INDIAN JOURNAL OF LAW, POLITY AND ADMINISTRATION

TAKING EQUITY SERIOUSLY: IN CONTEXT OF REMEDIES FOR BREACH OF TRUST

***Ayush Mishra**

ABSTRACT

This paper concerns itself with the analysis of the compensatory remedies vis-à-vis breach of trust. It is argued that the decision in AIB Group (UK) plc v. Mark Redler & Co Solicitors was a step in the wrong direction and that such unprincipled blurring of boundaries between equitable obligations and contractual principles not only erodes the fundamental distinction between Equity and Common Law, but also constitutes an attack on the very foundation of the law of Trust. Part I of the paper would briefly introduce us to our bone of contention. Part II will set the theoretical framework for the forthcoming arguments by shedding light on the traditional equitable principles involved. It shall also take home the point that the transposition of authorities by Lord Browne-Wilkinson in Target Holdings was patently erroneous. Part III would expound on the relevance of the completion of the trust objective while awarding the final remedy. Part IV will deal with the importance of the reflection of the nature of the obligations in the respective remedies or contractual and equitable nature. Part V would juxtapose the traditional remedies with equitable compensation and highlight the fundamental mistake that the courts have made while developing the jurisprudence of equitable compensation. Part VI would dissect the dichotomy of traditional and commercial trusts and gauge the significance of such a classification. Part VII would conclude the discussion.

INTRODUCTION

The Privy Council in 1919 observed that a failure to appreciate the difference between common accounting process and process of granting unliquidated damages in breach of contract would lead the future courts into error as it would misguide them into conceptualising trustee's liability in terms of causation.[607] Today, it seems that the fears of

* Advocate, Allahabad High Court, UP.

the Privy Council have concretised themselves into reality through what has been viewed as an endeavour to reconcile the fundamental elements of Equity and Common Law by the Supreme Court (UK) in *AIB Group (UK) plc v. Mark Redler & Co Solicitors.*[608] Such blurring of boundaries between equitable obligations and contractual principles not only erodes the fundamental distinction between Equity and Common Law, but also constitute an attack[609] on the very foundation of the law of Trust which has its theoretical underpinnings rooted in Equity and not Common Law contractual principles.

The law on wrongful disbursement of trust money was initially governed by traditional equitable principles and remedies of taking accounts and falsifying the relevant entry. However, in 1995 the House of Lords in *Target Holdings Ltd v. Redferns*[610] brought about certain problematic changes in the jurisprudence which was approved by the Supreme Court in the AIB judgement in 2014. In both these cases, the solicitors were holding on their client's money which they disbursed off in breach of trust and without adhering to the requirement which were imposed on them. The court in *Target Holding* brought for the first time the element of causation in such wrongful disbursement inquiry and held that because most of the losses would have happened anyway, the amount of compensation should be accordingly reduced. Secondly, it brought in the questionable distinction of commercial and traditional trust and held that contractual principles could be applied in commercial trust over traditional equitable principles. The Supreme Court in AIB got the chance to review this paradigm shift and it reaffirmed the principles laid down in *Target Holding.*

A FLAWED TRANSPOSITION: LOCATING CAUSAL ANALYSIS IN TRADITIONAL EQUITABLE PRINCIPLES

Under the traditional equitable principles, the liability of a trustee for the breach of a trust were resolved using the mechanism of 'taking and account for the trust', which meant that the beneficiary could command the trustee to justify his 'stewardship' of the trust asset. The trustee, in this situation, would be required to show that what he has done to the trust

[607] British America Elevator Co. Ltd. V. Bank of British North America [1919] AC 658, 663-6 (Viscount Haldane).
[608] [2014] UKSC 58.
[609] Matthew Hoyle, *'Where there is discord, we may bring Harmony': AIB group (UK) vs. Mark Redler and the perils facing Equity*, Oxford U. Undergraduate LJ, 2016.
[610] [1995] UKHL 10;

property.[611] There were two kinds of processes to take accounts: (a) *an order for account of administration* and (b) *an order of account of profits.*[612] The former was employed when the overall administration of the trust fund/property was to be accounted for and the latter was used when there was a threat of specified gains through specific equitable wrongdoings. The latter category does not form a part of our discussion as we would be dealing with general administration of funds only.

