LEAVING CAN BE SO HARD: THE LIABILITY OF A FIDUCIARY EMPLOYEE FOR BREACH OF CONFIDENCE ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

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An employee owes common law and equitable duties to his or her employer. Both import duties of fidelity and loyalty. The most significant difference lies in the nature and scope of remedies for breach of those obligations. In this setting, the demarcation between law and equity can be elusive, particularly if an employee occupies a fiduciary position. The implications are explored with respect to a breach of confidence by an employee who appropriates an employer's confidential information to assist in setting up a competing business. Starting from first principles, an employment relationship is founded in contract and if fiduciary duties arise, they are circumscribed by the terms of that agreement. The relevant legal regime will determine whether the employer is confined to damages for breach of contract or whether equitable relief in the form of equitable compensation and an account of profits can be granted. This is explored by reference to the fundamental concepts which underlie the employment relationship and their engagement with law and equity.

I INTRODUCTION

This article will assess the nature and extent of a duty of confidence in respect of employment relationships where a fiduciary takes preparatory steps to set up in competition with their employer. It is trite that while the employment relationship subsists, a fiduciary owes common law, statutory and equitable duties of loyalty and good faith to his employer. A fiduciary may advance his or

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her personal interests while serving as an employee, provided these duties are observed.[1] In practice, it is a fine line between fidelity and betrayal.

This discussion exposes the unsettled state of the law of confidence and its diverse legal foundations, variously attributed to contract, property law and equity. A duty of confidence may be an incident of a fiduciary relationship, attracting obligations within that setting. Although this may co-exist with other legal constructs, the respective obligations may differ. Compounding this, a duty of confidence may be an express or implied term of a contract.

Attention then turns to the remedy for breach of confidence. Two particular issues will be considered. First, the demarcation of compensatory and gain-based relief, with particular reference to the taxonomy of the wrong and contrasting positions on causation and limiting principles. Second, conceptual difficulties that arise from the jurisdictional basis of the proceedings. For example, whether an account of profits can be granted in equity's auxiliary jurisdiction for breach of contract or whether the plaintiff is confined to damages at law. This is particularly problematic in cases where equitable relief is neither expressly contemplated nor expressly excluded. This is developed further by exploring whether these approaches can be reconciled on the basis that an account of profits serves to enforce a performance interest. The article will conclude by drawing together some common themes that unify the nature of a duty of confidence and the normative expectations that underpin it.

II The Doctrinal Basis of A Duty of Confidence in an Employment Relationship

A duty of confidence has a lineage which derives from different private law sources.[2] Equity has long recognised a duty of confidence, both as a general

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1 It is moot whether an employee's failure to disclose to his employer that he is taking preparatory steps to set up in competition is a breach of the employment relationship. This will depend on factors such as 'the position and duties of the employee, the nature of the acts of preparation, the effect of non-disclosure upon the employer's business interests, and the motives of the employee': *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 807 (McLelland J).

2 This is framed against an interpretation of the Judicature Acts (commonly described as the fusion-fusion fallacy debate). Jurisdictions, such as New Zealand, which openly recognise the merger of law and equity, are more receptive to applying remedies and principles irrespective of their historical origins. See, eg, *Day v Mead* [1987] 2 NZLR 443, 451 (Cooke P). In contrast, Australia has largely adopted the fusion fallacy approach. See, eg, *Maguire v Makaronis* (1997) 188 CLR 449, 489 (Kirby J); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 226 [156] (Kirby J) ('*Pilmer*'); *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 306 [18] (Spigelman CJ), 326 [139]–[145] (Mason P), 391–2 [353] (Heydon JA) ('*Harris*'). See also JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) ch 2.

obligation and as an incident of a fiduciary relationship.[3] With respect to the former, the doctrine has a broad function in preventing unconscionable conduct.[4] In this setting, an expansive range of equitable remedies is available, including injunctive relief, delivery up, an account of profits[5] and compensation in the court's equitable jurisdiction.[6] A duty of confidence may also arise as the term of a contract, express or implied. This is a common law obligation and the traditional remedy is damages. The duty occurs in many settings, including employment relationships, personal and professional relationships, business negotiations, surreptitious journalism, joint venture agreements and information gathered by the government and public bodies. The obligation can arise incidentally and is not confined to the original parties to the confidence or dependent upon a direct relationship between them.[7]

This article focuses on the nature of a duty of confidence owed by a fiduciary employee. During the currency of the employment relationship, an employee is subject to a stringent duty of confidence. The standard is exacting, whether expressed as an equitable or common law duty. Some employees are classed as fiduciaries[8] and subject to obligations on that basis. This has implications for both liability and remedy. The latter is particularly significant when an employer seeks gain-based relief against a delinquent employee.

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3 The jurisdiction of the medieval Chancellors is depicted in the couplet: 'These three give place in court of conscience, Fraud, accident, and breach of confidence.' See FW Maitland, *Equity: A Course of Lectures*, ed AH Chaytor, WJ Whittaker and John Brunyate (Cambridge University Press, 2nd rev ed, 1936) 7 n 1. See also *Saltman Engineering Co Ltd v Campbell Engineering Co* (1948) 65 RPC 203, 215 (Lord Greene MR); *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50–1 (Mason J) ('*Fairfax*'); *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 265 ALR 281, 290 [39] (Finn, Sundberg and Jacobson JJ).

4 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 438 (Deane J) ('*Moorgate*'); *Stephens v Avery* [1988] 1 Ch 449, 456 (Browne-Wilkinson V-C); *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73, 95 (Gummow J); *Douglas v Hello! Ltd* [2001] QB 967, 985 (Brooke LJ).

5 *Seager v Copydex Ltd* [1967] 1 WLR 923, 931 (Lord Denning MR); *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 46 (Megarry J); *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515, 520–1 (Woodhouse J for the Court); *Fairfax* (n 3) 50–1 (Mason J); *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142, 157–63 (Binnie J).

6 *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301 (Cooke P); *Catt v Marac Australia Ltd* (1986) 9 NSWLR 639, 659 (Rogers J).

7 In a colourful and oft quoted example: 'where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by'. See *A-G v Observer Ltd* [1990] 1 AC 109, 281 (Lord Goff).

8 The New South Wales Court of Appeal has recently stated that *all* employees are fiduciaries, although their scope may be limited: *Anderson v Canaccord Genuity Financial Ltd* (2023) 113 NSWLR 151, 191–2 [150]–[154] (Gleeson, Leeming and White JJA) ('*Anderson*'). See below n 28 and accompanying text for discussion.

A *An Employee's Status*

It is axiomatic that an employment relationship imports common law duties of fidelity and good faith to an employer.[9] This has been expressed as embodying duties of loyalty, honesty, confidentiality and mutual trust.[10] A duty of fidelity is a strong corrective where an employee fails to faithfully serve his or her employer. Fidelity carries the expectation that the employee 'shall not use except for the purposes of service, the opportunities which that service gives him of gaining information'.[11] These stringent standards broadly correspond with fiduciary obligations, but it does not follow that every employment relationship is fiduciary. The finding that a relationship is fiduciary assumes a transcendent standard that exceeds a duty of fidelity.[12] However, the distinction is elusive:

> The problem of identifying the scope of any fiduciary duties arising out of the relationship is particularly acute in the case of employees. This is because of the use of potentially ambiguous terminology in describing an employee's obligations, which use may prove a trap for the unwary. There are many cases which have recognised the existence of the employee's duty of good faith, or loyalty, or the mutual duty of trust and confidence — concepts which tend to shade into one another. … Accordingly, in analysing the employment cases in this field, care must be taken not automatically to equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations.[13]

The nature and extent of an employee's duty of loyalty is a convenient criterion for distinguishing a fiduciary and non-fiduciary employee. Although loyalty does not, in the abstract, define a fiduciary employee, its distinguishing feature is the exclusivity of this undertaking:

> An employee owes an obligation of loyalty to his employer but he will not necessarily owe that exclusive obligation of loyalty, to act in his employer's interest and not in his own, which is the hallmark of any fiduciary duty owed by an employee to his employer. The distinguishing mark of the obligation of a fiduciary, in the context of employment, is not merely that the employee owes a duty of loyalty but of single-minded or exclusive loyalty.[14]

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9 *Robb v Green* [1895] 2 QB 315, 317 (Lord Esher MR), 320 (Kay LJ) ('*Robb*'); *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, 135–6 (Neill LJ) ('*Faccenda Chicken*').

