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# Court Orders Against Express Trustees

Samuel Williams, *Magdalen College*

Thesis submitted to the Faculty of Law, Oxford University  
for the degree of Doctor of Philosophy

Trinity Term 2019 | 85,947 Words

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## Abstract

This thesis concerns five court orders: the *Surcharging Order*, *Subject-Matter Distribution Order*, *Lesser Receipt Order*, *Falsification Order*, and *Personal Loss Order*. This thesis considers two questions, one descriptive and one normative. The descriptive question asks whether these five orders are available as a matter of law in England and Wales. The normative question asks whether there are normative reasons for or against the making of such orders. These questions are considered in respect of express trustees of trusts for persons following breach of the duty to follow the settlor's communicated intentions, and breach of the duty of care.

Notwithstanding the fact that the five court orders can be found in the reasoning of the courts of England and Wales, the literature in this area often fails to clearly discriminate between these five orders. This may be one reason why the two questions identified in this thesis have received insufficient attention.

In response to the descriptive question, this thesis argues that *Surcharging Orders*, *Subject-Matter Distribution Orders*, *Lesser Receipt Orders* and *Personal Loss Orders* are all sometimes available as a matter of law in England and Wales, but that *Falsification Orders* are not available.

In response to the normative question, this thesis outlines a number of normative reasons for and against the making of the five orders under discussion. The thesis canvasses possible ways for making such orders so as to further the values underpinning the reasons for making such orders, whilst avoiding harm to the values underpinning the reasons against.

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# Contents

Cases Cited	i
Legislation Cited	v
<b>1 Introduction</b>	<b>1</b>
1.1 Questions for this Thesis	1
1.2 Methodology	6
1.3 Excluded Questions	11
1.4 Summary of the Thesis	13
1.5 Conclusion	21
<b>2 Concepts</b>	<b>23</b>
2.1 Introduction	23
2.2 The Five Court Orders	24
2.3 The Scope of the Thesis	42
2.4 Conclusion	51
<b>3 Context and Justification</b>	<b>52</b>
3.1 Introduction	52
3.2 History of the Literature	53
3.3 Existing Analysis of the Five Orders	62
3.4 Conclusion	73
<b>4 <i>Surcharging Orders</i></b>	<b>76</b>
4.1 Introduction	76
4.2 Legal Authorities	77
4.3 Normative Reasons	93
4.4 Conclusion	121

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<b>5</b>	<b><i>Lesser Receipt Orders and Subject-Matter Distribution Orders</i></b>	<b>123</b>
5.1	Introduction	123
5.2	Legal Authorities	127
5.3	Normative Reasons	163
5.4	Conclusion	174
<b>6</b>	<b><i>Falsification Orders</i></b>	<b>176</b>
6.1	Introduction	176
6.2	Legal Authorities	179
6.3	Normative Reasons	224
6.4	Conclusion	246
<b>7</b>	<b><i>Personal Loss Orders</i></b>	<b>248</b>
7.1	Introduction	248
7.2	Legal Authorities	251
7.3	Normative Reasons	279
7.4	Conclusion	305
<b>8</b>	<b>The Construction and Comparison of Counterfactuals</b>	<b>307</b>
8.1	Introduction	307
8.2	Constructing Counterfactuals	308
8.3	Comparing Counterfactuals	332
8.4	Conclusion	333
<b>9</b>	<b>Conclusion</b>	<b>335</b>
9.1	Introduction	335
9.2	Summary of Conclusions	335
9.3	Further Questions	341
	<b>Bibliography</b>	<b>344</b>

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Ahmed (A Debtor) [2018] EWCA Civ 519, [2018] BPIR 535	250, 273-5, 277-8
AIB Group (UK) Plc v Mark Redler & Co (A Firm) [2012] EWHC 35 (Ch), [2012] PNLR 16	315
AIB Group (UK) Plc v Mark Redler and Co Solicitors [2014] UKSC 58, [2015] AC 1503	2, 4, 46, 53, 57-8, 62, 64, 66, 68-71, 81, 84-5, 88-91, 142, 147-8, 150-2, 177-8, 187, 200, 203, 206, 216-7, 219-20, 222-3, 232, 242-3, 246, 250, 257, 269-73, 276-9, 296-7, 304-5, 309, 312-3, 315, 317, 321-2, 324
Alliance and Leicester BS v Edgestop [1999] Lloyd's Rep PN 868 (Ch)	317
Ames v Parkinson (1844) 7 Beav 379; 49 ER 1111 (Ch)	320
Anglo-French Cooperative Society Ex p Pelly, Re (1882) 21 Ch D 492 (CA)	189
Baker v Willoughby [1970] AC 467 (HL)	324
Barclays Bank v Quistclose Investments Ltd [1970] AC 567 (HL)	47
Barnett v Creggy [2016] EWCA Civ 1004, [2017] Ch 273	203
Bartlett v Barclays Bank Trust Co Ltd [1980] Ch 515	36, 47, 63, 140, 142-4, 150, 157-8
Bell's Indenture, Re [1980] 1 WLR 1217 (Ch)	181-4
Biddulph ex p Norris, Re (1868-69) LR 4 Ch App 280 (CA)	180, 329
Blackwell v Blackwell [1929] AC 318 (HL)	45
Bristol and West BS v May [1996] PNLR 138 (Ch)	317
Bristol & West BS v Mothew [1998] Ch 1 (CA)	259
Brudenell-Bruce v Moore [2014] EWHC 3679 (Ch)	25, 45-7, 62-7, 90-1, 238, 310
Caffrey v Darby (1801) 31 ER 1159, 6 Ves 488	235
Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1 (HL)	233
Cocker v Quayle (1830) 1 R&M 535, 39 ER 206 (Ch)	179-81

Collie Ex p Adamson, Re (1878) 8 Ch D 807 (CA)	191-3, 232
Collins v Brebner [2000] Lloyd's Rep PN 587 (CA)	177-8, 211-7, 258, 317
Cowan v Scargill [1985] Ch 270	45, 238
Daniel v Tee [2016] EWHC 1538 (Ch), [2016] 4 WLR 115	92-3, 322
Denley, Re [1969] 1 Ch 373	47
Devaynes v Robinson (1857) 24 Beav 86, 53 ER 289 (Ch)	330
Durham Tees Valley v BMIBaby [2010] EWCA Civ 845, [2011] 1 All ER (Comm) 731	321
Endacott, Re [1960] 1 Ch 232 (CA)	47
Exchange Banking Co, Re (Flitcroft's Case) (1882) 21 Ch D 519 (CA)	188-9
FHR European Ventures LLP v Cedar Capital Partners LLC [2014] UKSC 45, [2015] AC 250	62, 282
Forsyth-Grant v Allen [2008] EWCA Civ 505, [2008] Env LR 41	282
Foskett v McKeown [2001] 1 AC 102 (HL)	282, 329
Francis v Francis (1854) 5 De GM&G 108; 43 ER 811	329
Fry v Fry (1859) 27 Beav 144, 54 ER 56 (Ch).	330
Fry v Tapson (1884) 28 Ch D 268	204-5
Greenwood Re, Sutcliffe v Gledhill [1901] 1 Ch 887	133
Hamilton-Jones v David & Snape [2003] EWHC 3147 (Ch), [2004] 1 WLR 924	331
Harris v Kent [2007] EWHC 463 (Ch)	6, 235, 250, 264, 313, 323
Henderson v Merrett Syndicates Ltd (No 1) [1995] 2 AC 145 (HL)	43
Hockley v Bantock (1833) 2 Mylne & Keen 437; 39 ER 1010 (Ch)	320
Hulbert v Avens [2003] EWHC 76 (Ch), [2003] WTLR 387	144-7, 254-6
Interactive Technology Corp Ltd v Ferster [2018] EWCA Civ 1594, [2018] 2 P&CR 22	4, 6, 64, 69-71, 189-90
Jackson, Re; Wilson v Donald (1881) 44 LT 467 (Ch)	136-7
Jenkins and HE Randall & Co's Contract, Re [1903] 2 Ch 362	329
Jervis v Harris [1996] Ch 195 (CA)	231
Jobling v Associated Dairies [1982] AC 794 (HL)	324
Jones v Kernott [2011] UKSC 53, [2012] 1 AC 776	44
Knight v Haynes Duffell Kentish & Co [2003] EWCA Civ 223	184
Lake, Re [1903] 1 KB 439	78-9, 329

Latchworth Ltd v Dryer [2016] EWHC 3424 (Ch), [2017] EWHC 1089 (Ch)	326
Learoyd v Whiteley (1887) 12 AC 727 (HL)	46
Lehman Brothers International (Europe) (In Administration), Re [2011] EWCA Civ 1544	117
Livingstone v Rawyards Coal Co (1880) 5 AC 25 (HL)	282
Lloyds TSB Bank Plc v Markandan & Uddin (A Firm) [2012] EWCA Civ 65, [2012] 2 All ER 884	310, 317
Lysaght v Edwards (1876) 2 Ch D 499	44
Makdessi v Cavendish Square Holdings BV [2015] UKSC 67, [2016] AC 1172	135
Mallott v Wilson [1903] 2 Ch 494	45, 117
Marsh v Hunter (1822) 6 Madd 295, 56 ER 1103 (Ch)	320
Massingberd's Settlement, Re; Clark v Trelawney (1890) 63 LT 296 (CA)	184, 331
Morice v Bishop of Durham (1804) 9 Ves 399, 32 ER 656	47
Moschi v Lep Air Services Ltd [1973] AC 331 (HL)	55
Nash v Pease, Re Eccles and Turner (1878) 47 LJ QB 766	130, 133
Nestle v National Westminster Bank Plc [1993] 1 WLR 1260 (CA)	86-7, 322
Norris v Wright (1851) 14 Beav 291, 51 ER 298	204-5
Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd [2010] EWHC 2026 (Comm), [2011] 2 All ER (Comm) 155	293
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Paul v Constance [1977] 1 WLR 527 (CA)	43, 117, 120-1
Radcliffe, Re [1891] 1 Ch 227 (CA)	128-9
Robinson v Harman (1848) 1 Ex 850, 154 ER 363	282-4
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Rochefoucauld v Boustead [1897] 1 Ch 196 (CA)	45
Rose (Deceased), Re [1952] Ch 499 (CA)	44
Salmon, Re (1889) 42 Ch D 351	44-6, 155-7, 328
Sampson, Re [1896] 1 Ch 630	133
Sculthorpe v Tipper (1871-2) LR 13 Eq 232 (Ch)	78
Selangor United Rubber v Cradock (no 3) [1968] 1 WLR 1555 (Ch)	189
Selot's Trust, Re [1902] 1 Ch 488	128

Sempra Metals v IRC [2007] UKHL, [2008] AC 561	12
Shepherd v Moulds (1845) 4 Hare 500; 67 ER 746 (Ch)	320
Smith v Bolden (1863) 33 Beav 262, 55 ER 368	128-9
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Target Holdings v Redferns Ltd [1994] 1 WLR 1089 (CA)	234-5
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Taurus Petroleum Ltd v State Oil Marketing Co [2017] UKSC 64, [2017] 3 WLR 1170	131
Thomson, Re [1930] 1 Ch 203	45
Thornton v Stokill (1855) 1 Jur (NS) 571 (Ch)	329
Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch)	56-7, 65, 71
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Warne, Ex p Moody, Re (1816) 2 Rose 413 (Ch)	180
Watts v Girdlestone (1843) 6 Beavan 188, 49 ER 797 (Ch)	320
Webb v Stenton (1883) 11 QBD 518 (CA)	132-4
Willers v Joyce (no 2) [2016] UKSC 44, [2018] AC 843	223, 321, 330
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Wroe v Seed (1863) 4 Giff 425	55

## Other Jurisdictions

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<i>Yuyang Pty Ltd v Minter Ellison Morris Fletcher</i> [2003] HCA 15, (2003) 212 CLR 484	193-203, 210

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Civil Procedure Rules	130, 131
Part 72	130
Rule 72.2(1)(a)	131
Common Law Procedure Act 1854	130
s 61	130
Judgments Act 1838	12
s 17(1)	12
Late Payment of Commercial Debts (Interest) Act 1998	12
Senior Courts Act 1981	12
s 35A	12
Trustee Act 1925	121
s 61	121
Trustee Act 2000	46, 47, 310
s 1	46, 47, 310
Variation of Trusts Act 1958	46

# I

## Introduction

### 1.1 Questions for this Thesis

This thesis concerns the following five court orders:<sup>1</sup>

*Surcharging Order*: a court order obligating a trustee to pay money into a trust estate, where the quantum of liability is the extent to which the trustee has wrongfully caused the trust estate to diminish in value.

*Subject-Matter Distribution Order*: a court order obligating a trustee to transfer subject-matter from the trust estate to a person, where the trustee has wrongfully failed to distribute that subject-matter to that person.

*Lesser Receipt Order*: a court order obligating a trustee to pay money to a person, where the quantum of liability is the extent to which the trustee has wrongfully caused that person to receive less valuable subject-matter from the trust estate.

*Falsification Order*: a court order obligating a trustee to pay money, where the quantum of liability is the value of any subject-matter wrongfully transferred by the trustee.

*Personal Loss Order*: a court order obligating a trustee to pay money to a person, where the quantum of liability is the extent to which the trustee has wrongfully caused a loss to that person all things considered.

This thesis considers two questions, one descriptive and one normative. The descriptive question asks whether these five orders are available as a matter of law in England and Wales. The normative question asks whether normative reasons exist for or against the making of these five orders. This thesis explores these questions in

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<sup>1</sup> These five orders are explored in detail in 2.2.

relation to express trustees of trusts for persons following breach of the duty to follow the settlor's communicated intentions and the duty of care.<sup>2</sup>

The thesis was motivated by the writer's interest in a number of problems created by two decisions of the courts of England and Wales: the House of Lords' decision in *Target Holdings Ltd v Redfern* in 1995, and the Supreme Court's decision in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* in 2014.<sup>3</sup>

One might question the need for such a thesis, given the density of the literature concerning the orders available against trustees following a breach of duty,<sup>4</sup> and given that a doctorate has already been written on this area by Steven Elliott in 2002.<sup>5</sup> However, there are a number of reasons why this thesis is needed. Chapter Three provides a full exploration of these reasons, though a brief summary of these reasons will be provided here.<sup>6</sup>

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<sup>2</sup> The concepts of express trustee, trust for persons, duty to follow the settlor's communicated intentions, and duty of care, are explored in detail in 2.3.

<sup>3</sup> *Target Holdings Ltd v Redfern* [1996] AC 421 (HL); *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503.

<sup>4</sup> A small sample: Peter Birks, 'Equity in the Modern Law: an Exercise in Legal Taxonomy' (1996) 26 *University of Western Australia Law Review* 1; Sir Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *Law Quarterly Review* 214; Andrew Burrows, 'Limitations on Compensation' ch 4 in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP 2003); Charles Mitchell, 'Stewardship of Trust Property and Liability to Account' [2014] *The Conveyancer and Property Lawyer* 215; James Edelman, 'An English Misturning with Equitable Compensation' ch 5 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017); James Penner, 'The Beneficiary's Performance Interest in a Trust' ch 9 in R Nolan, K Low, and T Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018).

<sup>5</sup> Steven Elliott, 'Compensation Claims Against Trustees' (DPhil thesis, University of Oxford 2002).

<sup>6</sup> See in particular 3.2.3.

First, commentators frequently fail to distinguish between the five orders under discussion. This is problematic as all five orders can be identified in the reasoning of the courts, and are thus deserving of analysis.<sup>7</sup>

For example, Andrew Burrows in his recent edition of *Remedies for Torts, Breach of Contract, and Equitable Wrongs* distinguishes two possible orders that may be available against trustees: the *Falsification Order*, and an order obligating a trustee to compensate for wrongfully caused losses. This latter order elides an important distinction between *Surcharging Orders*, *Lesser Receipt Orders*, and *Personal Loss Orders*: all three of these orders could be described as obligating a trustee to compensate for wrongfully caused losses.

Second, the literature does not adequately answer the questions considered in this thesis, namely whether the five orders are available as a matter of law, and whether normative reasons exist for or against the making of such orders. This problem differs in severity from order to order: for example, the legal authorities relevant to the availability of the *Falsification Order* has received some attention, whilst the existence of normative reasons concerning the *Surcharging Order* has received none.

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<sup>7</sup> See 4.2, 5.2, 6.2, and 7.2 for judicial discussion of each of the orders.

The questions considered in this thesis are important: accurate description of the legal rules in this area is necessary to ensure consistent application of the rules, and identifying the normative reasons relevant to this area is important in ensuring the rightful development of the law. There is some urgency to these questions, as the decisions in *Target* and *AIB* have left this area in a state of flux.<sup>8</sup> This state is evidenced by courts' failing to apply the legal rules stemming from these decisions,<sup>9</sup> and the controversy that these decisions have provoked.<sup>10</sup>

Third, the literature contains insufficient analysis of where a trustee may be ordered to pay money. In the areas of contract and tort it is common for defendants to be ordered to pay money to a person, for example a contractual counter-party or wronged property-holder. Similarly in the law of trusts, a trustee will sometimes be ordered to pay money to a person: this will be so whenever a *Lesser Receipt Order* or *Personal Loss Order* is made. However sometimes a trustee will be ordered to pay money into a trust estate. This is the case whenever a *Surcharging Order* is made. Much of the literature in this area focuses on the appropriate quantum of orders against

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<sup>8</sup> *Target* (n 3); *AIB* (n 3).

<sup>9</sup> *Various Claimants v Giambone and Law (A Firm)* [2017] EWCA Civ 1193, [2018] PNLR 2; *Interactive Technology Corp Ltd v Ferster* [2018] EWCA Civ 1594, [2018] 2 P&CR 22. For analysis of *Giambone* and *Ferster* see 8.2.1.2.3 and 6.2.1.5 respectively.

<sup>10</sup> Birks (n 4); Millett (n 4); Mitchell (n 4); Edelman (n 4); Penner (n 4).

trustees to pay money, but overlooks this question of where the trustee may be ordered to pay money once quantified.<sup>11</sup>

Fourth, the literature does not use consistent language when referring to these orders. This has the potential to create confusion and difficulty in analysis, as it is not always clear which concept a commentator is referring to. One difficulty is that the same label is often used to describe multiple orders. For example the label ‘equitable compensation’ has been used to refer to a *Surcharging Order*, *Lesser Receipt Order*, *Falsification Order*, and a *Personal Loss Order*.<sup>12</sup> Another difficulty is that multiple labels are often used to refer to the same order. For example, the labels ‘substitutive compensation’ order and ‘equitable debt’ order have both been used to refer to a *Falsification Order*.<sup>13</sup>

This thesis avoids these problems by clearly distinguishing the five orders under discussion, analysing where a trustee can be ordered to pay money, adopting consistent labels when referring to these orders, and making progress on the questions whether these orders are or should be available against trustees.

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<sup>11</sup> For example, James Edelman and Steven Elliott, ‘Money Remedies Against Trustees’ (2004) 18(3) *Trust Law International* 116; Paul Davies, ‘Remedies for Breach of Trust’ (2015) 78(4) *Modern Law Review* 681; Lionel Smith, ‘The Duties of Trustees in Comparative Perspective’ (2016) 24 *European Review of Private Law* 1031.

<sup>12</sup> This point is developed at greater detail in 3.2.3. The various labels used in the literature to refer to the orders under discussion are outlined in 3.3.

<sup>13</sup> See 3.3.4.

## 1.2 Methodology

The first question for this thesis is whether the five orders are available against trustees as a matter of law in England and Wales. This is a descriptive aim, which seeks to identify the law as it currently stands.<sup>14</sup> The focus will be on identifying the ratio decidendi of particular cases decided in England and Wales. However, the thesis will also consider obiter dicta in cases decided in England and Wales, and decisions of courts in other jurisdictions.<sup>15</sup>

This thesis relies upon cases where orders are made against defendants other than express trustees or following breach of duties other than the duty to follow the settlor's communicated intentions or the duty of care.<sup>16</sup> One might think that such cases are irrelevant to the present thesis, the focus of which is not upon such defendants for breach of such duties.

However such a thought is mistaken: it is possible that such cases affect the legal rules concerning express trustees for breach of either the duty to follow the settlor's communicated intentions or duty of care. All depends on the court's

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<sup>14</sup> This aim may be contrasted with other aims, such as interpretive, or prescriptive/normative. For discussion, see Stephen Smith, 'What is Contract Theory?' ch 1 in *Contract Theory* (Clarendon 1993) 4-6; Sandy Steel, 'Private Law and Justice' (2013) 33(3) *Oxford Journal of Legal Studies* 607, 612-3.

<sup>15</sup> The reliance on authority from other jurisdictions is particularly commonplace in the literature on *Falsification Orders*. For discussion see 6.2.1.7.

<sup>16</sup> Examples include *Ferster* (n 9) in which an order was made against a company director, and *Harris v Kent* [2007] EWHC 463 (Ch) in which an order was made against a constructive trustee. For discussion of *Ferster* and *Harris* see 6.2.1.5 and 7.2.2.1 respectively.

reasoning in justifying its decision. If the reasoning embraces express trustees for breach of either of the two duties under discussion, the decision is relevant authority for this thesis.

The second question for this thesis is whether there are normative reasons for or against the making of the five orders. The concept of a reason is captured by Thomas Scanlon:<sup>17</sup>

Any attempt to explain what it is to be a reason for something seems to me to lead back to the same idea: a consideration that counts in favour of it.

As such this thesis seeks to identify considerations that count in favour of or against making the five orders under discussion. Such identification requires making value judgements about what matters, and assessing the making of these five orders with reference to these values. This can be referred to as a normative aim.<sup>18</sup>

Normative reasons should be distinguished from authoritative reasons or reasons of precedent. There may be authoritative reasons for or against making a particular order, for example if some prior decision-maker has recognised or rejected the availability of such an order. However the existence of such an

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<sup>17</sup> Thomas Scanlon, 'Reasons' ch 1 in *What We Owe to Each Other* (HUP 1998) 17.

<sup>18</sup> See Smith (n 14); Steel (n 14).

authoritative reason is both insufficient and unnecessary to ground the existence of a normative reason.<sup>19</sup>

In seeking to identify normative reasons for or against the making of a particular order, one must be alert to the various features of the order. It is possible that there might be a reason in favour of making an order with one of these features, but that the other features are not justified by such a reason. If this is the case, other reasons must also be marshalled to provide a complete justification for the making of such an order.

For example, a *Surcharging Order* requires: (1) a trustee, (2) to pay money into a trust estate, (3) where the quantum of liability is the extent to which the trustee has wrongfully caused the trust estate to diminish in value. Let us assume that one reason in favour of making such an order is that it provides a deterrent to future trustees from breaching their legal duties, by setting a precedent that such an order will be made in the future. Such a reason justifies feature (1) as the deterrence functions by threatening future trustees that if they breach their duty they will be ordered to pay money.

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<sup>19</sup> It may be that there is some value in consistency, so as to create a normative reason which depends on the existence of an authoritative reason. But the existence of the authoritative reason does not ground, without more, the existence of a normative reason. Some value judgment - such as the value in consistency - is necessary. For discussion, see Charlie Webb, 'The Double Lives of Property' (2011) 2(1) *Jurisprudence* 205, 214.

However, the reason identified does not justify feature (2): it is possible that future trustees would be just as deterred by a threatened order to pay money to the state, or to charity, rather than the trust estate. Furthermore it seems not to justify feature (3): if the aim is to deter future trustees, why limit the quantum of liability? Would doubling or tripling the quantum not be a better deterrence?

These considerations do not show that no reason has been identified in favour of making a *Surcharging Order*, but rather that to fully justify making such an order further reasons must be identified to explain features (2) and (3) of the order.

The thesis thus assumes that there may be multiple reasons in favour of making a particular order, and that multiple reasons may even be necessary to justify the making of a particular order. Some doubt that the making of an order is satisfactorily justified where different reasons are provided for different features of the order, though the writer knows of no good argument grounding this doubt.<sup>20</sup>

The thesis also assumes no restriction on the range of reasons that may exist for or against the making of an order. Some commentators have argued for such a restriction in the context of private law, on the basis that reasons in favour of making orders against private law defendants are limited to those that embrace the claimant and defendant in the court proceedings. If this argument was accepted in

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<sup>20</sup> For a successful rejection of the idea that private law abides by this ‘same reason’ requirement see Nicholas McBride, ‘Assessing the Explanation’ ch 7 in *The Humanity of Private Law* (Hart 2019) 256-64.

the present context, it might entail that only reasons embracing the trustee and the person seeking an order can be considered. Alternatively, it might entail that only reasons embracing the trustee and anyone interested in the trust estate held by the trustee can be considered.

Lionel Smith makes such an argument against the consideration of reasons that focus on deterring future potential defendants:<sup>21</sup>

An explanation based on deterrence is inconsistent with the internal rationality of private law. The reason is that deterrence looks outside of the relationship between plaintiff and defendant, and their conduct that gave rise to the litigation. To the extent that it seeks to influence the conduct of others in the future, it is effectively a public law principle.

Ernest Weinrib formulates a similar argument as part of his broader theory that only reasons of ‘corrective justice’ count in private law:<sup>22</sup>

To satisfy the dimension of correlativity, the justificatory considerations at work in corrective justice must be... bipolar... They must be bipolar in that... the justificatory considerations must link two, and only two, parties... Consequently, a justificatory consideration that fits into the normative structure of corrective justice cannot have a justificatory force that reaches only one of the parties.

Both arguments should be rejected. Smith assumes that private law has an ‘internal rationality’ or that private law cannot be concerned with ‘public law principles’.

Weinrib assumes that private law’s only concern is with reasons of ‘corrective

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<sup>21</sup> Lionel Smith, ‘The Motive, Not the Deed’ ch 4 in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis 2003) 61.

<sup>22</sup> Ernest Weinrib, ‘Correlativity’ ch 5 in *The Idea of Private Law* (2nd OUP 2012) 120.

justice'.<sup>23</sup> However, the truth of such assumptions is far from obvious, and neither Smith nor Weinrib provide any reason to ground the assumptions. As such this thesis assumes no limit on the range of available reasons to be considered.

### 1.3 Excluded Questions

A number of questions are not considered in this thesis. First, the thesis does not consider the issue of standing. If a person has 'standing' in respect to a particular order, that person has a legal power to require a court to make that order. For example, if a person had standing in respect of *Surcharging Orders*, that person would have a legal power to require a court to make a *Surcharging Order*.

The exclusion of standing from the scope of this thesis has two consequences. First, to the extent that legal rules support the availability of any of the five orders under discussion, this thesis does not identify the people who have standing in respect of such orders under the legal rules. Second, the thesis does not identify whether reasons exist for or against providing any particular person with standing.

One might object to the exclusion of standing from the scope of the thesis. The thesis focuses on the availability of five orders against trustees, and the question of standing seems related to this focus. In response, it is suggested that, whilst related to

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<sup>23</sup> For a successful rejection of Weinrib's ideas, see John Gardner, 'The Purity and Priority of Private Law' (1996) 46 *University of Toronto Law Journal* 459, 459-66.

the questions for this thesis, the question of standing need not be considered to answer these questions. Standing warrants detailed consideration, and for reasons of space cannot be considered here.

Second, the thesis does not consider the question of interest. A number of interest regimes exist within English law.<sup>24</sup> Applied to the present context, a trustee could be ordered to make interest payments upon any order made against them. The exclusion of interest from the scope of this thesis means that the thesis does not consider whether interest is available as a matter of law for any of the five orders under discussion, and does not consider whether there are reasons for or against the availability of interest.

Third, this thesis does not consider the legal position of a trustee following breach but prior to the making of a court order. Controversy exists in the literature over whether private law defendants are under legal duties or legal liabilities following breach of duty but prior to the making of a court order.<sup>25</sup> This thesis steers clear of this controversy. This is because the questions posited in this thesis can be answered without resolving the controversy: the answers the thesis provides are consistent with express trustees' either owing a legal duty or a legal liability prior to the making of a court order.

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<sup>24</sup> A small selection: Judgments Act 1838, s 17(1); Senior Courts Act 1981, s 35A; Late Payment of Commercial Debts (Interest) Act 1998; *Sempra Metals v IRC* [2007] UKHL, [2008] AC 561.

<sup>25</sup> Stephen Smith, 'Duties, Liability, and Damages' (2012) 125 Harvard Law Review 1727, 1741-9.

Fourth, generally speaking this thesis does not consider mitigation, remoteness, or contributory negligence. Such concepts may be relevant to at least the *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order*, as these orders are quantified with reference to any losses wrongfully caused by the trustee.

This thesis generally excludes consideration of such concepts. This means that the thesis does not consider whether legal rules limit the recovery of losses wrongfully caused with reference to these concepts, or whether there are reasons for or against limiting recovery in this way. One exception is made in Chapter Seven where it is argued that a possible reason against making a *Personal Loss Order* is eliminated if such orders contained a remoteness condition.<sup>26</sup>

## 1.4 Summary of the Thesis

### 1.4.1 Thesis Structure

This chapter has defined the scope of this thesis: the five orders for consideration, and the two questions for discussion. The five orders are the *Surcharging Order*, *Subject-Matter Distribution Order*, *Lesser Receipt Order*, *Falsification Order*, and *Personal Loss Order*.

The descriptive question asks whether these five orders are available as a matter of law in England and Wales. The normative question asks whether there are normative reasons for or against the making of the five orders. These questions are

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<sup>26</sup> See 7.3.3.

considered in respect of express trustees of trusts for persons, following breach of both the duty to follow the settlor's communicated intentions and the duty of care.

Chapter Two ('Concepts') defines the scope of this thesis with greater precision. In particular it explores the five orders under discussion, and defines the concepts of express trustee, trust for persons, duty to follow the settlor's communicated intention, and duty of care.

Chapter Three ('Context and Justification') contextualises this thesis within the existing literature, and explains the contribution that this thesis endeavours to make to that literature. A history and critique of the existing literature will be provided, alongside an account of the progress that has been made on the two questions considered in this thesis.

Chapter Four ('*Surcharging Orders*'), Chapter Five ('*Lesser Receipt Orders* and *Subject-Matter Distribution Orders*'), Chapter Six ('*Falsification Orders*'), and Chapter Seven ('*Personal Loss Orders*') consider the two questions in relation to the five orders under discussion.

Three of the orders in this thesis obligate a trustee to compensate for losses wrongfully caused by a trustee: the *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order*. This thesis refers to such orders as 'counterfactual loss orders'. Identifying

whether a trustee has wrongfully caused loss involves the construction and comparison of two counterfactuals: a non-breach counterfactual, and a breach counterfactual.<sup>27</sup> Chapter Eight ('The Construction and Comparison of Counterfactuals') identifies the legal rules relevant for constructing and comparing these counterfactuals.

Chapter Nine ('Conclusion') summarises the thesis, and identifies a number of questions for further exploration that are raised by the thesis.

## 1.4.2 Thesis Claims

### 1.4.2.1 The Descriptive Question

In response to the first question, this thesis makes a number of claims. All references to trustees should be taken as references to 'express trustees of trusts for persons'.

This thesis will argue that *Surcharging Orders*, *Subject-Matter Distribution Orders*, *Lesser Receipt Orders*, and *Personal Loss Orders* are all sometimes available against express trustees of trusts for persons as a matter of law.<sup>28</sup> It will be argued that *Falsification Orders* are not available against such trustees.<sup>29</sup>

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<sup>27</sup> For in-depth discussion see 2.2.1.

<sup>28</sup> See 4.2, 5.2, and 7.2.

<sup>29</sup> See 6.2.

Chapter Four will argue that *Surcharging Orders* are available following breach of both the duty to follow the settlor's communicated intentions, and the duty of care. However, such orders are only sometimes available where a relevant trust has come to an end. The precise scope of this exception is uncertain.

Chapter Five will argue that *Subject-Matter Distribution Orders* are available following breach of the duty to follow the settlor's communicated intentions by failing to distribute subject-matter to a beneficiary under a fixed trust.<sup>30</sup> The possibility will be raised that such orders would not be made where a settlor communicates in the declaration of trust that, following a wrongful failure to distribute subject-matter to a beneficiary, the subject-matter should not be distributed to that beneficiary.

Chapter Five will also argue that *Lesser Receipt Orders* are available following breach of both the duty to follow the settlor's communicated intentions and the duty of care, in favour of beneficiaries under fixed trusts and bare trusts, where a trustee has wrongfully caused a beneficiary to receive less money from a trust estate.<sup>31</sup> Whilst arguable, it is somewhat unclear whether such orders are available where a beneficiary has been caused to receive less valuable non-monetary subject-matter

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<sup>30</sup> See 5.2.1. The concepts of fixed trust and beneficiary are defined in 2.2.2.

<sup>31</sup> The concept of bare trust is defined in 2.2.2.

from a trust estate. The authorities are silent on whether such orders can be made in favour of the objects under a discretionary trust or power of appointment.<sup>32</sup>

Chapter Seven will argue that *Personal Loss Orders* are available following breach of the duty to follow the settlor's communicated intentions in favour of beneficiaries under fixed trusts and bare trusts. Whilst arguable, it is unclear whether such orders are available following breach of the duty of care. The authorities are silent on whether such orders can be made in favour of people other than beneficiaries.