The account of administration could be further divided into (a) *Account in Common Form* and (b) *Account on Wilful Default*. In the former, the trustee has to account for what has actually been disposed of by him or received by him.[613] However, taking an account is never in itself a remedy. It is just a means to an end which enables the beneficiary to decide the appropriate method through which the deficit may be made good.[614] So, after taking the accounts, if the beneficiary contests that more money was received by the trustee than is reflected in the account, he/she may go for the remedy of surcharging the account. Conversely, if the beneficiary asserts that less money should have been disposed of from the account than what is being currently reflected in it, he/she may take recourse to the remedy of falsifying the account.[615] For instance, if the trustee has made certain unauthorised investments, the beneficiary can falsify the disbursement and ask the trustee to restore that amount. The 1852 case of *Knott v. Cottee* tells us that in this situation: -

> *"The case must either be treated as if the investments had not been made, or had been made for the trustees own benefit and out of his own monies and that he had at the same time retained monies of the testator in his hands"*[616]

In context of Account for wilful default, it would be imperative to understand that it exposes the trustee to a potentially greater liability[617] vis-à-vis common account as it not limited to the money which the trustee actually received, but extends to the money which he/she ought to have received but for the 'wilful default/neglect'.[618] Owing to this extended liability, the order for common accounting was called the "usual order" and an order for wilful neglect

[611] Ultraframe (UK) Ltd. Vs. Fielding [2005] EWHC 1638
[612] H.G. Hanbury,'Forms of Accounts against Executors and Trustees' (1936) 52 Law Quarterly Review 365,365.
[613] Meehan v. Glazier Holdings Pty Ltd (2002) 54 NSWLR 146,149 [13] (Giles JA)
[614] Libertarian Investments Ltd. v. Hall (2013) 16 HKCFAR 681,732 [168].
[615] *Supra.*
[616] Knott v. Cottee (1852) 16 Beav 77, 79-80;
[617] *Ibid.*
[618] Amritage v. Nurse [1998] Ch 241,252 (Millett LJ); Cooke v. Stevens [1898] 1Ch 162,172 (Chitty LJ).

was called the "order founded on breach of trust"[619] as for this special account to be taken, the beneficiaries had to prove that there exists, on the very least, one instance of the trustee having committed a breach of trust.[620] Therefore, it was held that wilful deceit is completely grounded in 'misconduct' and any such requirement is missing from common accounting which makes both these procedures proceed on fundamentally different grounds.[621]

Having discussed the types of accounts and the subsequent remedies of surcharge and falsification, we must turn to the relevance (or lack thereof) of the element of causation in the entire process. In the context of common accounts, a causal inquiry is absolutely irrelevant for both the remedies of falsification and surcharge. When falsification of an account is sought for, the entry in the account is disallowed and the money disbursed is held to be still there in the fund. Therefore, any causal inquiry to what would have happened to the money even if it was rightfully disbursed does not come into picture because the money ought not to have been disbursed at all.[622] This approach has been consistently held to be the correct position on the point that when falsification is sought, the other party cannot claim that the money would have been lost anyway.[623] The rationale for this is rooted in the nature of the fundamental obligations of the trustee itself.[624] Moreover, a causal inquiry has also been held to be irrelevant where the remedy of surcharging a common account is sought as one can only charge the account with the money that has actually been received and not with something that ought to have been received.[625]

However, the situation is different when the remedy of surcharging is sought on the account of wilful default. Here a causal inquiry becomes relevant. Before proceeding, I would like to highlight the fact that whenever the trust money is misapplied, the remedy sought if falsification of common account[626], and it is when the trustee fails to exercise due skill and care and it is owing to this that the trust asset is undervalued, the remedy sought is

[619] Dowse v. Gorton [1981] AC 190,202 (Lord Macnaghten)
[620] Cooke v. Stevens [1897] 1 Ch 422, 432 (North J).
[621] Partington v. Reynolds (1858) 62 ER 98, 99 (Sir Richard Kindersley V-C).
[622] Magnus v. Queensland National Bank (1888) 37 Ch D 466
[623] Cocker v. Quayle (1830) 39 ER 206,207 (Sir John Leach MR).
[624] A-G (UK) v. Alford (1855) 43 ER 373,341 (Lord Cranworth LC).
[625] G P Stuckey and C D Irwin, Parker's Practice in Equity (Lawbook Co, 2nd ed, 1949) 269; Jamie Glister, 'Breach of Trust and Consequential Loss' (2014) 8 Journal of Equity 235, 236.
[626] Knott v. Cottee (1852), 16 Beav 77 (Ch (Eng)) [Knott]; Re Massingberd's Settlement (1890), 63 LT 296 (CA (Eng)); Re Dawson (dec'd), (1966) NSWR 211 (SC (Austl)) [Re Dawson].