10 *Concut Pty Ltd v Worrell* (2000) 176 ALR 693, 705–7 [51] (Kirby J).

11 *Merryweather v Moore* [1892] 2 Ch 518, 524 (Kekewich J).

12 See, eg, *Bayley & Associates Pty Ltd v DBR Australia Pty Ltd* [2013] FCA 1341, [232] (Foster J); *Nexgen Sydney Pty Ltd v Barakat* [2022] NSWSC 312, [380] (Ward CJ in Eq) ('*Nexgen*').

13 *Nottingham University v Fishel* [2000] ICR 1462, 1492–3 (Elias J) ('*Nottingham*'). This may not represent the view in New South Wales, following the decision of *Anderson* (n 8): see below n 28 and accompanying text. Also, the reference to a 'mutual duty of trust and confidence' does not represent the view of the High Court of Australia. In *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, the High Court rejected the notion that there is an implied *mutual* duty of trust and confidence in an employment contract: at 178 [1] (French CJ, Bell and Keane JJ).

14 *Helmet Integrated Systems Ltd v Tunnard* [2007] FSR 16, 448 [36] (Moses LJ). See also *Woolworths Ltd v Olson* (2004) 184 FLR 121, 185 [212] (Einstein J).

Employees who owe a duty of undivided loyalty are subject to the unique principles developed by equity in respect of unauthorised gains and conflict of interest:

> The fiduciary duty that an employee has to an employer within the scope of the relationship of employment, no less than the fiduciary duty that any other person in a fiduciary position has to any other person to whom the fiduciary duty is owed … in respect of which the person in the fiduciary position has undertaken or assumed responsibility to act in the exclusive interests of that other person, is a duty of 'absolute and disinterested loyalty'. That duty of loyalty is imposed in equity by means of two overlapping 'proscriptive obligations'. … 'The first', often referred to as the 'conflict rule' … 'The second', often referred to as the 'profit rule'…[15]

It follows that care must be taken not to immediately equate obligations of good faith and loyalty with fiduciary duty.[16] A chauffeur employed by one person may work on his own account as a taxi driver during off-duty hours without necessarily acting inconsistently with his employer's interests.[17] In contrast, a sales manager who markets similar products to potential customers of his employer during his off-duty hours may be in breach of a duty of loyalty.[18] Loyal performance must be exclusive in the case of the sales manager, but not the chauffeur. The determinative factor is not simply what an employee is engaged to do but how that duty is discharged in the context of the employment relationship. In the example of the sales manager and the chauffeur, the duty of loyalty differs and in turn defines the status of the former as a fiduciary and the latter as a non-fiduciary employee.

In practical terms, an errant employee is as likely to be snared by a duty of fidelity as a breach of fiduciary duty. However, as will be discussed below, the classification of the wrong may have significant implications to the outcome and, importantly, the remedy. This draws to the fore the distinction between status-based and fact-based fiduciary relationships. The former, such as trustee and beneficiary, solicitor and client, partners, company directors, agent and principal, are deemed to be inherently fiduciary. With the exception of relationships falling within these categories,[19] an employee is not — at least in a general sense — a fiduciary.[20] While relationships falling outside the status-based categories are not presumptively fiduciary, it may be established on the particular

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15 *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 29–30 [67]–[69] (Gageler J) (citations omitted) ('*Lifeplan*').

16 *Nottingham* (n 13) 1493 (Elias J).

17 Arguably, loyalty is not a significant feature of this form of employment, but the example brings home the point that the employee's off-duty activities are not inconsistent or harmful to his employer and to that extent a duty of loyalty is not engaged.

18 See *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, 172, 174–8 (Lord Greene MR), 179–83 (Morton LJ).

19 It is apparent from the specificity of these roles that employment relationships per se do not necessarily fall within the status-based category.

20 As noted below, particular obligations of an employee may create fiduciary duties.

facts that a relationship meets the required standard.[21] In this setting, a fiduciary obligation may arise out of the employment relationship although it is not inherent in the nature of the relationship itself.[22]

An inference as to an employee's status may be drawn from the employee's seniority,[23] but a more comprehensive approach is usually required.[24] This is achieved by identifying the employee's duties, the manner in which they are carried out and their significance to the employer.[25] This supplies a context in which it can be asked whether the employee has a special opportunity to exercise power or discretion to the detriment of their employer and whether, as a result, the employer is vulnerable to abuse. As Ward CJ in Equity commented:

> [T]he test requires one to take into account the features of the particular employment relationship in question (including matters such as ascendancy, influence, vulnerability, trust, confidence or dependence) as to whether there is a reasonable expectation that a party will act in another's interest to the exclusion of his or her own or a third party's interest.[26]

Fundamentally, the focus is the duty, not the relationship. The obligations which are the constituents of that duty define the nature of the relationship. In Paul Finn's celebrated pronouncement: '[A] person is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to fiduciary obligations that he is a fiduciary.'[27]

However, the status of an employment relationship is not without controversy. In *Anderson v Canaccord Genuity Financial Ltd* ('*Anderson*'), the New South Wales Court of Appeal stated that, as a general proposition, employees owe fiduciary obligations to their employers.[28] Appellate authorities establish that two elements must be separately assessed: the existence of a fiduciary relationship and the scope of the fiduciary obligations that arise.[29] In *Anderson*, the conduct of two senior company employees was in issue. The initial premise was that the defendants were fiduciaries. It was then necessary to determine the scope of their fiduciary obligations and to assess liability by reference to equity's traditional strictures. On the facts it was found that the defendants were not permitted to act self-interestedly by removing an existing trustee and appointing entities in which they had a personal interest.

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21 For example, in *A Company v Secretariat Consulting Pte Ltd* [2021] 4 WLR 20 it was questioned whether an expert witness owes a fiduciary duty of loyalty to his or her client.

22 *Nottingham* (n 13) 1491 (Elias J).

23 *Colour Control Centre Pty Ltd v Ty* (Supreme Court of New South Wales, Santow J, 24 October 1995) [48].

24 *Victoria University of Technology v Wilson* (2004) 60 IPR 392, 438 [145] (Nettle J).

25 *Crowson Fabrics Ltd v Rider* [2008] FSR 17, 445–6 [77]–[83] (Peter Smith J).

26 *Nexgen* (n 12) [379] (Ward CJ in Eq).

27 PD Finn, *Fiduciary Obligations* (Law Book, 1977) 2.

28 *Anderson* (n 8) 185 [126] (Gleeson, Leeming and White JJA).

29 Ibid.

A concern with the Court of Appeal's approach in *Anderson* is that an enquiry regarding the scope of the obligations assumes a substantive determination of the status of the relationship and the duties which inform it. Their Honours elaborate:

> [I]t is not sufficient to hold that a fiduciary obligation *exists*. The next step is to determine the *scope* of that obligation. Ordinarily, unless the employee is very senior, or has a large degree of authority, there is unlikely to be conduct which falls within the *scope* of that obligation.[30]

On this model, an employment relationship is classified as a status-based fiduciary relationship. But unless it falls within certain exceptions (seniority and degree of authority), in the normal course there is no content to the putative fiduciary relationship. This has the semblance of putting the cart before the horse when the cart is empty.

