



Equitable money remedies: an overview

Hon Justice E Peden'
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Monetary compensation granted by a court of equity 'historically escaped close definition' and, an award of a monetary sum as a primary remedy to an injured plaintiff was arguably unknown.² In *Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane summarised the position of plaintiffs turning to a court of equity for monetary relief prior to enactment of the Judicature Act,³ as follows:⁴

'Courts of equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him.'

However, in the pre-Judicature Act system a court of equity would not award a monetary sum or 'damages' for breaches of common law rights, and a common law court would not award damages for breaches of purely equitable obligations.⁵

Equitable money remedies are a class of equitable remedy that have now come to develop in the court's exclusive and auxiliary equitable jurisdictions.⁶ An understanding of the available equitable money remedies, the differences between them, and the contexts in which they could become available is therefore critical to the arsenal available to an aggrieved party when looking to a court of equity for monetary relief.

Whilst practical 'fusion' of the general law and equity was formalised in NSW in 1972,⁷ the relief available in the exclusive and auxiliary equitable jurisdictions remain distinct in principle and in form to that which the general law can offer.⁸ Furthermore, the type of money remedies available in the auxiliary jurisdiction are distinct to those available in the exclusive jurisdiction, even in circumstances where the distinction between them has little practical impact after implementation of the Law and Equity Act 1972 (NSW).⁹

Where a breach of contract has occurred, an award of a monetary sum of damages is granted, as of right, to the innocent party to place it in the position it would have been in had the contract been performed.¹⁰ This '*prima facie* rule'¹¹ can be dis-

placed, for example by excluding or limiting a party's right to damages in the contract by express agreement.¹² Balancing liability and mitigating risk in a written contract provides commercial certainty for parties.

However, where a remedy at law is deficient, or a relevant injustice has arisen in the circumstances, equity may intervene to provide an injured party with a suitable remedy. The court is thus empowered to grant a remedy that will achieve a just outcome between the parties.¹³

This bares two points of relevance: first, limiting the right to damages in a contract does not conclusively shut out the availability of a monetary award for an injury suffered in circumstances where an equitable money remedy, for example equitable damages in lieu of specific performance, could be available; and secondly, whilst common law damages may be inadequate or otherwise unavailable for an innocent party, a monetary award may still be granted (in substitution for or in addition to) other equitable remedies that may be appropriate.

Conversely, in the court's exclusive equitable jurisdiction equitable money remedies have become a key tool used by the court to indemnify beneficiaries for breach of duties imposed by equity on individuals or entities who are held to owe them special duties, for example trustees and fiduciaries.¹⁴ Whilst not intended to be punitive,¹⁵ the remedy of equitable compensation provides monetary recourse to a plaintiff in circumstances where one of equity's proprietary remedies is undesirable or inappropriate.¹⁶

It is undeniable that the equitable remedies of damages, compensation and account are distinct in several respects.¹⁷ However, there are overarching principles considered by a court of equity when assessing whether to exercise the discretion to award any form of equitable relief.¹⁸ As such, a discussion of equitable money remedies cannot be divorced from the principles relevant to equitable remedies generally. It therefore serves to commence this paper with a brief outline of the nature of equitable remedies prior to canvassing the suite of equitable money remedies that have come to develop in Australia.

The nature of equitable remedies

Overriding principles of conscience and fairness are foundational to the equitable jurisdiction.¹⁹ Although the historical and philosophical roots of the equitable jurisdiction are topics often overlooked for want of practical utility, answers pertaining to the nature of the jurisdiction inform its purpose and function under Australian law.²⁰

In *Essays in Equity*, a collection of seminars held at the Australian National University in 1984, the Hon Sir Anthony Mason said the following:

‘The enduring validity of equitable doctrine ... has its roots in its natural law origins and in the goals of equity and justice, equality and fairness which have always shaped its principles and its broad range of discretionary remedies. It is for this reason that equity has succeeded in moulding its doctrines so as to make available an appropriate remedy when a transaction or relationship is affected by any one of the elements which have attracted an exercise of its jurisdiction ...’²¹

It is for this reason that equitable remedies are described as being flexible and discretionary. However, common remedies sought from a court of equity are well known and include specific performance, declarations and injunctions.

Of course, the discretion to grant equitable relief is judicial and exercised in a principled manner.²² Several relevant factors are considered by a court when considering whether it is appropriate to exercise this discretion. For example, defences such as estoppel, laches, acquiescence and delay will defeat a claim for equitable relief.²³

Furthermore, where the same facts give rise to different remedies, a plaintiff may need to elect which remedy to obtain.²⁴ Such an election is binding. However, where a plaintiff does not know which remedy is more favourable at the time of judgment on liability, the court may order discovery or other orders designed to give the plaintiff the information it requires to make its election.²⁵ A plaintiff may also be entitled to make a ‘split-election’ in the case of multiple wrongdoers such that different forms of relief are sought from each defendant.²⁶

Whilst the objective of this paper is not to provide a comprehensive discussion of the nature and availability of equitable remedies generally, a comment on the nature of equitable remedies and the court’s discretion to order such relief provides important context for the ensuing discussion and ought to always be kept in mind when seeking any form of equitable remedy.