surcharging the account on wilful default.[627] It is in the latter case that causation is important. To illustrate[628], suppose there is a trustee who had to buy certain shares of a company and he did not do so and falsely told the beneficiary that he has bought them and then the value of those shares increase. Upon discovery of this, the beneficiary will not falsify the account as it will only give him his original money back which would be a state of loss for him compared to a situation where he goes for surcharging the account on wilful default and states that the trust fund has had a loss of profit because the trustee did not buy the shares which he should have and now the value of those shares has increased. Therefore, it is because of the fault of the trustee that this loss of profit has occurred to the trust and so he must provide for the loss of profit. In such a situation a causal inquiry is brought into the analysis. However, it should be noted that even when the causation is sought, it is to see what profits would have occurred had the trustee fulfilled his obligations and not to see whether the loss would have been caused even if the trustee had complied with the requirements. The nature of the two inquiries is different. Moreover, Lord Millet, who gave this judgement, also stressed on the fact that such causal inquiry is inappropriate in the cases which require falsification as both these remedies rest on completely different basis.[629]

Having established the relevant background, we can proceed to unfold the primary argument involved here in context of the causation requirement stressed on in *Target Holdings* by Lord Browne-Wilkinson. He made the problematic assertion that 'there does have to be some causal connection between the breach of trust and the loss to the trust estate'.[630] To come up with this proposition, Lord Browne-Wilkinson relied on two cases viz. *Nestle v. National Westminster Bank plc*[631] and *Miller's Deed Trusts case.*[632] It is imperative to note at this juncture that both these cases involve situations wherein the traditional remedy would guide us to surcharge the trust account on a wilful default footing, and therefore the element of causation would be relevant. However, the remedy involved in Target Holdings was never surcharging the account. On the contrary, it was concerned with an attempt to falsify an unauthorised disbursement and for this purpose, no causal inquiry is required. Lord Browne-

[627] Nestle v. National Westminster Bank plc, (1993) 1 WLR 1260 (CA (Civ) (Eng)) [Nestle]; Bristol & West Building Society v. Mothew, (1998) Ch 1 (CA (Civ) (Eng)) at 17 [Mothew]; Fry v. Fry (1859), 27 Beav 144 (Ch (Eng)).
[628] Libertarian Investments Ltd. v. Hall (2013) 16 HKCFAR 681,732 [168].
[629] Libertarian, supra note 21 at para 168.
[630] Target Holdings [1996] AC 421, 434.
[631] [1993] 1 WLR 1260
[632] [1978] 75 LSG 454.

Wilkinson somehow transposed the authorities from one context to another unrelated context, and it is precisely from here that all the confusion regarding the relevance of causation stems.

TESTING ON THE TOUCHSTONE OF 'COMPLETION' OF TRUST OBJECTIVE

The above-mentioned confusion in terms of causation was also compounded by the fact that the final outcome of the Target holdings case could be understood and achieved by staying within the four-corners of traditional equitable principles.[633] However, this was not true for the AIB case as the fact situation in both of these was drastically different vis-à-vis the completion of the trust objective. And it is precisely this fact that makes the application of principles devised in Target holdings to the AIB case a potentially problematic proposition. To put things in perspective, we must start by unfolding the situation that existed in Target holdings. Redferns did cause a breach of the trust by the unauthorised disbursement of funds. But they still remained the trustee even after this unauthorised act. If at this stage they were asked to give an account then this entry could have been falsified and they would have been liable to pay the entire amount of the £1.49 million.[634] However, redferns was still the trustee and possessed the authority to collect the mortgage documents. Therefore, when the account was taken, Target Holding was entitled to either have the mortgage documents in the trust or have £1.49 million in the fund.[635] As the former was present in there, one could say that the trust fund was defect free. The underlying point herein is that in equity, it is the date of the judgement on which you assess the remedy and not the date of the breach. Borrowing from the terminology of Lord Browne-Wilkinson, one can say that the transaction was "completed" when redferns received the mortgage documents and consequently, there was no defect in the trust fund on the date of judgement and therefore no compensation was payable.