In surveying the authorities, the New South Wales Court of Appeal placed particular reliance on Mason J's statement in *Hospital Products Ltd v United States Surgical Corporation* ('*Hospital Products*'):

> The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations … viz, trustee and beneficiary, agent and principal, solicitor and client, *employee and employer*, director and company and partners.[31]

This passage describes status-based fiduciary relationships. However, it is unsafe to categorise employment relationships as inherently fiduciary. It cannot be said that every employee owes an exclusive duty of loyalty and undertakes to act for or on behalf of his or her principal in the exercise of a power or discretion which will affect the interests of the principal. Nor is it necessarily the case that an employer reposes trust and confidence in the employee and is vulnerable to abuse by that person.[32] The obligations that flow from a fiduciary relationship are onerous and, understandably, equity is parsimonious in recognising relationships as inherently fiduciary. Taking the relationship of trustee and beneficiary, the elements of fiduciary duty are unquestionably present. Other nominate relationships have the common feature that one party enjoys a dominant position of control, with the ability to exploit their role for personal gain. While this may be true of some employment relationships, it is unrealistic to suggest that it applies to employment relationships generally. Similarly, it does not follow that an employer is necessarily vulnerable to the conduct of an employee. The relationship is founded in contract and the employer typically has the ability to set the terms.

It would therefore be more accurate to say that *some* employment relationships are fiduciary. A relationship falling outside the usual status-based

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30 Ibid (emphasis in original).

31 (1984) 156 CLR 41, 97 (emphasis added) ('*Hospital Products*').

32 Ibid 96–7 (Mason J). In any event, an employer may be adequately protected by analogous common law duties of fidelity and faithful performance.

categories can, of course, on enquiry, be deemed fiduciary. Given the diversity of employment relationships, this cannot be placed any higher. In *Anderson*, the New South Wales Court of Appeal discussed whether an errand boy could be a fiduciary in relation to his master.[33] To adopt, with variation, the example given by the Court, suppose an errand boy is given a folded note to take to his master. The errand boy reads it. It is a tip to invest in a particular company. As instructed, the errand boy delivers the note to his master. His master duly invests in the company and makes a significant profit. The errand boy does the same. The classification of the relationship and the taxonomy of the wrong is an essential precursor to the remedy. On these facts the errand boy is not a fiduciary,[34] because he does not act in a capacity of trust and confidence.[35] These expectations simply do not fit the facts. It is true that in this, as in most relationships, each party has the capacity to cause harm to the other, but such concerns are not the exclusive preserve of equity. The errand boy may be liable in tort or contract,[36] although the likely award would be nominal damages.[37]

B *Contract as the Foundation of an Employment Relationship*

An employment relationship is founded in contract. This is usually signified by a formal agreement, although a purely oral contract suffices.[38] In either case,

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33 *Anderson* (n 8) 194 [162]–[165] (Gleeson, Leeming and White JJA). The Court of Appeal cited *Re Coomber* [1911] 1 Ch 723, 728, where Fletcher-Moulton LJ observed: '[f]iduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change'.

34 Much could be said about the errand boy. Even if his position is not deemed fiduciary, it is arguable that he is a fiduciary when conveying confidential information. That is, a person 'may be in a fiduciary position *quoad* a part of his activities and not *quoad* other parts': *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126, 1130 (Lord Wilberforce for the Board) (Privy Council) (emphasis added) ('*New Zealand Netherlands Society*'). However, the delivery of written communications would appear to be central to the job, so it is a case of all or nothing. On this basis it is submitted that the role of an errand boy is most appropriately cast as non-fiduciary. Cf *Anderson* (n 8) 194 [164] (Gleeson, Leeming and White JJA).

35 However, this is not beyond doubt. Breach of confidence may arise if the note was in a sealed envelope and the contents were inherently confidential.

36 In contrast, if the errand boy is a fiduciary, the gains would offend the profit rule. Equity's usual response is to require the wrongdoer to disgorge the gains.

37 The outcome will probably be the same irrespective of whether the master invests in the shares. The errand boy's exploitation of the contents of the letter has no causal bearing on the master's use of this information. For a more contemporary perspective, in *Nexgen* (n 12), the defendant took from her former employer a spreadsheet containing confidential information about prospective sales leads. However, her former employer was unable to establish that any loss was sustained and nominal damages were awarded for breach of the defendant's employment contract: at [365]–[366] (Ward CJ in Eq).

38 See, eg, *Plus One International Pty Ltd v Ching (No 3)* [2020] NSWSC 1598, [436]–[443] (Hallen J) ('*Plus One*'). But compare with the position in New Zealand: *Employment Relations Act 2000* (NZ) ss 54, 65.

certain terms are generally implied.[39] The contractual nature of the relationship does not preclude fiduciary duties, but the terms of an agreement have primacy. Essentially, the parties may prescribe or exclude the elements of their relationship:

> This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms …[40]

Insofar as the terms of an employment contract are inconsistent with fiduciary obligations, contract prevails,[41] as Mason J's classic statement in *Hospital Products* makes clear:

> That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract which regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them.[42]

Thus, the terms of an employment contract and those which are necessarily implied, will define the nature of the relationship. Liability flows from consensus to the extent that contract describes the parties' expectations. However, there are limits to contractual primacy. Contract doctrine is less persuasive with respect to remedy. While equity usually follows the law, intervention is often triggered not because there is no legal sanction, but because on the facts the remedy is inadequate. This brings equity's auxiliary jurisdiction into play and exposes the limits to which contract holds sway in confining relief to damages. It may be

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39 Implied terms include a duty of confidence: *Robb* (n 9) 317 (Lord Esher MR); *Faccenda Chicken* (n 9) 135–6 (Neill LJ).

40 *Nottingham* (n 13) 1491 (Elias J).

41 Contractual terms may entirely exclude equitable doctrine. See *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148, 175 [118] (Campbell JA) ('*Del Casale*'): 'If there was a contractual obligation that covered the topic, there would, of course, be no occasion for equity to intervene to impose its own obligation.' This view has been generally approved by Australian courts. See, eg, *Coles Supermarkets Australia Pty Ltd v FKP Ltd* [2008] FCA 1915, [63] (Gordon J) ('*Coles Supermarkets*'); *Streetscape Projects (Australia) Pty Ltd v City of Sydney* (2013) 85 NSWLR 196, 223–4 [150] (Barrett JA); *Gold and Copper Resources Pty Ltd v Newcrest Operations Ltd* [2013] NSWSC 281, [97] (Stevenson J).

42 *Hospital Products* (n 31) 97. His Honour's analysis has been widely accepted. See, eg, *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 36 [91] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); *Kelly v Cooper* [1993] AC 205, 215 (Lord Browne-Wilkinson for the Board) (Privy Council); *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567, 575 [30] (Lord Walker) ('*Hilton*').

objected that the doctrine of efficient breach is undermined by pecuniary awards that exceed a compensatory measure.[43] However, this does not preclude relief in equity where there is a special interest in performance[44] and damages cannot satisfy the demands of justice.[45] The implications with respect to an account of profits are explored in the next section.

III The Implications of a Breach of Confidence by a Fiduciary Employee

The implications of a breach of confidence can be tested against the common scenario of an employee who surreptitiously appropriates customer lists, marketing information or commercial data from a current employer to assist in setting up a competing business.[46] Put colloquially, the employee's intention is to 'hit the ground running'.[47] In addressing the wrong, an account of profits may, on the particular facts, be a superior remedy to damages or compensation. This is cogently demonstrated in *Warman International Ltd v Dwyer* ('*Warman*').[48]

In *Warman*, the plaintiff was a manufacturer and distributor of slurry pumps. It also had an agency agreement for the distribution of gearboxes manufactured in Italy by Bonfiglioli. Warman was based in New South Wales, but it had a Queensland branch that was run by its general manager, Dwyer. The Queensland branch sold more Bonfiglioli products than any other outlet in Australia and accordingly it controlled the running of the agency. Dwyer became dissatisfied with his employer's operational decisions. In particular, Warman began to reduce its presence in Queensland. Stock was decreased and staff were laid off. Warman also abandoned its agencies for Bonfiglioli products in Australia except for Queensland.

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43 *Coles Supermarkets* (n 41) [64] (Gordon J).

44 *A-G v Blake* [2001] 1 AC 268, 282 (Lord Nicholls) ('*Blake*'). However, this judgment has not been widely accepted. See below n 55 for further discussion.

45 *Wilson v Northampton and Banbury Junction Railway Co* (1874) LR 9 Ch App 279, 284 (Lord Selborne LC); *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460, 503 (Windeyer J).