Chapter Eight will outline the legal rules for constructing and comparing the non-breach and breach counterfactual for quantifying the counterfactual loss orders considered in this thesis.<sup>33</sup>

The non-breach counterfactual is constructed in three stages.<sup>34</sup> First, one must determine the content of the duty breached. Second, one must ask what would have happened but for any breach of this duty, assuming that the trustee complied with any other duties that would have arisen but for the breach. Third, one may change certain facts included within the counterfactual under stage two.

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<sup>32</sup> The concepts of object, discretionary trust, and power of appointment, are defined in 2.2.3.

<sup>33</sup> Those orders are the *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order*.

<sup>34</sup> See 8.2.1.

The breach counterfactual is constructed in two stages.<sup>35</sup> First, one must determine what happened subsequent to the breach of duty. Second, one may change certain facts included within the counterfactual under stage one.

The counterfactuals are then compared to determine whether the trust estate is more valuable in the non-breach counterfactual, whether a person has received more valuable subject-matter in the non-breach counterfactual, or whether a person is better-off all things considered in the non-breach counterfactual. If an affirmative answer is given to any of these questions, a loss has been wrongfully caused. A *Surcharging Order*, *Lesser Receipt Order*, or *Personal Loss Order* would obligate a trustee to compensate for these respective losses.

### 1.4.2.2 The Normative Question

In response to the second question, this thesis will identify a number of reasons for and against the making of each of the five orders. Where reasons against making a particular order are identified, possibilities for furthering the values underpinning the reasons for making the order whilst avoiding harm to the value underpinning the reason against will be explored.

Chapter Four will identify two reasons for making a *Surcharging Order*. These reasons are underpinned by the values of reducing the incentive

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<sup>35</sup> See 8.2.2.

upon trustees to breach their legal duties with bad motives, and protecting the financial value of trust estates.<sup>36</sup>

Chapter Five will identify one reason in favour of making a *Subject-Matter Distribution Order*. This reason is underpinned by the value of facilitating beneficiaries to plan their life in reliance upon the receipt of subject-matter from a trust estate.<sup>37</sup>

Chapter Five will also identify two reasons in favour of making a *Lesser Receipt Order*. These reasons are underpinned by the values of facilitating beneficiaries to plan their life in reliance upon the receipt of subject-matter from a trust estate, and increasing access to justice through facilitating settlement and reducing the need for litigation.<sup>38</sup>

Chapter Six will identify three reasons in favour of making a *Falsification Order*. These reasons are underpinned by the values of deterring trustees from breaching their legal duties by transferring subject-matter from the trust estate, reducing the incentive upon trustees to fabricate evidence, and enhancing the autonomy of prospective settlors.<sup>39</sup>

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<sup>36</sup> See 4.3.1.

<sup>37</sup> See 5.3.2.

<sup>38</sup> See 5.3.2.

<sup>39</sup> See 6.3.2.

Chapter Seven will identify three reasons in favour of making a *Personal Loss Order*. These reasons are underpinned by the values of facilitating the ability of people to plan their life in reliance upon trustees' conforming to their legal obligations, enhancing the autonomy of prospective settlors, and reducing the incentive upon trustees to breach their legal obligations with bad motives.<sup>40</sup>

Chapter Four will identify three reasons against making either a *Surcharging Order*, *Lesser Receipt Order*, or *Personal Loss Order*. These reasons are underpinned by the values of trustee wellbeing and autonomy, confidence in the system of private property within a particular state, and not treating people as mere means to ends.<sup>41</sup> It will be suggested that these reasons are negated, or at least that it is permissible for a court to act inconsistently with these reasons, where the trustee subject to an order has had a reasonable opportunity to avoid being subjected to that order.<sup>42</sup>

Chapter Seven will identify a reason against making a *Personal Loss Order*. That reason is underpinned by the value of not subjecting trustees to extensive and unforeseeable liability. A rule will be proposed whereby *Personal Loss Orders* are available for breach of the duty to follow the settlor's communicated intentions, where the settlor had communicated that the purpose of a particular duty was to

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<sup>40</sup> See 7.3.2.

<sup>41</sup> See 4.3.2.1 and 4.3.2.2.

<sup>42</sup> See 4.3.2.3.

protect a person from a type of loss, and the breach had caused a loss of that type. Any order should be limited to losses that were reasonably foreseeable at the time of the declaration of trust. This rule is intended to further the values identified above, whilst avoiding harm to the value identified in this paragraph.

## 1.5 Conclusion

This chapter has introduced this thesis. First, the scope of the thesis was defined: the five orders under consideration, and the two questions for discussion. The five orders are the *Surcharging Order*, *Subject-Matter Distribution Order*, *Lesser Receipt Order*, *Falsification Order*, and *Personal Loss Order*.

The thesis answers two questions, one descriptive and one normative. The descriptive question asks whether the five orders are available as a matter of law in England and Wales. The normative question asks whether there are normative reasons for or against the making of such orders. The questions are considered in relation to express trustees of trusts for persons following breach of the duty to follow the settlor's communicated intentions and the duty of care.

A number of questions were excluded from the scope of the thesis, including questions of standing and interest. The need for a thesis of this scope was demonstrated, and the methodology adopted in answering the descriptive and normative questions provided.

Second, the structure of the thesis was detailed, and an outline was painted of the key arguments. In brief, it will be argued that *Surcharging Orders*, *Subject-Matter Distribution Orders*, *Lesser Receipt Orders*, and *Personal Loss Orders* are all sometimes available against express trustees of trusts for persons, whilst *Falsification Orders* are not available; and that there are reasons both for and against the making of each order. Possible ways of furthering the values underpinning the reasons for making the orders, whilst avoiding harm to the values underpinning the reasons against, will be canvassed.

# II

## Concepts

### 2.1 Introduction

The scope of this thesis is to consider whether five court orders are or should be available against express trustees of trusts for persons for either breach of the duty to follow the settlor's communicated intentions or breach of the duty of care. This chapter defines a number of concepts so as to define this scope with greater precision.

Section 2.2 outlines the five court orders: the *Surcharging Order*, the *Subject-Matter Distribution Order*, the *Lesser Receipt Order*, the *Falsification Order*, and the *Personal Loss Order*. Hypotheticals will be employed to highlight the distinctive nature of each order. Attention will be drawn to the various situations in which such orders may be available.

Section 2.3 outlines the concepts of express trustee, trusts for persons, duty to follow the settlor's communicated intentions, and duty of care. It will also consider the situation in which multiple orders are available against a trustee following a breach of duty, partly excluding this question from the scope of the thesis.

## 2.2 The Five Court Orders

This section outlines the five court orders in detail. An order is the exercise of a legal power to make a legally binding decision on the application of a legal rule to a case.<sup>1</sup>

A court order is an order made by a court rather than some other legal official.

Some would refer to the five court orders as examples of ‘judicial remedies’.<sup>2</sup>

### 2.2.1 The *Surcharging Order*

Consider:

*Surcharging Order*: a court order obligating a trustee to pay money into a trust estate, where the quantum of liability is the extent to which the trustee has wrongfully caused that trust estate to diminish in value.

It is helpful to emphasise two features of the *Surcharging Order*. First, it obligates a trustee to pay money into a trust estate. Second, the quantum of liability is the extent to which the trustee has wrongfully caused the trust estate to diminish in value.

As to the first feature, often private law defendants are ordered to pay money to a person: orders to pay damages for torts or breaches of contracts are examples of such orders. *Lesser Receipt Orders* or *Personal Loss Orders* are examples of such orders against trustees. However a *Surcharging Order* is different: it obligates a trustee to pay

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<sup>1</sup> This definition is borrowed with slight adaptation from John Gardner, ‘Some Types of Law’ ch 3 in *Law as a Leap of Faith* (OUP 2012) 74.

<sup>2</sup> See for example: Andrew Burrows, ‘General’ Ch 1 in *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (OUP 2019) 3.

money into a trust estate.<sup>3</sup> This will generally require a trustee to pay money into a bank account held on trust.

As to the second feature, the quantum of liability is the extent to which the trustee has wrongfully caused the trust estate to diminish in value. A trust estate is a collection of subject-matter held on trust by a trustee or trustees on the same terms. This definition needs further unpacking.

Subject-matter refers to anything that can be held on trust by a trustee. Examples include fees simple or leases of land, title to goods, shares, and bank accounts. A trust estate is a collection of subject-matter held on the same terms by a trustee or trustees. To identify a trust estate one must identify the subject-matter initially held on trust by a trustee, and consider whether any subject-matter has been added to or removed from the trust estate. Subject-matter may be added by a trustee declaring a trust over subject-matter on the same terms as the original declaration of trust, or by another person transferring subject-matter to a trustee whilst making a similar declaration.

The quantum of liability under a *Surcharging Order* is the extent to which the trustee has wrongfully caused the trust estate to diminish in value. The value of a

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<sup>3</sup> An example of a trustee's being ordered to pay money into a trust estate is provided by *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch) [270] (Newey J). For discussion of this phenomenon, see Robert Chambers, 'Liability' ch 1 in P Birks and A Pretto (eds), *Breach of Trust* (Hart 2002) 4.

trust estate is the financial value of the various subject-matter within it. For a trustee to wrongfully cause the trust estate to diminish in value, it is necessary that the trustee breaches some legal duty or obligation, and that this breach causes the trust estate to diminish in value.<sup>4</sup> The *Surcharging Order* employs a counterfactual notion of causation: one must ask whether but for the breach of duty the trust estate would have had more value.<sup>5</sup> If so, then the trustee has wrongfully caused the trust estate to diminish in value.

There are two stages in determining whether a breach of duty has caused a loss under under a counterfactual notion of causation. First, one must construct two counterfactuals: a non-breach counterfactual in which no breach of the relevant duty occurs, and a breach counterfactual in which the breach of duty does occur.<sup>6</sup> Second, one must compare these counterfactuals to determine whether some loss has occurred.<sup>7</sup> Under a *Surcharging Order* the relevant loss is a loss to the trust estate: if the trust estate is worth more in the non-breach counterfactual, the breach has caused the trust estate to suffer a loss, or diminish in value.

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<sup>4</sup> Throughout this thesis the words ‘duty’ and ‘obligation’ are used interchangeably.

<sup>5</sup> For discussion of different notions of causation, see Victor Tadros, ‘What Might Have Been’ ch 8 in J Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (OUP 2014).

<sup>6</sup> This terminology is similar to that of ‘breach position’ and ‘non-breach position’ adopted in: Andrew Dyson and Adam Kramer, ‘There is no “Breach Date Rule”: Mitigation, Difference in Value and Date of Assessment’ (2014) 130 *Law Quarterly Review* 259.

<sup>7</sup> Victor Tadros refers to the exact loss to be measured as the ‘currency of harm’: Tadros (n 5) 173-77.

This thesis uses the term ‘counterfactual loss order’ to refer to those orders that employ a counterfactual notion of causation to determine whether some loss has been caused by a breach of duty. *Surcharging Orders*, *Lesser Receipt Orders*, and *Personal Loss Orders* are all examples of counterfactual loss orders, though each order focuses on a different type of loss.

A *Surcharging Order* focuses on whether a trust estate has diminished in value, a *Lesser Receipt Order* focuses on whether a person has received less valuable subject-matter from a trust estate, whilst a *Personal Loss Order* focuses on whether a person has suffered a loss all things considered. The legal rules for constructing and comparing counterfactuals to determine whether a loss has been wrongfully caused for the purpose of quantifying these orders are outlined in Chapter Eight.

A *Surcharging Order* can be contrasted with a *Falsification Order* through the following hypothetical:

*Duty to Invest*: a trustee holds £1m on trust, with a duty to invest the money in Lemon Shares on 1st January and then hold the shares for five years. The trustee wrongfully transfers away the £1m on 1st January. Three years later the trust estate is empty, and the Lemon Shares are worth £1.4m.

A *Falsification Order* renders a trustee liable for the value of any subject-matter wrongfully transferred in breach.<sup>8</sup> In *Duty to Invest* such an order would hold the

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<sup>8</sup> The *Falsification Order* is analysed in detail in 2.2.4.

trustee liable for £1m. However, a *Surcharging Order* would require the trustee to pay £1.4m into the trust estate. This is because the trust estate would contain shares worth £1.4m in the non-breach counterfactual, and is empty in the breach counterfactual. Thus the trustee's breach has caused the trust estate to diminish in value by £1.4m, and the trustee will be liable for this amount.

## 2.2.2 The *Subject-Matter Distribution Order*

Consider:

*Subject-Matter Distribution Order*: a court order obligating a trustee to transfer subject-matter from the trust estate to a person, where the trustee has wrongfully failed to distribute that subject-matter to that person.

It is helpful to emphasise three features of the *Subject-Matter Distribution Order*. First, it obligates a trustee to transfer subject-matter from the trust estate. Second, it obligates a trustee to transfer subject-matter to a person. Third, it obligates a trustee to transfer subject-matter that the trustee has wrongfully failed to distribute to that person.

As to the first feature, the *Subject-Matter Distribution Order* requires a trustee to transfer subject-matter from the trust estate. This may be contrasted with the other four orders considered in this thesis, which all obligate the trustee to pay money from the trustee's personal estate. The concepts of trust estate and subject-matter are considered above in relation to the *Surcharging Order*.<sup>9</sup>

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<sup>9</sup> See 2.2.1.

As to the second feature, the *Subject-Matter Distribution Order* requires a trustee to transfer subject-matter to a person. This may be contrasted with a *Surcharging Order* which requires a trustee to pay money into the trust estate.

As to the third feature, the subject-matter to be transferred depends on what the trustee has wrongfully failed to distribute to the person in question. In contrast to *Surcharging Orders*, *Lesser Receipt Orders*, and *Personal Loss Orders*, this does not involve comparing two counterfactuals to determine whether a loss has been wrongfully caused. Rather one considers whether a trustee owed a duty to transfer subject-matter to a person from the trust estate, whether the trustee failed to comply with that duty, and whether the subject-matter remains in the trust estate: if the trustee has breached such a duty by wrongfully transferring away subject-matter, a *Subject-Matter Distribution* will generally not be available, as the relevant subject-matter will not be in the trust estate.

It is probable that a settlor will only owe a duty to distribute subject-matter to a person by virtue of the duty to follow the settlor's communicated intentions in a fixed trust or bare trust. This is because it seems improbable that the duty of care would obligate a trustee to distribute subject-matter to a particular person, and because a trustee would not owe such an obligation under a discretionary trust or power of appointment.<sup>10</sup>

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<sup>10</sup> The concepts of discretionary trust and power of appointment are considered in 2.2.3.

In the context of express trusts, a fixed trust exists where a settlor communicates an intention in the declaration of trust that either income or capital should be transferred to some person at a particular time, and the time for transfer has arisen.<sup>11</sup> Examples include requiring the trustee to transfer any income arising from shares to a person on its arising, requiring the trustee to transfer £200 out of capital to a person on 1st January each year, or requiring the trustee to transfer all capital to a person upon the death of all persons with any interest in income.

A bare trust exists where a settlor communicates an intention in the declaration of trust that the trustee should hold the capital of and any income arising from the trust estate on trust for a person, and should distribute this subject-matter if that person requests a distribution. A settlor may declare a bare trust to take immediate effect from the declaration of trust. Alternatively a settlor may declare a bare trust to arise only if certain conditions are satisfied - for example the death of all other beneficiaries or objects of the trust. People to whom a trustee is obligated to distribute subject-matter under a fixed trust, or for whom a trustee is obligated to hold subject-matter under a bare trust, will be referred to as beneficiaries.

A *Subject-Matter Distribution Order* can be contrasted with a *Personal Loss Order* through the following hypothetical:

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<sup>11</sup> The concept of express trust is considered in 2.3.1.

*Bank Insolvency*: a trustee holds £1m on trust with a duty to distribute the money to Adam on 1st January. In breach the trustee holds onto the money, and on 2nd January Adam's bank goes insolvent. Had the trustee complied with her duty, Adam would have lost the money in the insolvency.

A *Personal Loss Order* requires a trustee to pay money to a person where the trustee has wrongfully caused loss to that person all things considered.<sup>12</sup> In *Bank Insolvency* such an order would not require any action from the trustee. This is because Adam is no worse-off in the non-breach counterfactual than in the breach counterfactual: had the trustee complied with her duty, Adam would have lost the £1m in his bank's insolvency.

In contrast, a *Subject-Matter Distribution Order* would require the trustee to transfer the £1m to Adam. Such an order does not look to the consequences of breach, but merely asks whether the trustee has breached a duty to transfer subject-matter from the trust estate to a person, and whether that subject-matter remains in the trust estate.

### 2.2.3 The *Lesser Receipt Order*

Consider:

*Lesser Receipt Order*: a court order obligating a trustee to pay money to a person, where the quantum of liability is the extent to which the trustee has wrongfully caused that person to receive less valuable subject-matter from the trust estate.

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<sup>12</sup> For detailed discussion of this order, see 2.2.5.

It is helpful to emphasise a number of features of the *Lesser Receipt Order*. First, it obligates a trustee to pay money to a person. Second, the quantum of the order is the extent to which the trustee has wrongfully caused that person to receive less valuable subject-matter from the trust estate.

As to the first feature, the *Lesser Receipt Order* is similar to the *Surcharging Order* in that it requires a trustee to transfer money from the trustee's personal estate to a person, rather than the *Subject-Matter Distribution Order* which requires a transfer of subject-matter from the trust estate.

Given that the *Lesser Receipt Order* focuses on the extent to which a trustee has wrongfully caused a person to receive less subject-matter from the trust estate, the people in whose favour such an order can be made are limited to the people a trustee may permissibly distribute subject-matter to from the trust estate. Such people include beneficiaries under fixed trusts and bare trusts, and objects of a discretionary trust or power of appointment.

In the context of express trusts, a discretionary trust arises where the settlor communicates an intention that a trustee owes an obligation to distribute subject-matter, but has discretion over who to distribute the subject-matter to. The class of people to whom the trustee may select between are the objects of the discretionary trust. A power of appointment arises where the settlor communicates an intention

that a trustee may permissibly distribute subject-matter to a person, but where the trustee is not obligated to distribute such subject-matter. The person to whom a trustee may permissibly distribute is the object of the power of appointment.

As to the second feature, the quantum of a *Lesser Receipt Order* is the extent to which the trustee has wrongfully caused a person to receive less valuable subject-matter from the trust estate. Like the *Surcharging Order*, the *Lesser Receipt Order* is a counterfactual loss order, which employs counterfactuals in determining whether a trustee has wrongfully caused some loss, and thus the quantum of the trustee's liability. The type of loss is the extent to which a beneficiary has received less valuable subject-matter from the trust estate. The concepts of trust estate and subject-matter are explored above in the discussion of *Surcharging Orders*.<sup>13</sup>

A *Lesser Receipt Order* can be contrasted with a *Personal Loss Order* through the following hypothetical:

*Duty to Invest 2*: a trustee holds £1m on trust, and owes a duty to invest the money in Orange Shares before distributing the income from the shares to Beatrice over the following five years. The trustee wrongfully retains the money, and over the next five years distributes £20k of interest earned with the money to Beatrice. £60k of dividends would have been declared on the shares throughout the five year period. Beatrice is a serious gambler, and has wasted the £20k she received from the trustee. Had she received the £60k dividends instead, she would have wasted this too, at a much greater detriment to her mental health.

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<sup>13</sup> See 2.2.1.

A *Personal Loss Order* requires a trustee to pay money to a person where the quantum of liability is the extent to which the trustee has wrongfully caused that person to suffer a loss all things considered. In *Duty to Invest 2* it is plausible that a *Personal Loss Order* would require no action from the trustee.<sup>14</sup> This is because on a plausible construction of the non-breach counterfactual Beatrice would have wasted £60k and her mental health would have suffered, whereas in the breach counterfactual Beatrice has wasted £20k and her mental health is less bad. Thus the trustee's wrong has not caused Beatrice a loss all things considered.

In contrast, a *Lesser Receipt Order* would require the trustee to pay £40k to Beatrice. This is because such an order focuses on Beatrice's receipt of subject-matter from the trust estate, and whether the subject-matter received in the non-breach counterfactual is more financially valuable than the subject-matter received in the breach counterfactual. In particular a *Lesser Receipt Order* ignores the impact of the breach upon Beatrice's life in general. In *Duty to Invest 2*, Beatrice would have received £60k in dividends in the non-breach counterfactual, and only £20k in the breach counterfactual. The trustee's liability is thus £40k.

The *Lesser Receipt Order* has been defined with a deliberate ambiguity, namely the appropriate date for assessing non-monetary subject-matter. The reason for this

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<sup>14</sup> Whether this is so depends on the appropriate construction of the non-breach counterfactual. For detailed discussion on the relevant rules for constructing the non-breach counterfactual, see Chapter 8.

is to provide full exploration of whether the legal authorities provide support for or against a particular date, and whether there are reasons in favour or against a particular date. The ambiguity is illustrated through the following hypothetical:

*Fluctuating Subject-Matter*: a trustee owes an obligation to transfer Peach shares to Clive. The trustee wrongfully transfers away the shares. At the time of breach the shares are worth £1m. Proceedings are brought against the trustee and at the time of judgment the shares are worth £1.2m.

In quantifying a *Lesser Receipt Order*, it is necessary to determine what subject-matter Clive received from the trust estate in the non-breach counterfactual and in the breach counterfactual, and measure the difference in value between such subject-matter. The time for valuing this subject-matter makes a difference in *Fluctuating Subject-Matter*: if one valued the subject-matter at the date of breach, liability would be £1m, whereas if one used the date of judgment liability would be £1.2m.

Given the fact that the *Lesser Receipt Order* focuses on distributions from the trust estate, in certain contexts the quantum of a *Lesser Receipt Order* may be the same as the quantum of a *Surcharging Order* had the latter order been quantified at the time just prior to distribution. Consider the following hypothetical:

*Duty to Invest 3*: a trustee holds £1m on trust with a duty to invest in Nectarine shares, and to distribute the capital of the trust estate to Denise five years later. The trustee wrongfully holds the money, and distributes it to Denise five years later. At the time of distribution the shares would have been worth £1.4m.

A *Surcharging Order* immediately prior to the time for distribution would be quantified at £400k, as this is the difference in value between the shares in the non-breach counterfactual and the £1m in the breach counterfactual. Subsequent to the time for distribution a *Lesser Receipt Order* would be quantified at £400k, as this is the difference in value between the shares Denise receives in the non-breach counterfactual and the £1m she receives in the breach counterfactual.

This point perhaps explains why some judges when making a *Lesser Receipt Order* justify their order with a focus on loss caused to the trust estate, rather than the extent to which a trustee has wrongfully caused a person to receive less valuable subject-matter from the trust estate.<sup>15</sup> Thus when a judge says the quantum of an order is the extent to which a trustee has wrongfully caused a trust estate to diminish in value, we should be alert to whether they mean a *Surcharging Order* or *Lesser Receipt Order*.

However the quantum of a *Surcharging Order* quantified just prior to the time for distribution and the quantum of any *Lesser Receipt Order* quantified after distribution will not always be the same. One example is where there are multiple beneficiaries. If in *Duty to Invest 3* the trustee is to distribute half the capital to Denise and half the capital to Edward after five years, then a *Lesser Receipt Order* in favour of Denise

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<sup>15</sup> For example, see Brightman LJ's decision in *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, and Ribeiro PJ's decision in *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368, [2013] HKCFA 93. These decisions are analysed at 5.2.2.2 and 6.2.1.7 respectively.

would require the trustee to pay £200k, a *Lesser Receipt Order* in favour of Edward would require the trustee to pay £200k, and a *Surcharging Order* quantified just prior to the time for distribution would be £400k.<sup>16</sup>

### 2.2.4 The *Falsification Order*

Consider:

*Falsification Order*: a court order obligating a trustee to pay money, where the quantum of liability is the value of any subject-matter wrongfully transferred by the trustee.

The quantum of liability under a *Falsification Order* is the value of any subject-matter wrongfully transferred by the trustee. A *Falsification Order* is not a counterfactual loss order, and as such does not focus on the consequences of the trustee's breach. Thus in contrast to the *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order*, it is unnecessary to construct counterfactuals when quantifying liability. The order is only available in respect of wrongful transfers. Examples of transfers include the assignment of subject-matter, such as a fee simple or lease of land, shares, or title to goods; and the transfer of money from one bank account to another.

A *Falsification Order* can be contrasted with a *Surcharging Order* through the following hypothetical:

*Duty to Invest 4*: a trustee holds £1m with a duty to invest in Pomegranate shares, and hold the shares for ten years. The trustee wrongfully transfers away the money, and now three years later the shares are worth £400k.

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<sup>16</sup> This point appears to be overlooked by Lord Browne-Wilkinson in *Target Holdings Ltd v Redfern* [1996] AC 421 (HL). For discussion see 5.2.2.1.2.

A *Surcharging Order* would require the trustee to pay £400k into the trust estate, as this is the difference in value between the trust estate in the non-breach counterfactual and the breach counterfactual. In contrast, a *Falsification Order* would hold the trustee liable for £1m, as this is the value of the subject-matter transferred in breach of duty.

The *Falsification Order* has been deliberately defined with two ambiguities. This is for a similar reason as the deliberate ambiguity in the *Lesser Receipt Order* considered above: to provide full opportunity to explore whether the legal authorities or normative reasons support a particular resolution of these the ambiguities. Whilst there is much academic commentary on *Falsification Orders*, little of that commentary notices these two ambiguities.<sup>17</sup>

The first ambiguity concerns the date of assessment of non-monetary subject-matter. This is similar to the ambiguity considered above in relation to *Lesser Receipt Orders*. If a trustee wrongfully transfers non-monetary subject-matter, the question arises as to when this subject-matter should be valued. One possibility is the date of breach, and another plausible possibility is the date of judgment. This question matters in situations where the value of such non-monetary subject-matter fluctuates subsequent to the date of breach.

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<sup>17</sup> Exceptions include: Jamie Glister, 'Breach of Trust and Conversion in a Falling Market' [2014] *Lloyd's Maritime and Commercial Law Quarterly* 512, 521; Matthew Conaglen, 'Equitable Compensation for Breach of Trust: Off *Target*' (2016) 40 *Melbourne University Law Review* 126, 164.

The second ambiguity concerns the appropriate destination for the money that the trustee is ordered to pay. One possibility is that the trustee should be ordered to pay money into the trust estate. Another possibility is that the trustee should be ordered to pay money to some person, plausibly a beneficiary or object of the trust. Intuitively if a *Falsification Order* is made against a trustee, and the time for distributing the subject-matter of the trust has not arisen, the trustee should be ordered to pay money into the trust estate. Furthermore, if a *Falsification Order* is made against a trustee who has always held the trust estate on bare trust, and the beneficiary has requested the trustee transfers the trust estate to the beneficiary, intuitively it seems appropriate to order the trustee to pay money to the beneficiary. However matters become more complicated when a trust has multiple beneficiaries, or the time for distributing some though not all of the trust estate has arisen.

### 2.2.5 The *Personal Loss Order*

Consider:

*Personal Loss Order*: a court order obligating a trustee to pay money to a person, where the quantum of liability is the extent to which the trustee has wrongfully caused a loss to that person all things considered.

It is helpful to emphasise a number of features of the *Personal Loss Order*. First, it obligates the trustee to pay money to a person. Second, the quantum of liability is the extent to which a trustee has wrongfully caused a loss to that person all things considered.

As to the first feature, the trustee must pay money to a person. In this sense a *Personal Loss Order* is similar to a *Lesser Receipt Order* which also obligates a trustee to pay money to a person, but different to a *Surcharging Order* which obligates a trustee to pay money into a trust estate.

As to the second feature, the phrase ‘all things considered’ is intended to emphasise that all facts are relevant in determining whether a person has been wrongfully caused loss. Like the *Surcharging Order* and *Lesser Receipt Order*, the *Personal Loss Order* is a counterfactual loss order: to determine whether loss has been wrongfully caused one must construct and compare two counterfactuals.<sup>18</sup>

There are two important differences between a *Personal Loss Order* and a *Lesser Receipt Order*. Whilst the type of loss relevant to the latter order is any diminution in value of subject-matter received from a trust estate, the type of loss relevant to the former order is any loss to a person all things considered. Recall the hypothetical discussed above, which demonstrates this difference:<sup>19</sup>

*Duty to Invest 2*: a trustee holds £1m on trust, and owes a duty to invest the money in Orange Shares before distributing the income from the shares to Beatrice over the following five years. The trustee wrongfully retains the money, and over the next five years distributes £20k of interest earned with the money to Beatrice. £60k of dividends would have been declared on the shares throughout the five year period.

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<sup>18</sup> For discussion of the relevant legal rules for constructing and comparing counterfactuals, see Chapter Eight.

<sup>19</sup> See 2.2.3.

Beatrice is a serious gambler, and has wasted the £20k she received from the trustee. Had she received the £60k dividends instead, she would have wasted this too, at a much greater detriment to her mental health.

As noted above, a *Lesser Receipt Order* would obligate the trustee to pay £40k to Beatrice, whilst a *Personal Loss Order* would require no action from the trustee. This is because a *Personal Loss Order* does not merely focus on a person's receipt, but rather all factors relevant in determining whether that person has suffered a loss, including what that person did or would have done with any subject-matter post-receipt.

Consider a further hypothetical illustrating this difference:

*Profit:* Derek is obligated to pay any income from a trust estate to Philippa on the 1st January of every year. In 2019, Derek pays ten days late. This breach causes Philippa to miss an investment opportunity which would have led to a £15k profit.

A *Personal Loss Order* would obligate Derek to pay Philippa £15k, as this is the extent to which Philippa is worse-off all things considered. In contrast, a *Lesser Receipt Order* would require no action from the trustee, as the trustee's wrongful failure to pay on time has not caused Philippa to receive less valuable subject-matter from the trust estate.

The second difference is that unlike the *Lesser Receipt Order* the *Personal Loss Order* has no conceptual limit on the type of person a trustee might be obligated to pay. As noted above, conceptually a *Lesser Receipt Order* can only be made in favour of

beneficiaries and objects under a particular trust, as the quantum of the order is the extent to which the trustee has wrongfully caused a person to receive less valuable subject-matter from the trust estate.<sup>20</sup> As the quantum of a *Personal Loss Order* is the extent to which a trustee has wrongfully caused a person to suffer a loss all things considered, this conceptual limit does not apply.

It is therefore possible that a *Personal Loss Order* would obligate a trustee to pay money to a person, where it would never be permissible for the trustee to distribute subject-matter from the trust to that person. This is demonstrated by the following hypothetical:

*Company Rescue:* a trustee holds £1m and is obligated to invest the money in Berry shares and hold the shares for ten years. The trustee wrongfully fails to invest the money, which causes Berry Ltd to go insolvent. Thomas is also a shareholder in Berry, and the breach causes Thomas a loss of £50k due to a diminution in the value of his shareholding.

Here a *Lesser Receipt Order* would require no action from the trustee. However a *Personal Loss Order* would obligate the trustee to transfer £50k to Thomas, for the loss that the trustee wrongfully causes.

## 2.3 The Scope of the Thesis

This section provides greater precision on the scope of the thesis. The thesis considers whether five court orders are or should be available against express

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<sup>20</sup> See 2.2.3.

trustees of trusts for persons for either breach of the duty to follow the settlor's communicated intentions or the duty of care. Thus other types of trustees, other types of trusts, and other breaches of duty are outside the scope of this thesis. These boundaries will be discussed in 2.3.1, 2.3.2, and 2.3.3.

Where multiple orders are available against a trustee in respect of the same breach of duty, a number of questions arise. First, can all the available orders be made against a trustee, or must some election take place?<sup>21</sup> Second, if multiple orders are available how does the availability of one order affect the quantum of any others? This thesis does not fully explore these questions. However certain points stem merely from the definitions of the five orders adopted above. These points will be discussed in 2.3.4.

### **2.3.1 Which Trustees?**

This thesis only considers express trustees. An express trustee is a trustee who owes obligations because a settlor has exercised a legal power to declare a trust over certain subject-matter.

Express trusts may arise in various situations. A settlor may make a self-declaration of trust and become sole trustee.<sup>22</sup> A settlor may transfer subject-matter

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<sup>21</sup> Note the rule permitting claimants with a cause of action in contract and tort to choose freely between the contractual and tortious action: *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 (HL).

<sup>22</sup> *Paul v Constance* [1977] 1 WLR 527 (CA).

to another person whilst declaring a trust so that the other person becomes a trustee.<sup>23</sup> A settlor may declare a trust in a will, in which case the settlor's personal representatives or sometimes some other person will become trustees.<sup>24</sup> The settlor in this final category is sometimes referred to as a testator.

A constructive trustee is a trustee who is not an express trustee. The categories of express trustees and constructive trustees are thus mutually exclusive and exhaustive of the category of trustees. This thesis does not consider constructive trustees. Examples of constructive trustees include trustees under a family home constructive trust,<sup>25</sup> trustees under a vendor-purchaser constructive trust,<sup>26</sup> and trustees under the *Re Rose* constructive trust.<sup>27</sup>

Furthermore, this thesis excludes a number of cases from the concept of express trusteeship, notwithstanding some may argue that such cases fall within the concept. First, where a settlor declares a trust and transfers subject-matter to a trustee, and the trustee disclaims the position of trusteeship, the subject-matter is

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<sup>23</sup> *Target* (n 16).

