'the acquisition of the mortgage or the disbursement by which it was obtained … was an authorised application of what must be treated as trust money notionally restored to the trust estate'.[116] Sir Peter Millett's reasoning appears to involve a fiction; the trust money was not restored to the estate so why treat it as having been so restored? The Supreme Court later described this as a 'fairy tale'.[117] The better approach, without resort to fiction, is to say that on a common accounting, or substitutive compensation approach, Target Holdings could not claim that the money had been disbursed without authority at the same time as accepting the benefit of the mortgage obtained from the disbursement of the money. The disbursement was a wrongful act requiring the solicitors to compensate for the loss suffered. But the solicitors could not be asked by Target Holdings to perform their duty of repaying the money to the trust fund when Target Holdings had accepted the benefits from the solicitors' wrongful disbursement. As Lord Reed put this point in *AIB Group (UK) plc v Mark Redler & Co*,[118] a claim for substitutive compensation was unavailable because '[t]he assets under the control of the trustee were then exactly what they ought to have been. There was nothing missing from the trust fund, and therefore no basis for a claim for restoration'. All that was left was a claim for reparative compensation for consequential loss. Thus, as Lord Toulson also said in the Supreme Court in *AIB Group (UK) plc v Mark Redler & Co*,[119] in circumstances such as those in *Target Holdings*, the measure of equitable compensation 'should be the same as if damages for breach of contract were sought at common law'.

More difficult is the rejection of a claim for substitutive compensation in *AIB Group (UK) plc v Mark Redler & Co*.[120] As we have seen, no debt claim was brought for the amount of £2,432,303 (£3.3 million, less amounts received in partial discharge after sale). That is why AIB's claim for that amount failed. Any claim for £2,432,303 would be a claim based on debt, not upon an unauthorised disposition. A claim for substitutive compensation, to rectify an unauthorised disposition could only ever have recovered the amount of the unauthorised disposition, around £300,000. As Lord Reed observed, it was a fallacy to assume that Redler had misapplied the entire £3.3 million rather than approximately £300,000 which had been paid to the borrowers rather than to Barclays.[121]

[116] Millett (n 1) 227.
[117] *AIB Group* (n 48) [69] (Lord Toulson).
[118] ibid [14].
[119] ibid [71].
[120] ibid.
[121] ibid [140].

The decisions in *Target Holdings* and *AIB Group* have thus been correctly distinguished by the Court of Appeal in other cases where substitutive compensation is sought. They have been described as concerned with the particular circumstances of obligations of solicitors that were defined by express and implied instructions and where 'the beneficiary obtained the full benefit for which it bargained' or was placed in the same position as if performance had occurred.[122]

Another difficult decision is the leading Australian case on the subject in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*.[123] In that case, an investment company agreed with solicitors to pay money to the solicitors, the first half of which was only to be released for investment by the solicitors after they obtained a bearer deposit certificate. The other half of the money was then subsequently to be invested in speculative activities on the international money market. In breach of the contractual terms that established the trust on which the solicitors held the money, the solicitors released all the money without obtaining a certificate. The solicitors later reinvested the money but still no bearer deposit certificate was obtained. The investments were poor and the money was all lost. A majority of the New South Wales Court of Appeal held that Youyang's claim should fail because at the time of reinvestment of the money if the director who acted on behalf of Youyang 'had been told about the form of the certificate he would not have been concerned and would have proceeded with the investment'.[124]

The difficulty with the appeal to the High Court of Australia is that it was argued by counsel for the solicitors as a case of reparative compensation for loss[125] but argued by counsel for Youyang as a case of substitutive compensation to restore the value of the trust fund.[126] Neither party explained that the measures were both legitimate. The High Court dealt with both measures but without expressly recognising that they were different. As to reparative compensation, the High Court dealt with the objection as to causation by endorsing the comments of Hodgson JA who dissented in the New South Wales Court of Appeal that there was, at least, an evidentiary onus upon the trustee to establish that the beneficiary would have authorised the action if asked.[127] On the other hand, the High Court also made a number of remarks that appeared to endorse substitutive compensation, such as by referring to Lord Millett's explanation of *Target Holdings* as a case in which the trust money had been 'notionally restored to the trust estate on the taking of the account'.[128] Critically, to the point that I have made above, one ground upon which the High Court distinguished *Target Holdings* was that the proposed commercial transaction was never completed.[129] In short, the duty for which substitutive compensation was sought had not been, belatedly, performed.

[122] *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291, [2020] BCC 316 [49] (David Richards LJ).
[123] (n 79).
[124] ibid [60] (the Court).
[125] ibid 488–89.
[126] ibid.
[127] ibid [60].
[128] ibid [45] (the Court).
[129] ibid [48].

V. CONCLUSION

The purpose of this chapter has been to foreshadow a coherent twenty-first century understanding of money awards for equitable wrongs. The starting point for that coherence is to complete a development that began with the nineteenth century English procedural reforms. That requires the recognition that money awards for wrongdoing in equity should be recognised as damages. Difficult questions can then be tackled as a matter of principle. One is to recognise when a money award in equity is a claim for debt, seeking to enforce a right, rather than a claim for damages. Another is to recognise that, as with the common law, there are different species of damages for which different principles apply. One species (substitutive compensation) is concerned with rectifying wrongful acts. Another (reparative compensation) is concerned with compensation for loss.