46 See, eg, *Lifeplan* (n 15). The plaintiff sold to the public retail investment contracts to meet the costs of pre-arranged funerals. Two employees (the defendants) secretly approached a competitor, F, with a view to diverting the plaintiff's existing business to that party. To this end they presented a 5-year business concept plan using confidential and commercially sensitive information purloined from their employer. At trial it was held that the defendants were in breach of their fiduciary duty of loyalty to the plaintiff as well as the fundamental obligations of confidence owed by an employee to an employer. The primary judge ordered an account of profits against the defendants (which was not challenged on appeal). See also Peter Devonshire, 'Recent Cases: Breach of Fiduciary Duty' (2019) 93(1) *Australian Law Journal* 20.

47 Not uncommonly, this includes diverting business opportunities from a current employer.

48 (1995) 182 CLR 544 ('*Warman*'). This case was primarily concerned with breach of fiduciary duty, although it was necessary for the defendant to appropriate confidential and commercially sensitive information to achieve his ends.

Bonfiglioli approached Warman with a view to entering into a joint arrangement for the assembly of its products in Australia. Warman's senior management rejected the proposal. Dwyer resolved to set up his own business and in furtherance of this he entered into secret negotiations with Bonfiglioli. Dwyer also incorporated two companies and encouraged existing Warman staff to join him. Clearly Dwyer's actions were calculated to undermine his employer's interests.[49] Ultimately Bonfiglioli executed a joint venture agreement with Dwyer's companies and terminated its agency agreement with Warman. The same month, Dwyer resigned from Warman to pursue his new business. Dwyer prospered and, in the 4 years preceding the trial, the business made net pre-tax profits of $1.6 million.

On discovering these events, Warman commenced proceedings against Dwyer and his companies. At first instance,[50] it was held that Dwyer was in breach of his duties to Warman. By advancing his own interests to the detriment of his employer it was found that Bonfiglioli had prematurely terminated its agency with Warman. Warman was entitled to recover equitable damages for the associated loss or, alternatively, an account of profits for the first four years of the defendant's business.[51] The Queensland Court of Appeal upheld the finding that Dwyer had breached his fiduciary duty, but the remedy was confined to compensation for losses flowing from the breach.[52] Warman appealed successfully to the High Court of Australia, which reinstated the order for an account of profits, albeit for a reduced period.[53] This was more advantageous to Warman because the fortunes of its operations in Queensland and Dwyer's new business were driving in opposite economic directions. Warman was running its operations down, whereas Dwyer had developed a vibrant and expanding business. Thus, the measure of Warman's loss was considerably less than Dwyer's gains.

On facts such as these, the wronged employer will usually seek an account of profits in respect of the delinquent employee's unauthorised gains.[54] Two factors discussed above are particularly relevant. First, an employment relationship is usually founded in contract. It is trite that the orthodox remedy for a breach of contract is damages. An important consequence is that on payment of damages the contract-breaker can retain gains derived from the breach and is at liberty to

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49 Compounding this, Dwyer was asked to review Warman's agency arrangements with Bonfiglioli to assist Warman's senior management to decide on its future relationship with that party. Given Dwyer's personal dealings with Bonfiglioli, there was an obvious conflict of interest.

50 (1992) 46 IR 250.

51 Ibid 259–60 (Derrington J).

52 [1994] QCA 12, 34 (Macrossan CJ and Pincus JA).

53 *Warman* (n 48) 570 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

54 The plaintiff usually has an election between equitable compensation and an account of profits. See below Part IV(B) ('*The Boundaries of Disgorgement*') and IV(C) ('*Account of Profits as a Performance Interest*'), where the implications of an order for account are discussed further.

pursue more valuable economic opportunities.[55] The comments of Lord Walker in *OBG Ltd v Allan* typify this binary approach:

> In order to investigate that problem it is necessary to enquire more closely into what is happening, in legal terms, when a court makes an order for the protection of confidential information. If the person disclosing the information is in contractual relations with the claimant, the most natural claim will be for breach of an express or implied term in the contract. That was the basis for the decision in *Pollard v Photographic Co* (1888) 40 Ch D 345 … Where there is no contractual tie the cause of action is the equitable jurisdiction to restrain (or if it cannot be restrained, to award compensation or an account of profits for) breach of confidence.[56]

This introduces the rudimentary argument that if damages are available at law for breach of contract there is 'no occasion for equity to intervene to impose its own obligation'.[57]

Second, employees can broadly be classified as fiduciary and non-fiduciary. This has implications as to whether a breach of confidence should be treated as an equitable or common law wrong. These factors give rise to a complex lattice of jurisdictional considerations,[58] which will be addressed in the next Part.

IV Where Should the Line be Drawn between Compensation and Gain-Based Relief?

Attention now turns to the remedial options with respect to a breach of confidence by fiduciary and non-fiduciary employees. This brings into play the boundary between compensatory and gain-based relief and the wider implications of classifying a breach as an equitable or legal wrong.

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55 Exceptionally, wider policy considerations are engaged, where it is not in the public interest for a contract to be broken. Here, the remedial focus is adjusted to deprive the defendant of the fruits of the wrong. *Blake* (n 44) provided impetus for this approach, but it has not been widely accepted. Moreover, the case was unique. The defendant was in breach of an undertaking of permanent confidentiality with regard to his employment in the Secret Intelligence Service. The Crown was seeking to obtain the royalties of a book written by the defendant about his time as an intelligence officer. It would be unrealistic to suggest that the outcome in this case has general application to employment relationships. If gain-based relief is to be propounded, it must rest on a more principled basis.

56 [2008] 1 AC 1, 77 [276].

57 *Del Casale* (n 41) 175 [118] (Campbell JA).

58 It has aptly been said that '[t]here is a substantial overlap between the content of an employee's contractual duties, the equitable duty of confidence, any fiduciary duties and … statutory duty': *Plus One* (n 38) [547] (Hallen J).

A *The Boundaries of Compensation*

It must be clarified what is meant by compensation for loss. The court can grant damages at law and compensation in its equitable jurisdiction. The terms are sometimes elided,[59] but this masks some significant differences. Damages for tort or breach of contract are subject to limiting principles such as remoteness, foreseeability and intervening cause. In contrast, equity's normative objectives are fostered by reducing the threshold of causation and the scope of limiting principles.[60] This is particularly pronounced in the case of formal trusts and less so in respect of relationships removed from the trust paradigm where there are diminished policy concerns for protecting the principal. The status of a fiduciary is much closer to the former. Equity's stringent policy of ensuring that fiduciaries should not profit from their wrongs suggests a much weaker causal enquiry and test of remoteness in respect of gains from a breach of fiduciary duty.[61]

This is subject to the qualification that not every wrong by a fiduciary is a breach of fiduciary duty.[62] If the impugned conduct is merely careless or negligent, liability may be governed by tort or contract. Alternatively, and with similar effect, equity may address such conduct, applying common law principles by analogy.[63] It has aptly been said that the 'fact that a fiduciary acts negligently, whether contractually or tortiously, does not in itself place the fiduciary in breach of any of its duties qua fiduciary'.[64]

In such cases, equitable duty is either subsumed, or fashioned by, the common law. In short, the nature of the substantive duty, rather than the category of relationship, determines the appropriate remedial regime.[65]

However, this is not without controversy. Much depends on where, philosophically, the line should be drawn in defining — or perhaps more precisely, preserving — the fiduciary principle. In *Youyang Pty Ltd v Minter Ellison Morris Fletcher*, the High Court of Australia observed:

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59 For example, equitable compensation is sometimes described as equitable damages.

60 On an extreme thesis, where a trustee is under a duty to restore trust assets, causation, foreseeability and remoteness are usually not material: *Re Dawson; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, 214–16 (Street J).

61 Graham Virgo, 'Restitutionary Remedies for Wrongs: Causation and Remoteness' in Charles E. F. Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing, 2008) 301, 327.

62 *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 647 [147], 670 [185] (La Forest J); *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 237 (Ipp J).

63 *Bristol and West Building Society v Mothew* [1998] Ch 1, 16–18 (Millett LJ).