<sup>24</sup> *Re Salmon* (1889) 42 Ch D 351 (CA).

<sup>25</sup> *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432; *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.

<sup>26</sup> *Lysaght v Edwards* (1876) 2 Ch D 499.

<sup>27</sup> *Re Rose (Deceased)* [1952] Ch 499 (CA).

treated as having never been transferred from the settlor, and the settlor becomes trustee.<sup>28</sup> For the purpose of this thesis such cases do not involve express trustees.

Second, some commentators argue that certain trustees who are standardly treated as constructive trustees are in fact express trustees. Such an argument has been made in relation to trustees under secret trusts,<sup>29</sup> trustees under the trust in *Rochefoucauld v Boustead*,<sup>30</sup> and trustees under presumed resulting trusts.<sup>31</sup> For the purposes of this thesis, such cases do not involve express trustees.

### 2.3.2 Which Duties?

Trustees may owe a variety of duties, including a duty to act in the best interests of the beneficiaries,<sup>32</sup> and a duty against conflicts of interest.<sup>33</sup> This thesis considers only two duties upon the trustee: the duty to follow the settlor's communicated intentions, and the duty of care.

The duty to follow the settlor's communicated intentions is a duty that arises by virtue of a settlor's exercising a legal power to impose such a duty upon the trustee

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<sup>28</sup> *Mallott v Wilson* [1903] 2 Ch 494.

<sup>29</sup> *Blackwell v Blackwell* [1929] AC 318 (HL). William Swadling, 'The Fiction of the Constructive Trust' (2011) 64 *Current Legal Problems* 399, 417-8.

<sup>30</sup> *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA). Swadling, *Ibid* 416-7.

<sup>31</sup> Swadling, *Ibid* 418-9.

<sup>32</sup> *Cowan v Scargill* [1985] Ch 270; *Brudenell-Bruce* (n 3).

<sup>33</sup> *Re Thomson* [1930] 1 Ch 203.

by virtue of communicating certain intentions in the declaration of trust. The settlor may communicate a variety of intentions. Intentions commonly communicated include requiring a trustee to hold subject-matter, sell subject-matter, purchase subject-matter, exchange subject-matter, or distribute subject-matter.

Sometimes it is said that a trustee owes a duty under the terms of the trust,<sup>34</sup> or under the terms of the trust instrument.<sup>35</sup> The duty to follow the settlor's communicated intentions is narrower than these two duties in two respects.

First, the 'terms of the trust' and 'terms of the trust instrument' may be used to refer to both the settlor's communicated intentions, and also to some implied terms. This thesis does not consider such implied terms. Second, the 'terms of the trust' may include not just the settlor's communicated intentions, but also any variations made to the terms of the trust by for example a court.<sup>36</sup> This thesis does not consider the breach of any duties imposed by the court under such a variation.

The duty of care arises both at common law and under statute.<sup>37</sup> Where applicable, there is some authoritative support for the view that the standard of care

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<sup>34</sup> *Re Salmon* (n 24) 368 (Cotton LJ).

<sup>35</sup> *AIB Group (UK) Plc v Mark Redler and Co Solicitors* [2014] UKSC 58, [2015] AC 1503 [28] (Lord Toulson).

<sup>36</sup> Variation of Trusts Act 1958.

<sup>37</sup> *Learoyd v Whiteley* (1887) 12 AC 727 (HL); Trustee Act 2000, s 1(1).

does not differ between the common law and statutory duty.<sup>38</sup> The duty of care where applicable requires a trustee to exercise such care and skill as is reasonable in the circumstances, having regard in particular to any special knowledge or experience that the trustee has or holds himself out as having, and if the trustee is acting in the course of a business or profession, any special knowledge or experience that it is reasonable to expect of a person acting in the course of that business or profession.<sup>39</sup>

### 2.3.3 Which Trusts?

A number of trusts fall under the category of express trusts, including trusts for charitable purposes,<sup>40</sup> and trusts for persons.<sup>41</sup> There are also perhaps categories of recognised trusts that are neither for charitable purposes or persons, including so-called ‘anomalous’ trusts,<sup>42</sup> *Quistclose* trusts,<sup>43</sup> and trusts under *Re Denley*.<sup>44</sup>

The scope of this thesis is limited to trusts for persons. Although some of the conclusions drawn may be applicable to these other types of trusts, this thesis is agnostic on the question whether this is so.

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<sup>38</sup> *Brudenell-Bruce* (n 3) [93] (Newey J).

<sup>39</sup> Trustee Act 2000 s 1(1); *Bartlett* (n 15).

<sup>40</sup> Charities Act 2011.

<sup>41</sup> *Morice v Bishop of Durham* (1804) 9 Ves 399, 32 ER 656.

<sup>42</sup> *Re Endacott* [1960] 1 Ch 232 (CA).

<sup>43</sup> *Barclays Bank v Quistclose Investments Ltd* [1970] AC 567 (HL).

<sup>44</sup> *Re Denley* [1969] 1 Ch 373.

Where a trust is for persons, the trustee may permissibly distribute subject-matter from the trust estate to a number of people, the categories of which have been mentioned above, but will be mentioned again here for ease of reference. Beneficiaries may exist under a bare trust, where a trustee holds both the capital and income of a trust for a sole beneficiary, and where the beneficiary has power to obligate the trustee to transfer the subject-matter of the trust to them. Beneficiaries may exist under a fixed trust, where a trustee is under an obligation to transfer subject-matter to a particular person. Objects may exist under discretionary trusts, where a trustee has an obligation to distribute subject-matter but discretion over whom to give the subject-matter. Objects may also exist under powers of appointment, where a trustee may permissibly distribute subject-matter to a person, but has no obligation to do so.

As stated above, under a *Lesser Receipt Order* a trustee is obligated to transfer money to a person where the quantum of the order is the extent to which the trustee has wrongfully caused that person to receive less valuable subject-matter from the trust estate. As such, a *Lesser Receipt Order* will only require the trustee to transfer money to people falling within one of the categories outlined in the previous paragraph. This thesis will consider whether *Lesser Receipt Orders* are or should be available in favour of any of these people.

Similarly, as stated above, a *Personal Loss Order* obligates a trustee to transfer money to a person where the trustee has wrongfully caused that person to suffer a loss all things considered. Whilst such an order can require a trustee to transfer money to a person within one of the categories two paragraphs above, such an order is not limited to such people. It is possible that such orders can require a trustee to transfer money to a person to whom a trustee may not permissibly distribute subject-matter under the trust: this is demonstrated through the *Company Rescue* hypothetical. This thesis will consider whether *Personal Loss Orders* are or should be available in favour of any of such people.

### **2.3.4 The Availability of Multiple Orders**

As stated above, where multiple orders are available against a trustee in respect of the same breach of duty, a number of questions arise. First, can all of these orders be made against a trustee, or must some form of election be made? Second, how does the availability of one order affect the quantum of other available orders? This thesis does not consider these questions in detail, though some points will be made that follow from the definitions of the five orders adopted above.

As to the first question, nothing follows from the definitions of the orders adopted in this thesis. Consistently with the definitions adopted, it is possible for all five orders to be made against a trustee in respect of a single breach of duty. In such a situation, the trustee would be ordered to pay money into the trust estate, transfer

subject-matter from the trust estate to a beneficiary, pay money to a person equalling the extent to which the trustee has wrongfully caused that person to receive less subject-matter from the trust estate, pay money equalling the value of any subject-matter wrongfully transferred, and transfer money to a person equalling the extent to which the trustee has wrongfully caused that person a loss all things considered.

As to the second question, the definitions of the orders adopted in this thesis do have relevance. In particular, the quantum of the counterfactual loss orders will be affected by the availability of other orders, where those other orders require a similar action from the trustee as the counterfactual loss order.<sup>45</sup> For example, assume a trustee wrongfully transfers £1m, causing the trust estate to diminish in value by £1.4m, and a *Falsification Order* is made obligating the trustee to pay £1m into the trust estate. If a *Surcharging Order* is sought, this will be limited to £400k. This is because compliance with the *Falsification Order* will reduce the loss to the trust estate by £1m.

Similarly, assume a trustee wrongfully causes a person to receive £7m less valuable subject-matter from the trust estate, causes that person £4m of loss all things considered, and a *Lesser Receipt Order* is made obligating the trustee to transfer £7m to that person. If a *Personal Loss Order* is sought, such an order will require no

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<sup>45</sup> The counterfactual loss orders considered in this thesis are the *Surcharging Order*, the *Lesser Receipt Order*, and the *Personal Loss Order*.

action from the trustee. This is because compliance with the *Lesser Receipt Order* will eliminate the loss caused to the person.

## 2.4 Conclusion

This thesis considers whether five court orders are or should be available against trustees of trusts for persons for breach of either the duty to follow the settlor's communicated intentions or the duty of care. This chapter has defined and explored a number of concepts in order to provide greater precision on this scope.

First, section 2.2 considered the five court orders considered in this thesis. Throughout discussion a number of further concepts were defined: trust estate, subject-matter, counterfactual loss order, non-breach counterfactual, breach counterfactual, beneficiary under a bare trust, beneficiary under a fixed trust, object under a discretionary trust, and object under a power of appointment.

Second, section 2.3 considered the concepts of express trustee, trust for person, duty to follow the settlor's communicated intention, and duty of care. Section 2.3. also considered and largely excluded questions arising from the availability of multiple orders against a trustee for a breach of duty, such as whether an election must be made between multiple orders, and whether the quantum of a particular order is affected by the availability of other orders.

# III

## Context and Contribution

### **3.1 Introduction**

This chapter has two aims: first, to contextualise this thesis within the existing literature concerning the court orders available against trustees; and second, to justify this thesis by explaining the contribution to the existing literature that this thesis will make.

This chapter achieves these aims in a number of ways. First, section 3.2.1 and 3.2.2 will provide a brief history of the literature's development. Second, section 3.2.3 will level three criticisms at the literature, and show how this thesis will avoid falling foul of these criticisms.

Third, this thesis concerns the whether five orders are or should be available against express trustees of trusts for persons following breach of either the duty to follow the settlor's communicated intentions, or the duty of care. Section 3.3 will outline the progress made on these questions within the literature, so as to identify the areas this thesis aims to develop.

## 3.2 History of the Literature

### 3.2.1 Contributions to the Literature

The majority of the academic literature concerning the court orders available against trustees developed subsequent to the House of Lords' decision in *Target Holdings Ltd v Redferns* in 1995.<sup>1</sup> This literature swelled following the Supreme Court's decision in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* in 2014.<sup>2</sup> A major feature of the literature is criticism of *Target* and *AIB* for failing to recognise the availability of *Falsification Orders* against trustees.<sup>3</sup>

The seminal works are articles written by Peter Birks in 1996 in the *University of Western Australia Law Review*, and Sir Peter Millett in 1998 in the *Law Quarterly Review*.<sup>4</sup> Steven Elliott has also had a major influence on the area, having

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<sup>1</sup> *Target Holdings Ltd v Redferns* [1996] AC 421 (HL). Some exceptions: Ian Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *Melbourne University Law Review* 349; William Gummow, 'Compensation for Breach of Fiduciary Duty' ch 2 in T Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell 1989).

<sup>2</sup> *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503.

<sup>3</sup> Examples: Peter Birks, 'Equity in the Modern Law: an Exercise in Legal Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 44-8; Charles Mitchell, 'Stewardship of Trust Property and Liability to Account' [2014] *The Conveyancer and Property Lawyer* 215, 224-8; James Penner, 'Falsifying the Trust Account and Compensatory Equitable Compensation' ch 7 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017) 150-7. A supporter of these decisions: Andrew Burrows, 'Limitations on Compensation' ch 4 in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP 2003) 46.

<sup>4</sup> Birks (n 3); Sir Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *Law Quarterly Review* 214. Lord Millett has also voiced his thoughts elsewhere: *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368, [2013] HKCFA 93; Lord Millett, 'The Common Lawyer and the Equity Practitioner' (2014-5) *UK Supreme Court Yearbook* 193; Lord Millett, 'AIB v Redler' (2018) 32(1) *Trusts Law International* 44.

submitted his Oxford DPhil on the subject in 2002.<sup>5</sup> Other major contributors include Charles Mitchell,<sup>6</sup> Edelman J,<sup>7</sup> Andrew Burrows,<sup>8</sup> James Penner,<sup>9</sup> and Paul Davies.<sup>10</sup> Various other influential contributions have also been made.<sup>11</sup>

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<sup>5</sup> Steven Elliott, ‘Compensation Claims Against Trustees’ (DPhil thesis, University of Oxford 2002). Elliott’s work is also contained in a number of other articles: Steven Elliott, ‘Remoteness Criteria in Equity’ (2002) 65 *Modern Law Review* 588; James Edelman and Steven Elliott, ‘Money Remedies Against Trustees’ (2004) 18(3) *Trust Law International* 116; Steven Elliott and Charles Mitchell, ‘Remedies for Dishonest Assistance’ (2004) 67(1) *Modern Law Review* 16.

<sup>6</sup> Elliott and Mitchell, ‘Remedies for Dishonest Assistance’ (n 5); Charles Mitchell, ‘Equitable Rights and Wrongs’ (2006) 59(1) *Current Legal Problems* 267; Charles Mitchell, ‘Equitable Compensation for Breach of Fiduciary Duty’ (2013) 66 *Current Legal Problems* 307; Mitchell, ‘Stewardship of Trust Property and Liability to Account’ (n 3).

<sup>7</sup> Edelman and Elliott, ‘Money Remedies Against Trustees’ (n 5); James Edelman, ‘Money Awards of the Cost of Performance’ (2010) 4 *Journal of Equity* 122; James Edelman, ‘An English Misturning with Equitable Compensation’ ch 5 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017); *Agricultural Land Management v Jackson (no 2)* [2014] WASC 102 [333]-[359] (Edelman J).

<sup>8</sup> Burrows, ‘Limitations on Compensation’ (n 3); Andrew Burrows, ‘We Do This At Common Law But That In Equity’ (2002) 22(1) *Oxford Journal of Legal Studies* 1, 10-12. Andrew Burrows, ‘Remedies for Equitable Wrongs’ ch 26 in *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (OUP 2019) 509-25.

<sup>9</sup> James Penner, ‘Distinguishing Fiduciary, Trust, and Accounting Relationships’ (2014) 8 *Journal of Equity* 202, 223-6; James Penner, ‘Falsifying the Trust Account and Compensatory Equitable Compensation’ ch 7 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017); James Penner, ‘The Beneficiary’s Performance Interest in a Trust’ ch 9 in R Nolan, K Low, and T Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018).

<sup>10</sup> Paul Davies, ‘Remedies for Breach of Trust’ (2015) 78(4) *Modern Law Review* 681; Paul Davies, ‘Compensatory Remedies for Breach of Trust’ ch 10 in Nolan, Low, and Tang (eds), *Trusts and Modern Wealth Management* (CUP 2018) 328; Paul Davies, ‘Equitable Compensation and the SAAMCO Principle’ (2018) 134 *Law Quarterly Review* 165.

<sup>11</sup> A small selection: Lionel Smith, ‘The Duties of Trustees in Comparative Perspective’ (2016) 24 *European Review of Private Law* 1031, 1031-41; Lusina Ho, ‘Causation in the Restoration of a Misapplied Trust Fund: Fundamental Norm or Red Herring?’ ch 8 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017); Matthew Conaglen, ‘Equitable Compensation for Breach of Trust: Off Target’ (2016) 40 *Melbourne University Law Review* 126.

### 3.2.2 Two Prominent Conceptual Frameworks

Two conceptual frameworks have been particularly prominent in the literature. Although this thesis does not employ these frameworks, they will be outlined here to provide context, and so that their non-employment can be justified.

First is the accounting framework, which is a consistent feature of Lord Millett's writing. In his 1998 article he wrote:<sup>12</sup>

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.

Confusingly, the word 'account' has been used to refer to a number of different concepts. These include a particular form of judicial procedure that may be instigated against a trustee,<sup>13</sup> a duty upon trustees to record or disclose information relating to their management of the relevant trust estate,<sup>14</sup> and a particular method for determining the obligations owed by a trustee, and the orders that might be

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<sup>12</sup> Millett, 'Equity's Place in the Law of Commerce' (n 4) 225. The reference is to comments made by Lord Diplock in *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL) 350.

<sup>13</sup> *Agricultural Land Management* (n 7) [334] (Edelman J); Elliott, 'Compensation Claims Against Trustees' 10.

<sup>14</sup> *Wroe v Seed* (1863) 4 Giff 425, 429; 66 ER 773, 774-5 (Sir John Stuart VC).

made against such a trustee.<sup>15</sup> This third concept is the relevant one for present purposes.

Although not always expressly stated, those adopting the account framework posit an obligation upon a trustee to be holding particular subject-matter on trust at any given time. Sir Peter Millett above refers to this as a trustee's obligation to account for his stewardship. This obligation may evolve so as to relate to different subject-matter, and there are different reasons for such evolution.<sup>16</sup>

The concepts of 'falsification' and 'surcharging' relate to the evolution or non-evolution of the trustee's obligation to account. If a trustee permissibly transfers subject-matter, their obligation will cease to relate to this subject-matter. However, if an account is 'falsified', this means that the trustee wrongfully transferred the subject-matter, and the trustee remains under an obligation to hold this subject-matter. This obligation can ground an order holding the trustee liable for this subject-matter, or its value. Within the language of this thesis, an order holding the trustee liable for the value of wrongfully transferred subject-matter is a *Falsification*

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<sup>15</sup> *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [2006] FSR 17 [1513] (Lewison J); Conaglen (n 11) 128-46; Penner, 'Distinguishing Fiduciary, Trust, and Accounting Relationships' (n 9) 211.

<sup>16</sup> For an outline of these different reasons: Steven Elliott, 'Personal Monetary Claims' ch 20 in J McGhee (ed) *Snell's Equity* (33rd S&M 2015) 20.019-20.020.

*Order*. One criticism often levelled at *Target* and *AIB* is that these decisions fail to recognise the concept of falsification.<sup>17</sup>

The concept of ‘surcharging’ is defined differently by different commentators. All treat surcharging as involving the augmenting of the trustee’s duty to account, where such augmenting responds to a breach of duty by the trustee. Different definitions include a trustee’s wrongfully ‘failing to obtain all that he should have done for the benefit of the trust estate’,<sup>18</sup> wrongfully occasioning a loss,<sup>19</sup> wrongfully failing to obtain property for the benefit of the trust,<sup>20</sup> or wrongfully concealing subject-matter received in the capacity of trustee.<sup>21</sup> The obligation to account, once surcharged, can ground orders holding the trustee liable for subject-matter or its value. This bears some resemblance to the *Surcharging Order* considered in this thesis, which obligates a trustee to transfer money to a trust estate, where the quantum of the order is the extent to which the trustee has wrongfully caused the trust estate to diminish in value.

The account framework is not used by this thesis for three reasons. First, the accounting framework is not used consistently by different commentators, and this

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<sup>17</sup> Millett, ‘Equity’s Place in the Law of Commerce’ (n 4) 225-6, Conaglen (n 11) 165-7; Penner, ‘Falsifying the Trust Account and Compensatory Equitable Compensation’ (n 9) 150-7.

<sup>18</sup> Millett (n 4) 225; *Ultraframe* (n 15) [1513].

<sup>19</sup> Millett (n 4) 226.

<sup>20</sup> *Libertarian* (n 4) [170] (Lord Millett).

<sup>21</sup> Conaglen (n 11) 130.

creates a potential source of confusion. Second, it is better to reduce the number of concepts in use where possible, the accounting framework involves a number of concepts - including the obligation to account, falsification, and surcharge - and the accounting framework is unnecessary to investigate the orders that are and should be available against trustees. Third, whilst some commentators include the concepts of *Falsification Order* and *Surcharging Order* within the account framework, the other orders considered in this thesis are not mentioned.

The second framework is developed by Steven Elliott in his doctoral research.<sup>22</sup> Elliott refers to two orders that may be made against trustees: a ‘substitutive compensation’ order, and a ‘reparative compensation order’. Whilst Elliott has at times used different labels to refer to these orders,<sup>23</sup> ‘substitutive compensation’ and ‘reparative compensation’ seem to have stuck.<sup>24</sup>

A substitutive compensation order obligates a trustee to pay money equal to the value of subject-matter wrongfully transferred from the trust estate. This thesis refers

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<sup>22</sup> Elliott, ‘Compensation Claims Against Trustees’ (n 5).

<sup>23</sup> Elliott has referred to a substitutive compensation order as an order for ‘performance’, and a reparative compensation order as an order for ‘reparation’: Elliott and Mitchell, ‘Remedies for Dishonest Assistance’ (n 5) 25-8.

<sup>24</sup> *AIB* (n 2) [53]-[54] (Lord Toulson), [115] (Lord Reed); *Agricultural Land Management* (n 7) [349] (Edelman J); Conaglen, (n 11) 150-1; Simone Degeling and Jason NE Varuhas, ‘Equity’s Personal Monetary Remedies’ ch 1 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017) 8.

to such orders as *Falsifications Orders*. Elliott has criticised the decision in *Target* for overlooking the availability of such orders.<sup>25</sup>

Elliott does not maintain a consistent definition of reparative compensation order. In one place he defines the order as being quantified with reference to the ‘loss or depreciation which [a trustee’s] act has caused to the trust estate’.<sup>26</sup> If a trustee was held liable to pay this quantum into the trust estate, this would be synonymous with a *Surcharging Order*. Elsewhere he has defined it as an order requiring a ‘trustee to make good losses occasioned by his breach of trust’.<sup>27</sup> An order framed in such terms could refer to a *Surcharging Order*, *Lesser Receipt Order*, or *Personal Loss Order*.

Elliott’s conceptual framework will be avoided in this thesis for two reasons. First, Elliott does not adopt consistent definitions of his concepts, and this creates a potential source of confusion. Second, Elliott at times elides the counterfactual loss orders considered in this thesis into one concept of reparative compensation. This elision conceals important distinctions.

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<sup>25</sup> Elliott, ‘Compensation Claims Against Trustees’ (n 5) 169-76.

<sup>26</sup> Elliott and Mitchell, ‘Remedies for Dishonest Assistance’ (n 5) 28-9.

<sup>27</sup> Edelman and Elliott, ‘Money Remedies Against Trustees’ (n 5) 118-9.

### 3.2.3 Criticisms of the Literature

Three criticisms may be levelled at the literature in this area. First, the literature frequently fails to distinguish the five orders under discussion in this thesis. All five orders can be identified in the reasoning of the courts, and are thus deserving of academic analysis.<sup>28</sup> One example of this phenomenon is illustrated above: Elliott's use of reparative compensation to refer to any order requiring a trustee to pay money equal to losses wrongfully caused by the trustee. This elides the counterfactual loss orders considered in this thesis: the *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order*. Andrew Burrows makes a similar elision in his recent edition of *Remedies for Torts, Breach of Contract, and Equitable Wrongs*.<sup>29</sup> This thesis avoids this problem by clearly separating the five orders for consideration.

Second, the literature contains insufficient analysis of where a trustee may be ordered to pay money. As stated in Chapter Two, a trustee might be ordered to pay money into a trust estate or to some person.<sup>30</sup> Much of the literature focuses on the appropriate quantum of available orders, whilst paying little attention to where the trustee should be ordered to pay money. Both Lord Millett's and Steven Elliott's writings can be faulted on this ground.

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<sup>28</sup> See 4.2, 5.2, 6.2, and 7.2.2 which discuss judicial recognition of the *Surcharging Order*, *Subject-Matter Distribution Order*, *Lesser Receipt Order*, and *Personal Loss Order* respectively.

<sup>29</sup> Andrew Burrows, 'Remedies for Equitable Wrongs' ch 26 in *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th OUP 2019) 511-20.

<sup>30</sup> See 2.2.

This thesis avoids this problem by clearly identifying where a trustee may be ordered to pay money. A trustee may be ordered to pay money into a trust estate under a *Surcharging Order*, or to a person under a *Lesser Receipt Order* or *Personal Loss Order*. A trustee may be ordered to transfer subject-matter from the trust estate to a person under a *Subject-Matter Distribution Order*. As stated in 2.2.4, the *Falsification Order* is defined ambiguously as to where a trustee must pay money. This ambiguity is to enable consideration of whether legal authority or normative reason provides support for or against requiring a trustee to pay money to a particular place.

Third, the literature in this area uses a bewildering array of language. In particular, two potential sources for confusion have arisen. First, the same label is often used to refer to more than one type order. Second, multiple labels are used to refer to the same order. This thesis seeks to avoid these confusions by clearly distinguishing between the different orders under discussion, and by attaching a label to each order that has not been used to refer to other orders. Section 3.3 outlines the labels that can be found in the literature, and justifies the labels adopted in this thesis.

The label ‘equitable compensation’ merits special attention due to its prominence. The label is a good example of the first source of potential confusion highlighted in the previous paragraph. ‘Equitable compensation’ has been used by

courts and commentators to refer to a *Surcharging Order*,<sup>31</sup> a *Lesser Receipt Order*,<sup>32</sup> a *Falsification Order*,<sup>33</sup> and a *Personal Loss Order*.<sup>34</sup> It has also been used to refer to orders against defendants other than trustees.<sup>35</sup> To avoid confusion, this thesis avoids the label where possible.<sup>36</sup>

### 3.3 Existing Analysis of the Five Orders

This section has five aims. First, it will detail the analysis made within the literature on whether the five orders under discussion are or should be available against trustees. Second, it will highlight gaps in this analysis, so as to indicate scope for development of the literature in this thesis. Third, it will detail the labels used in the literature to refer to these five orders, and justify the labels adopted in this thesis.

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<sup>31</sup> *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch).

<sup>32</sup> *Various Claimants v Giambrone and Law (A Firm)* [2017] EWCA Civ 1193, [2018] PNLR 2.

<sup>33</sup> Jamie Glister, 'Equitable Compensation' ch 7 in J Glister and P Ridge (eds), *Fault Lines in Equity* (Hart 2012).

<sup>34</sup> *AIB* (n 2). Surprisingly Lord Neuberger has also referred to a gain-based order as one for equitable compensation: *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 [1]. This is a peculiar usage, as the word compensation is naturally linked to loss, rather than gain.

<sup>35</sup> Jessica Hudson, 'Equitable Compensation for Equitable Estoppels' ch 11 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017); Peter Turner, 'Rudiments of the Equitable Remedy of Compensation for Breach of Confidence' ch 12 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017).

<sup>36</sup> Edelman and Elliott have made this point before, pointing out that the label 'equitable compensation' is used to refer to both *Falsification Orders* and counterfactual loss orders against trustees: Edelman and Elliott, 'Money Remedies Against Trustees' (n 5) 122-5. This thesis goes further by suggesting that further discrimination is necessary: the category of counterfactual loss orders should be split into *Surcharging Orders*, *Lesser Receipt Orders*, and *Personal Loss Orders*.

### 3.3.1 *Surcharging Orders*

Whilst some commentators acknowledge that *Surcharging Orders* are available against trustees, there is little analysis of the legal authorities relevant to the availability or content of such orders, and the analysis that exists often focuses on irrelevant authorities. Writing extra-judicially, Sir Peter Millett, as he then was, treated *Surcharging Orders* as available, but cited no authority to ground this claim.<sup>37</sup> Steven Elliott in his doctorate briefly discusses the rules applicable to quantifying *Surcharging Orders*, though focuses much attention on *Bartlett v Barclays Bank Trust Co Ltd*, which is a decision concerning *Lesser Receipt Orders*.<sup>38</sup> Sarah Worthington cites *Bartlett* and *Re Dawson* as authorities for the availability of *Surcharging Orders*, though the latter decision concerns the availability of *Falsification Orders*.<sup>39</sup> Matthew Conaglen provides perhaps the best analysis, though even this is fairly brief, with consideration of just three authorities.<sup>40</sup>

The present writer knows of no analysis of the normative reasons for and against the making of *Surcharging Orders*. This provides a stark contrast to

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<sup>37</sup> Millett, 'Equity's Place in the Law of Commerce' (n 4) 225.

<sup>38</sup> Elliott, 'Compensation Claims Against Trustees' (n 5) 230-8. *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515.

<sup>39</sup> Sarah Worthington, 'Four Questions on Fiduciaries' (2018) 32(1) *Trust Law International* 22, 41 (Fn 115); *Re Dawson* [1966] NSW 211 (NSWSC).

<sup>40</sup> Conaglen (n 11) 144-6.

compensatory orders in contract and tort, where there is no shortage of such analysis.<sup>41</sup>

This thesis will fill these gaps in the literature. Section 4.2 will demonstrate that *Surcharging Orders* are sometimes available as a matter of law. Section 4.3 will outline a number of reasons for and against the making of such orders. Some of these reasons against also apply to the making of *Lesser Receipt Orders*, *Falsification Orders*, and *Personal Loss Orders*. Chapter Eight will outline the relevant legal rules for constructing and comparing counterfactuals in quantifying these orders.

Multiple labels have been used to refer to the *Surcharging Order*. These include ‘account on the basis of wilful default’,<sup>42</sup> a ‘restitutionary order’,<sup>43</sup> an order for ‘compensatory damages’,<sup>44</sup> ‘reparative compensation’,<sup>45</sup> an order for ‘reparation’,<sup>46</sup> and ‘equitable compensation’.<sup>47</sup> These labels have sometimes been used to refer to other orders, for example the label ‘reparative compensation’ has been used to refer

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<sup>41</sup> A selection: Dori Kimel, ‘Remedies’ ch 4 in *From Promise to Contract* (Hart 2003); Ernest Weinrib, ‘Remedies’ ch 3 in *Corrective Justice* (OUP 2012); John Gardner, ‘What is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) 30(1) *Law and Philosophy* 1; Robert Stevens, ‘Rights Restricting Remedies’ ch 9 in A Robertson (ed), *Divergences in Private Law* (Hart 2016) 160-3.

<sup>42</sup> Millett ‘Equity’s Place in the Law of Commerce’ (n 4) 225-6; Conaglen (n 11) 132; *AIB* (n 2) [54] (Lord Toulson).

<sup>43</sup> *AIB* (n 2) [65] (Lord Toulson).

<sup>44</sup> Edelman and Elliott, ‘Money Remedies Against Trustees’ (n 5) 118-22.

<sup>45</sup> Edelman and Elliott, ‘Money Remedies Against Trustees’ (n 5) 118-22; *AIB* [54] (Lord Toulson).

<sup>46</sup> Elliott and Mitchell, ‘Remedies for Dishonest Assistance’ (n 5) 28; *Interactive Technology Corp Ltd v Ferster* [2018] EWCA Civ 1594, [2018] 2 P&CR 22 [12] (David Richards LJ).

<sup>47</sup> *Brudenell-Bruce* (n 31) [242]-[251] (Newey J).

to any counterfactual loss order, including the *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order*,<sup>48</sup> whilst as stated above the term ‘equitable compensation’ has been used to refer to all orders considered in this thesis except from the *Subject-Matter Distribution Order*.

This thesis adopts the label ‘*Surcharging Order*’. This is a label used by Lord Millett in his 1998 article, and has been used by a number of other commentators.<sup>49</sup> Furthermore the present writer knows of no commentator who used this label to refer to any other type of order: thus the risk of confusion is diminished.

### 3.3.2 *Subject-Matter Distribution Orders*

*Subject-Matter Distribution Orders* have received very little attention in the literature. One exception is *Lewin on Trusts* which views such orders as available against trustees, outlines the legal rules applicable to such availability, and cites a number of authorities in support of the rules.<sup>50</sup> No analysis is undertaken of any individual authority however. The present writer knows of no analysis considering the normative reasons for or against the making of Subject-Matter Distribution Orders.

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<sup>48</sup> Edelman and Elliott, ‘Money Remedies Against Trustees’ (n 5) 119.

<sup>49</sup> Millett, ‘Equity’s Place in the Law of Commerce’ (n 4) 225-6. See also Glister (n 33) 147; *Libertarian* (n 4) [170] (Lord Millett); Conaglen (n 11) 130; *Ultraframe* (n 15) [1513] (Lewison J).

<sup>50</sup> Lynton Tucker, ‘The Right to Call for the Trust Property’ ch 24 in *Lewin on Trusts* (19th S&M 2015).

This thesis will fill these gaps in the literature. Section 5.2.1 will demonstrate that these orders are sometimes available as a matter of law. Section 5.3 will outline a number of reasons in favour of making such orders.

In contrast to the other orders considered in this thesis, the writer knows of no label that has been used to refer to the *Subject-Matter Distribution Order* within the literature. Therefore this thesis adopts a new label, which is intended to be descriptive of the action that a *Subject-Matter Distribution Order* obligates a trustee to perform: to distribute subject-matter from the trust estate to a person.

#### **3.3.3 Lesser Receipt Orders**

The *Lesser Receipt Order* has received some academic attention. James Penner states that legal authorities support the availability of such order, though does not cite any legal authority for this position.<sup>51</sup> Sarah Worthington also states that such orders are available, citing *Target* and *AIB* for this proposition on the basis that the House of Lords in *Target* and the Supreme Court in *AIB* made *Lesser Receipt Orders*.<sup>52</sup> Such reliance seems misplaced as neither decision appears to make a *Lesser Receipt Order*. *Target* involves the House of Lords' refusing summary judgment and remitting the case back to first instance, whilst the Supreme Court in *AIB* is best interpreted as making a *Personal Loss Order*.<sup>53</sup> Whilst James Penner assumes that there are normative

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<sup>51</sup> Penner, 'Falsifying the Trust Account and Compensatory Equitable Compensation' (n 9) 156-7; Penner, 'The Beneficiary's Performance Interest in a Trust' (n 9) 285-6.