At this juncture, we must bring into light a 2003 Court of Appeal judgement in the case of *Knight v. Haynes Duffell Kentish & Co*[636]. The fact situation was similar to that in *Target Holdings,* except the fact that in this case the trust had required the trustee to hold the money against both the shares and the assignment and there was no assignment. So, one could say that the trust's objective was not completed on the day of the judgement. It was precisely this

[633] P J Millett, 'Equity's Place in the Law of Commerce' (1998) 114 Law Quarterly Review 214. Matthew Conaglen, 'Explaining Target Holdings v. Redferns' (2010) 4 Journal of Equity 288;
[634] Cf James Edelman, 'Money Awards of the Cost of Performance' (2010) 4 Journal of Equity 122, 128
[635] Peter Watts, 'Agents' Disbursal of Funds in Breach of Instructions' (2016) Lloyd's Maritime and Commercial Law Quarterly 118, 121, 129, 134.
[636] [2003] EWCA Civ 223.

point that was highlighted by Lord Justice Aldous when he made a critical observation with respect to the application of the principles of Target holding on this case: -

> "*First, in the present case the breach was the release of the money. The trust required the money to be held against provision of both the shares and the assignment. As there had been no assignment, the money should not have been paid out. Second, the principle in Target only applies where the underlying transaction covered by the trust had been completed*"[637](Emphasis Supplied)

This judgement is consistent with the traditional equitable principles involved in the accounting process. We can say that even if one agrees that *Target Holdings* did diverge from the traditional scheme of remedies, this divergence was applicable to only a very limited spectrum of cases which involved the completion of the trust objective. Moreover, the outcome of these cases could also have been justified using the traditional principles. Therefore, locating a stark divergence from the erstwhile principles was still uncertain.

However, by applying the principles of *Target Holding* in the AIB case, the Supreme Court went down the wrong path and complicated the situation rather than solving it. In AIB the lender required a "fully enforceable first charge" apart from the fact that all other charges over the property must be redeemed for the completion of the trust objective. However, redler paid the money without redeeming all existing charges and without securing a first charge and thereby breached the trust. Now a critical difference between *Target Holding* and AIB is that in the former the trust objective was eventually completed but the same did not happen in the latter. Therefore, technically the bank could ask for entire £3.3 million to reconstitute the trust fund as the trustees had breached the trust and were still under a duty to hold on to the advanced money for the benefit of the bank. However, side lining this traditional approach, Lord Toulson imposed completion on the transaction and said that the transaction was completed when the money was disbursed to the borrowers and after that the relationship between the bank and the borrower became that of a lender and a borrower.[638] It is argued that this pragmatic approach is quite unsound. This approach transfers the power to grant completion status of a transaction to the court rather than the beneficiary. So even if the transaction is not complete according to the instruction of the beneficiary, the court can deem it to be completed. This makes it very difficult for the beneficiaries to lay out the terms of

[637] *Ibid.*
[638] *Supra.*

completion upon which the trust would come to an end. Moreover, it alters the nature of relationship between the parties without their consent. AIB did never want to have a relationship of lender and borrower. It wanted to be a secured lender while retaining priority over other charges. This purpose was never fulfilled but the court still said that the transaction was complete the moment the money was disbursed.

We may take an illustration to understand the situation better. Suppose a trustee was asked to buy a new car out of trust money but he bought a second-hand car out of the same money. Would we consider this to be fulfilling the purpose of the trust? Following AIB, this transaction would be considered complete and the beneficiary might just sue for the difference in the cost of the two cars. However, on traditional grounds, the second had car would be trustee's personal issue and the beneficiary would not have to sell the car to ask for the difference. The trust fund would remain secured as he would falsify the unauthorised disbursement. The rationale for this higher standard has been understood by Lord Millett as a primary requirement of equity as the trustee holds particular power over the beneficiary and his assets and therefore it is imperative that he sticks to the terms of completion that have been laid out by the beneficiary.[639] Ascribing the status of completion on the transaction by the court not only defies the traditional principles of equity but also hampers an essential requirement of the commercial world: *certainty* in the transaction.

REMEDIES SHOULD REFLECT THE CHARACTERISTIC OF THE OBLIGATION

In the attempt to harmonise the principles of common law and equity, the court has blurred the boundary which existed between contractual relationships and equitable relationships. Lord Millett highlighted[640] that the law on trust is not the mirror image of the law on contract that is just separated by historical origins and equitable jurisdiction. He noted that the two have drastically different legal policies governing them and that treating them as one is as "worrying misstep".