Equitable damages

A court may order equitable damages under s68 of the Supreme Court Act 1970 (NSW), which provides:

‘Where the Court has power —

(a) to grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or

(b) to order the specific performance of any covenant, contract or agreement,’

the Court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance.

This provision finds its origins in s2 of the Chancery Amendment Act 1858,²⁷ otherwise referred to as the Lord Cairns Act. The Lord Cairns Act was enacted to remove any uncertainty about a court of Equity’s power to award damages. In *Hamann v Taleb* [2021] NSWSC 1632 (*Hamann*), Lindsay J summarised:²⁸

‘The legislation was first enacted (in both England and NSW) at a time when rules of common law and principles of equity were separately administered in the court system. In historical terms, it can be viewed as a step taken towards the adoption of a Judicature Act system of court administration in which the common law and equity jurisdictions are administered within the one court and can be exercised by a single judge of that court in the one set of proceedings. An inability, or perhaps more accurately a disinclination, of equity judges to award the common law remedy of damages as addressed by the conferral upon equity judges of a statutory jurisdiction to award ‘damages’ in addition to, or in substitution for, an injunction or an order for specific performance.’

The court’s discretion to award damages in addition or substitution to an alternative form of equitable relief raises a fascinating quirk in the remedial category of equitable money remedies. This is because a precondition to enlivening the power to award equitable damages is to demonstrate the court can in fact grant relief in the form of an injunction or specific performance, a consideration of which is that common law damages are inadequate in the circumstances. How, and why then, would an award of monetary compensation in the form of equitable damages arise?

The answer, in part, lies in the distinction between common law damages and the kind of money remedies available in equity.

As mentioned in the introduction to this paper, damages in common law are granted ‘as of right’. They are awarded for breach of contract or tort and are a form of pecuniary compensation for injury suffered that has been proved to have been caused by the defendant. Common law damages are not discretionary, and they are awarded and assessed according to established principles of causation, remoteness and mitigation.

Contrastingly, equitable damages are not fettered by principles such as foreseeability and remoteness,²⁹ and instead are guided by the court’s discretion to award a remedy that achieves a just outcome as between the parties.³⁰

It is insufficient to merely establish a breach of contract by a defendant in order to be entitled to equitable damages. Instead, a plaintiff must first establish its entitlement to equitable relief.³¹ This was considered recently by the Court of Appeal in *Paolucci v Makedyn Pty Ltd* [2021] NSWCA 215 (*Paolucci*).

In that case, Mrs Paolucci transferred a large parcel of land to Makedyn for the purposes of constructing a residential housing development. This was on the condition that, once the land was subdivided and developed, two lots would be transferred back to Mrs Paolucci once a house and duplex had been built. Several written agreements were entered by the parties.

The lots were to be transferred to Ms Paolucci by May 2017. Specifically, one of the terms of the agreement was that the house and duplex would be constructed in accordance with layout plans which were said to be annexed to the agreement. They were not, the transfer did not occur, and a dispute arose as to the layout plans of the dwellings. Construction was delayed and Mrs Paolucci sought an order for 'partial' specific performance of the agreement, namely that Makedyn transfer the vacant lots to her. She also sought equitable damages.

At first instance, Rein J refused to order specific performance.³² He concluded that the agreement between the parties could be completed as at the date judgment was delivered, Makedyn could not be held to be in breach. His Honour noted that relief in the form of specific performance could not be ordered until it was proven that damages at common law could not compensate the plaintiff, and in absence of a finding that Makedyn was in breach, this analysis could not properly be enlivened.³³ His Honour found that no order for equitable damages was appropriate.³⁴

On appeal, Mrs Paolucci argued that Rein J was in error in declining to order specific performance or equitable damages. On the topic of equitable damages, Leeming JA (McCallum and White JJA agreeing):³⁵

'Even if the precondition to the section is satisfied, the award of Lord Cairns' Act damages remains discretionary. That is the opposite of the position at common law, where damages are as of right. If a plaintiff can establish a breach of contract which has caused loss or damage which falls within either limb of *Hadley v Baxendale* then so long as the plaintiff sues within six years, the plaintiff is entitled as of right to damages, irrespective of matters such as delay or hardship which might loom large if the plaintiff sought equitable relief in equity's auxiliary jurisdiction. The notion of a claimant having an entitlement as of right to damages and the possibility of discretionary pecuniary relief is not unfamiliar: consider for example damages and account of profits for copyright infringement, analysed by Lockhart J in *Masterton Homes Pty Ltd v LED Builders Pty Ltd* (1996) 33 IPR 417 at 424-425, or the right to damages and the discretionary power to make compensation orders under ss236 and 237 of the Australian Consumer Law noted in *Jonval Builders Pty Ltd v Commissioner for Fair Trading* (2020) 104 NSWLR 1; [2020] NSWCA 233 at [19], [25] and [39]-[41].'