<sup>52</sup> Worthington (n 39) 41-2.

<sup>53</sup> See 4.2.1.3 and 7.2.2.2 respectively.

reasons in favour of making *Lesser Receipt Orders*, he does not state what these reasons are.<sup>54</sup>

This thesis will fill these gaps in the literature. Section 5.2.2 will demonstrate that *Lesser Receipt Orders* are sometimes available as a matter of law. Section 5.3 will outline a number of reasons in favour of making such orders. Chapter Eight will outline the legal rules relevant in constructing and comparing counterfactuals for use in quantifying these orders.

A number of labels referring to *Lesser Receipt Orders* can be found in the literature, including ‘equitable compensation’,<sup>55</sup> and ‘reparation’ order.<sup>56</sup> Both of these labels have been used to refer to other orders under discussion in this thesis, and are thus best avoided.<sup>57</sup> This thesis adopts a new label, which is intended to reflect the fact that the quantum of a *Lesser Receipt Order* is the extent to which the trustee has wrongfully caused a person to receive less valuable subject-matter from the trust estate.

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<sup>54</sup> (n 51).

<sup>55</sup> Worthington (n 39) 41.

<sup>56</sup> Elliott, ‘Compensation Claims Against Trustees’ (n 5) 236.

<sup>57</sup> ‘Equitable compensation’ has been used to refer to *Surcharging Orders: Brudenell-Bruce* (n 31) [242]-[251] (Newey J). ‘Reparation’ order has been used to refer to *Surcharging Orders* and *Personal Loss Orders: Elliott*, ‘Compensation Claims Against Trustees’ (n 5) 205-238.

### 3.3.4 *Falsification Orders*

The *Falsification Order* has received the most sustained attention in the academic literature, when compared with the other orders considered in this thesis.

As to analysis of legal authorities, both Peter Birks and Sir Peter Millett writing extra-judicially criticised the House of Lords' 1995 decision in *Target* for failing to notice that prior legal authorities supported the availability of *Falsification Orders*. Notably neither commentator cited any legal authority supporting such availability.<sup>58</sup> Steven Elliott identified a number of such authorities in his doctorate, commenting that these were overlooked in *Target*.<sup>59</sup> Matthew Conaglen and Lusina Ho have also provided analysis of whether the pre-*Target* authorities supports the availability of *Falsification Orders*.<sup>60</sup> A number of other commentators have also criticised *Target* for overlooking previous authorities, including Charles Mitchell, James Edelman, and James Penner.<sup>61</sup>

The Supreme Court's 2014 decision in *AIB* referred to much of this commentary, and on a natural reading rejects the availability of *Falsification Orders*.<sup>62</sup>

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<sup>58</sup> Birks (n 3) 45-8; Millett, 'Equity's Place in the Law of Commerce' (n 4) 226-7; *Target* (n 1).

<sup>59</sup> Elliott, 'Compensation Claims Against Trustees' (n 5) 154-63.

<sup>60</sup> Conaglen (n 11) 136-43; Ho (n 11) 161-6.

<sup>61</sup> Mitchell, 'Stewardship of Trust Property and Liability to Account' (n 3) 224-6; Edelman, 'Money Awards of the Cost of Performance' (n 7) 127-8; Penner 'The Beneficiary's Performance Interest in a Trust' (n 9) 292.

<sup>62</sup> This claim is considered in more detail in 6.2.3.3.

Given this, and the level of existing analysis on the legal authorities relevant to the availability of *Falsification Orders*, one might reasonably question whether there is any value in this thesis inquiring whether *Falsification Orders* are available as a matter of law.

There are two reasons why such an inquiry has value. First, there appears to be no consensus on whether *Falsification Orders* are available post-*AIB*: a recent decision of the Court of Appeal treats such orders as available,<sup>63</sup> and a number of commentators argue that *AIB* does not reject the availability of *Falsification Orders* in all situations.<sup>64</sup> Thus the question whether *Falsification Orders* are available today is a live issue.

Second, most commentators focus on the availability of *Falsification Orders* for breach of the duty to follow the settlor's communicated intentions, but few inquire whether such orders are available for breach of the duty of care. Those that do consider this question reach opposing conclusions on availability.<sup>65</sup>

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<sup>63</sup> *Ferster* (n 46). For analysis, see 6.2.1.5.

<sup>64</sup> Penner, 'Falsifying the Trust Account' (n 9) 150-7; Peter Turner, 'Want of Causation as a Defence to Liability for Misapplication of Trust Assets' ch 9 in P Davies, S Douglas, and J Goudkamp (eds) *Defences in Equity* (Hart 2018) 171-3.

<sup>65</sup> Jamie Glistler, 'Breach of Trust and Conversion in a Falling Market' [2014] *Lloyd's Maritime and Commercial Law Quarterly* 511, 527; Conaglen, 'Equitable Compensation' (n 11) 142-3. Glistler rejects, whilst Conaglen accepts, such availability.

This thesis embraces these questions. Section 6.2 will consider the pre-*Target* authorities, interpret *Target* and *AIB*, and demonstrate that *Falsification Orders* are never available against trustees.

The normative question of whether there are reasons for or against the making of *Falsification Orders* has received slightly less attention in the academic literature. This is perhaps surprising given the enthusiasm with which commentators have criticised the decisions in *Target* and *AIB*.

Commentators who have sought to identify reasons in favour of making *Falsification Orders* include Charles Mitchell, Matthew Conaglen, Lusina Ho, James Penner, and Matthew Harding.<sup>66</sup> Andrew Burrows has consistently voiced objections to the making of such orders.<sup>67</sup> Section 6.3 rejects some of these arguments, and accepts others, suggesting that a number of reasons exist in favour of making *Falsification Orders*.

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<sup>66</sup> Mitchell, 'Equitable Rights and Wrongs' (n 6) 287; Conaglen, (n 11) 139; Ho (n 11) 167; Penner, 'The Beneficiary's Performance Interest in a Trust' (n 9) 280-1; Matthew Harding, 'Equity and the Value of Certainty in Commercial Life' ch 7 in D Klimchuk, I Samet, and H Smith (eds), *The Philosophical Foundations of the Law of Equity* (OUP 2019 forthcoming) 150-1 - cited with permission of the author.

<sup>67</sup> A Burrows, 'Limitations on Compensation' (n 8) 46-7; A Burrows, 'Remedies for Equitable Wrongs' (n 8) 515-20.

A variety of labels can be found within the literature referring to the *Falsification Order*. These include an order for ‘common account’,<sup>68</sup> an order for ‘account’,<sup>69</sup> an order for ‘equitable debt’,<sup>70</sup> a ‘substitutive’ order,<sup>71</sup> a ‘substitutive performance’ order,<sup>72</sup> a ‘substitutive compensation’ order,<sup>73</sup> a ‘performance’ order,<sup>74</sup> and ‘equitable compensation’.<sup>75</sup> This thesis adopts the label ‘Falsification Order’, because this is the label used by Lord Millett in one of the most influential articles in this area, and because it is used by a number of other commentators.<sup>76</sup>

### 3.3.5 *Personal Loss Orders*

*Personal Loss Orders* have received some attention in the literature. A number of claims have been made concerning the availability of such orders. For example, Steven Elliott in his doctorate claims that such an order is available against a trustee who wrongfully fails to distribute subject-matter to a beneficiary, though cites no

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<sup>68</sup> Birks (n 3) 45-8; Conaglen (n 11) 129-32.

<sup>69</sup> Andrew Burrows, ‘Remedies for Equitable Wrongs’ (n 8) 515-20.

<sup>70</sup> Davies, ‘Remedies for Breach of Trust’ (n 10) 693; Edelman, ‘An English Misturning with Equitable Compensation’ (n 7) 91; *AIB* (n 2) [61] (Lord Toulson).

<sup>71</sup> *Ferster* (n 46) [12].

<sup>72</sup> Charles Mitchell and Stephen Watterson, ‘Remedies for Knowing Receipt’ ch 4 in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart 2010) 122; *Ferster* (n 46) [12].

<sup>73</sup> Edelman and Elliott, ‘Money Remedies Against Trustees’ (n 5) 116; *AIB* (n 2) [53] (Lord Toulson).

<sup>74</sup> Elliott and Mitchell, ‘Remedies for Dishonest Assistance’ (n 5) 26.

<sup>75</sup> Edelman, ‘An English Misturning with Equitable Compensation’ (n 7) 93; *Ferster* (n 71) [12].

<sup>76</sup> Millett, ‘Equity’s Place in the Law of Commerce’ (n 4) 226; Conaglen (n 11) 130; Penner, ‘Falsifying the Trust Account and Compensatory Equitable Compensation’ (n 9) 151; *Ultraframe* (n 15) [1513] (Lewison J).

authority for this proposition. Sarah Worthington has claimed that there is no authority supporting the availability of *Personal Loss Orders*.<sup>77</sup>

This thesis will fill this gap in the literature: section 7.2.2 will demonstrate that *Personal Loss Orders* are sometimes available against trustees. Chapter Eight will outline the legal authorities relevant in constructing and comparing counterfactuals when quantifying *Personal Loss Orders*.

A number of claims have been made concerning the justifiability of making *Personal Loss Orders*, though sustained treatment of this question is somewhat sparse. David Hayton assumes that there is a reason in favour of making such orders, though does not identify this reason.<sup>78</sup> James Penner argues that there are reasons against making such orders, and seeks to identify such reasons.<sup>79</sup>

This thesis will fill this gap in the literature: section 7.3 will reject the existing arguments made against making a *Personal Loss Order*, highlight some reasons in favour of making such an order, and indicate a reason against making such an order. A rule will be proposed which balances these competing reasons.

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<sup>77</sup> Worthington (n 39) 241.

<sup>78</sup> David Hayton, 'Unique Rules for the Unique Institution, the Trust' ch 11 in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 301-4.

<sup>79</sup> Penner, 'Falsifying the Trust Account and Compensatory Equitable Compensation' (n 9) 155-6; Penner, 'The Beneficiary's Performance Interest in a Trust' (n 9) 283-5.

The only label used to refer to *Personal Loss Orders* in the literature is ‘equitable compensation’.<sup>80</sup> Given that ‘equitable compensation’ has been used to refer to a number of different orders, this thesis adopts the new label of ‘Personal Loss Order’. This label reflects the fact that the quantum of the *Personal Loss Order* is the extent to which the trustee has wrongfully caused loss to a person all things considered.

### 3.4 Conclusion

This chapter has contextualised the present thesis within the academic literature concerning the orders available against trustees, outlined the progress made within the literature on which orders are and should be available against trustees, and detailed how this thesis will contribute to and develop that literature.

Section 3.2.1 and 3.2.2 outlined the history and development of the literature in this area, drawing attention to a number of conceptual frameworks used within the literature, and justifying why these frameworks are not adopted in this thesis.

Section 3.2.3 made three criticisms of the literature in this area. In particular the literature consistently fails to distinguish the five orders under discussion in this thesis, fails to properly analyse where a trustee can be ordered to pay money, and employs a bewildering array of language. It was shown how this thesis will avoid falling foul of these problems.

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<sup>80</sup> Penner, ‘The Beneficiary’s Performance Interest in a Trust’ (n 9) 283-6. The decisions discussed in 7.2.2 use the label ‘equitable compensation’ to refer to such an order.

Section 3.3 outlined the progress made in the literature on whether the five orders under discussion are and should be available against trustees, and indicates where this thesis will develop this literature. It also outlined the labels used in the literature for these five orders, and justified the labels adopted in this thesis.

# IV

## *Surcharging Orders*

### **4.1 Introduction**

#### **4.1.1 Chapter Aims**

This chapter considers two questions. First, does legal authority provide support for or against the availability of *Surcharging Orders*? Second, are there reasons for or against the making of such orders? The inquiry is limited to express trustees of trusts for persons following breach of the duty to follow the settlor's communicated intentions and breach of the duty of care.<sup>1</sup>

The following order forms the focus of this chapter:<sup>2</sup>

*Surcharging Order*: a court order obligating a trustee to pay money into a trust estate, where the quantum of liability is the extent to which the trustee has wrongfully caused the trust estate to diminish in value.

The *Surcharging Order* has a number of features: (1) it obligates a trustee, (2) to pay money into a trust estate, (3) where the quantum of liability is the extent to which the trustee has wrongfully caused that trust estate to diminish in value. The *Surcharging Order* is an example of a counterfactual loss order, where counterfactuals are constructed and compared to determine whether a loss has been wrongfully caused.<sup>3</sup>

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<sup>1</sup> For further discussion of this scope of inquiry, see 2.3.

<sup>2</sup> The concept of a *Surcharging Order* is considered in 2.2.1.

<sup>3</sup> The legal rules for constructing and comparing counterfactuals are considered in Chapter Eight.

Recall the following hypothetical:<sup>4</sup>

*Duty to Invest*: a trustee holds £1m on trust, with a duty to invest the money in Lemon Shares on 1st January and then hold the shares for five years. The trustee wrongfully transfers away the £1m on 1st January. Three years later the trust estate is empty, and the Lemon Shares are worth £1.4m.

A *Surcharging Order* would obligate the trustee to transfer £1.4m into the trust estate, as this is the extent to which the trustee has wrongfully caused the trust estate to diminish in value. This contrasts with a *Falsification Order* which would obligate the trustee to pay £1m, which is the value of subject-matter wrongfully paid out by the trustee.

## 4.1.2 Chapter Summary

Section 4.2 will consider whether legal authorities support the availability of *Surcharging Orders*. It will be demonstrated that *Surcharging Orders* are available against express trustees of trusts for persons for breach of the duty to follow the settlor's communicated intentions and breach of the duty of care. An exception to this availability exists where the relevant trusts have come to an end: in such circumstances *Surcharging Orders* are only sometimes available, though the precise scope of this exception is uncertain.

Section 4.3.1 will consider whether reasons exist in favour of making a *Surcharging Order*. It will be argued that there are two reasons in favour of making

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<sup>4</sup> This hypothetical was introduced in 2.2.1.

such an order: first, such an order contributes to the maintenance of a rule that reduces the incentive upon express trustees to wrongfully cause harm to trust estates; second such an order reduces the likelihood that the trustee subject to the order wrongfully diminishes the value of the relevant trust estate.

Section 4.3.2 will consider whether reasons exist against making a *Surcharging Order*. It will be argued that there may be three reasons against making such an order: first, where the order harms a trustee's wellbeing or autonomy; second, where the order contributes to an undermining of confidence in the system of private property; and third, where the order uses a trustee as a mere means to an end. So as to avoid repetition in future chapters, it will be shown that these reasons may also apply against making a *Lesser Receipt Order*, *Falsification Order*, or *Personal Loss Order*. Furthermore, it will be argued that it is often permissible to make one of these four orders notwithstanding the existence of these reasons: this will be so where the trustee has had a reasonable opportunity to avoid being subjected to such an order.

## 4.2 Legal Authorities

This section will demonstrate that *Surcharging Orders* are available against express trustees of trusts for persons for breach of the duty to follow the settlor's communicated intentions and breach of the duty of care. However, where any underlying trust has 'come to an end', such orders are merely sometimes available, though the precise scope of this exception is uncertain.

## 4.2.1 The Settlor's Communicated Intentions

In this section any references to wrongs or breach of duty refer to a breach of the settlor's communicated intentions, unless otherwise indicated.

### 4.2.1.1 *Sculthorpe v Tipper*

In *Sculthorpe v Tipper*, trustees held money and shares in an unlimited company on trust. The trustees wrongfully retained the shares, and wrongfully used the money to acquire additional shares in the same company. The nature of the shares meant that the shareholder could be called upon to meet the liabilities of the company should the company go insolvent. The company went insolvent and the trustees paid £1910 12s 9d from the trust estate to the company following such a call. An order was sought 'calling upon the trustees to make good the loss caused to the estate of the testator'.<sup>5</sup> Sir R Malins VC made the order.<sup>6</sup> This appears to be a *Surcharging Order*, as it seems to require payment of money into the trust estate where liability is quantified with reference to loss wrongfully caused to the trust estate.

### 4.2.1.2 *Re Lake*

In *Re Lake*, a trustee held £5.5k on trust, and wrongfully invested the money in a mortgage. The trustee was removed and then went bankrupt. New trustees were appointed and reached a settlement with the mortgagor and other mortgagees of the property, whereby the new trustees waived all claims under the mortgage. This

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<sup>5</sup> *Sculthorpe v Tipper* (1871-2) LR 13 Eq 232 (Ch) 239.

<sup>6</sup> *Ibid* 240-2.

settlement was made without consulting the original trustee. The new trustees sought to prove in the original trustee's bankruptcy in respect of the £5.5k wrongfully invested in the mortgage. Wright J refused this proof because such a claim would require assigning the rights under the mortgage to the original trustee, which was impossible given the waiver. Nevertheless Wright J ordered proof of a different claim:<sup>7</sup>

I can see no good reason, however, why a proper proof should not be made for the damages that the Howe trust has sustained by reason of the improper investment, and on such a proof being made evidence must be given as to the value of the agreement of compromise... and the measure of damages will be the difference between the 5500l. and the assessed value of the document of compromise.

The fact that the new trustees were able to prove in respect of 'damages that the Howe trust has sustained' suggests that the original trustee was liable to compensate the trust estate for loss wrongfully caused by the original trustee. This supports the availability of *Surcharging Orders*.

#### 4.2.1.3 *Target Holdings*

In *Target Holdings Ltd v Redferns*, a lender decided to make a secured loan.<sup>8</sup> They transferred £1.5m to a trustee to hold on bare trust for the lender, with a power to permissibly apply the money towards the loan transaction, on the condition that the lender had received a first charge over the borrower's land. The trustee wrongfully transferred the money before the first charge was received, which was received by

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<sup>7</sup> *Re Lake* [1903] 1 KB 439, 443.

<sup>8</sup> *Target Holdings Ltd v Redferns* [1996] AC 421 (HL).

the lender around a week later. The borrower defaulted on repayments and the proceeds of sale of the land were insufficient to pay off the outstanding loan.

The beneficiary sought a *Falsification Order* on summary judgment. Whilst the appropriate non-breach counterfactual was to be determined at trial, such a determination was unnecessary for the purpose of quantifying a *Falsification Order* the quantum of which is the value of any subject-matter wrongfully transferred. The trustee wrongfully transferred £1.5m, though the beneficiary sought around £1m, agreeing to give credit for money recouped under the loan transaction. The House of Lords refused to make the order, with Lord Browne-Wilkinson giving the only reasoned speech.

In refusing to make a *Falsification Order*, Lord Browne-Wilkinson outlined the rules for determining whether orders are available against a trustee for breach of duty:<sup>9</sup>

A trustee who wrongly pays away trust money... commits a breach of trust and comes under an immediate duty to remedy such breach.... The quantum is fixed at the date of judgment at which date... the compensation 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.

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<sup>9</sup> *Ibid* 437.

The reference to ‘compensation is assessed at the figure then necessary to put the trust estate... into the position it would have been in had there been no breach’ shows that Lord Browne-Wilkinson supports the availability of *Surcharging Orders*.

One might argue that Lord Browne-Wilkinson limits the availability of *Surcharging Orders* to breaches of traditional trusts. This argument might derive support from the following statement:<sup>10</sup>

... in relation to a traditional trust... the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss.

However this argument is inconsistent with the statement in the previous paragraph which places no such limit on the availability of *Surcharging Orders*. The statement said to support the argument is better interpreted as stating that *Surcharging Orders* are available for breach of traditional trusts, but not that such orders are only available for breach of traditional trusts. Furthermore, the proposition that the available orders against trustees depend on whether a trust is traditional or commercial is rejected by the Supreme Court in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*.<sup>11</sup>

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<sup>10</sup> *Ibid* 434.

<sup>11</sup> *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 [70] (Lord Toulson), [102] (Lord Reed). The remainder of the Supreme Court - Lord Neuberger, Baroness Hale, and Lord Wilson - agreed with both Lord Toulson’s and Lord Reed’s judgments: [143].

Lord Browne-Wilkinson does, however, reject the general availability of *Surcharging Orders* in situations where the relevant trusts have ‘come to an end’:<sup>12</sup>

But what if at the time of the action claiming compensation for breach of trust those trusts have come to an end? Take as an example again the trust for A for life with remainder to B. During A’s lifetime B’s only right is to have the trust duly administered and, in the event of a breach, to have the trust fund restored. After A’s death, B becomes absolutely entitled. He of course has the right to have the trust assets retained by the trustees until they have fully accounted for them to him. But if the trustees commit a breach of trust, there is no reason for compensating the breach of trust by way of an order for restitution and compensation to the trust fund as opposed to the beneficiary himself... Therefore, although I do not wholly rule out the possibility that even in those circumstances an order to reconstitute the fund may be appropriate, in the ordinary case where a beneficiary becomes absolutely entitled to the trust fund the court orders, not restitution to the trust estate, but the payment of compensation directly to the beneficiary.

‘Reconstitute’ and ‘restitution’ refer to paying subject-matter or money into the trust estate. Thus if reconstitution or restitution are inappropriate, a *Surcharging Order* will not be made.<sup>13</sup> The concept of a trust having ‘come to an end’ is not defined. From the above passage, it seems that Lord Browne-Wilkinson thinks trusts have ‘come to an end’ at least when a beneficiary has become absolutely entitled to the income and capital of a trust estate, though it is not clear whether a trust will have come to an end in other situations.

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<sup>12</sup> *Target* (n 8) 434-5.

<sup>13</sup> In such circumstances a *Lesser Receipt Order* may be available. For the availability of *Lesser Receipt Orders* see 5.2.2.

Where trusts have ‘come to an end’, the quantum of a *Surcharging Order* will sometimes be zero. Assume that in Lord Browne-Wilkinson’s example, the trustee owed an obligation to distribute the capital to B upon A’s death, that the trustee wrongfully transferred away subject-matter, and that A had died before the time of judgment. In the non-breach counterfactual, the trust estate would be empty as but for any breach of duty the trustee would have distributed the capital of the trust to B.<sup>14</sup> As such the quantum of a *Surcharging Order* would be zero. In such cases, the rationale for rejecting the availability of *Surcharging Orders* where trusts have ‘come to an end’ is not clear.

However, in other cases the quantum of a *Surcharging Order* will be substantial. Vary the example in the previous paragraph so that the trustee owes a duty to hold the capital on bare trust upon A’s death. In such a case it is possible that the trust estate will contain subject-matter in the non-breach counterfactual: this will be so where but for the breach B would not have yet requested a transfer of the capital. Given this, it is possible that the quantum of a *Surcharging Order* would be non-zero. Nevertheless, Lord Browne-Wilkinson says that generally a *Surcharging Order* would not be available in such cases.

Lord Browne-Wilkinson provides no indication as to when a *Surcharging Order* will and will not be available in such cases. If one treated a trust as ending whenever

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<sup>14</sup> For the legal rules on constructing the non-breach counterfactual so that the trustee complies with any duties that would have arisen but for the breach of duty, see 8.2.1.2.4.

a beneficiary becomes absolutely entitled to the income and capital of the trust estate, one example where a *Surcharging Order* perhaps should be available is when the beneficiary wishes for the trustee to continue managing the trust estate. In such a circumstance, a *Surcharging Order* would facilitate such continued management.

#### 4.2.1.4 *AIB Group*

In *AIB*, a lender decided to make a secured loan.<sup>15</sup> The lender transferred around £3.3m to a trustee to be held on bare trust for the lender, and the trustee had a power to permissibly apply the money in the loan transaction providing that the lender had received a first charge over the borrower's land. The trustee wrongfully transferred this money when a first charge had not been received. Subsequently the lender received a second charge over the borrower's land. The lender defaulted on the loan repayments, and the proceeds of sale were insufficient to pay off the first chargee's debt and the entirety of the lender's debt.

The breach caused the lender around £300k of loss: this was the extent to which the lender would have been better-off had they received a first charge.<sup>16</sup> The lender sought a *Falsification Order* against the trustee, which would hold the trustee liable for around £3.3m. However the beneficiary sought an order for just £2.5m, offering to give credit for the money recouped by the beneficiary under the loan

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<sup>15</sup> *AIB* (n 11).

<sup>16</sup> The non-breach counterfactual was constructed so that the trustee permissibly applied the money in the loan transaction, rather than returning the money to the beneficiary. This construction was on the basis of a finding of fact made by Judge David Cooke at first instance: *AIB* (n 11) [13] (Lord Toulson). For analysis of this construction of the non-breach counterfactual, see 8.2.1.2.1.

transaction. The Supreme Court refused the *Falsification Order*, instead ordering the trustee to pay around £300k to the lender.<sup>17</sup> Lord Toulson and Lord Reed gave the only reasoned judgments, with which the remainder of the court agreed.

In refusing to make the order sought by the lender, Lord Toulson outlined the rules relevant for determining the orders available against trustees following a breach of duty:<sup>18</sup>

The purpose of a restitutionary order is to replace a loss to the trust fund which the trustee has brought about.

‘Restitutionary’ refers to an order requiring the payment of money into the trust estate. ‘Loss to the trust fund’ shows that the focus is on the trust estate, whilst ‘brought about’ connotes a causal relationship between the trustee’s wrong and any loss. As such, this statement shows Lord Toulson supports the availability of *Surcharging Orders*.

Like Lord Browne-Wilkinson, Lord Toulson states that when trusts have come to an end, *Surcharging Orders* are only generally available. This is demonstrated by his approving Lord Browne-Wilkinson’s discussion on the point.<sup>19</sup> Lord Toulson does not expressly develop this exception, though perhaps implies that a beneficiary’s becoming absolutely entitled to the income and capital of a trust estate is merely one

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<sup>17</sup> The nature of this order is analysed at 7.2.2.2.

<sup>18</sup> *AIB* (n 11) [65]. Other relevant paragraphs include [30].

<sup>19</sup> *Ibid* [31], [63].

situation in which a trust has come to an end, which leaves open the possibility that a trust will have come to an end in other situations.

Lord Reed outlined the following rule:<sup>20</sup>

I am not persuaded that Lord Browne-Wilkinson intended to depart from the orthodox view that the equitable obligation arising from a breach of trust affecting the trust fund is to restore the fund to the position it would have been in but for the breach.

This shows clear support for the availability of *Surcharging Orders*. Furthermore, like Lord Browne-Wilkinson and Lord Toulson, Lord Reed rejects the general availability of *Surcharging Orders* where a trust has come to an end, though adds no further development of this concept.<sup>21</sup>

## 4.2.2 The Duty of Care

### 4.2.2.1 *Nestle v National Westminster Bank*

In *Nestle v National Westminster Bank Plc*, a testator died in 1922 leaving a portfolio of investments on trust for various members of his family, before the claimant became entitled under a bare trust in 1982.<sup>22</sup> In 1922 the investments were worth around £53k, and by 1982 had risen in value to around £269k. The claimant sought an order against the trustee, arguing that the trustee had breached the duty of care on a

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<sup>20</sup> *Ibid* [116]. Other relevant paragraphs include [90], [94], [100] and [134].

<sup>21</sup> *Ibid* [99]-[100].

<sup>22</sup> *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260 (CA). There had been two consecutive trustees in *Nestle*: the trustee at the time of judgment was a bank, whilst the previous trustee had been a predecessor of the bank. Nothing turned on this fact.

number of occasions, and that the trust estate would have been worth more than £269k in 1982 had the breaches not occurred. The Court of Appeal refused to make any order: whilst the trustee had breached the duty of care, it had not been proved that this breach had caused any loss.

*Nestle* supports the availability of *Surcharging Orders* because each judge makes clear that such an order would be available had it been shown that any breach of the duty of care caused loss to the trust estate on the facts. Dillon LJ said that had any breach of the duty of care caused loss:<sup>23</sup>

...the appropriate course would have been to require the bank to make good to the trust fair compensation...

‘Bank’ refers to the trustee. The requirement ‘to make good to the trust’ is suggestive of a payment into the trust estate. Although the word ‘compensation’ is somewhat ambiguous, it perhaps implicitly refers to money quantified with reference to any wrongfully caused diminution in value to the trust estate.

Staughton LJ said:<sup>24</sup>

The plaintiff must show that... the trustee made decisions which they should not have made or failed to make decisions which they should have made. If that were proved, and if at first sight loss resulted, it would be appropriate to order an inquiry as to the loss suffered by the trust fund.

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<sup>23</sup> *Ibid* 1268.

<sup>24</sup> *Ibid* 1276.

Leggatt LJ said:<sup>25</sup>

I would endorse the concession of Mr Nugee for the bank that “loss” will be incurred by a trust fund when it makes a gain less than would have been made by a prudent businessman. A claimant will therefore fail who cannot prove a loss in this sense caused by breach of duty. So here in order to make a case for an inquiry, the plaintiff must show that loss was caused by breach of duty on the part of the bank.

Both Staughton LJ and Leggatt LJ focus on whether loss has been wrongfully caused to the trust estate, which suggests that they support the availability of *Surcharging Orders*. Admittedly they do not expressly state that the trustee can be ordered to pay money into the trust estate, though this seems implicit from their discussion.

#### **4.2.2.2 *Target Holdings and AIB Group***

It was argued above that *Target* and *AIB* support the availability of *Surcharging Orders* for breach of the duty to follow the settlor’s communicated intentions, unless the relevant trust has ‘come to an end’, in which case such orders are only generally available.<sup>26</sup> This reasoning appears to extend to breaches of the duty of care, so as to support a similar scope of availability for breach of that duty.

In *Target*, Lord Browne-Wilkinson said:<sup>27</sup>

The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust

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<sup>25</sup> *Ibid* 1283.

<sup>26</sup> See 4.2.1.3 and 4.2.1.4.

<sup>27</sup> *Target* (n 8) 434.

instrument, if any, and the general law... the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss.

In *AIB*, Lord Toulson said:<sup>28</sup>

All agree that the basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law... The purpose of a restitutionary order is to replace a loss to the trust fund which the trustee has brought about.

Both statements support a *Surcharging Order*: the former refers to paying compensation for ‘assets which have been lost to the estate by reason of the breach’, whilst the latter refers to replacing a ‘loss to the trust fund which the trustee has brought about’. Furthermore the references to the ‘general law’ is naturally interpreted as including the duty of care, so as to support availability for the breach of this duty.

In *AIB*, Lord Reed said:<sup>29</sup>

Some of the typical obligations of the trustee of a fund are strict: for example the duty to distribute the fund in accordance with the purposes of the trust. Others are obligations of reasonable care: for example the duty to exercise reasonable care and skill in the management of the fund... the trustee’s liability for breach of trust... will generally be based on the diminution in the value of the fund caused by the trustee’s default.

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<sup>28</sup> *AIB* (n 11) [64]-[65].

<sup>29</sup> *Ibid* [94].

Here, Lord Reed expressly refers to some duties owed by a trustee, including the duty of care, and outlines the orders available for breach of these duties. He outlines an order focusing on any ‘diminution in the value of the fund’ wrongfully caused by the trustee. Thus Lord Reed also seems to support the availability of *Surcharging Orders* for breach of the duty of care.

As shown above, the judges in *Target* and *AIB* say that where a trust has come to an end, *Surcharging Orders* are only generally available. They make no distinction in this regard between the duty to follow the settlor’s communications, and the duty of care. As such it seems this exception applies to the duty of care also.

#### 4.2.2.3 *Brudenell-Bruce v Moore*

In *Brudenell-Bruce v Moore*, trustees held residential land on trust, referred to as ‘Sturmy House’. A pipe burst within the house causing water damage and rendering the house uninhabitable. The trustees breached their duty of care by delaying to repair the house. This caused around eighteen months of rent to be lost to the trust estate, as the house could not be let.<sup>30</sup> A beneficiary sought a *Surcharging Order* against the trustees, and Newey J made the order.

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<sup>30</sup> *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch). Relevant discussion at [156]-[178].

Newey J reasoned that the trustees' breach caused around £50k of lost rent to the trust estate. He also concluded that separate breaches by the trustee had caused around £14k of loss to the trust estate. As a result he ordered:<sup>31</sup>

The Trustees should pay sums totalling £64,225 to the Trust by way of compensation for their failure to achieve the repair and re-letting of Sturmy House and to take steps to obtain possession of Little Lye Hill Cottage after 1 December of last year.

This is a *Surcharging Order* as it requires the trustees to pay money into the trust estate where the quantum is the extent to which the trustees had wrongfully caused the trust estate to diminish in value. As such, *Brudenell-Bruce* supports the availability of *Surcharging Orders* for breach of the duty of care.

*Brudenell-Bruce* perhaps implicitly recognises that where a trust has come to an end, *Surcharging Orders* are only generally available for breach of the duty of care. On the facts the trustees sought to resist the making of a *Surcharging Order* on the basis that the beneficiary before the court only had a 49% interest in the trust, and that it was thus inappropriate to order the trustee to pay anything more than 49% of the loss caused to the trust estate. After citing statements from *Target* and *AIB*, Newey J rejected this argument:<sup>32</sup>

...there is no basis for departing from the Court's normal approach in the present case. The relevant trusts have not "come to an end", and no one has become "the sole owner of the trust estate".