Contract law is based on the conception of 'bargain' between parties for personal monetary benefit. There is no element of 'good faith' in contracts and the parties are not bound to look after the interest of the other.[641] Contractual obligations are bilateral and self-interested. The underlying philosophy is always quid pro quo. Contrary to this, the relationship of trusts is

[639] *Supra*.
[640] *ibid.*
[641] Walford v Miles [1992] 2 AC 128 (HL).

not grounded on considerations (even when they arise from contracts) or self-interest but is always of stewardship i.e. to look after the interest of the beneficiary and his/her trust asset. Herein, the relationship between the two is of a fiduciary nature and the trustee subordinates his own interests to that of the beneficiary[642] and it is argued that this subordination leads to certain modified consequences vis-à-vis a contractual relationship. Moreover, freedom of contract dictates that the parties to a contract should be free to breach the contract provided that they are ready to bear the losses which are caused by the breach.[643] This is not the situation in trust relationship. When one willingly enters into a trust relationship instead of or in addition to a contractual relationship, one takes up a more onerous burden and therefore must accept the more burdensome duties and expanding and stringent liabilities.[644]

Therefore, it is evident that owing to different underpinning policies, the breach of a trust and contract demand distinct remedies as the remedies must reflect the inherent nature of the different obligations that the two entail. In contractual relations, it is against the commercial policy to hold someone accountable for the losses which would have happened anyway and the same is ensured by principles of remoteness and reasonable contemplation.[645] However, when it comes to trust relationships the courts have articulated the policy of 'maintenance of a very high standard of conduct'[646] by the trustee by virtue of 'the beneficiary being in a position of uniquely vulnerable position to him which causes the trustee to owe him a duty of undivided loyalty'.[647] Such high standards have been maintained to discourage non-performance and negligence so that the loss to beneficiary does not arise in the first place.[648] Therefore, the courts grant the remedy with the objective of making the trustee fulfil his primary obligation otherwise the entire purpose of the law of trust goes for a toss. Therefore it is argued that the difference in the relationship of a trustee and beneficiary and that of two contracting parties is so distinct that the legitimate interest of the beneficiary in enforcing the primary obligation of the trustee far exceeds the interests of the contracting party.[649] Hence, one can conclude that owing to the vast dichotomy between the trust relationship and the

[642] Novoship (UK) Ltd v Mikhaylyuk [2015] QB 499, [68].
[643] Printing and Numerical Registering Co v Sampson (1875) 19 Eq 462.
[644] Jamie Glister and James Lee (eds), *Hanbury & Martin: Modern Equity* (20th edn, Sweet & Maxwell 2015), 475, 18-001.
[645] Hadley v. Baxendale (1854) 9 Ex 341.
[646] Consul Development Pty Ltd v. DPC Estates Pty Ltd (1975) 132 CLR 373, 397.
[647] Bristol & West Building Society v. Mothew [1996] EWCA Civ 533.
[648] Boardman v. Phipps [1966] UKHL 2.
[649] Cavendish Square Holdings BV v. Talal El Makdessi [2015] 3 WLR 1373.

contractual relationship and the greater legitimate interest of the beneficiary to have the primary obligation performed makes the application of contractual principles ion a trust setting an unsound legal exercise. To suggest otherwise would just be an attempt to undermine the legitimacy of an institution which has been devised over hundreds of years by the chancery courts.

Nothing would be more appropriate to conclude this discussion than this explanation by Lord Millett: -

> *"Lord Diplock has said that a contracting party is under a primary obligation to perform his contract and a secondary obligation to pay damages if he does not. It is tempting, but wrong, to assume that a trustee is likewise under a primary obligation to perform the trust and a secondary obligation to pay equitable compensation if he does not. The primary obligation of a trustee is to account for his stewardship. The primary remedy of the beneficiary – any beneficiary no matter how limited his interest – is to have the account taken, to surcharge and falsify the account, and to require the trustee to restore to the trust estate any deficiency which may appear when the account is taken. The liability is strict."*[650]

JUXTAPOSING TRADITIONAL REMEDIES WITH EQUITABLE COMPENSATION

A pertinent question at this juncture that we must engage with is that when the traditional principles apply to the remedy of falsification and surcharging, will the same really be applicable to cases wherein the remedy asked is not the traditional ones but that of equitable compensation? Does this difference in the remedy asked have any bearing on the set of principles that the court would adopt to decide the case?