Further, his Honour noted:³⁶

'Nice questions can arise where at the time a plaintiff commences a suit, it lacks all of the 'ingredients' for equitable relief, but these do exist by the time of the hearing. Nice questions

may also arise if the ingredients exist when the suit is commenced, but are not all present when the time for the order arrives. But it is clear that if at all times one or more of those ingredients is absent, then Lord Cairns' Act damages cannot be ordered because the precondition to the discretionary power has not been satisfied.'

The appeal was dismissed.

Whilst *Paolucci* sets out with clarity that equitable damages are discretionary and a plaintiff's entitlement to equitable relief must first be established prior to a grant of a monetary sum, it should be noted that the court is not constrained by the same principles that apply to common law damages. In other words, once a plaintiff has overcome the hurdle of establishing her entitlement to equitable relief, the principles of establishing her entitlement to equitable damages are more flexible than those that would be applied to a claim for damages at common law. The recent case of *Hamann* is illustrative of this.

In *Hamann*, the plaintiff (purchaser) sued the defendants (vendors) for an award of equitable damages for loss incurred by virtue of the defendants' delay in attending to completion of the sale of the subject property.³⁷ Completion eventually occurred pursuant to the court's order that the contract for sale be specifically performed, which enlivened the court's power to award equitable damages.

The relevant loss claimed by the plaintiff was the liability incurred by the plaintiff to pay an increased interest rate on the funds borrowed to purchase the property.

The plaintiff's initial loan approval set a fixed interest rate of 1.99% for the first four years of the 30-year loan term. Due to the delay in completion, the bank withdrew the loan approval. A fresh loan approval was provided and it contemplated a higher interest rate at 2.24% for the first four years of the loan than what the plaintiff had originally received. During the application for equitable damages, the plaintiff adduced expert evidence which valued its loss at the date of completion as \$17,944.71.³⁸

The defendants did not know that the plaintiff had borrowed money to purchase the property and the loss was held to be too remote to recover damages at common law.³⁹

However, Lindsay J considered that whilst equitable damages are assessed on a different basis than common law damages. On the facts of a particular case, an award of equitable damages may be made upon an exercise of discretion notwithstanding that:⁴⁰

1. the general rule is sometimes said to be that, if a defendant has committed a common law breach of contract, damages awarded under section 68(b) should generally be the same as they would be at common law: *ASA Constructions Pty Ltd v Iwanov* [1975] 1 NSWLR 512 at 516G-517B; *Rosser v Maritime Services Board of NSW (No 2)* (1996) 14 BCL 375 at 380; Jones and Goodhart, *Specific Performance*, page 222; and

2. On a claim for equitable damages for a delay, it is some-

times said that the Court should have regard to damages which may be reasonably said to have naturally arisen from the delay, or what may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract: *Jaques v Millar* (1877) 6 Ch 153 at 159-160; *Griffin v Mercantile Bank* (1890) 11 NSW (Eq) 231 at 248, 253, 258 and 26.

His Honour concluded that the defendants' delay in completion continued after the agreed date for completion, and after an express warning was given to them by the plaintiffs about the risk that the plaintiffs would suffer loss for which they would hold the defendants liable. In that circumstance, to do 'complete justice'⁴¹ between the parties, equitable damages ought to be awarded.⁴²

His Honour made orders in the sum of \$15,000 to be paid to the plaintiff. The amount ordered had been reduced to account for factors such as that the plaintiffs loss may be unexpectedly diminished by a future sale of the property, which would discharge the mortgage. An allowance was also made in favour of the plaintiffs to account for pre-judgment interest.⁴³

Obviously, equitable damages are only available in limited circumstances.⁴⁴ However, they may be the appropriate remedy in particular situations and ought not be overlooked or confused with equitable compensation.

Equitable compensation

In the exclusive jurisdiction, equity may award compensation for breach of a purely equitable obligation.⁴⁵

An action for damages was unknown in equity's exclusive jurisdiction. If a trustee was in breach of duty, thereby occasioning loss to the trust, the defaulting trustee was required to restore the lost assets to the trust or provide compensation to the value of the asset.⁴⁶ Thus, equity could impose a personal obligation on the defaulting trustee to make restitution to the estate. Such restitution was not fettered by the restrictions on common law damages,⁴⁷ such as concepts of remoteness or causation.⁴⁸

In *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 273, the Court (Spigelman CJ, Priestley and Meagher JJA agreeing) cited with approval a passage by her Ladyship Justice McLacklin in *In Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129:

'In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, ie the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which on a common sense view of causation, were caused by the breach.'