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<sup>31</sup> *Ibid* [270].

<sup>32</sup> *Ibid* [248].

Here it may be said that Newey J implicitly accepts that if a trust has come to an end or a beneficiary has become the sole owner of the trust estate then a *Surcharging Order* will not generally be available for breach of the duty of care. He provides no further development on these concepts, which as stated above are somewhat under-developed.<sup>33</sup>

#### 4.2.2.4 *Daniel v Tee*

In *Daniel v Tee*, trustees held money on trust and made various investments.<sup>34</sup> The beneficiaries of the trust brought proceedings, arguing that the trustees had breached their duty of care in making the investments, that these breaches had caused loss, and sought an order compensating for this loss. Richard Spearman QC refused to make such an order: whilst the trustees had breached their duty of care on multiple occasions, it had not been proved that these breaches had caused loss.

Although he refused to make an order, Richard Spearman QC recognised the availability of *Surcharging Orders* for breach of the duty of care. He cited the following passage from Lord Browne-Wilkinson's speech in *Target*, though added his own emphasis:<sup>35</sup>

...the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been *had the breach not been committed*... the trustee

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<sup>33</sup> See 4.2.1.3.

<sup>34</sup> *Daniel v Tee* [2016] EWHC 1538 (Ch), [2016] 4 WLR 115.

<sup>35</sup> *Ibid* [84].

is liable to make good that loss to the trust estate *if, but for the breach, such loss would not have occurred.*

Richard Spearman QC's focus on a payment of compensation 'to the trust estate', which aims to put the trust estate into the position it would have been in but for the breach is supportive of the availability of *Surcharging Orders*

## 4.3 Normative Reasons

### 4.3.1 Reasons in Favour

This section will argue that there are two reasons in favour of making *Surcharging Orders*. First, making such an order contributes to the maintenance of a rule that adjusts the incentives upon trustees. Second, making such an order increases the likelihood that the trustee subject to the order does not wrongfully cause the relevant trust estate to diminish in value.

#### 4.3.1.1 Trustee Incentives

One reason in favour of making a *Surcharging Order* is that the making of such an order contributes to the maintenance of a rule providing for such orders. That rule has value as it reduces trustees' incentives to commit legal wrongs so as to cause a trust estate to diminish in value. This argument provides a reason in favour of making a *Surcharging Order* following breach of the duty to follow the settlor's communicated intentions, and breach of the duty of care.

To establish the present argument, it must be demonstrated that there is a reason in favour of reducing the incentives upon trustees to commit legal wrongs so as to cause harm to a trust estate, that a rule providing for the availability of *Surcharging Orders* reduces this incentive, and that the making of a particular *Surcharging Order* contributes to the maintenance of such a rule.

As to the first point, the argument assumes that there is a reason to reduce the incentive upon trustees to commit legal wrongs so as to cause harm to a trust estate. One might ground this assumption by arguing that such reduction could deter a trustee from breaching their legal duties. Alternatively, such reduction might deter trustees from acting with the bad motives of causing loss to a trust estate. Such deterrence may be particularly important given the control that trustees have over subject-matter held on trust, rendering vulnerable those people in favour of whom the subject-matter is to be managed for.<sup>36</sup> Alternatively one could argue that such reduction increases the confidence of those people considering using the trust facility, by demonstrating that the law seeks to adjust the incentives upon trustees to do bad things.

As to the second point, a rule providing for the availability of *Surcharging Orders* reduces the incentive upon trustees to commit a legal wrong so as to diminish the value of the trust estate. It is possible that a trustee may wish to reduce the value of

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<sup>36</sup> For a similar thought: Charles Mitchell, 'Equitable Rights and Wrongs' (2006) 59(1) Current Legal Problems 267, 287.

the trust estate, and believe that breaching their legal duties will achieve this end: an obvious example would be a trustee's wrongfully gifting away subject-matter held on trust. A rule providing for the availability of *Surcharging Orders* reduces the incentive upon a trustee to perform such action, as on the performance of the action the trustee may be ordered by a court to compensate the trust estate for any diminution in value wrongfully caused. Upon compliance with such an order, the trustee's wish would not be achieved.

As to the third point, the making of a particular order contributes to the maintenance of a rule providing for the availability of *Surcharging Orders*, as if particular orders were not always made in situations provided for by the rule the incentive-reducing value of the rule would be diminished.

This argument provides a reason in favour of making a *Surcharging Order* following a breach of the duty to follow the settlor's communicated intentions, and a breach of the duty of care, as a trustee may have an incentive to breach either duty so as to cause a trust estate to diminish in value.

One might object that the current argument does not explain feature (3) of the *Surcharging Order*, namely that the order is quantified with reference to the loss wrongfully caused to the trust estate. If the aim is to deter the trustee from breaching

their obligation, then would an order quantified at double or triple this amount not act as a better deterrent?

The objection misunderstands the current argument. The current argument does not merely concern the deterrence of trustee wrongdoing. Rather, the current argument focuses on reducing certain incentives that a trustee may have to breach their duty. The relevant incentive is the ability to cause a trust estate to diminish in value through breach of a legal duty. The availability of *Surcharging Orders* is sufficient to reduce this incentive: no greater quantum is needed.

One might object that the availability of *Surcharging Orders* does not reduce the incentive upon trustees to a greater extent than the availability of *Falsification Orders*. A *Falsification Order* would render a trustee liable for the value of any subject-matter wrongfully transferred from the trust estate. Does this not suffice to reduce the incentives upon trustees? If so, then is there a reason in favour of making *Surcharging Orders*?

There are three responses to this objection. First, *Falsification Orders* are not available as a matter of law.<sup>37</sup> In such circumstances *Falsification Orders* do nothing to reduce the relevant incentive.

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<sup>37</sup> This proposition is demonstrated in 6.2.3 and 6.2.4.

Second, assuming that *Falsification Orders* were legally available, *Surcharging Orders* are available in situations where the relevant incentive exists upon a trustee but *Falsification Orders* are unavailable. In particular, *Surcharging Orders* are available when a trustee wrongfully retains subject-matter, by failing to sell or invest, whereas *Falsification Orders* are only available where a trustee wrongfully transfers subject-matter.

Third, again assuming that *Falsification Orders* were legally available, *Surcharging Orders* are sometimes more effective at reducing the incentive upon trustees. For example if a trustee is obligated to invest money in subject-matter, and thinks the subject-matter will increase in value subsequent to the investment, the trustee has an incentive to wrongfully fail to invest so as to cause loss to the trust estate. A *Falsification Order* would be capped at the value of any subject-matter wrongfully transferred: it would be unable to hold the trustee liable for any increase in value of the subject-matter to be purchased. In contrast a *Surcharging Order* is capable of holding the trustee liable for this increase in value.

#### **4.3.1.2 Protecting the Value of the Trust Estate**

One reason in favour of making a *Surcharging Order* is that such an order makes it more likely that a trustee does not wrongfully cause a trust estate to diminish in value. To establish this argument, it must be demonstrated that there is a reason against a trustee wrongfully causing a trust estate to diminish in value, and that the

making of a *Surcharging Order* makes it more likely that a trustee complies with this reason.

As to the second point, the making of a *Surcharging Order* makes it more likely that a trustee does not wrongfully cause a trust estate to a diminish in value. Such an order obligates a trustee to pay money into a trust estate equalling the extent to which the trustee has wrongfully caused that trust estate to diminish in value. If the trustee complies with that order, any wrongful effects of the trustee's actions upon the value of the trust estate will be reversed.

As to the first point, the argument assumes that there is a reason against the trustee's wrongfully causing a trust estate to diminish in value. This assumption might be grounded in two ways. First, it is in the interests of the beneficiaries and objects of the trust that the trust estate contains subject-matter of greater value. This is because the greater the value of the trust estate, the greater the market value of the subject-matter to be eventually distributed from the trust estate amongst the beneficiaries and objects. This also increases the financial value of any beneficiary's interest under a trust prior to distribution.

Second, some argue that one value furthered by express trusts is that a trustee is obligated to manage subject-matter in the interests of other people.<sup>38</sup> This has value

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<sup>38</sup> Matthew Harding, 'Trust and Fiduciary Law' (2013) 33(1) Oxford Journal of Legal Studies 81, 95-102.

in that a trustee's time and expertise are dedicated towards furthering the interests of others. The greater the value of the trust estate, the greater potential there is for the trustee managing subject-matter in the interests of other people.

If accepted this argument provides a reason in favour of making *Surcharging Orders* in respect of a breach of the settlor's communicated intentions, and for breach of the duty of care, as breach of either duty could cause the trust estate to diminish in value.

A number of objections may be made to the current argument. First, one may question whether the financial interests of the beneficiaries and objects of a trust are always reason-giving in the relevant sense. That these financial interests are reason-giving is necessary to ground the assumption stated above that there is a reason in favour of protecting the trust estate from wrongful diminution in value. In particular if the beneficiaries or objects of a trust are billionaires or major companies, can it really be said that whenever subject-matter is held on trust their interests are furthered by that subject-matter being of greater value?

The premise of the objection should be accepted: it is clear that the financial interests of multi-billionaires and large companies are rarely reason-giving without further argument. This is because providing such individuals with extra money is unlikely to add to their life, for example through an increase in wellbeing or

autonomy; and providing such companies with extra money is unlikely to add to the lives of those people who are interested in the company - for example employees, creditors, and shareholders.

However, the present argument can be adjusted to take account of the objection. If one considers the beneficiaries and objects of all trusts, whilst the financial interests of some will not be reason-giving, the fact remains that the financial interests of many will be reason-giving. Many people's lives would be improved through the receipt of relatively small sums of money: this may improve their wellbeing, or give them further autonomy by augmenting the valuable choices open to them.

Following this thought, one could adopt a rule where a *Surcharging Order* would only be made against a trustee if it could be proved that the financial interests of some of the beneficiaries or objects under the relevant trust were reason-giving in the relevant sense. However there are reasons against adopting such a rule. First, such a rule would involve the delicate task of defining the line between people whose financial interests are reason-giving and other people. Second, adopting such a rule would increase litigation concerning the boundary of this line. Third, such a rule would create uncertainty for prospective settlors and prospective trustees, as whether the financial interests of a person were sufficient to warrant the making of a *Surcharging Order* would plausibly be unpredictable.

Adopting a rule providing for the general availability of *Surcharging Orders* avoids these problems, and is thus to be preferred. If one accepts this line of thought, the present argument needs restating in the following form. One reason in favour of making a *Surcharging Order* is that such an order contributes to the maintenance of a rule providing for the general availability of such orders, where that rule has a valuable consequence. That consequence is the making of *Surcharging Orders* in situations where the financial interests of the beneficiaries or objects under the relevant trust are reason-giving. General availability is justified with reference to avoiding the three problems outlined in the previous paragraph.

A second objection is that the present argument proves too much. If one is concerned with the interests of beneficiaries and objects of the trust, then there is a reason against any causal impact on the value of the trust estate. Notwithstanding this, the present argument purports to provide a reason in favour of making *Surcharging Orders* merely where a trustee has *wrongfully* caused a trust estate to diminish in value. The wrongfulness condition seems unnecessary if one's concern is reducing trust estates to diminish in value.

It is accepted that the value of protecting the financial interests of beneficiaries and objects of the trusts provides a reason against both wrongfully and non-wrongfully causing a trust estate to diminish in value. Nevertheless the present argument may be adjusted to take account of this objection: if there are reasons

against the making of *Surcharging Orders* in situations where a trustee has non-wrongfully caused a trust estate to diminish in value, which do not apply where a trustee has wrongfully caused such a diminution, then the wrongfulness condition is rationally intelligible.

One such reason concerns the value of the rule of law: it is possible that the availability of *Surcharging Orders* in respect of non-wrongfully caused diminutions to the trust estate would threaten the rule of law in a way that such availability in respect of only wrongfully caused diminutions would not. One requirement of the rule of law is that the law should give people fair opportunity to predict the legal consequences of their actions.<sup>39</sup> Such an opportunity respects the autonomy of the relevant actor by allowing the actor to choose which legal consequences they would prefer to embrace or avoid.

The wrongfulness condition on the availability of *Surcharging Orders* facilitates trustees in predicting the legal consequences of their actions. This is because a trustee can avoid liability under a *Surcharging Order* by avoiding breach of the duty to follow the settlor's communicated intentions and breach of the duty of care. If no wrongfulness condition existed, there would be a wider and less predictable range of actions that would trigger the availability of a *Surcharging Order* on the causing of a

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<sup>39</sup> Joseph Raz, 'The Rule of Law and its Virtue' ch 11 in *The Authority of Law* (Clarendon 1979) 220-3; John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53(3) *Cambridge Law Journal* 502, 511-20; Alan Bogg and John Stanton-Iffe, 'Protecting the Vulnerable: Legality, Harm and Theft' (2003) 23(3) *Legal Studies* 402, 407-14.

trust estate to diminish in value. As such the wrongfulness condition on the availability of *Surcharging Orders* is rationally intelligible.

### 4.3.2 Reasons Against

This section will argue that there may be three reasons against making a *Surcharging Order* against a trustee. First, such an order may reduce the wellbeing or autonomy of the trustee. Second, such an order may contribute to a decrease in confidence in the system of private property. Third, such an order may treat the trustee as a mere means to an end.

To the extent that these reasons apply to making a *Surcharging Order* it will be shown that they also apply to the making of a *Lesser Receipt Order*, *Falsification Order*, and *Personal Loss Order*. The application of these reasons to such orders is included in this chapter to avoid repetition in future chapters.

Notwithstanding the existence of such reasons, making one of these four orders will often be permissible, and will be permissible where the trustee subject to the order had a reasonable opportunity to avoid being subjected to the order.

#### 4.3.2.1 Financially Harming Trustees

One possible reason against making a *Surcharging Order*, *Lesser Receipt Order*, *Falsification Order*, or *Personal Loss Order* against a trustee is that making such an order harms the

trustee. To establish this argument it must be shown that these orders harm a trustee, and that there is a reason against harming trustees.

As to the first point, each of these orders obligate a trustee to transfer money from their personal estate to either a trust estate or some person. They therefore contrast with a *Subject-Matter Distribution Order* which obligates a trustee to transfer subject-matter from a trust estate to some person. The mere fact of obligating a trustee to pay money from their personal estate to a trust estate or person does not harm the trustee: it is possible that the trustee fails to comply and no further enforcement action taken. However, if a trustee complies with such an obligation this may cause financial harm to the trustee. This is most obvious in a situation where a trustee is uninsured and thus not reimbursed for any money paid. Even where a trustee is insured, some financial harm may be caused to the trustee through an increase in their insurance premiums.

As to the second point, does the fact of causing financial harm to a trustee provide a reason against making such orders? The concept of harm has received extensive analysis in the academic literature.<sup>40</sup> Three arguments will be made to illustrate that there is a reason against causing such financial harm, at least in some

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<sup>40</sup> Joseph Raz, 'Autonomy, Toleration, and the Harm Principle' ch 7 in S Mendus (ed), *Justifying Toleration: Conceptual and Historical Perspectives* (CUP 1988); Seana Shiffrin, 'Harm and its Moral Significance' (2012) 18 *Legal Theory* 367; Victor Tadros, 'What Might Have Been' ch 8 in J Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014); Frederick Wilmot-Smith, 'Should the Payee Pay' (2017) 37(4) *Oxford Journal of Legal Studies* 844, 847-51.

cases. These arguments focus on a trustee's wellbeing, a trustee's autonomy, and the need to maintain confidence in a system of private property.

First, the fact that an action causes harm to a person's wellbeing is a reason against that action. It might be that the causing of financial harm to a trustee causes harm to that trustee's wellbeing. In such cases, there is a reason against causing such financial harm to the trustee. These considerations may be particularly strong in relation to non-professional or lay trustees. If such a trustee complies with an order obligating them to pay, say, £20k into a trust estate, this could disrupt that trustee's wellbeing by reducing the resources available for paying rent or mortgages, engaging in hobbies, or taking holidays. Such a drop in resources may also cause stress and anxiety to such a person. The strength of this reason will vary, depending on considerations such as the trustee's overall resources, and their ability to borrow money.

Second, the fact that an action causes harm to a person's autonomy is a reason against that action.<sup>41</sup> Leading an autonomous life involves making particular choices over how to lead one's life. It might be that causing financial harm to a trustee causes harm to that trustee's autonomy. This is because many choices require the expenditure of money to exercise them: examples include dining with friends, taking

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<sup>41</sup> For discussion see Joseph Raz, 'Autonomy and Pluralism' ch 14 in *The Morality of Freedom* (Clarendon 1986).

tennis lessons, and travelling with one's family. For many people a reduction in their financial resources will restrict their autonomy by reducing their available choices.

One might object to this line of thinking. In particular one might argue that from the class of trustees who are caused financial harm, only a sub-set of trustees from that class will suffer harm to their wellbeing or autonomy as a result of such financial harm. Human trustees may have vast resources, so that neither their wellbeing nor their autonomy will be impacted by having fewer resources. Furthermore, companies do not obviously have wellbeing or autonomy interests that are in themselves reason-giving in the relevant sense. Accepting these objections would reduce the number of cases in which there is a reason against making the four orders under discussion.<sup>42</sup>

In response, the interests of a company are plausibly seen as a conglomeration of the various people interested in such a company: for example, their employees, creditors, and shareholders. In small companies it might well be that the wellbeing and autonomy interests of these people are negatively impacted by causing the company financial harm. However, it is clear that in many cases involving company trustees such interests will not be affected. In these sorts of cases, and cases involving human trustees with large resources, it is accepted that considerations of wellbeing

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<sup>42</sup> These thoughts are similar to those voiced in 4.3.1.2.

and autonomy provide no reason against the making of the four orders under discussion.

A further reason against the causing of financial harm through the making of a court order is that this reduces confidence in the system of private property. If courts order people to transfer money in situations people generally feel are unjustified, this may decrease people's confidence in the system of private property within a state. For example if courts frequently ordered random individuals to compensate for harms unrelated to the actions of such individuals, this could undermine confidence in the system of private property. Such an undermining of confidence could be problematic for the economy or provoke civil unrest.

One might object to this argument on the basis that making a single order against a trustee is unlikely to cause an undermining of confidence in the system of private property. This is true, but the argument rests on the thoughts that the making of one order sets a precedent, so as to enable courts to make similar orders in the future, and that making one order could contribute to, albeit not cause, an undermining of confidence.

Alternatively one could object that people are unlikely to consider that making orders against a trustee is unjustified in situations where such orders follow the trustee's breaching a legal obligation, such as the duty to follow the settlor's

communicated intentions. However, this objection depends on whether people would think that the trustee's owing such a legal obligation is justified. If courts imposed such legal obligations upon seemingly random people, it is plausible to suppose that people would not think such imposition as justified.

In summary, the making of a *Surcharging Order*, *Lesser Receipt Order*, *Falsification Order*, or *Personal Loss Order* can cause financial harm to a trustee. Where the causing of such financial harm affects the wellbeing or autonomy of that trustee, or contributes to an undermining of confidence in the system of private property, there is a reason against making such an order.

### 4.3.2.2 Use as a Mere Means

One possible reason against the making of a *Surcharging Order*, *Lesser Receipt Order*, *Falsification Order*, or *Personal Loss Order* against a trustee is that such an order uses that trustee as a mere means to an end. To show that such a reason exists it must be demonstrated that making one of these orders against a trustee uses that trustee as a mere means to an end, and that there is a reason against using people as a mere means to an end.

To determine the first point, it is necessary to provide some definition of using someone as a mere means to an end. It suffices for present purposes to say that a court's making an order against a trustee, where the court's motivating reasons for

making the order do not concern that trustee and those interested in the relevant trust estate, counts as using that trustee as a mere means to an end.

Under this definition, a court's making an order against a trustee, where the court's only motivating reasons for making the order are from a set of reasons advanced in this thesis for making such orders, that court would be using the trustee as a mere means to an end.

For example, in this chapter it was argued that one reason in favour of making a *Surcharging Order* is that the making of such an order contributes to the maintenance of a rule providing for the availability of such orders, where the existence of such a rule removes incentives upon trustees to breach their duties so as to cause loss to trust estates.<sup>43</sup> Such a reason does not concern the trustee and those interested in the relevant trust estate. If a court was to make a *Surcharging Order* against a trustee, and was solely motivated by this reason, the court would be using the trustee as a mere means to an end.

Chapters Five to Seven advance reasons of a similar structure in favour of making *Lesser Receipt Orders*, *Falsification Orders*, and *Personal Loss Orders*. For example, in Chapter Seven it is argued that one reason in favour of making a *Personal Loss Order* is that the making of such an order contributes to the maintenance of a rule providing

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<sup>43</sup> See 4.3.1.1.

for the availability of such orders, where the existence of such a rule facilitates people in relying upon trustees complying with their legal obligations, thus helping those people to plan their lives.<sup>44</sup> Again, such a reason does not concern the trustee subject to the order and those interested in the relevant trust estate. A number of other arguments considered in this thesis have a similar structure.<sup>45</sup> If a court's actions were solely motivated by any of these reasons, they would be using the trustee as a mere means to an end.

An objection to such a conclusion is provided by John Gardner, who argues that courts need not be motivated by the reasons that exist in favour of making court orders, and that if a court is not motivated by such reasons they are not necessarily treating the recipient of the order as a mere means to an end. He advances this argument whilst considering whether affecting the moral dispositions of people in society is one reason in favour of making orders for the punishment of criminals. Gardner refers to such an effect as 'Positive General Prevention':<sup>46</sup>

...the question arises of who is going to be doing the treating... [Positive General Prevention] need not figure in the reasoning of anybody who is actually criminalizing or punishing criminals, but only the reasoning of people like us (i.e. theorists) who are bound to step back and consider the whole rational picture... But the mere fact that Positive General Prevention does its fair share in justifying criminalization and criminal punishment does not mean

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<sup>44</sup> 7.3.2.1

<sup>45</sup> See 4.3.1.2, 5.3.2.1, 5.3.2.2, 5.3.2.3, 6.3.2.1, 6.3.2.2, 6.3.2.3, 7.3.2.2, and 7.3.2.3.

<sup>46</sup> John Gardner, 'Functions and Justifications of Criminal Law and Punishment', ch 10 in *Offences and Defences* (OUP 2007) 210-11.

that any official should rely on it, i.e. that it should form part of that official's reasoning.

If one accepted this objection, then providing a court making an order against a trustee was not motivated by the fact that the making of such an order contributed to the maintenance of an incentive-reducing rule, the court would not necessarily be using the trustee as a mere means.

The objection should be rejected. It is accepted that a court need not be motivated by the reasons that exist in favour of a particular order.<sup>47</sup> However, if a court is not so motivated, the question arises as to what reasons are motivating the court. The most plausible motivating reason is the upholding of the rules of the relevant legal system: a court makes an order against a particular trustee, because this is what some legal rule requires of the court. However, if this is the court's motivating reason, it seems the court is using a trustee as a mere means when making one of the orders under discussion: upholding the rules of a legal system does not concern the trustee and those interested in the trust estate. As such, Gardner's objection is unsuccessful in the present context.

As to the second point, does the fact that an action uses someone as a mere means to an end provide a reason against that action? A number of commentators

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<sup>47</sup> For further discussion of the distinction between reasons that exist in favour of an action, the reasons motivating an actor to perform an action, and how these reasons come (and in some situations have reason to come) apart, see Joseph Raz, 'On Reasons for Action' ch 1 in *Practical Reason and Norms* (OUP 1999) 15-20; John Gardner, 'Justifications and Reasons' ch 5 in *Offences and Defences* (OUP 2007) 91-3.

have provided an affirmative answer to this question, including Lionel Smith, John Gardner, and Victor Tadros.<sup>48</sup> Such an answer falls within a Kantian tradition of philosophy, in which the principle against treating people as a mere means features prominently. However this answer is far from uncontroversial: Thomas Scanlon denies that such a fact provides a reason against action.<sup>49</sup>

It thus becomes necessary to consider the sorts of arguments provided by those who think that there is a reason against using someone as a mere means to an end. One difficulty is that the existence of such a reason is often assumed by commentators: for example, neither Lionel Smith nor John Gardner provide any argument for its existence. In contrast, Victor Tadros presents two sorts of argument: one from intuition, and one focusing on the moral status of humans.

First, let us consider Tadros's argument from intuition. Tadros suggests that if there is a reason against using someone as a mere means, such a reason would make sense of our intuitions concerning a number of cases. Tadros focuses on a range of hypotheticals, including the following variations of the trolley problem. The word 'trolley' refers to a tram:<sup>50</sup>

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<sup>48</sup> Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 *Journal of Equity* 87, 94; John Gardner, 'The Wrongness of Rape' ch 1 in *Offences and Defences* (OUP 2007) 15-16; Victor Tadros, 'Defending the Means Principle' ch 6 in *The Ends of Harm: The Moral Foundations of Criminal Law* (OUP 2011).

<sup>49</sup> Thomas Scanlon, 'Means and Ends' ch 3 in *Moral Dimensions: Permissibility, Meaning, Blame* (HUP 2008).

<sup>50</sup> Tadros (n 48) 115. The trolley problem is a thought experiment first considered by Philippa Foot, 'The Problem of Abortion and the Doctrine of Double Effect' (1967) 5 *Oxford Review* 5.

*Trolley Driver:* The driver of a trolley is hurtling down a track and he realises that the brakes have failed. Five people are on the track in front of him, and if he does nothing the trolley will run into them and kill them. However, he can turn the trolley onto another track. If he does so, the trolley will run into one person, killing them.

*Bridge:* The driver of a trolley is hurtling down a track and the brakes have failed. Five people are on the track in front of the trolley. However, there are two people on the bridge between the trolley and the five. One of those is a large person, large enough to stop the trolley if he falls in front of it. The other is a very strong small person. The only way for the strong small person to prevent the trolley hitting the five is by knocking the large person off the bridge so that he will fall in front of it, killing him.

Tadros suggests that it is intuitively permissible for the driver in *Trolley Driver* to switch tracks, but intuitively impermissible to push the large person in *Bridge*. This contrast is puzzling if one merely focuses on lives saved: switching tracks and pushing the large person results in one death rather than five. However, Tadros justifies the intuition with reference to the mere means principle: pushing the large person uses that person as a mere means which is impermissible. In contrast switching tracks does not use the one person killed as a mere means, and thus switching tracks is permissible.

There are a number of difficulties with this argument from intuition. First, it is not obvious that the fact of a reason's existence making sense of our intuitions is a good reason in favour of believing in the existence of that reason. Second, under this argument the content of any reason against using someone as a mere means

would presumably be determined by the intuitions said to ground the reason. The hypotheticals used by Tadros are sufficiently dissimilar to the making of the four orders under discussion that it is not clear that such a reason would apply to the making of such orders.

Second, let us consider Tadros's argument focusing on the moral status of humans. He suggests that there is a reason against using people as a mere means to an end because humans have a form of 'moral status', meaning that we are 'not available for use by each other to pursue the good'.<sup>51</sup> He grounds this moral status in our capacity for 'determining what ends to set for ourselves' by 'determining what we will value amongst the range of things that are valuable'.

This argument also has a difficulty: it does not follow from the fact that humans have the capacity to determine what ends to set for themselves, that there is a reason against other people using humans to pursue the good. From the existence of a capacity one cannot assume that there are reasons against interference with such a capacity.

However, perhaps one could avoid this difficulty by adjusting Tadros's argument: instead of merely identifying a capacity held by humans, one could provide an argument to show that this capacity is valuable, and thus worthy of

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<sup>51</sup> Tadros (n 48) 124-7.

protection. If such an argument was successful, perhaps one could view the existence of reasons against treating someone as a mere means as a method of such protection. Perhaps one could argue that the relevant capacity is valuable because it enables humans to form an identity, which is one aspect of a valuable life.

The foregoing discussion highlights a difficulty which is often not attended to in the legal literature, that of grounding the existence of a reason against treating people as a mere means to an end. Where commentators ground such existence in the rationalisation of intuitions on hypothetical cases, this can create problems in deciding whether the reason applies to future cases. Few commentators provide further reasons grounding such existence, and where they do such reasons are somewhat unconvincing. The argument tentatively advanced here is that the valuable capacity to formulate one's identity may ground the existence of a reason against treating people as a mere means to an end. Clearly more work is required to properly substantiate such an argument, but such work is reasonably outside the scope of a thesis on the court orders available against trustees. However, proceeding on the basis of this argument will suffice for the purposes of the next section, which considers whether trustees have a reasonable opportunity to avoid being subjected to one of the four orders under discussion, and whether the existence of such an opportunity negates any reason against making such an order, or at least renders the making of such an order permissible notwithstanding the existence of such a reason.

### 4.3.2.3 Reasonable Opportunities to Avoid

The previous two sections have suggested that there might be reasons against making one of the four orders under discussion against a trustee, as such orders can cause the trustee financial harm, or involve using the trustee as a mere means to an end. This section considers a suggestion that where a trustee has a reasonable opportunity to avoid being subjected to one of these four orders, these reasons are either negated, or it is permissible to act inconsistently with them.

A number of commentators suggest that providing a person with a reasonable opportunity to avoid some negative consequence affects the permissibility of imposing that negative consequence upon that person. Such commentators include HLA Hart, Thomas Scanlon, Victor Tadros, Niko Kolodny, and Emmanuel Voyiakis.<sup>52</sup> This principle has been discussed in the contexts of state punishment,<sup>53</sup> agreements,<sup>54</sup> and tort law.<sup>55</sup> For example, the fact that a person had a reasonable opportunity to avoid making an agreement is said to be relevant in justifying the conclusion that that person has an obligation to keep their agreement. The idea has

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<sup>52</sup> HLA Hart, 'Prolegomenon to the Principles of Punishment' ch 1 in *Punishment and Responsibility* (OUP 2008) 22-3; Thomas Scanlon, 'Responsibility' ch 6 in *What We Owe to Each Other* (HUP 1998) 256-67; Victor Tadros, 'Against Desert' ch 5 in *The Ends of Harm* (OUP 2011) 65-6; Niko Kolodny, 'Political Rule and its Discontents' ch 3 in D Sobel (ed), *Oxford Studies in Political Philosophy. Volume 2* (OUP 2016) 50-5; Emmanuel Voyiakis, 'Choice and Responsibility' ch 3 in *Private Law and the Value of Choice* (Bloomsbury 2017) 77-92.

<sup>53</sup> Hart *Ibid*; Scanlon *Ibid* 266.

<sup>54</sup> Scanlon *Ibid* 260

<sup>55</sup> Emmanuel Voyiakis, 'Protection Against the Burden of Repair' ch 4 in *Private Law and the Value of Choice* (Bloomsbury 2017).

strong intuitive appeal. The principle will be referred to in the following discussion as ‘the avoidance principle’.

In the present context, one may point to the fact that people can always take action which prevents them from becoming an express trustee. In a self-declaration trust, it was possible for the settlor to avoid declaring a trust.<sup>56</sup> For other forms of trust, a trustee who receives subject-matter following a declaration of trust can disclaim the position of trusteeship by communicating that they do not wish to be trustee.<sup>57</sup> Furthermore, a person may refuse to be a trustee except on particular terms, for example terms concerning remuneration and exclusion clauses. Is it possible to argue that such an opportunity negates the two reasons against making the four orders under discussion, or that such an opportunity renders it permissible to act inconsistently with these reasons?

The answer to this question depends on what reasons, if any, exist in favour of the avoidance principle. Unfortunately the literature is somewhat light on this question. Scanlon, whose discussion of the principle is regarded as seminal in this area, argues for the principle through the use of intuitive judgements concerning

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<sup>56</sup> This is because certainty of communicated intention to create a trust is necessary for a valid declaration of trust: *Paul v Constance* [1977] 1 WLR 527 (CA); *Re Lehman Brothers International (Europe) (In Administration)* [2011] EWCA Civ 1544, [2012] 2 BCLC 151. For analysis of the decision in *Lehman* see Robert Stevens, ‘Floating Trusts’ ch 5 in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart 2017) 120-1.

<sup>57</sup> *Mallott v Wilson* [1903] 2 Ch 494.

various hypotheticals.<sup>58</sup> Given that the hypotheticals concern a city authority's response to the need to remove hazardous waste, it is not obvious how they apply in the present context.<sup>59</sup>

A more profitable approach considers the reasons against making one of the four orders under discussion, and considers how the avoidance principle may interact with these reasons. Recall that these reasons were decreasing a trustee's wellbeing or autonomy, reducing confidence in the system of private property, and treating a trustee as a mere means.

Consider the concern over undermining confidence in the system of private property. Above it was suggested that if courts ordered parties to pay money in situations which people generally thought were unjustified, this could contribute to an undermining of confidence in the system of private property. However, if the avoidance principle has strong intuitive appeal, the potential of making one of the four orders under discussion to contribute to an undermining of such confidence is reduced. People may think that ordering a trustee to pay money is justified, because the trustee had a reasonable opportunity to avoid becoming a trustee, and had the opportunity to derive benefits - such as remuneration - from accepting trusteeship. If this is accepted, one ground for the reason against causing financial harm is negated.