The genesis of the remedy of equitable compensation in place for traditional accounting has been admitted to be difficult to pinpoint. Analysis of cases[651] reveal two interesting points. Firstly, such claims originated in cases where in the beneficiary was seeking relief for only a specific breach of trust compared to the earlier request of scrutinising the complete trust account.[652] Secondly, owing to certain changes in the civil procedure rules of that time, now cases could be brought against a trustee without the need to join the other trustees and this

[650] Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 Law Quarterly Review 214 at 255.
[651] Coppard v. Allen (1864) 2 De G J & S 173, 180
[652] Kellaway v. Johnson (1842) 5 Beav 319.

aided the scheme of equitable compensation.[653] It should be noted that the final outcome of the cases for which the remedy of equitable compensation was being asked for would have been the same if they had chosen to proceed on traditional remedies. Therefore, the remedy of equitable compensation was just a more direct and streamlined method of providing the same outcome without having to deal with burdensome procedural hurdles.[654] This, it is argued, is consistent with the overarching purpose of bringing in the element of equity in common law: to provide easy procedures to people to avail justice. Scholars have argued that since the remedy of equitable compensation was just a more focused means of enforcing the same traditional remedies, the principles which should be applied to this remedy must also be the same[655] which have for long governed the traditional remedies of falsification and surcharging.[656]

It is precisely here in the context of developing the jurisprudence of equitable compensation that *Target Holdings* and AIB have made a critical mistake. To understand and develop the notion of equitable compensation, Lord Browne-Wilkinson relied on the case of *Canson Enterprises Ltd v. Boughton & Co.*[657] which was further endorsed by the Supreme Court in AIB. Now the problem arises out of the fact that this case was never related to a breach of a trust situation in the first place.[658] It was concerned with a breach of a normal fiduciary duty by the lawyer and not breach of a trust. This divide was highlighted by the fact that the court in *Canson* itself recognised that reconstitution of fund should be done in cases of breach of trust and equitable compensation should be brought in only where it was not possible. Both *Target Holdings* and AIB cite heavily from McLachlin's speech in *Canson* but none highlights the fact that none of the citations were ever applicable to cases where the trust money had been misapplied (which was precisely the situation with which both *Target Holdings* and AIB were dealing). It is the confusion that stems from this flawed understanding of equitable compensation that led the courts in *Target Holdings* and AIB to believe that the purpose of substitutive and reparative compensation was the same i.e. to

[653] Perry v. Knott.
[654] J D Heydon, M J Leeming and P G Turner, Meagher, Gummow *and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2015) 822 [23-210].
[655] P G Turner, 'Measuring Equitable Compensation for Breach of Fiduciary Duty' (2014) 73 Cambridge Law Journal, 257.
[656] Robert Chambers, 'Liability' in Peter Birks and Arianna Pretto (eds), Breach *of Trust* (Hart Publishing, 2002) 1, 22.
[657] Canson Enterprises Ltd v. Boughton & Co, [1991] 3 SCR 534.
[658] Lionel Smith, "The Measurement of Compensation Claims against Trustees and Fiduciaries" in Elise Bant & M Harding, eds, *Exploring Private Law* (Cambridge: Cambridge University Press, 2010) at 363.

"make good any losses suffered". Not only was *Canson*a weak precedent to argue for causal based inquiry (because McLachlin J solely relied on an article by Ian Davidson[659] and that article explicitly mentioned in the first page itself that cases wherein trust money in fiduciary capacity is misapplied will not be discussed in the article), but it was also heavily overpowered by other precedents which were strongly in support of the traditional remedy of falsification in the relevant case. Therefore, it is submitted that relying on this case to develop the jurisprudence around equitable compensation was a critical mistake which has allowed the current situation to drastically shift from the traditional understating of the application of equitable principles in cases of misapplication of trust funds.