In 1999, the Court of Appeal commented that '[t]he rules for the recovery of equitable compensation are less developed than the rules for proprietary remedies in equity. The rigour of the remedy is of comparatively recent vintage'.⁴⁹

Over the last two decades since 'the first decade of real judicial development of this remedy',⁵⁰ several overarching comments can now be made about this remedy.

The remedy is available in the court's exclusive equitable jurisdiction to remedy loss suffered for breaches of a defendant's purely equitable obligations, for example, arising out of a fiduciary relationship, or a trust.⁵¹

Equitable compensation bares some similarities to damages at common law, in that the purpose of the remedy is to restore a plaintiff as nearly as possible to the position they would have been in had the breach of duty or trust not occurred.⁵² However, 'equitable compensation is intended to compensate for loss caused by conduct which equity holds to be fraudulent ... the award should compensate the plaintiffs but it is no part of its function to strip profits from defendants, or to punish them for wrongdoing'.⁵³

Demonstration of breach of an equitable duty alone is insufficient to entitle a plaintiff to equitable compensation.⁵⁴ A plaintiff bares the onus to prove that any loss suffered was caused by the defendant's breach of duty. In *Target Holdings Ltd v Redfern*,⁵⁵ Lord Browne-Wilkinson explained that:

'Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.'

The quantum of equitable compensation payable, if awarded, is 'fixed at the date of judgment'⁵⁶ and is 'assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach'.⁵⁷

Compound interest may also be awarded.⁵⁸ This is discretionary.⁵⁹ Interest is awarded on the amount of compensation payable in circumstances where 'justice so demand[s]'.⁶⁰ Compound interest is not awarded to punish the defendant, but rather to acknowledge that the defendant put themselves in a position where an asset was 'made use of by them'⁶¹ and as such it is presumed interest has accrued. It has been suggested that the appropriate interest rate to apply is that specified in the applicable Supreme Court Practice Note at the relevant time.⁶²

Whilst these overarching comments are assistive in understanding the nature of equitable compensation, it is important to comment that not all claims for equitable compensation are the same. The availability of the remedy and the calculation of compensation available will vary depending on how the claim for the remedy arises, for example whether the award is made by the court to substitute for the performance of a duty or to compensate for actual loss suffered arising from a breach.⁶³

In several respects, the remedy of equitable compensation bares similarity with the ancient remedy of account.⁶⁴ However, whilst equitable compensation finds its roots in the remedy of account, the remedies have developed distinctly and are separate remedies.

Account and tracing

The equitable remedy of an account and the concept of equitable tracing concern obtaining from a wrongdoer improperly obtained benefits arising from their wrongdoing. The remedy of 'account' is available at common law and in equity, although the distinction is now largely only of historical relevance and common law account is not used.⁶⁵ Whilst the common law has remedies and processes for recovering property from third parties, the concept of 'tracing' is exclusive to equity.⁶⁶

Account

In *Warman International Ltd v Dwyer* (1995) 182 CLR 544, the full Court of the High Court noted that the remedy of account 'is ancient and notoriously difficult in practice and it gives rise to a liability, even in a case of a fiduciary, which is personal...the purpose of ordering an account is not to punish the defendant, but to prevent the defendant's unjust enrichment'.⁶⁷

An equitable account describes a remedy and also a process. The focus is on assessing the amount that will be ordered to be paid by the defendant to the plaintiff. The remedy of account is the liability of a defendant to disgorge money or property that cannot be claimed through a common law claim to damages or equitable compensation.⁶⁸

The intention of the remedy is to disgorge the defendant of a gain received in circumstances where it has committed a wrongdoing. In this sense, an account may be available even if a plaintiff has not suffered any known loss.⁶⁹ Further, it is for this reason that the remedy may be more valuable than one for equitable compensation.⁷⁰ Specifically, where an account is ordered the plaintiff obtains the profits wrongfully earned by the defendant which may enable a plaintiff to recover a higher award of monetary relief than if only compensation is sought.

In equity, an account will be ordered if it is necessary to give effect to a plaintiff's equitable right.⁷¹ In the equitable jurisdiction an account of profits is most commonly ordered for breach of fiduciary duty, for example, partners, directors, trustees may be ordered to account. In practice, the remedy is also available and commonly ordered in intellectual property cases.⁷²

As indicated above, the remedy of account shares some similarity with the remedy of equitable compensation in that it is a personal, not a proprietary remedy.⁷³ However, a significant difference between the remedies is that equitable compensation can be awarded even in circumstances where a defendant did not make a pecuniary gain.⁷⁴ Contrastingly, the remedy of an account of profits 'means the plaintiff affirms an impeachable transaction or wrongful conduct and takes the profits from it,

thereby preventing the wrongdoer from retaining any benefit from their wrongdoing'.⁷⁵ It is on this basis the remedies are said to be inconsistent.⁷⁶

When assessing causation it has been held that a 'but for' connection is sufficient. This is because all that needs to be shown to demonstrate an entitlement to an account of profits is that the profit would not have been made 'but for' the wrongdoing.⁷⁷ However, it should be noted that the quantum recoverable by a plaintiff is discounted by the cost to the defendant of obtaining the profit.