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<sup>58</sup> Scanlon (n 52) 256-62.

<sup>59</sup> For an attempt, albeit it is suggested a failed attempt, to ground the principle see Voyiakis (n 52) 86-92.

Consider the concern with trustee wellbeing and autonomy. Perhaps one argue: if people's opportunity to be a trustee is likely to increase their wellbeing or autonomy, then it is permissible to impose one of the costs of trusteeship on that person, such as one of the four orders under discussion. By ensuring that the opportunity to be a trustee is of this nature, the law shows sufficient concern for the trustee's wellbeing and autonomy, thus rendering it permissible to make one of the four orders under discussion.

Is the existence of the opportunity to be a trustee likely to increase the wellbeing and autonomy of trustees? Plausibly yes. As to autonomy, the trustee is provided with a choice as to whether they are willing to undertake the burdens of trusteeship so as to achieve the benefits of trusteeship - such as remuneration, or the potential to benefit people through the management of subject-matter - or whether they would rather not undertake those burdens. As to wellbeing, it is plausible that many people are the best judges of whether a particular arrangement is good or bad for their wellbeing. So providing people with an opportunity to be a trustee is likely to increase these people's wellbeing. If these points are accepted, it is permissible for a court to make one of the four orders under discussion, notwithstanding the causing of financial harm.

Finally, consider the possible existence of a reason against treating a person as a mere means to an end. Above it was suggested that such a reason may exist to

protect the valuable capacity for forming one's own identity. It is possible that the avoidance principle may also negate this concern: by providing people with a reasonable opportunity to avoid being trustees this respects their capacity to form their own identity, as the person has an option to reject the position of trusteeship, and so need not render themselves liable to one of the four orders. The provision of such an opportunity renders it permissible to make one of those orders should the conditions for availability be satisfied.

The above arguments rest on presenting people with a reasonable opportunity to accept or reject trusteeship. One reason why such opportunities may not be reasonable is if sufficient information concerning the costs of trusteeship is not available to people. In such a case, it is not likely that a person will make a choice that is better for their wellbeing, or autonomy, and their capacity for forming their identity is not respected. As such the availability of the four orders under discussion must be reasonably discoverable to people who are given the opportunity to be trustee.

This condition is easily met for professional trustees who have access to legal advice. It is potentially more problematic in relation to informal trusts, where the costs of trusteeship are not reasonably discoverable to the prospective trustee. Consider a case such as *Paul v Constance* in which a person self-declared a trust by referring to his bank account and stating to his partner that 'this money is as much

yours as it is mine'.<sup>60</sup> It seems safe to assume that the person self-declaring the trust did not realise that they were declaring a trust, or that they were to become a trustee. The costs of trusteeship are clearly not reasonably discoverable to such a person, and the reasons against making one of the four orders under discussion seem applicable.

If a court wished to avoid making an order against such a trustee, they could possibly rely on s 61 of the Trustee Act 1925. This provision empowers a court to relieve a trustee from liability where the trustee has acted honestly, reasonably, and ought fairly to be excused for the breach and omitting to obtain the directions of the court. It is plausible that in a situation such as *Paul v Constance* where the trustee reasonably did not know that they were a trustee, the court could rely on s 61 to refuse to make one of the four orders.

## 4.4 Conclusion

This chapter has made a number of arguments. First, *Surcharging Orders* are available against express trustees of trusts for persons for breach of the duty to follow the settlor's communicated intentions and breach of the duty of care. However, such orders are not generally available where any relevant trust has come to an end, though the scope of this exception is unclear.<sup>61</sup>

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<sup>60</sup> *Paul v Constance* (n 56).

<sup>61</sup> See 4.2.

Second, there are two reasons in favour of making a *Surcharging Order*.<sup>62</sup> Making such an order contributes to the maintenance of a rule providing for the availability of such orders, where that rule has two valuable consequences. First, it reduces the incentive for trustees to breach their legal duties so as to cause trust estates to diminish in value. Second, it provides for the availability of orders to protect the value of trust estates where the financial interests of the beneficiaries and objects under the relevant trust are reason-giving.

Third, there are three reasons against making a *Surcharging Order*.<sup>63</sup> Such an order might reduce a trustee's wellbeing or autonomy, contribute to a decrease in confidence in the system of private property, or use a trustee as a mere means to an end. These reasons also count against making a *Lesser Receipt Order*, *Falsification Order*, or *Personal Loss Order*. However, these reasons either do not apply, or it is permissible to act inconsistently with them, in situations where a trustee had a reasonable opportunity to avoid becoming subjected to liability under one of these four orders.

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<sup>62</sup> See 4.3.1.

<sup>63</sup> See 4.3.2.

# V

## *Lesser Receipt Orders and Subject-Matter Distribution Orders*

### **5.1 Introduction**

#### **5.1.1 Chapter Aims**

This chapter considers four questions. First, does legal authority provide support for or against the availability of *Subject-Matter Distribution Orders*? Second, does legal authority provide support for or against the availability of *Lesser Receipt Orders*? Third, are there reasons for or against the making of *Subject-Matter Distribution Orders*? Fourth, are there reasons for or against the making of *Lesser Receipt Orders*?

In relation to *Subject-Matter Distribution Orders* the inquiry is limited to express trustees of trusts for persons who breach the duty to follow the settlor's communicated intentions by failing to distribute subject-matter under a fixed trust or bare trust.

In relation to *Lesser Receipt Orders*, the inquiry is limited to express trustees of trusts for persons who breach either the duty to follow the settlor's communicated intentions or duty of care. The availability of *Lesser Receipt Orders* in favour of beneficiaries under fixed trusts or bare trusts, and objects under a discretionary trust or power of appointment, will be considered.<sup>1</sup>

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<sup>1</sup> For further discussion of this scope, see 2.3.

This chapter focuses on the following order:<sup>2</sup>

*Subject-Matter Distribution Order*: a court order obligating a trustee to transfer subject-matter from the trust estate to a person, where the trustee has wrongfully failed to distribute that subject-matter to that person.

A *Subject-Matter Distribution Order* has a number of features. Such an order obligates (1) a trustee, (2) to transfer subject-matter from a trust estate to a person, (3) where the trustee has wrongfully failed to distribute that subject-matter to that person.

Recall the following hypothetical, demonstrating the *Subject-Matter Distribution Order*:<sup>3</sup>

*Bank Insolvency*: a trustee holds £1m on trust with a duty to distribute the money to Adam on 1st January. In breach the trustee holds onto the money, and on 2nd January Adam's bank goes insolvent. Had the trustee complied with her duty, Adam would have lost the money in the insolvency.

A *Subject-Matter Distribution Order* would obligate the trustee to transfer £1m from the trust estate to Adam, as this is the subject-matter that the trustee wrongfully failed to distribute to Adam. This contrasts with a *Personal Loss Order* which would plausibly require no action from the trustee: given that the £1m would have been lost in the bank's insolvency, the trustee has not wrongfully caused Adam a loss all things considered.<sup>4</sup>

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<sup>2</sup> The concept of a *Subject-Matter Distribution Order* is explored in detail in 2.2.2.

<sup>3</sup> This hypothetical was introduced in 2.2.2.

<sup>4</sup> The accuracy of this depends on the appropriate construction of the non-breach counterfactual. For discussion of the legal rules relevant in constructing this counterfactual, see 8.2.1.

This chapter also focuses on the following order:<sup>5</sup>

*Lesser Receipt Order*: a court order obligating a trustee to pay money to a person, where the quantum of liability is the extent to which the trustee has wrongfully caused that person to receive less valuable subject-matter from the trust estate.

The *Lesser Receipt Order* has a number of features. It obligates (1) a trustee, (2) to pay money to a person, (3) where the quantum of liability is the extent to which the trustee has wrongfully caused that person to receive less valuable subject-matter from the trust estate. Given (3) the *Lesser Receipt Order* is an example of a counterfactual loss order, where counterfactuals are constructed and compared to determine whether a loss has been wrongfully caused.<sup>6</sup>

The *Lesser Receipt Order* is defined with an ambiguity concerning non-monetary subject-matter. That ambiguity concerns the appropriate date for assessing the value of any non-monetary subject-matter received by a person in the non-breach counterfactual or breach counterfactual. The ambiguity is deliberately adopted, so as to ensure full exploration of whether the legal authorities or normative arguments resolve the ambiguity.

Recall the following hypothetical which demonstrates the *Lesser Receipt Order*:<sup>7</sup>

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<sup>5</sup> The concept of a *Lesser Receipt Order* is explored in detail in 2.2.3.

<sup>6</sup> The legal rules for constructing and comparing counterfactuals are considered in Chapter Eight.

<sup>7</sup> This hypothetical was introduced in 2.2.3.

*Duty to Invest 2*: a trustee holds £1m on trust, and owes a duty to invest the money in Orange Shares before distributing the income from the shares to Beatrice over the following five years. The trustee wrongfully retains the money, and over the next five years distributes £20k of interest earned with the money to Beatrice. £60k of dividends would have been declared on the shares throughout the five year period. Beatrice is a serious gambler, and has wasted the £20k she received from the trustee. Had she received the £60k dividends instead, she would have wasted this too, at a much greater detriment to her mental health.

A *Lesser Receipt Order* would obligate the trustee to pay £40k to Beatrice, as this is the extent to which the trustee has wrongfully caused Beatrice to receive less valuable subject-matter from the trust estate. In contrast, a *Personal Loss Order* would require no action from the trustee: it seems that the breach of duty has caused Beatrice to be better-off all things considered.

## 5.1.2 Chapter Summary

Section 5.2.1 will argue that *Subject-Matter Distribution Orders* are available where a trustee breaches the duty to follow the settlor's communicated intentions by failing to distribute subject-matter under a fixed trust.

Section 5.2.2 will argue that *Lesser Receipt Orders* are available in favour of beneficiaries under a fixed trust or a bare trust, for breach of either the duty to follow the settlor's communicated intentions or the duty of care, where the breach causes such a beneficiary to receive less money from the trust estate. The authorities

are less clear on whether such orders are available where a beneficiary is caused to receive less valuable non-monetary subject-matter from the trust estate. Furthermore the authorities are silent on whether such orders are available in favour of objects under discretionary trusts or powers of appointment.

Section 5.3.1 will reject an existing argument seeking to identify a reason in favour of making a *Lesser Receipt Order* or *Subject-Matter Distribution Order*.

Section 5.3.2 will identify two reasons in favour of making such orders. These reasons are underpinned by the values of enabling beneficiaries to plan their lives around the receipt of subject-matter from trust estates, and increasing access to justice by facilitating settlement and decreasing the need for litigation.

## **5.2 Legal Authorities**

### **5.2.1 *Subject Matter Distribution Orders***

This section will demonstrate that *Subject-Matter Distribution Orders* are available when a trustee breaches the duty to follow the settlor's communicated intentions by failing to distribute subject-matter to a beneficiary under a fixed trust. The authorities considered will be grouped into two categories.

### 5.2.1.1 Late Distribution of Subject-Matter

#### 5.2.1.1.1 *Re Radcliffe*

In *Re Radcliffe*, in the circumstances that arose, the claimant was entitled to half of the capital of a trust fund under a fixed trust, and the time for distribution had passed. The claimant ‘took out summons asking for an order that he was entitled to a moiety of the trust property, and to have the same moiety transferred and paid to him’.<sup>8</sup> The Court of Appeal granted the order. Lindley LJ said the claimant was ‘entitled to an order such as he asks’,<sup>9</sup> whilst Bowen and Fry LJJ both agreed with Lindley LJJ. The words ‘that he was entitled to a moiety of the trust property, and to have the same moiety transferred and paid to him’ is indicative of a *Subject-Matter Distribution Order* as it focuses on subject-matter within the trust that the trustee had wrongfully failed to distribute to the beneficiary.<sup>10</sup>

#### 5.2.1.1.2 *Smith v Bolden*

In *Smith v Bolden*, a testator left shares on trust for his wife for life remainder to their seven children in equal shares.<sup>11</sup> The wife died and the trustee had made appropriate distributions to six of the seven children. The seventh child had died but the trustee refused to transfer one-seventh of the shares to the seventh child’s administratrix on the ground that there was some dispute over the entitlement to

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<sup>8</sup> *Re Radcliffe* [1891] 1 Ch 227 (CA) 228.

<sup>9</sup> *Ibid* 233.

<sup>10</sup> A similar interpretation can be made of *Re Selot’s Trust* [1902] 1 Ch 488, 493 (Farwell J).

<sup>11</sup> *Smith v Bolden* (1863) 33 Beav 262, 55 ER 368, 369 (Sir John Romilly MR).

these shares under the seventh son's will. The administratrix sought an order requiring the transfer of the shares, arguing that any such dispute was irrelevant to the trustee. Sir John Romilly MR made the order, requiring the trustee 'to pay the one-seventh to the legal personal representative' of the seventh son. This appears to be a *Subject-Matter Distribution Order* as it required the trustee to transfer subject-matter from the trust estate to the person to whom the trustee had wrongfully failed to distribute to.

#### 5.2.1.1.3 Differing Subject-Matter

*Re Radcliffe* makes a *Subject-Matter Distribution Order* in respect of money held on trust, and *Smith v Bolden* makes such an order in respect of shares held on trust. It might be argued that the availability of such orders is limited to wrongful failures to distribute money and shares. However, such an argument should be resisted. Admittedly the reasoning of neither *Radcliffe* nor *Smith* embraces the general availability of such orders. However, there seems little reason to restrict the availability of such orders to money and shares. Furthermore, the courts give no indication that such orders should not be available for other subject-matter, such as title to land or goods. As such, it is suggested the decisions provide authority for the availability of *Subject-Matter Distribution Orders* whenever a trustee wrongfully fails to distribute under a fixed trust, irrespective of the type of subject-matter.

### 5.2.1.2 Third Party Debt Orders

Before outlining the authorities supporting the availability of *Subject-Matter Distribution Orders*, the nature of third party debt orders will be discussed. A third party debt order obligates a defendant - the third party - to pay money to a judgment creditor to whom the judgment debtor owes a judgment debt, where the defendant owes a debt to the judgment debtor.<sup>12</sup> It is sometimes said that a third party debt order ‘attaches’ to the debt owed by the defendant to the judgment debtor.<sup>13</sup>

The effect of a defendant’s complying with a third party debt order is to reduce the judgment debt owed to the judgment creditor and the debt owed to the judgment debtor to the extent of that compliance. One value served by the availability of third party debt orders is the reduction of litigation: rather than the judgment creditor sue the judgment debtor and the judgment debtor sue the defendant, the judgment creditor can sue the defendant directly. Another value is that they provide an additional means for the judgment creditor to enforce their judgment debt.

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<sup>12</sup> The rules governing such orders are contained in the Civil Procedure Rules (‘CPR’) Part 72. Third party debt orders used to be called ‘garnishee orders’. Garnishee orders were initially established under the Common Law Procedure Act 1854, s 61.

<sup>13</sup> For example: *Nash v Pease, Re Eccles and Turner* (1878) 47 LJ QB 766 (Kelly CB and Lush J).

The following example demonstrates the working of a third party debt order. Assume Natalie (a judgment creditor) receives judgment against Thomas (a judgment debtor) requiring Thomas to pay Natalie £10k. Assume further that Lily (a third party) owes Thomas £6k. A third party debt order will require Lily to pay £6k directly to Natalie. If Lily complies with the third party debt order and pays £6k to Natalie, the debt owed by Lily to Thomas, and the debt owed by Thomas to Natalie, are extinguished to the extent of £6k. The result would be Lily's owing nothing to Thomas, and Thomas owing Natalie £4k.

A necessary condition for the making of a third party debt order is that there is a 'debt due' from the defendant to the judgment debtor. Another necessary condition is that the judgment debtor can acquire some order against the defendant to enforce the debt.<sup>14</sup> An unenforceable debt is not sufficient, as made clear by Lord Mance in *Taurus Petroleum Ltd v State Oil Marketing Co*:<sup>15</sup>

The concept of a debt for the purposes of a third party debt order, or its predecessor the garnishee order, is particularly well-settled by authority. First, "The test of 'debt due' is whether it is one for which the creditor could immediately and effectually sue... Secondly, and as a concomitant of the first principle, a judgment creditor cannot stand in a better position than the judgment debtor did in relation to the third party against who the third party debt order is

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<sup>14</sup> CPR Rule 72.2(1)(a).

<sup>15</sup> *Taurus Petroleum Ltd v State Oil Marketing Co* [2017] UKSC 64, [2017] 3 WLR 1170 [87]-[90]. Although Lord Mance was in the minority of the Supreme Court in *Taurus*, which was a 3:2 decision, the judges did not differ on the rule providing for the availability of third party debt orders. Rather the disagreement concerned whether a debt was actually owed to the judgment debtor on the facts of the case, which depended on the proper construction of some complicated letters of credit. Lord Mance's statement of principle is therefore safe as a summary of the law in this area.

sought... this principle means that the court will look at the judgment debtor's actual entitlement to sue for the money.

The fact that an enforceable debt owed by the third party to the judgment debtor is necessary for the granting of a third party debt order against the third party is important in showing that the availability of third party debt orders against trustees supports the availability of *Subject-Matter Distribution Orders*. This argument will now be outlined.

Third party debts orders are sometimes available against a trustee requiring that trustee to transfer money from the trust estate to a judgment creditor. Such orders are available where the trustee has wrongfully failed to distribute money to a beneficiary under a fixed trust, where the beneficiary owes a judgment debt to the judgment creditor. The Court of Appeal's decision in *Webb v Stenton* contains the fullest discussion of the applicable law.<sup>16</sup>

In *Webb*, trustees were obligated to distribute any income arising from a trust estate to a life tenant under a fixed trust in February and November of each year. At the time of proceedings all income that had arisen had been distributed to the beneficiary. Nevertheless, a judgment creditor of the beneficiary sought to attach to a 'debt due' from the trustee to the beneficiary, so that the trustee would be ordered to pay any future income to the judgment creditor once it had arisen.

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<sup>16</sup> *Webb v Stenton* (1883) 11 QBD 518 (CA).

The Court of Appeal refused to make an order to attach, because there was no debt due. Lindley LJ said:<sup>17</sup>

But is a trustee a debtor to his cestui que trust? You cannot say he is unless he has got in his hands money which it is his duty to hand over to the cestui que trust; then of course he is a debtor and there is no difficulty in attaching such a debt...

Fry LJ said:<sup>18</sup>

A trustee is not, in my opinion, an equitable debtor to the cestui que trust until there is money in his hands which he ought to pay to his cestui que trust, or until he has made himself personally liable to pay money to his cestui que trust by reason of some breach of trust...

Lindley LJ's focus on 'in his hands money which it is his duty to hand over to the cestui que trust' and Fry LJ's focus on 'money in his hands' show that where a trustee is holding money that they are obligated to transfer to a beneficiary, a third party debt order can be made requiring the trustee to transfer the money to a judgment creditor.

Furthermore a number of cases have actually made third party debt orders against trustees requiring the payment of money from the trust estate to the judgment creditor of a beneficiary to whom the trustee was obligated to distribute under a fixed trust.<sup>19</sup> Although the reasoning in these cases is less extensive than that

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<sup>17</sup> *Ibid* 526.

<sup>18</sup> *Ibid* 530.

<sup>19</sup> *Re Sampson* [1896] 1 Ch 630; *Re Greenwood, Sutcliffe v Gledhill* [1901] 1 Ch 887. Capital: *Nash v Pease, Re Eccles and Turner* (n 13).

employed in *Webb v Stenton*, they too stand for the availability of third party debt orders against trustees.

The availability of third party debt orders against trustees in situations where the trustee has wrongfully failed to distribute money to a beneficiary under a fixed trust shows that there is an enforceable ‘debt due’ in such situations. This is because the existence of an enforceable ‘debt due’ is a necessary condition for the making of such orders. That there is a ‘debt due’ from the trustee means that the trustee is obligated to transfer money from the trust estate to the beneficiary, and that this obligation is enforceable by the beneficiary. Thus the existence of an enforceable ‘debt due’ demonstrates that *Subject-Matter Distribution Orders* are available in favour of beneficiaries where a trustee has failed to distribute money under a fixed trust. The authorities considered in this section tell us nothing of the situation in which a trustee wrongfully fails to distribute non-monetary subject-matter.

### 5.2.1.3 A Change in the Settlor’s Communicated Intentions

There is one situation where intuitively it seems a *Subject-Matter Distribution Order* should not be available, notwithstanding that a trustee wrongfully failed to distribute subject-matter to a beneficiary under a fixed trust. The following example demonstrates the point:

*Gift for a Purpose*: a settlor transfers £500k to a trustee, and communicates an intention that the trustee will distribute £5k to a beneficiary on the 1st January 2020. The settlor communicates that the purpose of the gift is for the

beneficiary to have additional spending money for their honeymoon, which takes place in February and March. The settlor also communicates that if the trustee has not distributed the money by the end of the honeymoon, the money should be retained in the trust estate. It is June 2020 and the trustee has not distributed the £5k.

Intuitively it seems that a *Subject-Matter Distribution Order* should not be made, notwithstanding that the trustee has wrongfully failed to distribute money to a beneficiary under a fixed trust. This is perhaps because such a distribution would be inconsistent with the settlor's communicated intentions, which state that no distribution should be made once the beneficiary's honeymoon is over. There is no legal authority applicable to the present case, though it seems plausible to suppose a court would not make a *Subject-Matter Distribution Order* on such facts.<sup>20</sup> It is possible that the beneficiary could seek a *Lesser Receipt Order* instead.

### 5.2.2 *Lesser Receipt Orders*

This section will demonstrate that *Lesser Receipt Orders* are sometimes available for breach of both the duty to follow the settlor's communicated intentions, and the duty of care. Such orders are available in favour of beneficiaries under fixed trusts and bare trusts, though the authorities are silent on availability in favour of objects under discretionary trusts or powers of appointment. Such orders are available when a trustee wrongfully causes a person to receive less money from the trust estate.

The authorities are less clear on whether such orders are available where a trustee

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<sup>20</sup> It is possible that an analogy could be drawn between this example and the rules of contract law which enable parties to agree to liquidated damages, limitation, and exclusion clauses. Liquidated damages clauses are not, however, enforceable to the extent that they fall foul of the penalties doctrine: *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67, [2016] AC 1172.

wrongfully causes a person to receive less valuable non-monetary subject-matter from the trust estate, though it is arguable that such orders are available. If one were to accept this argument, the question arises as to the appropriate date for assessing the value of such non-monetary subject-matter. The authorities are silent on this question.

### 5.2.2.1 The Settlor's Communicated Intentions

In this section any references to wrongs or breach of duty refer to a breach of the settlor's communicated intentions, unless otherwise indicated.

#### 5.2.2.1.1 *Re Jackson*

In *Re Jackson*, a testator contracted to sell fee simple to land and died before conveyance or payment was made.<sup>21</sup> The trustee under the testator's will conveyed the fee simple to the purchaser and received the purchase money in exchange. The trustee came under a duty to distribute this purchase money to the claimant, though wrongfully distributed to the incorrect person as a result of misinterpreting the will. The trustee subsequently died and the claimant sought an order against the trustee's estate seeking money equal to what should have been distributed to him.

Bacon VC made the order stating that the claimant was 'entitled in the first instance to have the money paid to him on the part of Mr Donald's estate', where

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<sup>21</sup> *Re Jackson; Wilson v Donald* (1881) 44 LT 467 (Ch).

Mr Donald refers to the trustee.<sup>22</sup> This appears to be a *Lesser Receipt Order* as it is quantified with reference to the amount of money that the trustees should have distributed to the claimant, and one assumes that had some of this money been paid already the order would have been reduced to the extent of such payment. As there is no reasoning on the general availability of such orders, it is safest to state the ratio of the case as applying when a trustee wrongfully fails to distribute money to a beneficiary under a fixed trust.

One might object to this interpretation of *Jackson*, on the ground that Bacon VC could have been making a *Personal Loss Order*: presumably the trustee's breach in failing to distribute caused the beneficiary loss to the extent of the amount to be distributed. As such the order in the case is consistent with both a *Lesser Receipt Order* and a *Personal Loss Order*, and the case is unsafe authority for the availability of the former.

The objection should be rejected. It is accepted that the decision is consistent with either form of order. However, a reasonable interpretation of Bacon VC's judgment renders it more plausible that he was making a *Lesser Receipt Order*. This is because Bacon VC does not employ causal language, and does not consider whether the beneficiary was in fact worse-off as a result of the breach of duty. One would expect such discussion if he were making a *Personal Loss Order*. However, the

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<sup>22</sup> *Ibid* 469.

discussion that is made - that the trustee wrongfully failed to distribute money to the claimant - and had not at the time of judgment distributed any money to the claimant - is sufficient to ground a *Lesser Receipt Order*. As all the conditions for the availability of such an order are discussed, it is more plausible that such an order was made.

#### 5.2.2.1.2 *Target Holdings*

The facts of *Target Holdings Ltd v Redferns* are outlined elsewhere.<sup>23</sup> In brief, a trustee held £1.5m on bare trust for a lender for use in a loan transaction. The trustee wrongfully transferred away the money, and it was not proved whether this breach had caused any loss. The lender sought a *Falsification Order* on summary judgment. The House of Lords refused to make any order, with Lord Browne-Wilkinson giving the only reasoned speech.

In refusing summary judgment, Lord Browne-Wilkinson outlined the appropriate principles for determining the liability of trustees following a breach of duty. His discussion of a hypothetical shows his support for the availability of *Lesser Receipt Orders*.

In the relevant hypothetical, a trustee holds subject-matter on trust for A for life remainder to B, and wrongfully transfers some subject-matter during A's lifetime. Lord Browne-Wilkinson reasoned that in such circumstances the trustee will be

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<sup>23</sup> See 4.2.1.3. *Target Holdings Ltd v Redferns* [1996] AC 421 (HL).

ordered to place subject-matter or money into the trust estate. Such an order ensures that A can continue to receive the income from the trust estate, and that B can receive the capital upon A's death:<sup>24</sup>

...the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss.

... the right of each beneficiary is to have the whole fund vested in the trustees so as to be available to satisfy his equitable interest when, and if, it falls into possession. Accordingly, in the case of a breach of such a trust involving the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund, often called "the trust estate," what ought to have been there.

Lord Browne-Wilkinson states that a trustee may owe a duty following the wrongful distribution of subject-matter to place that subject-matter back into the trust estate, or alternatively a duty to compensate the trust estate with what ought to be there. A *Surcharging Order* would enforce this latter duty.

Lord Browne-Wilkinson continued to consider a situation in which an order is sought after A's death in respect of the breach. He said that it is generally unnecessary in such a situation to place money into the trust estate, as the trustee

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<sup>24</sup> *Ibid* 434.

will have come under an obligation to distribute the trust estate to B. Therefore the order will generally require the trustee to transfer money to B:<sup>25</sup>

...there is no reason for compensating the breach of trust by way of an order for restitution and compensation to the trust fund as opposed to the beneficiary himself... The measure of such compensation is the same, i.e. the difference between what the beneficiary has in fact received and the amount he would have received but for the breach of trust.

The order discussed appears to be a *Lesser Receipt Order* for two reasons. First, Lord Browne-Wilkinson stated that the quantum of ‘compensation’ is the difference in value between what the beneficiary has in fact received and what he would have received but for the breach of trust. Second, Lord Browne-Wilkinson cited *Bartlett v Barclays Bank Trust Co Ltd* as an example of the order under discussion. As will be demonstrated below, *Bartlett* makes a *Lesser Receipt Order* for breach of the trustee’s duty of care.<sup>26</sup>

Lord Browne-Wilkinson said that the quantum of any order made after A’s death will be ‘the same’ as the quantum of any *Surcharging Order* made before A’s death. This is true in the considered hypothetical, as there is only one remainder-person under the trust. However it is worth noting that ‘the difference between what the beneficiary has in fact received and the amount he would have received but for

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<sup>25</sup> *Ibid* 434-5. Note that the quantum of an order sought within the lifetime of a life tenant will not always be the same as the quantum of an order sought upon the life tenant’s death. In a situation involving a trust for A for life, remainder to B and C in equal shares, the quantum of an order within A’s lifetime will be the quantum of an order made in favour of B added to the quantum of an order made in favour of C upon A’s death. For further discussion see 2.2.3.

<sup>26</sup> See 5.2.2.2.2. *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515.

the breach' will not always equate to the amount of such a *Surcharging Order*. For example if there are two remainder-people with equal interests to capital, the *sum* of the orders available in each remainder-person's favour will equate to the amount of such a *Surcharging Order*, not each order individually.<sup>27</sup> This point should not detract from the conclusion that Lord Browne-Wilkinson supports the availability of *Lesser Receipt Orders*: he seems merely to have overlooked a possible variation of his hypothetical.

*Target* concerned a beneficiary under a bare trust, whilst the hypothetical discussed by Lord Browne-Wilkinson concerned a beneficiary (B) under a fixed trust over capital. As such *Target* provides authority for at least these cases. Furthermore, there seems little reason to distinguish between beneficiaries under a fixed trust of capital and beneficiaries under a fixed trust of income. As such one could plausibly argue that *Target* extends to the latter case.

One might object to the above analysis by suggesting that Lord Browne-Wilkinson placed additional limits on the availability of *Lesser Receipt Orders*. On one reading of Lord Browne-Wilkinson's speech, such orders are only available in respect of 'traditional trusts', where those trusts have 'come to an end', and only in favour of beneficiaries who are 'absolutely entitled' to the trust estate.<sup>28</sup> Such

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<sup>27</sup> For further discussion, see 2.2.3.

<sup>28</sup> There are parallels here with the discussion in Chapter 4 concerning possible limits to the availability of *Surcharging Orders*: 4.2.1.3.

limitations may be implied by various comments made by Lord Browne-Wilkinson when considering the hypothetical scenario.<sup>29</sup> The objection should be rejected. The better interpretation is that Lord Browne-Wilkinson did not intend these limitations.

First, it seems Lord Browne-Wilkinson did not intend to limit availability to ‘traditional trusts’. Lord Browne-Wilkinson seems to be the first judge in any case to employ this concept, and leaves it undefined. Furthermore, there seems little obvious reason to limit the availability of *Lesser Receipt Orders* to traditional trusts. It seems more plausible that Lord Browne-Wilkinson was using the phrase as a loose characterisation of his hypothetical, to contrast it with the sort of case that arose in *Target* where a settlor had used a trust to effect a commercial investment. Furthermore, the idea that the available orders against trustees depend on whether the trust in question was traditional or otherwise was rejected in the judgments of both Lord Toulson and Lord Reed in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, where the remainder of the Supreme Court agreed with both judgments.<sup>30</sup>

Second, it seems Lord Browne-Wilkinson did not intend to limit availability to ‘trusts that had come to an end’. He expressly endorsed Brightman LJ’s decision in *Bartlett v Barclays Bank* as an illustration of the order under discussion.<sup>31</sup> *Bartlett* will

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<sup>29</sup> *Target* 434-5.

<sup>30</sup> *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 [70] (Lord Toulson), [102] (Lord Reed).

<sup>31</sup> *Target* (n 23) 435.

be discussed in detail below, but in brief Brightman LJ makes a *Lesser Receipt Order* for breach of the duty of care in favour of a beneficiary under a fixed trust over income, where the trustee was still managing subject-matter held on trust.<sup>32</sup> This endorsement is inconsistent with a limitation of such orders to trusts that have come to an end, assuming that a situation where a trustee still holds subject-matter and is managing that subject-matter for various beneficiaries does not involve a trust that has come to an end.

Third, it seems Lord Browne-Wilkinson did not intend to limit availability to beneficiaries who are ‘absolutely entitled’ to the trust estate. Again this is inconsistent with Lord Browne-Wilkinson’s endorsement of *Bartlett*, where a *Lesser Receipt Order* was made in favour of a beneficiary under a fixed trust over income. One might resolve this inconsistency by arguing that ‘absolutely entitled’ refers to either a beneficiary under a fixed trust over income or capital, or the beneficiary under a bare trust. This interpretation involves treating ‘absolutely entitled’ as not referring to the trust estate as a whole, but merely part of the trust estate or income that may arise. However, it is not clear that this interpretation is possible: whilst Lord Browne-Wilkinson clearly thinks that a beneficiary under a bare trust is absolutely entitled, it is unclear whether he thinks it possible that other beneficiaries can also be absolutely entitled. Irrespective of one’s interpretation of absolutely entitled, one should not

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<sup>32</sup> See 5.2.2.2.2.

read Lord Browne-Wilkinson as limiting availability to beneficiaries under bare trusts, as this is inconsistent with his endorsement of *Bartlett*.

As such, it seems incorrect to interpret Lord Browne-Wilkinson as having placed such limitations on the availability of *Lesser Receipt Orders*. It seems more plausible to interpret the second and third limitations as relevant to whether the trustee can be ordered to pay money into the trust estate. In situations where the trust has come to an end, or in a bare trust, there will generally be little value served by the trustee's paying money to the trust estate: the payment of money directly to a beneficiary or beneficiaries seems more appropriate.<sup>33</sup>

#### 5.2.2.1.3 *Hulbert v Avens*

In *Hulbert v Avens*, trustees were obligated to pay capital gains tax liabilities that had fallen due upon a trust estate.<sup>34</sup> They breached this duty by failing to pay on time. This breach had three consequences. First, the trustees became liable to the revenue for interest on and penalties for the late payment. Second, £37k of additional income arose on the capital remaining in the trust estate that should have been used to pay the tax liability. Third, upon final distribution of the trust estate, the beneficiary who was solely entitled to the capital and income of the trust estate received more from the trustees than they would have done had the trustees not

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<sup>33</sup> This point is expanded upon in 4.2.1.3.