DISSECTING THE DICHOTOMY OF TRADITIONAL/COMMERCIAL TRUSTS

This apparent distinction which Lord Browne-Wilkinson introduced in the jurisprudence between traditional and commercial trusts has been severely criticised in academic literature[660] to the extent that sophisticated scholarship[661] has called the distinction to be "unprincipled"[662]. It has been established beyond any doubt that 'a commercial context should not and cannot displace the operation of the law of trust that has been governing the solicitor-client relationship'[663]. Moreover, this distinction has also been questioned in various judgements including *Youyang Pty Ltd v. Minter Ellison Morris Fletcher*[664] and *Bairstow v. Queens Moat Houses Plc*[665]. Lord Browne-Wilkinson used 'common sense' and 'basic principles of equitable compensation' to create this distinction. However, we have already seen that the principles to which he is referring have been wrongly brought in the through *Canson* which were not applicable to the present situation. Much has already been written about the irregularity[666] of this distinction and I would not be reproducing the same to avoid repetition. However, I would like to mention two pertinent points.

[659] Ian E Davidson "The Equitable Remedy of Compensation" (1982) 13 MULR 349 quoted in *Canson* Enterprises, above n 69, at 548.
[660] James Edelman, *Money awards of the cost of performance* (2010) 4 J Eq 122 at 122.
[661] William Gummow, *Three cases of misapplication of a solicitor's trust account* (2015) 41 Aust Bar Rev 5
[662] JE Penner, *Distinguishing fiduciary, trust, and accounting relationships* (2014) 8 J Eq 202 at 210.
[663] *Ibid.*
[664] (2003) 212 CLR 484.
[665] [2001] EWCA Civ 712.
[666] Joshua Getzler, 'Equitable Compensation and the Regulation of Fiduciary Relationships' in Peter Birks & Francis Rose, eds, *Restitution and Equity Volume 1: Resulting Trusts and Equitable Compensation* (London: Mansfield Press, 2000) 249 at 24950.

Firstly, when the distinction was originally devised, it was supposed to restrict the application of contractual principles to only commercial trusts. This would, by corollary mean that the traditional principles were still applicable in cases of traditional trusts. However, the phrasing of the AIB judgement has made it pretty difficult for us to locate any such restriction in the judgement.[667] According to the judgement, the same set of rules should be applicable across the board. So how can one reconcile the judgement in AIB to the original distinction? Moreover, Lord Reed in AIB has gone on to categorically reject any distinction between commercial and non-commercial trusts.[668] He further says that the fundamental principles of equity should apply to all trusts. This makes the approach internally inconsistent because the very basis on which the application of traditional equitable principles was excluded in these cases was this distinction of commercial and non-commercial trusts. So, if this distinction itself does not hold good, how can the non-application of traditional principles be held good law?

Secondly, one fails to understand that how 'common sense' according to Lord Browne-Wilkinson dictated the application of contractual principles in commercial trusts. Such a distinction is on the contrary, opposed to common sense because how can a commercial trustee (who is mostly monetarily remunerated and usually insured against his losses) be subject to a less stringent remedy than his traditional counterpart who is most of the times acting as a trustee gratuitously and without any payment or insurance for his losses? When the beneficiary is making certain payments for the enforcement of the trustee's primary duty, he must, if not more than the traditional protection, be at least offered the same strong remedial protection which is granted in a traditional trust. Diluting this protection of the beneficiary is highly illogical. Therefore, this distinction is against both 'common sense' and the 'basic principles of equitable compensation'.

CONCLUSION

The decision of the court in AIB case can neither be justified on normative grounds nor has strong rooting in precedents. Such blurring of boundaries between equitable obligations and contractual principles not only erodes the fundamental distinction between Equity and Common Law, but also constitute an attack on the very foundation of the law of Trust which

[667] Peter Turner, 'The New Fundamental Norm of Recovery for Losses to Express Trusts' (2015) 74:2 Cambridge Law Journal 188.
[668] *Supra* n.2 1536–7 [102]

has its theoretical underpinnings rooted in Equity and not Common Law contractual principles. The judgement comes from the highest court of the land and so will have to be unfortunately considered the applicable law for the time being. It has shoehorned contractual principles in the remedy of wrongful disbursement of trust fund by the trustee and this starkly affects the involvement of equitable principles in the evaluation of the equitable compensation for the breach of trust. The author sides with Hayton and Mitchell[669] to say that the precedent value of AIB mist is limited to this peculiar fact circumstance and the development of law should happen on lines of traditional equitable principles only that do justice to the distinct nature of obligations that trustees entail.

[669] Ben McFarlane and Charles Mitchell, *Hayton and Mitchell on the Law of Trusts and Equitable Remedies: Text, Cases & Materials* (14th edn, Sweet & Maxwell 2015), 10-057.