It has been accepted that determining quantum may not be precise. For example, in a joint majority judgment of the High Court in *Dart Industries Inc v Décor Corporation Pty Ltd* (1993) 179 CLR 101, their Honours Mason CJ, Deane, Dawson, Toohey and McHugh JJ stated (at 111) that:

'Whilst it is accepted that mathematical exactitude is generally impossible the exercise is one that must be undertaken and some assistance may be derived from the principles and practices of commercial accounting.'

Part 46 of the Uniform Civil Procedure Rules 2005 (NSW) sets out process for taking an account. Whilst the taking of an account is within the authority delegated to the Registrar, the court retains a power to undertake this process.⁷⁸

The process adopted by a court generally requires a defendant to provide to the plaintiff a detailed account setting out all the relevant dealings or transactions as to the timing and amount of receipts and payments. An affidavit supporting the 'account' must also be prepared. The plaintiff may seek the opportunity to have the defendant examined before the court about the account and/or identify any challenges (called 'sur-charges or falsifications') to the defendant's account, so that the court can hold a hearing about those issues. An alternative may be for the accounting process to be referred out, for example, to an accountant to determine the quantum involved.

Whilst the process for an account may take place after a trial, there must be some evidence at trial that an account is an appropriate remedy to order.

Tracing

Tracing has been described as an evidential process by Allsop P (Campbell JA and Handley AJA agreeing) in *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230:⁷⁹

'Tracing has been said to be neither a claim nor a remedy, rather the process by which a claimant demonstrates what has happened to its property, identifies its proceeds and the persons who have handled or received them; and the successful completion of a 'tracing exercise' may be a preliminary to the making of a personal or proprietary claim, to the extent such is available ...'

Tracing can operate against property purchased by the defendant in breach of the plaintiff's rights.⁸⁰ Tracing can also operate where a third party has received the unjust enrichment passed on by the fiduciary.⁸¹

For example, if the directors of the company in breach of their fiduciary duties misapply the funds of the company so that they come into the hands of a stranger to the trust who receives them with knowledge (actual or constructive) of the breach, the third party cannot conscientiously retain those funds (or property acquired with those funds) unless the third party has some better equity. It becomes a constructive trustee of the misapplied funds or property acquired with those funds.⁸²

There are also complex equitable rules which permit tracing through bank accounts which may also hold funds other than the 'property' over which the plaintiff may have an interest.⁸³

The concept of 'tracing' was recently considered in *RnD Funding Pty Limited v Roncane Pty Limited* [2023] FCAFC 28.

A brief summary of the facts is as follows.

RnD Funding Pty Limited (RnD), a commercial lender, entered into a general security deed with a mining company, Australian Tailings Group Pty Ltd (ATG). ATG was controlled by Mr Hillam.⁸⁴ Security for the loan was granted by way of a floating charge of funds held by ATG in a bank account. In the event of default, the deed contemplated that this floating charge would become a fixed charge.⁸⁵

Upon crystallisation of the security, ATG disposed of the funds in its bank account by buying shares in a company called *Goldus Pty Ltd* in the name of a company called Roncane, also controlled by Mr Hillam. Goldus was a joint venturer with another party to the security deed between RnD and ATG.⁸⁶

RnD sought to trace its security interest to the shares, and it also sought to have the shares transferred to it. ATG argued that Roncane was a bona fide borrower for value pursuant to a separate loan agreement that existed between it and ATG. This was rejected, and not in issue on appeal.⁸⁷

The relevant issue on the topic of tracing on appeal was whether RnD had a proprietary interest in the funds in the ATG account which was capable of being traced to the shares acquired by Roncane. Specifically, RnD sought to appeal the primary judge's conclusion that:⁸⁸

'[e]quity only affords the characteristics of property that allows for tracing into the hands of third parties where the interest takes the form of a vested beneficial interest in trust property' and at [290] that, 'there appears to be no Australian decision that has embraced a complete departure from the requirement that there must be a fiduciary relationship before tracing can apply on the basis of an equitable foundation.'

Derrington J (Beach and Halley JJ agreeing) stated:⁸⁹

'An analysis of the authorities reveals that tracing claims generally require the following:

(a) that the party seeking to trace has held an original proprietary right or claim in respect of property or, possibly, was owed an obligation by another person who had control of property in which that party claims to have a right;

(b) that there occurred an unauthorised disposition or dispositions of the original property; and

(c) that the claimant seeks the application of the tracing rules to establish an entitlement to a proprietary interest in an asset identified as a substitute for the original property by establishing the tracing links between the original property and any substitutions for it.'