<sup>34</sup> *Hulbert v Avens* [2003] EWHC 76 (Ch), [2003] WTLR 387.

breached their duty to pay the tax liability.<sup>35</sup> This was mainly due to the increased income that had arisen on the estate.

The beneficiary sought an order requiring the trustee to pay £37k to the beneficiary for breach of the obligation to pay the tax liability. The arguments made in support of this order were fairly spurious, and HH Richard Seymour QC refused to make the order. He made the following statements of principle derived from Lord Browne-Wilkinson's speech in *Target*:<sup>36</sup>

The particular principles which are relevant are that equitable compensation falls to be assessed as at the date of trial in the light of all the information then available as to whether the relevant trust fund, or, if by the date of trial the trust has come to an end, beneficiary, has actually sustained a loss as a result of a breach of trust, and, if so, the amount of such loss.

...in the ordinary case where a beneficiary becomes absolutely entitled to the trust fund the court orders, not restitution to the trust estate, but the payment of compensation directly to the beneficiary. The measure of such compensation is the same, ie the difference between what the beneficiary has in fact received and the amount he would have received but for the breach of trust.

HH Richard Seymour QC appears to have recognised the availability of *Lesser Receipt Orders*. First, he recognises an order quantified at the 'difference between what the beneficiary has in fact received and the amount he would have received but for

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<sup>35</sup> The case actually concerned three beneficiaries, but for present purposes a focus on one beneficiary will suffice.

<sup>36</sup> *Hulbert* (n 34) [56], [45]. The latter statement is a direct quote from Lord Browne-Wilkinson's speech in *Target*.

the breach of trust'. This is a direct quote from Lord Browne-Wilkinson's speech in *Target*, which as stated above supports the availability of *Lesser Receipt Orders*.

Second, in applying these principles to the facts of *Hulbert*, HH Richard Seymour QC says that the fact that the beneficiary had 'received more from' her trust than she would 'but for the breaches of trust' was a conclusive reason against making the order sought.<sup>37</sup> This focus on the beneficiary's receipt is also suggestive of a *Lesser Receipt Order*.

As the facts had occurred in *Hulbert*, the beneficiary was entitled under a bare trust. Therefore *Hulbert* stands at least for the proposition that *Lesser Receipt Orders* are available in favour of such people. Given that HH Richard Seymour QC quoted from Lord Browne-Wilkinson's discussion of the hypothetical in *Target*, it may be presumed that he endorses the availability of such orders in favour of beneficiaries under fixed trusts.

One might object to the idea that *Hulbert* provides authority in favour of the availability of *Lesser Receipt Orders* for breach of the duty to follow the settlor's communicated intentions. Whilst it was accepted in *Hulbert* that the failure to pay capital gains tax was a breach of trust, it is not made clear, and seems improbable,

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<sup>37</sup> *Ibid* [56].

that the breach was of the duty to follow the settlor's communicated intentions.<sup>38</sup> As such one might say that HH Richard Seymour QC did not recognise availability for breach of this duty.

The objection should be rejected, as it seems plausible to interpret HH Richard Seymour QC as recognising the availability of *Lesser Receipt Orders* for breach of the duty to follow the settlor's communicated intentions, even if the facts of *Hulbert* did not concern a breach of that duty. This is for two reasons.

First, HH Richard Seymour is applying and therefore developing the legal concept of 'equitable compensation' in refusing the order sought.<sup>39</sup> It is clear that equitable compensation governs the orders available against trustees following a breach of the duty to follow the settlor's communicated intentions: this can be discerned from *Target* itself.

Second, HH Richard Seymour cited and endorsed statements from Lord Browne-Wilkinson's speech in *Target*, where those statements recognised the availability of *Lesser Receipt Orders* for breach of the duty to follow the settlor's communicated intentions.

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<sup>38</sup> The passage indicating the acceptance by the trustees that they were in breach of trust is at *Ibid* [27].

<sup>39</sup> The heading of the relevant part of his judgment is 'Assessment of Equitable Compensation' *AIB* (n 30) [35].

#### 5.2.2.1.4 *AIB v Mark Redler*

The facts of AIB are outlined elsewhere.<sup>40</sup> In brief, a trustee held around £3.3m on bare trust for a lender for use in a loan transaction. The trustee wrongfully transferred away the money, which caused about £300k of loss to the beneficiary of the trust. The beneficiary sought a *Falsification Order* for around £2.5m, and the Supreme Court refused to make such an order, instead ordering the trustee to pay around £300k to the beneficiary.<sup>41</sup> Lord Toulson and Lord Reed gave the only reasoned judgments. Lord Neuberger, Baroness Hale, and Lord Wilson agreed with both judgments.

Lord Toulson considered the aspect of Lord Browne-Wilkinson's speech dealing with the hypothetical discussed above.<sup>42</sup> He paraphrased Lord Browne-Wilkinson's analysis:<sup>43</sup>

...Lord Browne-Wilkinson went on to consider the position if at the time of the action the trust had come to an end, for example by the beneficiary becoming absolutely entitled to the trust fund... The normal order would... be for the payment of compensation directly to the beneficiary. The measure of compensation would be the difference between what the beneficiary had in fact received and the amount which he would have received but for the breach of trust'.

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<sup>40</sup> See 4.2.1.4.

<sup>41</sup> It is argued in Chapter Seven that this was a *Personal Loss Order*. 7.2.2.2.

<sup>42</sup> 5.2.2.1.2.

<sup>43</sup> *AIB* (n 30) [31].

Later, Lord Toulson approved Lord Browne-Wilkinson's analysis.<sup>44</sup> As such he supported the availability of *Lesser Receipt Orders*.

Lord Reed cited directly from Lord Browne-Wilkinson's speech, including the discussion of the hypothetical considered above:<sup>45</sup>

“The measure of such compensation is the same, i e the difference between what the beneficiary has in fact received and the amount he would have received but for the breach of trust.”

Lord Reed endorsed this analysis, and therefore supported the availability of *Lesser Receipt Orders*.

However, one might argue that Lord Toulson and Lord Reed limited the availability of *Lesser Receipt Orders* to situations in which a trust had come to an end, one example of such a situation being where a beneficiary had become absolutely entitled to the trust estate.

In respect of Lord Toulson, the quote on the previous page raises the possibility of such a limit. However, it is not clear that Lord Toulson intended to place such a limit on availability. It is possible that he was merely characterising the hypothetical considered by Lord Browne-Wilkinson, whilst not intending to limit availability to that hypothetical. Furthermore, as stated above, it is not obvious why

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<sup>44</sup> *Ibid* [63].

<sup>45</sup> *Ibid* [99].

one should distinguish trusts that have ended from other trusts, and such a distinction is inconsistent with the decision in *Bartlett*.<sup>46</sup> Given this, it seems more plausible to interpret Lord Toulson as not limiting availability.

However, it seems that Lord Reed did limit the availability of *Lesser Receipt Orders* to situations where the ‘trust is no longer subsisting’ or in favour of a beneficiary who is ‘absolutely entitled’ to the trust estate under a bare trust:<sup>47</sup>

The pecuniary remedy for a breach of trust affecting the trust fund cannot involve a payment to a particular beneficiary, unless the beneficiary is absolutely entitled to the fund... Where, on the other hand, the trust is no longer subsisting, compensation for the breach of trust can be paid directly to the beneficiary absolutely entitled.

Lord Reed seems pretty clear: ‘The pecuniary remedy for a breach of trust... cannot involve a payment to a particular beneficiary, unless the beneficiary is absolutely entitled to the fund’. To determine the scope of this idea, one must consider what Lord Reed meant by a beneficiary being ‘absolutely entitled’. This concept has been explored elsewhere.<sup>48</sup> One possibility is that the concept refers to beneficiaries under bare trusts. Alternatively a wider interpretation would include beneficiaries under fixed trusts over income or capital. It is clear that Lord Reed views beneficiaries under bare trusts as absolutely entitled, but he gives no indication as to whether fixed trust beneficiaries are included or excluded within the concept.

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<sup>46</sup> For analysis of *Bartlett* (n 26) see 5.2.2.2.2.

<sup>47</sup> *AIB* (n 30) [100].

<sup>48</sup> See 4.2.1.3 and 5.2.2.1.2.

In terms of the scope of the ratio of *AIB*, the case concerned a beneficiary under a bare trust, and both Lord Toulson and Lord Reed endorsed Lord Browne-Wilkinson's hypothetical involving a beneficiary under a fixed trust. As such we should conclude that *AIB* supports the availability of *Lesser Receipt Orders* in favour of such beneficiaries, though is silent on objects under a discretionary trust or power of appointment.

It is unclear whether *AIB* limits the availability of such orders to beneficiaries who are absolutely entitled: Lord Reed supports such a limit, whilst Lord Toulson does not, and the remaining three judges support both Lord Reed and Lord Toulson. Given this, it seems unsafe to conclude that *AIB* either supports or rejects such a limit.

#### 5.2.2.1.5 *Main v Giambrone*

In *Various Claimants v Giambrone and Law (A Firm)*, a purchaser decided to buy land under construction in Italy.<sup>49</sup> They paid a deposit for the purchase to a trustee to be held on bare trust for the purchaser, with a power to permissibly apply the money towards the purchase of the land, exercisable on the condition that the purchaser had received a particular form of guarantee.<sup>50</sup> The trustee wrongfully transferred the money when no conforming guarantee had been received. The purchase was a

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<sup>49</sup> *Various Claimants v Giambrone and Law (A Firm)* [2017] EWCA Civ 1193, [2018] PNLR 2. The case actually concerned multiple purchasers, but for present purposes a focus on one will suffice.

<sup>50</sup> The guarantee was a legal requirement under Italian law designed to protect purchasers of land under construction from various forms of loss: *Ibid* [7]-[9], [27], [47].

bad decision for the purchaser: the land to be purchased was confiscated by the Italian authorities from the vendor due to suspicions of links with the Mafia and the IRA. The purchaser received no interest in land, and no return of their deposit.

The purchaser sought an order requiring the trustee to pay the value of the deposit to the purchaser. The Court of Appeal made the order, with Jackson LJ giving the main judgment. Underhill and Moylan LJJ gave shorter judgments, whilst agreeing with Jackson LJ's reasoning on the present issue.

It appears that the Court of Appeal made a *Lesser Receipt Order*, with the appropriate non-breach counterfactual constructed so that the trustee retained the deposit and then returned it to the purchaser.<sup>51</sup> Jackson LJ made two framings of principle, paraphrasing the reasoning in *Target* and *AIB*:<sup>52</sup>

Lord Browne-Wilkinson [in *Target*] said... that equitable compensation makes good the loss suffered by the beneficiaries “which, using hindsight and common sense, can be seen to have been caused by the breach”.

The Supreme Court [in *AIB*] held that principles of equitable compensation required the trustee to restore the trust fund, if still in existence, to the position in which it would have been but for the trustee's breach and, if the trust were no longer subsisting to pay compensation to the beneficiary on the same basis.

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<sup>51</sup> *Ibid* [60]-[63]. For criticism of the reasoning leading to this construction of the non-breach counterfactual see 8.2.1.2.2.

<sup>52</sup> *Ibid* [53], [54].

Jackson LJ applied these principles to the facts of the case:<sup>53</sup>

Therefore Giambrone should have remained as custodians of the deposit moneys until the preliminary contracts were rescinded, and then paid those moneys back to their clients.

The actual breach with which I am concerned at this stage of the judgment is paying out sums of money... in circumstances where those payments were breaches of trust... The loss which those breaches caused was the disappearance of the deposit monies.

One might object to the conclusion that a *Lesser Receipt Order* was made, by suggesting that a *Personal Loss Order* was made. In particular one may focus on Jackson LJ's references to 'loss suffered by the beneficiaries' and 'compensation to the beneficiary' in his framing of principles, and suggest that this is more suggestive of an order focusing on loss to the beneficiary all things considered, rather than a more narrow focus on whether the beneficiary has received subject-matter of less value from the trustee.

It must be accepted that Jackson LJ's statements could be read as making either a *Personal Loss Order* or a *Lesser Receipt Order*. However, there are two reasons to suppose that the latter order was intended.

First, Jackson LJ's second statement of principle is suggestive of a *Lesser Receipt Order*. Jackson LJ says that a trustee must 'restore the trust fund, if still in existence, to the position in which it would have been but for the trustee's breach'.

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<sup>53</sup> *Ibid* [62], [84].

This is a *Surcharging Order*. He continues to state that ‘if the trust were no longer subsisting’ the trustee must ‘pay compensation to the beneficiary on the same basis’. The crucial question is what sort of order is meant by ‘pay compensation to the beneficiary on the same basis’. The words ‘on the same basis’ suggest that this order is quantified similarly to a *Surcharging Order*. As stated above, this is true of a *Lesser Receipt Order* in the case of a bare trust with one beneficiary, as the focus is on what the beneficiary has received from the trustee from the trust estate.<sup>54</sup> However, this is not true of a *Personal Loss Order* which focuses on the beneficiary’s position more broadly. As such, it seems Jackson LJ was making the former type of order, rather than the latter.

Second, a *Lesser Receipt Order* is narrower in terms of its potential application than a *Personal Loss Order*. The availability of *Personal Loss Orders*, as outlined in Chapter Seven, has the potential to subject a trustee to unpredictable and extensive liability.<sup>55</sup> *Lesser Receipt Orders* do not have such great potential, as they focus purely on the subject-matter received by a person from the trust estate. It seems more likely that Jackson LJ intended to make the more cautious of these two orders.

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<sup>54</sup> See 2.2.3.

<sup>55</sup> See 7.3.3.

## 5.2.2.2 The Duty of Care

### 5.2.2.2.1 *Re Salmon*

In *Re Salmon*, a trustee held money on trust, but held a power to permissibly loan this money on the taking of real security for the trust estate.<sup>56</sup> The trustee lent £1,300 on real security in Kingston-upon-Hull. This loan was made within the terms of the power, but was in breach of the duty of care. The borrower defaulted, and the security was deficient to meet the outstanding debts: £480 remained outstanding from the borrower. As circumstances turned out, the trust estate was held for a life tenant, remainder to six children. One of the children mortgaged their remainder interest, and later transferred it to the mortgagee.

The mortgagee sought an order against the trustee for breach of the duty of care. By this time the life tenant had died, and the Court of Appeal ordered the trustee to pay £80 to the mortgagee: this represented one-sixth of the £480 unrecovered from the loan transaction. Cotton LJ and Fry LJ gave reasoned judgments, with which Bowen LJ agreed without adding further comments on the relevant issue.

It is possible to view the order to pay £80 as a *Personal Loss Order*. The report of *Re Salmon* states that any other beneficiary with a remainder interest - who were

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<sup>56</sup> *Re Salmon* (1889) 42 Ch D 351 (CA).

not party to proceedings - could 'apply in Chambers for the loss sustained by him'.<sup>57</sup> However, the reasoning of the judges is more suggestive of their making a *Lesser Receipt Order*. Cotton LJ and Fry LJ respectively made the following statements. 'Mr Uppleby' refers to the trustee:<sup>58</sup>

There must be a decree against Mr Uppleby for the Plaintiff's share of the deficiency.

I think the liability of the trustee in such a case is to make good the loss occasioned to the trust estate by the improper investment.

Neither judge focuses on the loss wrongfully caused to the beneficiary all things considered. Cotton LJ focuses on the mortgagee's share of the deficiency - the unrecovered £480 under the loan transaction. This focus is suggestive of a *Lesser Receipt Order*, where liability is quantified at the extent to which the beneficiary has received less valuable subject-matter from the trust estate.

Similarly, Fry LJ focuses on loss caused to the trust estate. This is most naturally interpreted as a *Surcharging Order*, though the order in *Re Salmon* cannot be of this nature, as the order required the trustee to pay money to the beneficiary, not into the trust estate. Fry LJ's focus makes sense if he is making a *Lesser Receipt Order*: one way of quantifying such an order is to consider the extent to which the trustee wrongfully caused the trust estate to diminish in value immediately before the time for distribution, and then determine how much of this diminution would have been

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<sup>57</sup> *Ibid* 371.

<sup>58</sup> *Ibid* 369, 371

distributed to the claimant.<sup>59</sup> Such a focus on the trust estate is inconsistent with the making of a *Personal Loss Order*.

Thus the Court of Appeal in *Re Salmon* made a *Lesser Receipt Order* in favour of a beneficiary of a fixed trust over capital. One presumes that the result would be no different had the trustee wrongfully caused a beneficiary under a bare trust or a fixed trust over income to receive subject-matter of less value from the trustee. As such *Re Salmon* can be said to support the availability of *Lesser Receipt Orders* in these cases. It seems unsafe to draw any conclusions concerning the objects of a discretionary trust or power of appointment.

#### 5.2.2.2.2 *Bartlett v Barclays Bank*

In *Bartlett*, a trustee held a 99% majority shareholding in a property management company on trust, and had a duty to distribute the income from these shares to a number of beneficiaries under a fixed trust.<sup>60</sup> The trustee breached its duty of care by failing to exercise sufficient control over the company in the trustee's capacity as majority shareholder. As a result, the company made bad investments, which proved loss-making for the company. As a result, the company distributed less dividends to the trustee as majority shareholder, which caused less income to be distributed to the beneficiaries.

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<sup>59</sup> For exposition of this point, see 2.2.3.

<sup>60</sup> *Bartlett* (n 26).

The income beneficiaries sought an order against the trustee for breach of the duty of care.<sup>61</sup> Brightman LJ ordered the trustee to make the following payments:<sup>62</sup>

To each of the plaintiffs a sum equal to the proportion of the further distributions of income which... it is found ought properly to have been made.

The reference to ‘further distributions of income’ is to the distributions that would have been made but for breach of the duty of care. This is suggestive of a *Lesser Receipt Order*.

One might suggest that Brightman LJ made a *Personal Loss Order*, but such a suggestion is inconsistent with Brightman LJ’s rejection of an argument made by the trustee. The trustee sought to qualify the above order with the following words:<sup>63</sup>

Provided that such sums shall not exceed the net loss, if any, respectively suffered by such plaintiffs by reason of the non-payment of the further distributions of income, if any, which ought properly to have been made.

The trustee was concerned that any order should take account of the taxes that would have been levied on the beneficiaries for income distributed had the trustee not breached their duty of care, and the taxes that would be levied on the beneficiaries’ receipt of money pursuant to any court order, so as to ensure that the beneficiaries were not left better-off as a result of the breach of duty. The trustee’s

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<sup>61</sup> The capital beneficiaries also sought orders, though it is sufficient for present purposes to consider the income beneficiaries.

<sup>62</sup> *Bartlett* (n 26) 544.

<sup>63</sup> *Ibid* 544.

argument was that a *Personal Loss Order* should be made, not a *Lesser Receipt Order*: only the former order would ensure the beneficiary was not better-off as a result of the breach of duty, as only the former order would take account of the beneficiary's tax position.

To illustrate the trustee's concern, assume that had the trustee in *Bartlett* complied with all its duties, they would have distributed £10k to a beneficiary in the relevant period, and that the beneficiary would have been taxed 10% on this distribution, being left with £9k after tax. Assume further that the beneficiary would not be taxed on any money paid by the trustee pursuant to any court order. A *Lesser Receipt Order* would be quantified at £10k, as this is the extent to which the trustee has wrongfully caused the beneficiary to receive less money from the trust estate. In contrast, a *Personal Loss Order* would be quantified at £9k, as this is the extent to which the duty had caused the beneficiary to be worse off.

As stated above, Brightman LJ rejected the trustee's argument:<sup>64</sup>

I have reached the conclusion that the defendant's submission is wrong and that tax ought not to be taken into account. My reasoning is this: the obligation of a trustee who is held liable for breach of trust is fundamentally different from the obligation of a contractual or tortious wrongdoer. The trustee's obligation is to restore to the trust estate the assets of which he has deprived it. The tax liability of individual beneficiaries, who have claims qua beneficiaries to the capital and income of the trust estate, do

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<sup>64</sup> *Ibid* 545.

not enter the picture because they arise not at the point of restitution to the trust estate but at the point of distribution of capital or income out of the trust estate.

Brightman LJ's reasoning here does not justify the order made, as he orders the trustee to pay money directly to the beneficiaries, rather than into the trust estate. However the idea seems to be that the trustee is liable for some wrongful impact to the trust estate, and that the beneficiaries' entitlements are linked to this impact: the focus is not on the beneficiaries' loss all things considered. As such this reasoning is inconsistent with the idea that Brightman LJ made a *Personal Loss Order*, and the focus on the trust estate is more suggestive of a *Lesser Receipt Order*.<sup>65</sup> The more plausible conclusion is that a *Lesser Receipt Order* was made.

Thus *Bartlett* supports the availability of *Lesser Receipt Orders* for breach of the duty of care. Furthermore, Lord Browne-Wilkinson expressly endorses the order made in *Bartlett* which provides further support for this approach.<sup>66</sup> Given that the order was made in favour of beneficiaries with fixed trust interests in income, it seems plausible to assume the availability extends to beneficiaries under bare trusts, and beneficiaries with fixed trust interests in capital. However, it seems unsafe to draw any conclusions in relation to objects under discretionary trusts or powers of appointment.

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<sup>65</sup> This point is explained in 2.2.3.

<sup>66</sup> *Target* (n 23) 435.

### 5.2.2.3 Non-Monetary Subject-Matter

The above authorities concern trustees who have wrongfully caused a person to receive less money from the trust estate. The question arises as to whether these authorities provide support for the availability of *Lesser Receipt Orders* where a trustee has wrongfully caused a person to receive less valuable non-monetary subject-matter from the trust estate.

To determine the question one should consider whether the reasoning in the above authorities extends to non-monetary cases. Two comments may have relevance. First, Lord Browne-Wilkinson in *Target* said:<sup>67</sup>

The measure of such compensation is the same, i.e. the difference between what the beneficiary has in fact received and the amount he would have received but for the breach of trust.

Lord Browne-Wilkinson draws no express distinction between a beneficiary's receipt of monetary and non-monetary subject-matter: the references to what the beneficiary has 'received' and the 'amount' he would have received may be said to relate to both monetary and non-monetary subject-matter. One might argue on this basis that *Target* supports the availability of *Lesser Receipt Orders* for breach of the duty to follow the settlor's communicated intentions in non-monetary cases.

Second, Brightman LJ in *Bartlett* said:<sup>68</sup>

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<sup>67</sup> *Ibid.*

<sup>68</sup> *Bartlett* (n 26) 545.

The trustee's obligation is to restore to the trust estate the assets of which he has deprived it. The tax liability of individual beneficiaries, who have claims qua beneficiaries to the capital and income of the trust estate, do not enter the picture because they arise not at the point of restitution to the trust estate but at the point of distribution of capital or income out of the trust estate.

Brightman LJ draws no express distinction between monetary and non-monetary subject-matter: the references to 'income' and 'capital' seem applicable in both cases. One might argue on this basis that *Bartlett* supports the availability of *Lesser Receipt Orders* for breach of the duty of care in non-monetary cases.

One may strengthen these arguments with the point that there seems little reason to distinguish between monetary and non-monetary cases. This point supports an interpretation of Lord Browne-Wilkinson's and Brightman LJ's comments as supporting availability of *Lesser Receipt Orders* in non-monetary cases. As such it is arguable that *Lesser Receipt Orders* are available in non-monetary cases for breach of the duty to follow the settlor's communicated intentions and breach of the duty of care.

If one were to accept the argument that *Lesser Receipt Orders* are available in cases of non-monetary subject-matter, the question arises as to the appropriate date of valuing this non-monetary subject-matter. The authorities appear silent on this question: neither Lord Browne-Wilkinson nor Brightman LJ provide support for any particular date.

## 5.3 Normative Reasons

This section considers whether there are reasons in favour of making a *Subject-Matter Distribution Order* or *Lesser Receipt Order*. Section 5.3.1 rejects an existing argument seeking to ground the existence of such a reason. Section 5.3.2 makes two arguments grounding such a reason.

Recall that Chapter Four identified three reasons against making a *Lesser Receipt Order*. Such an order may harm a trustee's wellbeing or autonomy, contribute to a decrease in confidence in the system of private property, or use a trustee as a mere means to an end.<sup>69</sup> It was also argued that these reasons are negated, or at least that it is possible for a court to act inconsistently with these reasons, where a trustee has had a reasonable opportunity to avoid being subjected to a *Lesser Receipt Order*.

### 5.3.1 Existing Arguments

James Penner is possibly the only commentator to give any normative attention to the *Subject-Matter Distribution Order* or the *Lesser Receipt Order*. He posits the following example:<sup>70</sup>

Consider this final example. Trudy the trustee has a duty to distribute the entirety of trust income to Ben the beneficiary, which duty, however, is subject to a power to accumulate up to half the income which will accrue to capital, held on trust for his wife and children. Ben is a notorious wastrel. Trudy, quite rightly, exercises her discretion to accumulate as much

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<sup>69</sup> See 4.3.2.

<sup>70</sup> James Penner, 'The Beneficiary's Performance Interest in a Trust' ch 9 in R Nolan, K Low, and T Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018) 285-6.

as she can with a view to distributing capital to his wife and children, when the former is released from Ben's affections by his death, and when the latter come of age. Trudy miscalculates. For the last five years she has accumulated 55 per cent of the income, rather than 50 per cent, such that Ben has received £250 k less than he otherwise would have done. What if, during the period, Ben would, on the balance of probabilities, have lost the money gambling, or was a devoted collector of an artist whose work was junk?

Penner is using this example to resist the idea that only a *Personal Loss Order* should be available against Trudy. Such an order would plausibly be quantified at zero, as the wrongful retention of the £250k has not caused Ben to be worse-off all things considered. Rather, Penner thinks a substantial order should be available against Trudy, though it is unclear whether Penner supports the availability of *Subject-Matter Distribution Orders* or *Lesser Receipt Orders*: it is unclear from the example whether Trudy stills holds the wrongfully retained £250k as part of the trust estate. If Trudy did hold the £250k, a *Subject-Matter Distribution Order* would obligate her to transfer it to Ben. Alternatively, a *Lesser Receipt Order* would obligate Trudy to transfer £250k to Ben.

Penner's view that a substantial order should be available against Trudy does not move beyond intuition: he provides no reason as to why such an order should be available. Furthermore, it is not immediately obvious that Penner's intuition is correct: it seems reasonable to hold the converse intuition that Trudy should not be liable to pay money to Ben in this example. As such, Penner's argument identifies no reason in favour of making *Subject-Matter Distribution Orders* or *Lesser Receipt Orders*.

## 5.3.2 Reasons in Favour

### 5.3.2.1 Facilitating Beneficiary Reliance

One reason in favour of making *Subject Matter Distribution Orders* and *Lesser Receipt Orders* is that the making of such orders contributes to the maintenance of rules providing for the availability of such orders, where those rules have valuable consequences. In particular, the existence of such rules facilitates the ability of people to plan their life by relying on the receipt of subject-matter from a trust estate.

For the argument to succeed, it must be shown that there is a reason in favour of facilitating people to plan their life whilst relying on the receipt of subject-matter from a trust estate, that rules providing for the availability of *Subject-Matter Distribution Orders* and *Lesser Receipt Orders* facilitate such reliance, and that the making of particular *Subject-Matter Distribution Orders* and *Lesser Receipt Orders* contributes to the maintenance of these rules.

As to the first point, the ability of people to plan their life whilst relying on the receipt of subject-matter from a trust estate is valuable, and there is thus a reason in favour of facilitating such planning.<sup>71</sup> Consider a situation in which a person has a high degree of certainty that they will receive £1m from a trust estate in a year's time. This belief enables the person to plan their life in advance of the

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<sup>71</sup> A similar argument will be made in Chapter 7 when considering *Personal Loss Orders*: see 7.3.2.1.

receipt of value. Such plans may take a number of forms. One example is where the person spends money or uses their property in advance of the receipt of the £1m, in the knowledge that this will be replaced by the £1m in a year's time. Alternatively, they may make plans for how to use the £1m once received. This ability to plan around the receipt of subject-matter is valuable as it enhances the person's autonomy.<sup>72</sup>

As to the second point, rules providing for the availability of *Subject-Matter Distribution Orders* and *Lesser Receipt Orders* facilitate people in relying upon the receipt of subject-matter or its value from trust estates. Where a person is a beneficiary under a fixed trust or bare trust, this may give rise to an expectation in that person that they will receive subject-matter from the trustee. For example, a life tenant may expect that income arising on a trust estate will be distributed to them, or a beneficiary under a bare trust may expect that the trustee will distribute the trust estate to them should the beneficiary request it. Once a beneficiary has formed such an expectation, they may take the probability of receiving subject-matter into account when planning their life. Increasing the probability that such a beneficiary will receive such subject-matter facilitates the ability of beneficiaries to rely in this regard.

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<sup>72</sup> For discussion of the interaction between private law and personal autonomy, see John Gardner, 'That Was Then and This is Now' ch 6 in *From Personal Life to Private Law* (OUP 2018) 195-9.

The availability of *Subject-Matter Distribution Orders* increases this probability, as where a trustee wrongfully fails to distribute subject-matter to a beneficiary they can be ordered to transfer that subject-matter to that beneficiary. This facilitates a beneficiary in relying upon the receipt of particular subject-matter. Furthermore, the fact that such an order requires the transfer of subject-matter from the trust estate increases the likelihood of receipt in situations where a trustee's personal estate is deficient.

The availability of *Lesser Receipt Orders* increases this probability, as such an order enables beneficiaries to recover money equalling the extent that a trustee wrongfully causes them to receive less valuable subject-matter from a trust estate. This is particularly useful where a *Subject-Matter Distribution Order* would not be available, such as where a trustee has wrongfully failed to distribute through transferring subject-matter away from the trust estate, or for breaches of duty other than the duty to distribute under a fixed trust. Although a *Lesser Receipt Order* does not ensure that a beneficiary receives the exact subject-matter they relied upon receiving, it ensures the beneficiary receives the value of such subject-matter. The ability to rely upon the receipt of such value is useful in planning one's life.

It will perhaps be rare that a person can rely on the receipt of subject-matter from a trust estate to a high degree of certainty. Perhaps more realistically one can predict that there is a certain likelihood of receiving such subject-matter. Perhaps

one thinks that there is a 60% chance that a trustee will eventually distribute subject-matter under a fixed trust, or a 35% that a certain amount of income will arise for distribution. This does not undermine the present argument: a person can take the probability of receipt into account in their practical reasoning, and the availability of *Subject-Matter Distribution Orders* and *Lesser Receipt Orders* increases the probability that such a receipt will occur.

As to the third point, the making of *Subject-Matter Distribution Orders* and *Lesser Receipt Orders* helps maintain the rules providing for such orders. If such orders were not always made then this would adversely affect a beneficiary's ability to rely on the rule providing for such orders: an extra element of uncertainty would exist, which would lower the probability that a beneficiary received subject-matter or its value from a trustee, so affecting the beneficiary's ability to plan their life.

This argument identifies a reason in favour of making a *Subject-Matter Distribution Order* against a trustee who wrongfully fails to distribute under a fixed trust, as beneficiaries may rely on trustees' complying with such a duty.

The argument identifies a reason in favour of making a *Lesser Receipt Order* following breach of any duty that beneficiaries may rely upon a trustees' complying with in assessing the probability that they will receive a distribution of particular subject-matter from the trust estate. This extends to the duty of care: a beneficiary

may rely upon a trustee's carefully managing the trust estate when assessing the subject-matter that the beneficiary is likely to receive. However the strength of the reason identified by the argument will vary from duty to duty depending on the likelihood that beneficiaries would rely on compliance with that duty in making such an assessment. The reason is likely to be strongest in relation to duties to distribute, and weaker in relation to a duty of care arising twenty five years prior to the time for distribution.

The argument as presented applies to beneficiaries under fixed trusts and bare trusts. Whilst the argument applies to anyone who may rely on the receipt of subject-matter from a trust estate, and so is applicable to objects under discretionary trusts and powers of appointment, the reason identified in such cases is likely to be especially weak. Given that receipt by such objects is subject to trustee discretion, it is unlikely that the availability of *Subject-Matter Distribution Orders* or *Lesser Receipt Orders* will affect such objects' ability to plan their life in any significant way. As such the argument is relied upon solely in relation to beneficiaries under fixed trusts and bare trusts.

It is plausible that the argument provides a reason in favour of valuing non-monetary subject-matter at the time at which a beneficiary would have received such subject-matter in the non-breach counterfactual.<sup>73</sup> This is because in planning their

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<sup>73</sup> On the relevant legal rules for constructing the non-breach counterfactual, see 8.2.1.

life a beneficiary is likely to attempt to predict the value of such subject-matter at that time, and so an order valuing the subject-matter at that time makes it easier for the beneficiary to rely on such receipt.