64 *Nimmo v Westpac Banking Corporation* [1993] 3 NZLR 218, 237 (Blanchard J). See also *New Zealand Netherlands Society* (n 34) 1130 (Lord Wilberforce for the Board); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 688 (Tipping J) ('*Bank of New Zealand*'); *Hilton* (n 42) 575 [29] (Lord Walker).

65 If a fiduciary or non-fiduciary employee is in breach of a duty of care, liability is determined by the tort of negligence and the remedy is damages. This is of limited relevance in the context of a duty of confidence, because the unauthorised removal of confidential information is usually an intentional wrong.

> [T]here must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.[66]

This reflects a reluctance to compromise fiduciary doctrine, which is a consistent theme of Australian jurisprudence.[67] In this jurisdiction at least, equity retains a tenacious grip on fiduciary wrongs and the remedial regime that supports it. This is reinforced from another perspective. The obligations of trustees and fiduciaries arise in equity's exclusive jurisdiction. In regard to compensation, at least, equitable relief is not impeded by a concurrent cause of action at law.[68] There is no reason in principle to exclude orders such as an account of profits, which belong to the same suite of remedies. In the context of an employment relationship, these expansive remedies are accessible in respect of fiduciary employees.[69] Having considered equitable compensation, attention now turns to the parameters of an account of profits.

B *The Boundaries of Disgorgement*

A shared feature of equitable compensation and an account of profits is that the strictness of fiduciary doctrine has a significant influence on the causal enquiry.[70] Where special obligations of trust have been assumed, the focus of equity is to support rather than undermine expectations of fidelity.[71] Sanctions reflect the nature of the interest that requires protection,[72] and an account of profits must therefore be understood in the context of the duty it enforces.[73]

While it is necessary to establish a causal nexus between the breach and the gain, the precise formulation of this principle is open to debate. This is particularly evident from recent pronouncements of the English Court of Appeal,[74] which affirm that, while a defaulting fiduciary is strictly accountable for illicit gains, there must be a nexus between the breach of duty and the profits for which a fiduciary must account. However, the necessary link did not have to be of a causal

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66 (2003) 212 CLR 484, 500 [39] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

67 See, eg, *Pilmer* (n 2) 196 [71] (McHugh, Gummow, Hayne and Callinan JJ).

68 *Nocton v Lord Ashburton* [1914] AC 932, 957 (Viscount Haldane LC). See also Heydon, Leeming and Turner (n 2) 862 [23-565].

69 See above Part II(A).

70 *Gunasegaram v Blue Visions Management Pty Ltd* (2018) 282 IR 15, 67 [268] (Gleeson JA).

71 *Marathon Asset Management LLP v Seddon* [2017] ICR 791, 852 [230] (Leggatt J).

72 This is particularly germane to fiduciary obligations, which are underpinned by the deterrent principle.

73 *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), [343] (Sales J). See also *Gray v Global Energy Horizons Corporation* [2020] EWCA Civ 1668, [128] (David Richards, Henderson and Rose LJJ) ('*Gray*').

74 *Gray* (n 73) [128] (David Richards, Henderson and Rose LJJ); *Recovery Partners GP Ltd v Rukhadze* [2023] Bus LR 646, 666 [76] (Popplewell, Phillips and Falk LJJ) ('*Recovery Partners*').

character.[75] It sufficed if there was a 'reasonable relationship' between breach and gain.[76] This introduces considerable uncertainty, not least because of the difficulty of imputing liability without the obvious reference point of causation.

Australia has adopted 'but for' causation[77] to define the relationship between the breach and the gain.[78] This was affirmed by the High Court of Australia in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd*, where the plurality stated that it is sufficient to show that the profit would not have been made but for dishonest wrongdoing.[79] The 'but for' test provides a 'narrow escape route from liability',[80] but this does not significantly diminish the role of an account of profits in vindicating the standards of fiduciary duty.[81] The outcome, if not the methodology, is not inconsistent with the position in England and New Zealand,[82] despite their rejection of 'but for' reasoning for an account of profits,[83] and disavowal of causation as a formal test.[84]

The boundaries of disgorgement can also be defined from an economic perspective. To this point it has been assumed that gain-based relief is superior to compensation for loss.[85] However, this cannot be pressed further. The most desirable remedial outcome will depend on the facts of each case. If the plaintiff's losses exceed the defendant's gains, the preliminary indication, at least, would be

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75 *Gray* (n 73) [128] (David Richards, Henderson and Rose LJJ); *Recovery Partners* (n 74) 666 [76] (Popplewell, Phillips and Falk LJJ). See also *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461, 484 [47] (Morritt LJ) ('*United Pan-Europe*'); *Akita Holdings Ltd v Attorney General of the Turks and Caicos Islands* [2017] AC 590, 598 [17] (Lord Carnwath JSC) ('*Akita Holdings*'); *Murad v Al-Saraj* [2005] EWCA Civ 959, [57] (Arden LJ) ('*Murad*').

76 *Gray* (n 73) [128] (David Richards, Henderson and Rose LJJ); *Recovery Partners* (n 74) 666 [76] (Popplewell, Phillips and Falk LJJ).

77 A similar approach was taken by the Court of Appeal of Singapore in *UVJ v UVH* [2020] SGCA 49.

78 This contrasts with the position in England and New Zealand where 'but for' reasoning has not been adopted for an account of profits. See, eg, *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443, 453 (Roskill J) ('*Industrial Development Consultants*'); *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [145] (Mummery LJ for the Court) ('*Gwembe Valley*'); *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384, 400–1 [32] (Elias CJ) ('*Premium Real Estate*'); *McLaughlin v McLaughlin* [2021] NZHC 3015, [412] (Gendall J) ('*McLaughlin*').

79 *Lifeplan* (n 15) 12–13 [9] (Kiefel CJ, Keane and Edelman JJ). In separate reasons, Gageler J contemplated the assimilation of the 'but for' test for compensatory and gain-based relief: at 37 [88]. See also Devonshire (n 46).

80 *Bank of New Zealand* (n 64) 687 (Tipping J).

81 See, eg, Gageler J's qualifications to the 'but for' test: *Lifeplan* (n 15) 37 [88].

82 See generally Peter Devonshire, 'Account of Profits and the Causation Paradigm' [2024] *Lloyd's Maritime and Commercial Law Quarterly* 188.

83 *Industrial Development Consultants* (n 78) 453 (Roskill J); *Gwembe Valley* (n 78) [145] (Mummery LJ for the Court); *Premium Real Estate* (n 78) 400–1 [32] (Elias CJ); *McLaughlin* (n 78) [412] (Gendall J).

84 *United Pan-Europe* (n 75) 484 [47] (Morritt LJ); *Akita Holdings* (n 75) 598 [17] (Lord Carnwath JSC); *Murad* (n 75) [57] (Arden LJ); *Gray* (n 73) [128] (David Richards, Henderson and Rose LJJ); *Recovery Partners* (n 74) 666 [76] (Popplewell, Phillips and Falk LJJ).

85 This was certainly the basis of the plaintiff's appeal to the High Court of Australia in *Warman* (n 48). However, the final orders were suspended for 7 days to give the plaintiff an opportunity to assess whether judgment should be entered for an account of profits instead of equitable compensation: at 570 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

to claim compensation. But it is one thing to allege loss and another to establish this as a measure of relief. Much will depend on the evidence and the conclusions to be drawn in the context of adversarial proceedings.[86] The gains of a former employee who appropriates confidential information for a startup business may be easily quantified, whereas the plaintiff may struggle to impute revenue losses to the defendant's breach. On this scenario, an account of profits may be the preferable option. However, certain factors potentially diminish its scope. Notably, on the taking of accounts a court may, in its discretion, permit the delinquent fiduciary to set off certain claims against gross receipts.[87] This includes expenses incurred in obtaining profits, together with allowances for the defendant's industry, enterprise and skill[88] in making the gains.[89]

This much is fairly settled. There is a further consideration which has received less attention, namely the concept of risk in defining the defendant's claim for allowances. This can be assessed from the perspective of both the wronged employer and the delinquent employee. Several principles are engaged. If the defendant makes unauthorised use of the plaintiff's property to advance his personal interests, the plaintiff bears the risk of loss. Equity is intolerant to such wrongs, not least because '[s]uch conduct puts the trust fund at risk without hope of gain. Equity's response is to insist that any profit is for the beneficiaries and any loss for the trustee.'[90]

Not unexpectedly, this has implications for the defendant's claim for remuneration. In discussing the distinction between gains deriving from misuse of the plaintiff's property and revenues attributable to a fiduciary's independent enterprise, the High Court of Australia accepted that:

> [I]t may be appropriate to allow the fiduciary a proportion of the profits, depending upon the particular circumstances. That may well be the case when it appears that a significant proportion of an increase in profits has been generated by the skill, efforts, property and resources of the fiduciary, *the capital which he has introduced and the risks he has taken, so long as they are not risks to which the principal's property has been exposed*.[91]

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86 If an employer promptly obtains an interlocutory injunction restraining misuse of confidential information, it may be difficult to establish loss or the relevant losses may be minimal. See, eg, *Express Cargo Services Pty Ltd v Mysko* [2023] SASC 11, [528]–[531] (Stein J).