The law is somewhat unsettled as to exactly what is required to invoke the tracing process. However, the various authorities were summarised by Derrington J,⁹⁰ and her Honour identified that either:

(1) the party seeking to trace must have an equitable beneficial interest in property created by the existence of a trust or fiduciary duty owed to them; or

(2) all that is required is a sufficient equitable interest in the property which has been misapplied, regardless of how it was created, including in personam rights.

The appeal was allowed.

Conclusion

A plaintiff seeking to recover money or assets from a defendant or third party may find recourse in the remedy of account and the process of tracing. However, practitioners ought to have regard to the relevant distinctions between these 'remedies' and the foregoing complexities identified when seeking relief of this nature.



1 The Hon Justice Elisabeth Peden, Supreme Court of NSW and Jasmine Robertson, former tipstaff/associate to Peden J. This paper is based on a seminar delivered by the authors to the Commercial Law Association on 29 April, 2024.

2 Ian E. Davidson, 'The Equitable Remedy of Compensation', (1982) 13 *Melbourne University Law Review* 349.

3 Referring to the Supreme Court of Judicature Act 1873, which had the effect of fusing the administration of the common law and equity in England.

4 *Nocton v Lord Ashburton* [1914] AC 932 at 54.

5 Paul Perell, *The Fusion of Law and Equity* (1990, Butterworths Canada Ltd) citing J Story, 'Commentaries on Equity Jurisprudence', 2nd English Ed. (London: Stevens and Haynes, 1982), by W E Grigsby, 532.

6 Note, the formal delineation of the division of the equitable jurisdiction has been abolished. However, conceptually the divisions of the jurisdiction are still a useful device for understanding the remedial function of a court of equity and as such will be referred to throughout this paper. See Simone Degeling and Jason Ne Veruhas, 'Equity's Personal Monetary Remedies' in Degeling and Varuhas (Eds), *Equitable Compensation and Disgorgement of Profit* (2017, Hart Publishing).

7 See Law and Equity Act 1972 (NSW). See also Paul Perell, *The Fusion of Law and Equity* (1990, Butterworths Canada Ltd).

8 I C F Spry, *The Principles of Equitable Remedies* (9th ed, 2014, Lawbook Co) 1.

9 Whilst practical ‘fusion’ of the common law and equity has occurred by operation of this legislative reform, there exists a line of thought which questions whether the doctrines of equity remain a ‘separate and coherent body of principles’ in Australia: see eg, *Pilmer v The Duke Group Ltd* (2001) 207 CLR 165 at [173] (Kirby J); The Hon Justice Michael Kirby, ‘Overcoming equity’s Australian Isolationism’ (2009) 3 *Journal of Equity* 1.

10 See eg, *Robinson v Harman* (1848) 1 Exch 850 at 855. See also E M Peden (Ed) *Australian Law of Contract* (2023, Thomson Reuters) at [26.10].

11 See discussion in *Wenham v Ella* (1972) 127 CLR 454 at 466 (Walsh J).

12 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849.

13 This broad statement of principle has been widely articulated. For example, in *Plimmer v Wellington Corpn* (1884) 9 AppCas 699, at 714 the Court commented that when fashioning an appropriate equitable remedy ‘the Court must look at the circumstances in each case to decide in what way the equity can be satisfied’ (Sir Arthur Hobhouse on behalf of the Privy Council). However, it ought to be noted that this is not an unfettered power to fashion equitable relief divorced from settled legal principles. See *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [16] (Gleeson CJ) See also discussion in J D Heydon, M J Leeming and P G Turner, Meagher, Gummow and Lehane’s *Equity: Doctrines and Remedies* (5th edition, 2015, LexisNexis Butterworths) at [3-025].

14 See discussion in Julie Ward, ‘Equitable Compensation — An Overview’ in Simone Degeling and Jason Ne Varuhas (eds) *Equitable Compensation and Disgorgement of Profit* (2017, Hart Publishing) at 74.

15 See eg, *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 where Spigelman CJ and Heydon JA found that the Court has no power to make a punitive monetary award where a fiduciary relationship arises out of a contract. Note, in that case Spigelman CJ noted (at [4]) that ‘It is, in my opinion, unnecessary and undesirable to decide this case on the basis that a punitive monetary award can never be awarded in equity. Remedial flexibility is a characteristic of equity jurisprudence’. However, it is the accepted position that the Court generally lacks power in NSW to make a punitive money award in equity: see J D Heydon, M J Leeming and P G Turner, Meagher, Gummow and Lehane’s *Equity: Doctrines and Remedies* (5th edition, 2015, LexisNexis Butterworths) at 865.

16 See discussion in J D Heydon, M J Leeming and P G Turner, Meagher, Gummow and Lehane’s *Equity: Doctrines and Remedies* (5th edition, 2015, LexisNexis Butterworths) at 814.