87 In calculating gross receipts, a fiduciary is not required to account for more than the amount actually received (*Vyse v Foster* (1872) LR 8 Ch App 309, 333 (James LJ)) or such sum as should have been received but for the fiduciary's wilful default (*Armitage v Nurse* [1998] Ch 241, 252 (Millett LJ); *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194, 222 [54] (Lord Clarke JSC) (Privy Council)).

88 Allowances by way of an apportionment of profits between defaulting fiduciary and principal are rarely granted outside the realm of intellectual property infringement.

89 Awards in the latter category recognise the entrepreneurial elements of planning and implementing the wrong: Peter Watts, 'Restitution and Conflicted Agents' (2009) 125 (July) *Law Quarterly Review* 369, 374.

90 *Tang Ying Ip v Tang Ying Loi* [2017] 2 HKC 502, 510 [27] (Lord Millett NPJ). His Lordship was addressing unauthorised use of trust funds, but the statement has general application.

91 *Warman* (n 48) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) (emphasis added).

As these passages indicate, there are compelling policy reasons for denying allowances where the plaintiff's property is exposed to risk.[92] The fiduciary has gambled with another's property and violated his core obligations to the principal.[93] In contrast, where gains are obtained without recourse to the plaintiff's property, the case for allowances is more compelling because risk is entirely to the defendant's account. Here, remuneration may bear some relationship to the defendant's risk-taking and energy and skill in making the profit.[94] Nevertheless, the imperatives of fiduciary doctrine tend to influence the scale of remuneration and awards are generally modest and less than the defendant would otherwise have received in the absence of a breach of duty.[95] This does not entirely rule out allowances on a liberal scale, but such sums will typically fall short of full profit participation.[96]

The term 'allowances' can be misleading in failing to distinguish between expenses and awards for industry, enterprise and skill. For example, in *Halliday & Nicholas Insurance Brokers Pty Ltd v Corsiatto*,[97] the defendant was employed as an account executive for an insurance broker (the plaintiff). The defendant decided to leave their employment. Before doing so, in breach of fiduciary duty, the defendant compiled a list of the plaintiff's customers, whom he intended to contact as soon as he had left. The defendant terminated his employment on short notice and was immediately engaged as a sub-broker for a competitor ('DHB'). Timing was crucial. Possession of the customer list enabled the defendant to contact former customers before the plaintiff had an opportunity to do so. As a result, the defendant persuaded many of the plaintiff's customers to nominate DHB as their broker. Consequently, substantial brokerage fees flowed to DHB and

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92 An issue left open is whether confidential information can be classified as property. This has important implications because there is a clear imperative for denying allowances if the plaintiff's property has been exposed to risk. Historically at least, opinion was divided. For example, in *Boardman v Phipps* [1967] 2 AC 46 ('*Boardman*'), two of their Lordships considered that confidential information could be regarded as property (Lord Hodson at 107, Lord Guest at 115), whereas Lord Upjohn's powerful dissent expressed a contrary view (at 127–9). Uncertainty has not entirely been dispelled: see *Janala Pty Ltd v Hardaker (No 3)* [2023] NSWSC 446, [51] (Richmond J). However, Heydon, Leeming and Turner (n 2) 1175 [42.135] points persuasively to a growing consensus in the High Court of Australia that in respect of a breach of confidence, equity acts on the conscience of the defendant, and not in aid of any proprietary right: see *Moorgate* (n 4) 438 (Deane J); *Breen v Williams* (1996) 186 CLR 71, 81 (Brennan CJ), 90 (Dawson and Toohey JJ), 111–12 (Gaudron and McHugh JJ), 128–9 (Gummow J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 143–4 [118] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). It is submitted that this is an appropriate focus unless settled principles are to be disturbed. Most relevantly, if there is a proprietary interest in confidential information, it is difficult to see how allowances can be granted when those rights are abused.

93 Moreover, to allow such claims would undermine the objectives of deterrence.

94 See, eg, *Boardman* (n 92), where a fiduciary who demonstrated exceptional skill and risk-taking was granted allowances on a liberal scale.

95 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309, [251] (Tobias JA).

96 *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, 468–9 (Fox LJ).

97 [2001] NSWCA 188 ('*Halliday & Nicholas*').

the defendant. On these facts, it was held that the defendant derived a commercial advantage from his misuse of confidential information and he had acted in breach of his fiduciary duty.[98]

The defendant was required to account for his profits, subject to allowances for his time, trouble and expertise. The New South Wales Court of Appeal noted that the plaintiff would otherwise be unjustly enriched to the extent that the plaintiff would be better off than if the defendant had undertaken this work in their service. The sum due to the defendant was fixed by reference to his basic remuneration whilst employed by the plaintiff.[99] This methodology illuminates a tendency to conflate the reimbursement of expenses with awards for industry, enterprise and skill.

Wages and salary should be treated as an expense to the plaintiff. If the defendant's conduct had been authorised by his employer,[100] the latter would have paid overheads and general expenses, including employee's remuneration. Salary and wages are a cost of doing business and in that regard no different from paying a power bill. From this perspective, allowances for industry, enterprise and skill are akin to a bonus for particularly meritorious service.[101] The awards should be distinguished because each is granted on a different basis. The defendant is invariably reimbursed for expenses because profit in this context denotes the margin of receipts over costs. Expenses are therefore deducted from gross receipts to produce the net profits in respect of which allowances are claimed.[102] Conversely, allowances for industry, enterprise and skill are discretionary and dependant on a finding that the defendant made a substantive contribution to producing the gains.[103]

The distinction between expenses and awards for the defendant's entrepreneurial skill is aptly captured by the Full Court of the Federal Court of Australia in *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd*:

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98 The trial judge dismissed the claim against DHB, but this was reversed on appeal. The Court of Appeal held that the defendant had acted as DHB's agent. The defendant's misuse of confidential information was therefore imputed to his principal: see ibid [36], [38], [45]–[46] (Handley JA, Spigelman CJ agreeing at [1], Heydon JA agreeing at [47]).

99 Ibid [29], [30] (Handley JA, Spigelman CJ agreeing at [1], Heydon JA agreeing at [47]).

100 See below n 124 and accompanying text for discussion, where it is argued that the plaintiff effectively affirms the unauthorised conduct in order to claim the benefits it produced.

101 As a preliminary matter, the court will assess whether 'the work done by the fiduciary would otherwise have had to be done by another and/or … the work done has benefitted the property which forms the basis of the account': *Recovery Partners GP Ltd v Rukhadze* [2022] EWHC 690 (Comm), [372] (Cockerill J). This is not directed to the nature or moral quality of the misconduct. It is confined to the causal relationship between the defendant's services and the benefit conferred on the principal.

102 *De Bussche v Alt* (1878) 8 Ch D 286, 307 (Hall V-C); *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 154 (Lord Macmillan).

103 An informative discussion of allowances and the obligation to account is found in Matthew Conaglen, 'Identifying the Profits for which a Fiduciary Must Account' (2020) 79(1) *Cambridge Law Journal* 38.

> To the extent that it was established that the profits of V-Flow and the increase in value of its business were generated by skills and efforts of the individual appellants, some allowance might be appropriate. However, such an allowance is quite different from reasonable remuneration for the work actually performed by the individuals in the business, being work that was necessary such that, whoever performed the work, it would have been a reasonable expense of the business. …
>
> [I]n calculating the profit made by V-Flow, there is no reason why an appropriate amount for reasonable remuneration should not be treated as an expense. It appears that, in fact, no salary was paid to either Mr Aloe or Mr Matkovic. However, if they had not worked in the business, it would have been necessary to pay someone else to do the work that they did.[104]

The practical outcome of awarding both remuneration and merit-based allowances is that the defendant may be placed in the same, or similar financial position as if he had not betrayed his principal's interest. Having regard to the objectives of deterrence it would be preferable to award either remuneration below market or contract rates,[105] or to monetise the value of the defendant's unique skills and exertions, discounted to reflect the fact that the defendant is being rewarded for committing a breach of fiduciary duty.

To return to the working example of an employee who surreptitiously appropriates confidential data from his employer for use in a competing business, it has been noted that the available remedies are either damages or compensation,[106] or an account of profits.[107] This revives the taxonomical question whether a particular breach of confidence is to be treated as an equitable wrong.[108] If so, the usual principle is that illicit gains must be disgorged, subject to expenses and allowances. In the present context, this is problematic. To strip all net gains presumes a clean causal enquiry where profits can be readily imputed to the wrong. This is an oversimplification which seldom fits the facts where an employee exploits confidential information from his employer.

It is submitted that accountable profits should be assessed by analogy to the infringement of intellectual property rights. In quantifying gains for intellectual property infringement, a narrower focus is taken. The remedial objective is to strip the defendant of gains attributable to infringing the plaintiff's interests.[109] Causation is interrogated with greater vigour than for a breach of fiduciary duty.

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104 (2013) 296 ALR 418, 432–3 [70]–[71] (Emmett, Edmonds and Rares JJ).

105 Arguably, this raises the spectre of an illegal penalty. See *Harris* (n 2), where the majority of the New South Wales Court of Appeal held that punitive remedies are not available in contract or equity: at 312 [61] (Spigelman CJ), 384 [338], 422 [470] (Heydon JA).

106 The former contemplates common law liability, the latter, liability in equity.

107 The betrayed employer may also seek a prohibitory injunction to restrain use of commercially sensitive and confidential material, with the caveat that care must be taken in defining the extent of the prohibition: *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840, 853–7 (Nicholls V-C) ('*Universal Thermosensors*').

108 As noted, the enquiry is complicated further if the employee is a fiduciary.

109 *Spring Form Inc v Toy Brokers Ltd* [2002] FSR 17, 280 [7] (Pumfrey J); *My Kinda Town Ltd v Soll* [1983] RPC 15, 49 (Slade J); *Potton Ltd v Yorkclose Ltd* [1990] FSR 11, 15 (Millett J).

It is settled law that the plaintiff can only claim that portion of the infringer's profits which are causally attributable to appropriation of the plaintiff's intellectual property.[110] Thus, where the wrong consists of selling goods infringing a registered trade mark, the defendant is not liable for the sale price of the article itself, but the gain derived from its sale under the trade mark.[111]

Semantically, at least, this seems coherent, but the process of identifying causally relevant gains is not without difficulty. In the case of an employee's breach of confidence, revenues from his business may largely be attributable to legitimate post-employment activities. If evidential difficulties can be overcome, it may be possible to impute to the defendant gains that are causally related to the plaintiff's interests and to apportion profits on that basis. Admittedly, equity abhors the betrayal of trust and confidence, and its sanctions are calculated to remove any economic incentive for breaching those duties. From this perspective it may seem anomalous to apportion gains between the wrongdoer and the party whose confidence he has betrayed. However, a division of profits from a single venture to which infringing and non-infringing elements have contributed, is not, strictly, a sharing of profits, but rather an identification of the parties' distinct interests and the attribution of economic outputs to each.[112]

If it is not feasible to distinguish the parties' interests with precision,[113] it may be necessary to adopt a more impressionistic approach. Suppose the defendant has appropriated the plaintiff's customer lists and marketing strategies. In extreme cases the benefit gained by the defendant may be profound,[114] but more commonly, the misuse of a former employer's confidential information merely provides a springboard advantage.[115] An award[116] can take different forms but, in broad terms, the sum is usually quantified by reference to the value to the defendant of entering the market with the benefit of knowledge that could otherwise have been acquired over time from legitimate sources.[117]

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110 *Monsanto Canada Inc v Schmeiser* [2004] 1 SCR 902, 938 [101] (McLachlin CJ and Fish J for McLachlin CJ and Major, Binnie, Deschamps and Fish JJ).

111 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, 37 (Windeyer J). This is not a universal principle and depends on the nature of the intellectual property right. If the infringer sells an article made wholly from a patent, he or she may be accountable for the entire profits from the sale.

112 See also Peter Devonshire, *Account of Profits* (Thomson Reuters, 2013) ch 5.

113 See, eg, *Aquaculture Corp v New Zealand Green Mussel Co Ltd (No 3)* (1986) 1 NZIPR 678, 690 (Prichard J).

114 See, eg, *Lifeplan* (n 15).

115 In its modern form, this is usually attributed to the judgment of Roxborough J in *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1967] RPC 375, 391. An employer's confidential information may confer a head start even if that information is in the public domain or capable of being independently ascertained. The advantage gained by the former employee is a saving in time and resources in locating that information: *North West Pilots Pty Ltd v Daniel* [2023] WASC 73, [82] (Hill J), quoting *Zomojo Pty Ltd v Hurd (No 2)* (2012) 299 ALR 621, 679 [201]–[202] (Gordon J).

116 An account of profits can be granted for a springboard claim: *Bayer Cropscience KK v Charles River Laboratories Preclinical Services Edinburgh Ltd* [2011] SLT 145, 147 [8]–[9] (Lord Malcolm).

117 See, eg, *Universal Thermosensors* (n 107) 850 (Nicholls V-C).

There is considerable latitude in assessing the advantage obtained by the defendant:

> The equitable remedy of account is a personal order. The order operates to require that a defendant pay to a plaintiff the monetary value of a benefit or gain to the defendant. Although commonly referred to as an 'account of profits', there is no reason why a benefit or gain to be made the subject of an account must answer the description of a 'profit' in conventional accounting terms. Nor is there any reason why that benefit or gain must answer the description of 'property' or must have sufficient certainty as to be capable of forming the subject matter of a trust.[118]

C *Account of Profits as a Performance Interest*

It has been observed that an employment relationship is defined by contract.[119] It follows that damages are awarded in respect of losses flowing from a breach. However, the argument can be made that gain-based relief is not inconsistent with this scheme. The core question is whether an account of profits can be invoked to enforce a performance interest notwithstanding that the (employment) relationship is founded in contract. If so, this would overreach some traditional impediments to granting an account of profits in a contractual setting.[120] Some observations by the High Court of Australia in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* ('*Tabcorp*') conveniently set the scene.[121] The case concerned the measure of damages for losses sustained from a tenant's breach of covenant in effecting unauthorised changes to the demised premises. *Tabcorp* is instructive in rejecting traditional restrictions on the scope of damages when a more expansive approach is required. In this regard, the Court gave short shrift to the doctrine of efficient breach and awarded damages reflecting the tenant's failure to perform its contractual obligations. A unanimous bench emphasised:

> Underlying the Tenant's submission that the appropriate measure of damages was the diminution in value of the reversion was an assumption that anyone who enters into a contract is at complete liberty to break it provided damages adequate to compensate the innocent party are paid. … It has been dignified as 'the doctrine of efficient breach'. … The assumption underlying the Tenant's submission takes no account of the existence of equitable remedies, like decrees of specific performance and injunction,

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118 *Lifeplan* (n 15) 32–3 [75] (Gageler J).