17 This paper is intended to provide an overview only of the availability of each of these three named money remedies and, therefore, the differences between them.

18 See eg, *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559.

19 See generally Dennis Klimchuk, Irit Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (2020,

Oxford University Press).

20 See eg, The Hon Mark Leeming, ‘The role of equity in 21st century commercial disputes — Meeting the needs of any sophisticated and successful legal system’ (2019) 47 *Australian Bar Review* 137.

21 The Hon Sir Anthony Mason, ‘Themes and Prospects’ in Finn (ed) *Essays in Equity* (1985, the Law Book Company Limited) at 242.

22 In *R v Wilks* (1770) 4 Burr 2527 at 2539; 98 ER 327 at 334, Lord Mansfield stated ‘discretion when applied to a court of justice means sound discretion ... governed by rule not by humour; it must not be arbitrary, vague and fanciful; but legal and regular’. See also discussion in James Edelman, ‘Judicial Discretion in Australia’ (2000) 19 *Australian Bar Review* 285; P Finn, ‘Equitable Doctrine and Discretion in Remedies’ in W R Cornish et al (eds), *Restitution: Past, Present and Future — Essays in Honour of Gareth Jones*, (Hart Publishing, 1998) at 251.

23 The Court in *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559 commented that the Court’s discretion to award equitable relief is exercised with reference to ‘settled principles’, and where a defendant can make good a common equitable defence a claim for equitable relief will be rejected.

24 For example, an account of profits is considered to be an alternative form of relief to equitable compensation. Both remedies are in personam and are considered to be inconsistent remedies. As such a plaintiff cannot claim both an account of profits and equitable compensation from the same defendant. Instead, a plaintiff must make an election when judgment is given,

25 *GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers* [2005] VSCA 113 (per Warren CJ, with whom Chernov JA and Dodds-Streeton JA agreed) at [56].

26 See *Xiao v BCEG International (Australia) Pty Ltd* [2023] NSWCA 48.

27 21 & 22 Vict c 27.

28 *Hamann* at [63].

29 See discussion in Daniel Reynolds, ‘Rethinking Equitable Damages’ (2019) 13 *Journal of Equity* 46.

30 See *Wentworth v Woollabra Municipal Council* (1982) 149 CLR 672 at 676 (Gibbs CJ, Mason, Murphy, Aickin and Brennan JJ).

31 Specifically, its entitlement to an injunction or specific performance pursuant to s68 Supreme Court Act 1970 (NSW).

32 *Carmelita Paolucci v Makedyn Pty Ltd* [2020] NSWSC 1871 at [85].

33 *Carmelita Paolucci v Makedyn Pty Ltd* [2020] NSWSC 1871 at [84].

34 *Carmelita Paolucci v Makedyn Pty Ltd* [2020] NSWSC 1871 at [85].

35 *Paolucci* at [27].

36 *Paolucci* at [30].

37 See the factual background set out in *Hamann* at [1]-[5].

38 *Hamann* at [73].

39 *Hamann* at [43].