119 See above Part II(B).

120 In particular, the distinction between a fiduciary and non-fiduciary employee, and the argument that the contractual nature of an employment relationship precludes gain-based relief. With respect to the latter, the Australian position is that an account of profits is unavailable as a remedy for a breach of contract. Such awards would potentially place a plaintiff in a superior position than if the contract been performed. This is inconsistent with the basic tenets of *Robinson v Harman* (1848) 1 Ex 850. See also *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 82 (Mason CJ and Dawson J); *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, 196 [158]–[159] (Hill and Finkelstein JJ); *Anderson* (n 8) 194–5 [166] (Gleeson, Leeming and White JJA).

121 (2009) 236 CLR 272.

> which ensure or encourage the performance of contracts rather than the payment of damages for breach. It is an assumption which underrates the extent to which those remedies are available.[122]

Can this reasoning be extended to an account of profits? This remedy of course contrasts with specific performance and an injunction. Both, in different forms, enforce performance contemplated by the parties. The function of specific performance is self-evident. Injunctive relief achieves a similar purpose. A mandatory injunction can enforce contractual undertakings and a prohibitory injunction ensures compliance by preventing a breach.

An account of profits operates quite differently in the context of an employee's breach of confidence. Unlike an injunction and specific performance, it does not enforce a course of conduct reflecting the parties' intentions. On the contrary, an account of profits is directed to actions which were not within the parties' contemplation.[123] The question is whether this remedy can be reconciled with an injunction and specific performance on the basis that it enforces a performance interest.

It is here that a fiction comes into play. In electing to strip the defendant's profits, the plaintiff is effectively treating the unauthorised conduct as having been undertaken for the plaintiff's benefit. It has been suggested that this is tantamount to condoning or approbating those activities,[124] and on one view it can be said that the plaintiff has notionally adopted the wrongdoer's conduct as his or her agent.[125] In these circumstances, the court will avoid unjust enrichment to the plaintiff, who as an applicant for equitable relief, must not unfairly deny value provided by the defendant. This is consistent with the practice of setting off allowances against gross receipts[126] and inconsistent with a claim for damages to the extent that the latter disaffirms the defendant's conduct.

It has been noted that a delinquent fiduciary may be reimbursed for expenses incurred in obtaining profits and awarded allowances for industry, enterprise and skill in generating revenues. Thus, in economic terms at least, the plaintiff is affirming the defendant's breach by treating the defendant's misconduct as if it was an approved arrangement.[127] From this perspective, an account of profits is effectively enforcing a performance interest.

In addition, it should not be overlooked that a contract may expressly contemplate enforcement of a performance interest by stipulating that

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122 Ibid 285–6 [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). Their Honours upheld an award of reinstatement damages to reflect loss sustained from the tenant's failure to perform its contractual obligation to preserve the premises.

123 Or at least, not within the contemplation of the injured party.

124 As pithily expressed, 'if you take an account of profits you condone the infringement': *Neilson v Betts* (1871) LR 5 HL 1, 22 (Lord Westbury). See also *Celanese International Corp v BP Chemicals Ltd* [1999] RPC 203, 219 (Laddie J); *Caxton Publishing Co Ltd v Sutherland Publishing Co Ltd* [1939] AC 178, 198 (Lord Porter).

125 See Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook, 2009) 16.1230.

126 See, eg, *Halliday & Nicholas* (n 97) [30] (Handley JA).

127 *Warman* (n 48) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

unauthorised gains should be surrendered to the counterparty. This is exemplified in *Attorney-General for England and Wales v R* ('*A-G v R*').[128] The defendant, a member of the Special Air Service, wrote a book about his experiences in the Gulf War. Publication of such material was contrary to a confidentiality agreement executed by the defendant as a term of his employment with the Crown.

The New Zealand Court of Appeal stated that if the defendant chose to publish, he would be in breach of his contractual obligations for which the Crown could recover damages and an account of profits.[129] Here, an account of profits was enforcing an express contractual expectation. McGrath J observed:

> In the present case a term of the confidentiality contract provides an indication that the remedy of an accounting for profits will be an appropriate remedy for breaches of contract by the employee. The contract envisages that the Ministry, rather than the respondent, would enjoy any financial benefits arising from a publication covered by the contract ...[130]

The parties had comprehensively addressed the consequences of a breach and an alternative rationale for disgorgement of gains can be propounded which circumvents the jurisdictional issues under discussion. Where contemplated by the terms of an agreement, the surrender of gains from one contracting party to the other may be explained on the simple basis of an assignment. In this regard, in *A-G v R*, Tipping J was mindful that the disgorgement of profits was within the compass of the contract and that any order in favour of the Crown had the effect of enforcing a contractual entitlement, which his Honour described as 'the contractually provided remedy of accounting for, strictly assignment of, profits'.[131]

V CONCLUSION

The law of confidence has an uncertain relationship to law and equity. Perhaps more accurately, it is the relationship between law and equity that is problematic. This is exacerbated when the confidential relationship is between employer and employee. An employment relationship imports strict standards of fidelity which resemble those applicable to a fiduciary. The task of distinguishing the two hinges on narrow — at times, improbable — distinctions such as the degree to which a duty of loyalty is owed to the employer. Again, employment relationships are founded in contract. While the contractual nature of the relationship does not

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128 [2002] 2 NZLR 91 ('*A-G v R*'), affd *R v Her Majesty's Attorney-General for England and Wales* [2004] 2 NZLR 577 (Privy Council).

129 *A-G v R* (n 128) 96 [2] (Keith J), 125 [112] (Tipping J, McGrath J agreeing at 126 [117]). The normal rule is that the plaintiff must exercise an election between these remedies. In the present case the Crown's rights flowed from a contract that contemplated both a right to sue for breach of contract and an account of profits, expressed as an assignment of all rights accruing from any unauthorised publication.

130 Ibid 133 [147].

131 Ibid 125 [113].

preclude fiduciary duties, the terms of the agreement have primacy. The scope of the fiduciary principle is therefore a matter of construction.

However, fiduciary doctrine seldom cowers, and a more vigorous role can be countenanced on the basis that fiduciary obligations are enforced substantively and remedially in equity's exclusive jurisdiction notwithstanding a concurrent cause of action at law. Again, adopting the fiction of the plaintiff's approbation of a wrongful course of conduct, it can be argued that an account of profits should be applied expansively to enforce a performance interest.

Underlying these considerations, causation and limiting principles have a different focus at law and in equity. This is particularly pronounced in defining the relationship between breach and compensable loss or recoverable gain. A remedy applied against this backdrop is unpredictable. If the uncertainties that attend this area of law are to be dispelled, the first step is to make some taxonomical decisions. A few points can be taken forward.

First, fiduciary obligations are not universal. Its strictures simply do not fit every employment relationship. To assert otherwise is to mischaracterise fundamental doctrine.

Secondly, it has been noted that a contract of employment regulates the basic rights and liabilities of the parties.[132] Equitable principles inherent in a particular relationship can be ousted by the terms of an agreement. However, this is not a fixed position. The status of a duty of confidence is ambivalent. As a breach of the employment contract, it is a common law wrong. In addition, this has long been recognised as an equitable wrong. The remedy for the former is damages, while the latter provides both compensatory and gain-based relief. The allocation of remedy for a breach of duty is usually guided by the jurisdictional provenance of the wrong. Clearly, this is problematic with respect to a breach of confidence.

Thirdly, while law and equity are conceptually distinct, the cases demonstrate that there is no bright line between the two. There is at least an argument for equitable hegemony with regard to fiduciary employees. Yet, circuitously, this must ultimately be reconciled with the dictates of contractual terms. The counterargument is that both fiduciary duty and a duty of confidence are recognised in equity's exclusive jurisdiction. In this realm at least, equity's governance of its own processes is paramount. Again, and more controversially, the equitable remedy of an account of profits is not inimical to the law of contract to the extent that it enforces a performance interest.

Finally, equitable relief must be understood in the wider context of its auxiliary jurisdiction to supplement common law remedies. Perhaps a compromise lies here. Where the threshold for intervention is met, equity exercises an overriding jurisdiction. Subject to this, employer and employee should be free to enter into a bargain in their own terms.

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[132] To borrow the language of Mason J in *Hospital Products* (n 31), 97.