- 40** Hamann at [57].
- 41** Hamann at [66] citing *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 676.
- 42** Hamann at [70]-[72].
- 43** Hamann at [73].
- 44** Where a plaintiff has established its entitlement to an injunction or specific performance: s68 Supreme Court Act 1970 (NSW).
- 45** J D Heydon, M J Leeming and P G Turner, Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies* (5th edition, 2015, LexisNexis Butterworths) at 801.
- 46** *Target Holdings v Redferns* [1996] AC 421 at 434 (Lord Browne-Wilkinson).
- 47** See discussion in *The Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347 at [129] (Basten JA). See also Ian E Davidson, 'The Equitable Remedy of Compensation', (1982) 13 *Melbourne University Law Review* 349 at 351.
- 48** *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [35].
- 49** *Beach Petroleum NL v Kennedy and Ors* (1999) 48 NSWLR 1 at [431] (Spigelman CJ, and Sheller and Stein JJA).
- 50** J D Heydon, M J Leeming and P G Turner, Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies* (5th edition, 2015, LexisNexis Butterworths) at 801.
- 51** Recent examples include *Pirrottina v Pirrottina* [2024] NSWSC 558 (Rees J); In the matter of *Sunnya Pty Ltd* [2024] NSWSC 403 (Williams J). See also discussion in *Anderson v Canacord Genuity Financial Ltd* [2023] NSWCA 294.
- 52** *Nocton v Lord Ashburton* [1914] AC 932 at 952 (Viscount Haldane LC); *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 272 (Spigelman CJ)
- 53** *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 (at 56) (Handley JA, Mason P and Beazley JA agreeing).
- 54** See eg, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [200].
- 55** [1996] AC 421 at 439.
- 56** Ibid at 422.
- 57** *Target Holdings Ltd v Redferns* [1996] AC 421 at 437 (Lord Browne-Wilkinson), cited with approval in *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [50] (Full Court).
- 58** See eg, *Lewis v Nortex Pty Ltd (in liq)* [2006] NSWSC 480.
- 59** *Lewis v Nortex Pty Ltd (in liq)* [2006] NSWSC 480 at [11] (Hamilton J).
- 60** See eg, *Hungerfords v Walker* (1990) 171 CLR 125 at 148 (Mason CJ and Wilson J).
- 61** *Burdick v Garrick* (1870) 5 Ch App 233 at 241 (Lord Hatherley LC).
- 62** *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 393 (Kearney J).
- 63** Whilst it has been suggested these distinctions remain largely academic, the substitutive/reparative distinction has been discussed at length and in many respects is causative of some confusion pertaining to the circumstances in which the remedy could become available: Julie Ward, 'Equitable Compensation — An Overview' in Simone Degeling and Jason Ne Varuhas (eds) *Equitable Compensation and Disgorgement of Profit* (2017, Hart Publishing) at 73-75.
- 64** See generally *Xiao v BCEG International (Australia) Pty Ltd* [2023] NSWCA 48 at [39]-[84] (Gleeson JA, Mitchelmore JA and Griffiths AJA agreeing).
- 65** See, for example, discussion in J A Watson, *The Duty to Account: Development and Principles* (2016, The Federation Press) at 6-7.
- 66** But see discussion in David Murr SC, 'Recovering lost assets: Tracing at common law and in equity' (2006) 27 *Australian Bar Review* 174.
- 67** *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557.
- 68** Simone Degeling and Jason NE Varuhas, 'Equity's Personal Money Remedies' in Simone Degeling and Jason Ne Varuhas (eds) *Equitable Compensation and Disgorgement of Profit* (2017, Hart Publishing) at 6.
- 69** Ian E Davidson, 'The Equitable Remedy of Compensation', (1982) 13 *Melbourne University Law Review* 349 at 354.
- 70** *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559.
- 71** *London Chatham & Dover Railway Co v Southeastern Railway Co* [1892] 1 Ch 120 at 140.
- 72** The remedy is available under the statutory regimes that govern intellectual property rights in Australia, for example under the Copyright Act 1968 (Cth) s115(2). The relevant statutory provisions find their origin in equity's jurisdiction to award an account of profits in common law trademark infringement cases. However, prior to the Judicature Act system the remedy could not be ordered unless an injunction was also ordered. See the Court's consideration of this in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 33-34 (Windeyer J).
- 73** *Warman International Limited v Dwyer* (1995) 182 CLR 544 at 557.
- 74** See eg, in *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at 500 (in the joint judgment of Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ) where the Court observed that 'one of the unique foundation and goals of equity' is to keep trustees to their duty. The relevant 'loss' is the breach of equitable duty itself: Julie Ward, 'Equitable Compensation — An Overview' in Simone Degeling and Jason Ne Varuhas (eds) *Equitable Compensation and Disgorgement of Profit* (2017, Hart Publishing) at 67.
- 75** The Hon Peter W Young AO, Clyde Croft and Megan Louise Smith *On Equity* (2019, Thomson Reuters) at 1117.
- 76** *Neilson v Betts* (1871) LR 5 HL 1 at 22 (Lord Westbury). This inconsistency bares relevance when a plaintiff must elect between which remedy it seeks to obtain. In other words, a plaintiff must elect between the remedies of account and equitable compensation, at the extinguishment of its right to seek the alternate remedy at a later point in time, or in addition to the remedy sought at the time the election is made.
- 77** *Ancient Order of Foresters in Victoria Friendly Society Ltd v*

Lifeplan Australia Friendly Society Ltd (2018) 265 CLR 1 at 6 (per Kiefel CJ, Keane and Edelman JJ).

78 Civil Procedure Act 2005 (NSW) s13.

79 252, at [89].

80 *Foskett v McKeown* [2001] 1 AC 102 at 127-128; J D Heydon and M J Leeming, Jacobs' *Law of Trusts in Australia* (8th ed, 2016, LexisNexis Butterworths) at 598.

81 Note, the distinction between an action for money had and received and tracing was recently articulated in *Carpenter v Morris* (2023) 111 NSWLR 603 at [2].

82 *Grimaldi v Chameleon Mining NL (No 2); Chameleon Mining NL v Murchison Metals Ltd* (2012) 200 FCR 296 at [563] (Finn, Stone and Perram JJ); *Thomas v Arthur Hughes Pty Ltd* [2015] NSWSC 1027.

83 Whilst these principles are beyond the scope of this paper, see eg, *Toksoz v Westpac Banking Corporation* (2012) 289 ALR 577.

84 *RnD Funding Pty Limited v Roncane Pty Limited* [2023] FCAFC 28 at [2].

85 Ibid at [6].

86 Ibid at [2].

87 Ibid [20].

88 Ibid at [45].

89 At [48].

90 At [86].