One might object to the present argument on the basis that orders should only be available in favour of beneficiaries who have proved that they relied upon receiving subject-matter from a trust estate. This objection derives its plausibility from the fact that the present argument focuses on facilitating beneficiary reliance: why should an order be made in favour of a beneficiary who has not so relied?

The objection should be rejected. If the orders were only available in favour of beneficiaries who had proved reliance, this would decrease the ability of beneficiaries to rely on the receipt of subject-matter, by making the receipt of such subject-matter less probable. This reduction in probability comes from the fact that a successful claim has an additional hurdle of proving reliance.

### **5.3.2.2 Facilitating Settlement and Easing Litigation**

One reason in favour of making a *Lesser Receipt Order* is that such an order contributes to the maintenance of a rule providing for the availability of such orders, where the existence of that rule has a valuable consequence. That consequence is the facilitating of settlement and easing of litigation. To establish this argument it must be demonstrated that there is a reason in favour of facilitating

settlement and easing litigation, that a rule providing for *Lesser Receipt Order* facilitates settlement and eases litigation, and that making a *Lesser Receipt Order* contributes to the maintenance of such a rule.

As to the first point, there is a reason in favour of facilitating settlement and easing litigation, as this reduces parties' costs concerning disputes, and reduces the burden on courts.<sup>74</sup> These concerns increase access to justice, as the cost of enforcing one's legal rights decreases, and the number of claims that can be considered by the courts increases.

As to the second point, a rule providing for the availability of *Lesser Receipt Orders* facilitates settlement and eases litigation, providing that *Personal Loss Orders* are available as a matter of law. Chapter Seven argues that this condition is satisfied in English law, and that *Personal Loss Orders* are at least available in favour of beneficiaries of fixed trusts and bare trusts following a breach of the duty to follow the settlor's communicated intentions.<sup>75</sup>

The availability of *Lesser Receipt Orders* facilitates settlement and decreases the need for litigation by rendering it superfluous for a trustee to argue that their breach

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<sup>74</sup> For a discussion of the role of private law standing rules in the facilitating of settlements, see Gardner, 'That Was Then and This Is Now' (n 72) 209.

<sup>75</sup> See 7.2. Chapter Seven is more cautious on whether *Personal Loss Orders* are available following breach of the duty of care, or in favour of objects under discretionary trusts or powers of appointment: see 7.2.3.

of duty caused less loss to a beneficiary all things considered than the extent to which the trustee's breach caused a beneficiary to receive less valuable subject-matter from the trust estate. The removal of any incentive upon the trustee to make this argument facilitates settlement by removing an issue from the realms of contention, and reduces the need for litigation by reducing the issues that need to be litigated. This is the reason why the success of this argument depends on the availability of *Personal Loss Orders*: the incentive upon the trustee to make such an argument depends on the existence of this order.

For example, imagine a situation in which a trustee owes a duty to distribute subject-matter to a beneficiary under a fixed trust, and wrongfully transfers this subject-matter to a third party. If the beneficiary seeks a *Personal Loss Order*, the trustee may argue that the breach did not cause the beneficiary a loss all things considered, this issue may become contentious, and the scope for settlement reduced and the need for litigation increased. However if *Lesser Receipt Orders* are available, there is no incentive for the trustee to make this argument: the floor of recovery will be provided by a *Lesser Receipt Order* which will require the trustee to pay the beneficiary the value of the subject-matter.

As to the third point, the making of particular *Lesser Receipt Orders* contributes to the maintenance of the rule, because if such orders were not always made where the rule provided, an incentive would arise upon trustees to make causal arguments,

which would decrease the opportunity for settlement and increase the need for litigation.

This argument provides a reason in favour of making *Lesser Receipt Orders* for breach of the duty to follow the settlor's communicated intentions, in favour of beneficiaries under fixed trusts and bare trusts, as these are the situations in which *Personal Loss Orders* are available in English law.

It is arguable that the argument provides a reason in favour of valuing non-monetary subject-matter at the date on which a beneficiary receives that subject-matter in the non-breach counterfactual.<sup>76</sup> This is because adopting such a date will give greater certainty at the time at which parties are negotiating settlement, and deciding whether to proceed to court, than adopting the date of judgment. This is because the latter date creates an incentive upon a party to risk litigation in the hope that the value of the relevant subject-matter changes favourably for them. This reduces the scope for settlement and increases the risk of litigation.

The current argument provides no reason in favour of making *Subject-Matter Distribution Orders*, providing one assumes that *Lesser Receipt Orders* are available. This is because in the situation where a trustee wrongfully fails to distribute subject-matter to a beneficiary - the only situation in which a *Subject-Matter Distribution Order* could

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<sup>76</sup> On constructing the non-breach counterfactual, see 8.2.1.

apply - a *Lesser Receipt Order* would already provide a floor on recovery so as to negate the trustee's incentive to plead a causation of loss argument. As such a *Subject-Matter Distribution Order* is unnecessary to remove this incentive.

## 5.4 Conclusion

This chapter has made a number of arguments. First, it was argued that *Subject-Matter Distribution Orders* are available following a breach of the settlor's communicated intentions in failing to distribute subject-matter to a beneficiary under a fixed trust. It was commented that such orders are unlikely to be made where a settlor has communicated an intention that the subject-matter should not be transferred to the beneficiary were this duty to be breached.<sup>77</sup>

Second, it was argued that *Lesser Receipt Orders* are available following breach of both the duty to follow the settlor's communicated intentions and the duty of care, in favour of beneficiaries under fixed trusts and bare trusts.<sup>78</sup> Such availability is clear where a beneficiary is caused to receive less money from the trust estate, and whilst such availability is arguable in respect of non-monetary subject-matter the authorities are less clear. The authorities are silent concerning availability for objects under discretionary trusts or powers of appointment.

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<sup>77</sup> See 5.2.1.

<sup>78</sup> See 5.2.2.

Third, it was argued that one reason in favour of making *Subject-Matter Distribution Orders* and *Lesser Receipt Orders* is the facilitating of beneficiaries' relying on the receipt of subject-matter from trust estates, so as to enhance the ability of such beneficiaries to plan their lives. This provided a reason in favour of making *Lesser Receipt Orders* in favour of beneficiaries of bare trusts and fixed trusts, for breach of both the duty to follow the settlor's communicated intentions and the duty of care. It was suggested that the argument provides a reason in favour of valuing non-monetary subject-matter at the time at which a beneficiary would have received this subject-matter in the non-breach counterfactual.

Fourth, it was argued that one reason in favour of making a *Lesser Receipt Order* is that the availability of such orders facilitates settlement and eases litigation, so contributing to increased access to justice. This argument provides a reason in favour of making such orders wherever *Personal Loss Orders* are available, which in English law is for breach of the settlor's communicated intentions in favour of beneficiaries under fixed and bare trusts. The argument similarly provides a reason in favour of valuing non-monetary subject-matter at the time at which a beneficiary would have received this subject-matter in the non-breach counterfactual.

# VI

## *Falsification Orders*

### **6.1 Introduction**

#### **6.1.1 Chapter Aims**

This chapter considers two questions. First, does legal authority provide support for or against the availability of *Falsification Orders*? Second, are there normative reasons for or against the making of such orders? The inquiry is limited to express trustees of trusts for persons who breach either the duty to follow the settlor's communicated intentions or the duty of care.

Recall:<sup>1</sup>

*Falsification Order*: a court order obligating a trustee to pay money, where the quantum of liability is the value of any subject-matter wrongfully transferred by the trustee.

The *Falsification Order* has a number of features: it obligates (1) a trustee, (2) to pay money, (3) where the quantum of liability is the value of any subject-matter wrongfully transferred by the trustee.

The *Falsification Order* is defined with two ambiguities. First, the appropriate date for valuing non-monetary subject-matter is unclear. Second, the place where or person to whom the trustee must pay money is unclear: the trustee might be obligated to pay money into a trust estate, or to some person or persons. These

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<sup>1</sup> The concept of a *Falsification Order* is explored in detail in 2.2.4.

ambiguities are deliberately included in the concept of the order so as to ensure full exploration of whether the legal authorities or normative arguments resolve the ambiguities.

Recall the following hypothetical demonstrating the *Falsification Order*:<sup>2</sup>

*Duty to Invest 4*: a trustee holds £1m with a duty to invest in Pomegranate shares, and hold the shares for ten years. The trustee wrongfully transfers away the money, and now three years later the shares are worth £400k.

A *Surcharging Order* would obligate the trustee to pay £400k into the trust estate, as this is the extent to which the trustee has wrongfully caused the trust estate to diminish in value. In contrast, a *Falsification Order* would hold the trustee liable for £1m, as this is the value of the subject-matter wrongfully transferred by the trustee.

## 6.1.2 Chapter Summary

Section 6.2 will consider whether legal authority supports or rejects the availability of *Falsification Orders*. It will be argued that whilst there is some authority in favour of such availability, authorities rejecting the availability of such orders take precedence. The authorities rejecting availability are the House of Lords' decision in *Target Holdings Ltd v Redferns*, the Court of Appeal's decision in *Collins v Brebner*, and the Supreme Court's decision in *AIB Group (UK) Plc v Mark Redler & Co Solicitors Group v*

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<sup>2</sup> This hypothetical was introduced in 2.2.4.

*Mark Redler*.<sup>3</sup> As such, *Falsification Orders* are not available against trustees as a matter of law.

Section 6.3 will consider whether there are reasons for or against the making of *Falsification Orders*. Section 6.3.1 rejects a number of arguments seeking to identify the existence of reasons in favour of making such orders.

Section 6.3.2 argues that there are three reasons in favour of making such orders. Each reason depends on the making of such orders contributing to the maintenance of a rule providing for such orders, where that rule has a valuable consequence. In particular the existence of a rule providing for the availability of *Falsification Orders* deters trustees from wrongfully transferring subject-matter, reduces the incentive upon trustees to fabricate evidence, and enhances the autonomy of prospective settlors.

It is worth noting that none of the three reasons identified provide an explanation of feature (3) of the *Falsification Order*, that the quantum is the value of subject-matter wrongfully transferred. To explain this feature, resort to other arguments is necessary. Some brief arguments are sketched below.

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<sup>3</sup> *Target Holdings Ltd v Redferns* [1996] AC 421 (HL); *Collins v Brebner* [2000] Lloyd's Rep PN 587 (CA); *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503.

## 6.2 Legal Authorities

This section considers whether legal authority provides support for or against the availability of *Falsification Orders*. It will be demonstrated that such orders are not available against trustees as a matter of law.

Section 6.2.1 will identify authorities supporting the availability of such orders for breach of the duty to follow the settlor's communicated intentions. Section 6.2.2 will identify authorities supporting the availability of such orders for breach of the duty of care. Section 6.2.3 will identify authorities rejecting the availability of such orders against trustees. Section 6.2.4 will show that the authorities identified in section 6.2.3 take precedence over those identified in 6.2.1 and 6.2.2.

### 6.2.1 The Settlor's Communicated Intentions

In this section any references to wrongs or breach of duty refer to a breach of the settlor's communicated intentions, unless otherwise indicated.

#### 6.2.1.1 *Cocker v Quayle*

In *Cocker v Quayle*, trustees held money on the trust of a marriage settlement.<sup>4</sup> The trustees held a power to advance capital to the husband providing the wife had given written consent, and the husband had provided a bond as security. The trustees wrongfully advanced capital to the husband on loan as, whilst it was not decided whether the wife had provided consent, it was clear that the husband provided no

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<sup>4</sup> *Cocker v Quayle* (1830) 1 R&M 535, 39 ER 206 (Ch).

bond. The husband went bankrupt and defaulted on the loan. Sir John Leach MR ordered the trustees to pay the value of the advanced capital into the trust estate. Sir John Leach MR did not consider whether loss had been caused to the trust estate or any person by the breach of trust. This suggests Sir John Leach MR was making a *Falsification Order*.<sup>5</sup>

An objection to this conclusion is that the absence of express inquiry into whether loss was caused by the breach is consistent with either the making of a *Falsification Order* or the making of a *Surcharging Order*: it may be that Sir John Leach MR assumed that loss had been caused by the breach of duty though did not state his assumption. If one constructed the non-breach counterfactual in *Cocker* so that the trustee did not make the loan, rather than permissibly making a loan after receiving consent and a bond, the breach of duty caused loss to the trust estate.<sup>6</sup> As such we cannot tell whether a *Falsification Order* or a *Surcharging Order* was made.

The objection should be rejected as it seems more likely that a *Falsification Order* was made. This is because Sir John Leach MR's reasoning captures all the features of a *Falsification Order* - namely that it is quantified with reference to the value of the

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<sup>5</sup> A similar argument can be made to suggest that the following cases support the availability of *Falsification Orders*: *Re Warne, Ex p Moody* (1816) 2 Rose 413 (Ch); *Knott v Cottee* (1852) 16 Beav 77, 51 ER 705 (Ch); *In Re Biddulph ex p Norris* (1868-69) LR 4 Ch App 280 (CA).

<sup>6</sup> For an outline of the legal rules relevant to constructing the non-breach counterfactual, see 8.2.1.

subject-matter wrongfully transferred, but does not discuss whether loss had been caused by the breach, a crucial feature of a *Surcharging Order*.<sup>7</sup>

### 6.2.1.2 *Re Bell's Indenture*

In *Re Bell's Indenture* a trustee wrongfully transferred away land in 1947.<sup>8</sup> An order was sought against the trustee for the value of the land and the other subject-matter. Vinelott J ordered the trustee to pay the value of the land in 1949 into the trust estate. The date of judgment was 1979.

If Vinelott J made a *Falsification Order*, *Re Bell's* provides support for the availability of such orders. The order made is consistent with a *Falsification Order*, where the non-monetary subject-matter wrongfully paid out is value at some time other than the date of breach. However, the order is also consistent with a *Surcharging Order* where one constructs the non-breach counterfactual so that the trustee sells the land in 1949. Is there reason to suppose that Vinelott J made one order rather than the other?

There is one indication that suggests Vinelott J made a *Falsification Order*. The trustee made an argument that the tax position of the trust estate should be taken

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<sup>7</sup> The omission of this discussion is especially surprising given that the trustee argued that no loss had been caused in *Cocker*: the trustee suggested that the non-breach counterfactual in which the trustee made the loan within the terms of the power should be adopted: *Cocker* (n 4) 535-6. This argument was not mentioned or addressed by Sir John Leach MR, but merely printed in the argument section of the case report.

<sup>8</sup> *Re Bell's Indenture* [1980] 1 WLR 1217 (Ch).

into account when quantifying the trustee's liability. This was because had the trustee not wrongfully transferred the land, a tax liability would have fallen upon the trust estate due to the decease of some of the beneficiaries. Furthermore the revenue had stated their intention not to tax the trust estate on the receipt of any money paid by the trustee following a court order. The trustee argued that the tax position should be taken account, so as to avoid over-compensation to the trust estate.<sup>9</sup> Such a tax position would be *prima facie* relevant when quantifying a *Surcharging Order*, as one is seeking to determine the causal impact of the trustee's breach on the trust estate. However the tax position is irrelevant when quantifying a *Falsification Order*: the quantum of such an order is the value of subject-matter wrongfully transferred away - the consequences of breach are irrelevant.

Vinelott J rejected the trustee's argument. He reasoned that trustees impermissibly appropriating subject-matter for their own benefit would be liable to replace the value of the subject-matter without regard to tax liabilities that would have arisen but for the breach and the same applies when the trustees misappropriate for another's benefit:<sup>10</sup>

...a trustee who has himself defrauded his beneficiaries by taking trust moneys for his own purposes is liable to restore the moneys he has taken without regard to any fiscal liabilities that might have fallen on the trust fund if he had not misappropriated the funds.

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<sup>9</sup> *Ibid* 1234-5.

<sup>10</sup> *Ibid* 1235-6.

In my judgment no valid distinction can be drawn between the position of a trustee who has misappropriated for his own benefit and a trustee who has deliberately misappropriated trust moneys for the benefit of someone else.

Although Vinelott J refers to the misappropriation of trust moneys, it is clear from the context that he means to include misappropriation of the land in this reference. The rejection of the relevance of the tax position suggests Vinelott J made a *Falsification Order*. This is bolstered by his reference to the need to ‘restore’ the subject-matter wrongfully transferred.

However, there is also indication that Vinelott J made a *Surcharging Order*. In quantifying the order, Vinelott J took the value of the land in 1949. Whilst the land was wrongfully transferred in 1947, it was found that but for this breach the trustee would have permissibly sold the land in 1949. For this reason Vinelott J adopted 1949 as the date of assessment. This is intelligible under a *Surcharging Order* as this fact would be relevant in constructing the non-breach counterfactual on the basis of what would have happened but for the trustee’s breach of duty.<sup>11</sup> In contrast it is not immediately obvious why this date would be adopted for the purpose of a *Falsification Order*.

As such we have one indication suggesting Vinelott J made a *Falsification Order* and another suggesting that he made a *Surcharging Order*. However, it seems more

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<sup>11</sup> For the legal rules applicable to this point, see 8.2.1.2.1.

plausible that Vinelott J made a *Falsification Order*: the fact that he valued the land in 1949 is intelligible, as he felt constrained by authority to do so.<sup>12</sup> However, if Vinelott J made a *Surcharging Order* it is not obvious why the tax position of the trust estate was excluded. As the conclusion that he made a *Falsification Order* made sense of more of Vinelott J's reasoning than the conclusion that he made a *Surcharging Order*, it is tentatively suggested that *Re Bell's* provides support for the availability of *Falsification Orders*.<sup>13</sup>

If one accepts this suggestion, *Re Bell's* supports the proposition that where a trustee wrongfully transfers non-monetary subject-matter, and but for the breach would have permissibly transferred such subject-matter at some other time, a *Falsification Order* is quantified with reference to the value of that subject-matter at that other time.

### 6.2.1.3 *Knight v Haynes Duffell*

In *Knight v Haynes Duffell Kentish & Co*, a solicitor negligently managed a beneficiary's claim against their trustee.<sup>14</sup> The negligence caused the claim to fail for want of prosecution. The beneficiary sought an order against the solicitor for negligence,

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<sup>12</sup> *Re Bell's* (n 8) 1231-2. The relevant authority was *Re Massingberd's Settlement; Clark v Trelawney* (1890) 63 LT 296 (CA).

<sup>13</sup> A number of commentators state that *Re Bell's* supports the availability of *Falsification Orders*: Charles Mitchell, 'Equitable Compensation for Breach of Fiduciary Duty' (2013) 66 Current Legal Problems 307, 322 Fn 71; Matthew Conaglen, 'Equitable Compensation for Breach of Trust: Off Target' (2016) 40 Melbourne University Law Review 126, 140. Neither commentator states how *Re Bell's* provides such support, so it is impossible to determine whether they endorse the present argument.

<sup>14</sup> *Knight v Haynes Duffell Kentish & Co* [2003] EWCA Civ 223.

and Judge Howarth at first instance made the order, requiring the solicitor to pay money to the beneficiary. The quantum of the order was equal to a *Falsification Order* which would have been made against the trustee in favour of the beneficiary but for the solicitor's negligence.

The Court of Appeal refused the grant leave to appeal to the solicitor, whilst commenting on the nature of the order that would have been made against the trustee, and in particular the fact that a *Falsification Order* would have been available. This thus supports the availability of *Falsification Orders*. Aldous LJ gave the only reasoned judgment, with which Kay LJ and Parker LJ agreed.

It is necessary to outline further facts concerning the relationship between the trustee and beneficiary in *Knight*. A number of investors decided to invest in shares in a company called Trimsoft, though focus on one investor suffices for present purposes. The investor gave £66k to a trustee for use in the purchase of shares. The trustee was to hold the money on bare trust for the investor, and a necessary condition for the permissible release of the money to the seller of the shares was that the company had made assignments of certain trademarks to the investors. The trustee paid out the money when such an assignment had not been made, which was a breach of the duty to follow the settlor's communicated intentions. The value of the trademarks to the investors had not been proved.

Aldous LJ stated that the trustee would have been liable for the value of any money paid out in breach. He said ‘The breach was the payment and the remedy for that breach is reconstitution of the trust fund’.<sup>15</sup> This appears to be a *Falsification Order* as the order is quantified with reference to the value of the money paid out in breach, and the word ‘reconstitution’ is used.

The solicitor argued that *Target Holdings* was inconsistent with the availability of orders for ‘reconstitution’ - or *Falsification Orders* - and required the investor to prove that loss had been wrongfully caused. Aldous LJ paraphrased this argument:<sup>16</sup>

They submitted upon the basis of the speech of Lord Browne-Wilkinson in *Target*... that the remedy for the breach of this trust was not reconstitution of the trust fund, but to put the claimants in the position that they would have been in but for the breach. In the present case the breach had been the failure to obtain the assignment. To remedy that breach [the trustee] needed to compensate the [claimant] for the loss of that assignment. In the present case that loss was negligible in that the trade mark had proved to be valueless or there was no evidence to prove that it was of substantial value.

The solicitor’s argument was that the trustee would only have been liable for any loss wrongfully caused, that the appropriate non-breach counterfactual was one in which the trademarks were assigned and money held on trust permissibly transferred, and given that the value of the trademarks to the investors had not been proved, the

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<sup>15</sup> *Ibid* [39].

<sup>16</sup> *Ibid* [37].

trustee's liability should be zero. Given this the solicitor's liability for negligently causing the beneficiary to lose their claim against the trustee should be zero.

Aldous LJ rejected this argument, stating that *Target* only restricted the availability of a *Falsification Order* in a situations where any underlying transaction had not been completed. On the facts of *Knight* the transaction was incomplete:<sup>17</sup>

...the principle in *Target* only applies where the underlying transaction covered by the trust had not been completed... In the present case there was a trust fund made up of money supplied by [the investor]... The transaction had not been completed. The breach was the payment and the remedy for that breach is reconstitution of the trust fund.

Thus leave to appeal Judge Howarth's order was refused. This order required the solicitor to pay money to the beneficiary equal to the quantum of the *Falsification Order* that would have been made against the trustee had the solicitor not been negligent. As such *Knight* supports the availability of *Falsification Orders*, in situations where any underlying transaction of the trust is not complete. The circumstances in which a trust will have an underlying transaction, and when such a transaction will be complete are not discussed in the case.<sup>18</sup>

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<sup>17</sup> *Ibid* [38]-[39].

<sup>18</sup> The Court of Appeal do not state why the transaction was not complete on the facts. One might guess that it is because the assignment had not been made, though it is far from clear. Aldous LJ clearly saw himself as applying *Target*, though *Target* similarly provides no guidance on these concepts: *Target* (n 3) 435-6 (Lord Browne-Wilkinson). It is strongly arguable that *Knight* misinterprets *Target* on this point. *Knight* employs the concept of completed transactions as relevant to determining the quantum of the trustee's liability. In contrast, Lord Browne-Wilkinson in *Target* appears to be using the concept of completed transactions as relevant in determining whether a trustee should be liable to place subject-matter into trust, or transfer subject-matter to an object of the trust. Lord Reed takes a similar line on Lord Browne-Wilkinson's speech: *AIB* (n 2) [98]-[109]. For discussion see 6.2.3.1.

#### 6.2.1.4 *Flitcroft's Case*

In *Re Exchange Banking Co (Flitcroft's Case)*, company directors wrongfully transferred £3192 from the company's bank account.<sup>19</sup> The company went into liquidation, and the Court of Appeal ordered the directors to pay £3192 to the liquidator, holding them jointly and severally liable.

The following reasons were provided for making the order. Cotton LJ said:<sup>20</sup>

...directors are in the position of trustees and are liable not only for what they put into their own pockets, but for what they in breach of trust pay to others.

Brett LJ said:<sup>21</sup>

It is a [a director's] duty when such a breach of trust as this is discovered to get a return of the assets improperly expended that they may be applied in payment of debts. The act of the directors is impeached as a breach of trust...

Lord Jessel MR said:<sup>22</sup>

...if directors who are quasi trustees for the company improperly pay away the assets to the shareholders, they are liable to replace them.

The order made seems to be quantified with reference to the value of the subject-matter wrongfully transferred. This is demonstrated by the references to 'what they in breach of trust pay to others', 'return of the assets improperly expended', and

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<sup>19</sup> *Re Exchange Banking Co (Flitcroft's Case)* (1882) 21 Ch D 519 (CA).

<sup>20</sup> *Ibid* 536.

<sup>21</sup> *Ibid* 535.

<sup>22</sup> *Ibid*

‘replace them’. The reason provided by the Court of Appeal for making this order is that directors are to be treated the same way as trustees, and that a similar order is available against trustees. That order appears to be a *Falsification Order* as such an order is also quantified with reference to the value of subject-matter wrongfully transferred. As such *Flitcroft’s Case* provides support for the availability of *Falsification Orders*.<sup>23</sup>

#### 6.2.1.5 *ITC v Ferster*

In *Interactive Technology Corp Ltd v Ferster*, a director wrongfully transferred money from a company’s bank to himself purportedly for remuneration.<sup>24</sup> The company sought an order for equitable compensation against the director in respect of this breach. Morgan J at first instance made an order for equitable compensation stating that the director was liable to the company for any ‘losses resulting from the payment... of unauthorised remuneration’.<sup>25</sup> This order is framed in causal terms, and thus focuses on the consequences of breach. The Court of Appeal allowed the company’s appeal, varying the order to include an additional term that the director was liable to the company for ‘the equivalent amount of the “remuneration” that he

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<sup>23</sup> A similar argument could be made in respect of the following cases: *Re Anglo-French Cooperative Society Ex p Pelly* (1882) 21 Ch D 492 (CA); *Selangor United Rubber v Cradock (no 3)* [1968] 1 WLR 1555 (Ch) 1574-7, 1660 (Ungoed-Thomas J).

<sup>24</sup> *Interactive Technology Corp Ltd v Ferster* [2018] EWCA Civ 1594, [2018] 2 P&CR 22.

<sup>25</sup> *Ibid* [11].

received... in excess of his entitlement'.<sup>26</sup> David Richards LJ gave the only reasoned judgment, with which Newey LJ agreed.

David Richards LJ justified the variation of the order in the following way:<sup>27</sup>

Equitable compensation is apt to include a payment made to restore to a claimant the value of assets or funds removed without authority by a trustee or other fiduciary, such as a director. It may also include reparation for losses suffered by the claimant, such as in this case any tax penalties and interest resulting from the payment of the unauthorised remuneration. But it is not restricted to reparation for losses, as the judge appears to have held...

Thus the Court of Appeal made an order against the director for the value of subject-matter wrongfully transferred, under which the consequences of breach were irrelevant to quantification. This is the same as a *Falsification Order*, though made against a director. This is confirmed through David Richards LJ's expressly citing a judgment of Lord Millett and academic commentary which argue in favour of the availability of *Falsification Orders*.<sup>28</sup> The Court of Appeal's justification for this order was that such orders were available against fiduciaries, a category which includes both directors and trustees. As such, *Ferster* provides support for the availability of *Falsification Orders*.<sup>29</sup>

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<sup>26</sup> *Ibid* [28].

<sup>27</sup> *Ibid* [16].

<sup>28</sup> *Ibid* [17]-[19]. The cited discussion can be found at: *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368, [2013] HKCFA 93 [168] (Lord Millett); David Hayton and Paul Matthews, *Underhill and Hayton: Law Relating to Trusts and Trustees* (19th LexisNexis 2016) 87.11.

<sup>29</sup> For criticism of the decision in *Ferster*, see Andrew Burrows, 'Remedies for Equitable Wrongs' ch 26 in *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th OUP 2019) 520.

### 6.2.1.6 *Re Collie*

In *Re Collie Ex p Adamson*, a partnership fraudulently induced the claimant to invest money in the partnership.<sup>30</sup> The partnership and the two partners subsequently went bankrupt, and the claimant sought to prove a claim in the separate estates of the partners, rather than proving in the estate of the partnership, even though no judgment had been awarded in his favour against the individual partners.<sup>31</sup> The Court of Appeal by majority allowed the proof. James and Baggallay LJ gave a joint judgment, whilst Bramwell LJ dissented.

At the time of *Re Collie*, a rule existed which precluded the proof of tort claims in bankruptcy unless judgment have already been given on the claim. However, James and Baggallay LJ thought this rule inapplicable on the facts of *Re Collie*:<sup>32</sup>

In cases of fraud, or breach of trust, which is often only one form and instance of fraud, there never was any division of liability between the tort-feasors; every person participating in the tort was liable to make good the whole; the liability of each in equity was for the whole amount. And the proof in bankruptcy was exactly commensurate with that liability; it being the established rule in bankruptcy that every debt which a person could, either in his own name or in the name of any other person, recover at law, or in equity, was a provable debt in bankruptcy.

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<sup>30</sup> *Re Collie Ex p Adamson* (1878) 8 Ch D 807 (CA).

<sup>31</sup> Proving in bankruptcy involves a party with a claim against a bankrupt notifying the trustee in bankruptcy of their claim, so as to entitle that party to some share of the bankrupt's estate. For further discussion, see Ian Fletcher, 'Proof of Debts' ch 9 in *The Law of Insolvency* (5th S&M 2017) 9.001ff.

<sup>32</sup> *Collie* 820.

The reason the proof was permitted was because the proof was for a ‘debt’. Earlier in their judgment James and Baggallay LJJ discussed the concept of debt:<sup>33</sup>

The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated.

James and Baggallay LJJ treat a debt as meaning the value of the money that the partnership fraudulently induced the claimant out of. The debt is not fixed with reference to any loss wrongfully caused by the inducement, but rather with reference to the money that was induced to be invested. The claim’s being of this nature was the reason for allowing the proof, and so *Re Collie* provides ratio authority for the availability of such a claim following the fraudulent inducement of a transfer of money.

In addition, *Re Collie* provides obiter support for the availability of *Falsification Orders*. James and Baggallay LJJ stated that in response to a ‘breach of trust’ an ‘equitable debt’ will lie for the ‘actual money’ or ‘value of the thing’ that the cheated party has been cheated of. This appears to support the availability of *Falsification Orders*.

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<sup>33</sup> *Re Collie* (n 30) 819.

It could be argued that *Re Collie* supports the availability of *Falsification Orders* as a matter of ratio. The reasoning of the court's majority states that proofs are permitted in bankruptcy in cases of fraud, as in such cases a debt lies against the fraudulent party, where debt means the availability of an order quantified with reference to the value of subject-matter of which the innocent party has been defrauded: an order similar to a *Falsification Order*. Furthermore the court states that breach of trust 'is often only one form and instance of fraud'. From this it may be gleaned that *Falsification Orders* are available against trustees for breach of duty, where such a breach amounts to fraud. No guidance is given on when a trustee's breach is a fraud, and so the scope of support is unclear.

### 6.2.1.7 Commonwealth Authorities

A number of commonwealth authorities are frequently relied upon in the literature as supporting the availability of *Falsification Orders*.<sup>34</sup> If such support existed, then as commonwealth authorities they would be of persuasive value in England and Wales. The three authorities are Street J's decision in *Re Dawson (Deceased)*, the High Court of Australia's decision in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*, and the Hong Kong Court of Final Appeal's decision in *Libertarian Investments Ltd v Hall*.<sup>35</sup> It will be shown that the ratio of *Re Dawson* supports the availability of *Falsification Orders*, that

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<sup>34</sup> A selection of literature: James Edelman and Steven Elliott, 'Money Remedies Against Trustees' (2004) 18(3) *Trust Law International* 116, 117; Jamie Glister, 'Breach of Trust and Conversion in a Falling Market' [2014] *Lloyd's Maritime and Commercial Law Quarterly* 512, 525-7; Conaglen, 'Equitable Compensation for Breach of Trust: Off *Target*' (n 13) 160-4.

<sup>35</sup> *Re Dawson* [1966] NSW 211; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15, (2003) 212 CLR 484; *Libertarian Investments Ltd v Hall* (n 28).

*Youyang* provides no support for the availability of *Falsification Orders*, and that there is obiter support for such availability in Lord Millett NPJ's judgment in *Libertarian*.

#### 6.2.1.7.1 *Re Dawson*

In *Re Dawson* a trustee wrongfully transferred NZ£4700, and then died. Beneficiaries under the trust sought an order against the deceased trustee's estate in respect of the breach of duty. It was common ground that the order should be quantified in Australian pounds, but it was contested whether the exchange rate should be taken at the date of breach (1939) or the date of judgment (1966). At the time of breach NZ£4700 was worth AU£4700, whilst at the time of judgment it was worth AU£6000. Street J ordered the trustee's estate to pay AU£6000, considering that the exchange rate at the date of judgment was appropriate.

Street J provided the following reason in favour of the order:<sup>36</sup>

The form of relief is couched in terms appropriate to require the defaulting trustee to restore to the estate the assets of which he deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee's account... The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation.

It seems Street J made a *Falsification Order*: the references to the trustee's 'obligation to restore to the estate the assets of which he deprived it' and that 'compensation is to

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<sup>36</sup> *Ibid* 216.

be assessed by reference to the value of the assets' shows that the order is quantified with reference to the value of subject-matter wrongfully transferred, rather than any losses wrongfully caused. This interpretation is confirmed by a number of other statements:<sup>37</sup>

The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage... Considerations of causation, foreseeability and remoteness do not readily enter into the matter... The principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach.

As such, *Re Dawson* supports the proposition that *Falsification Orders* are sometimes available against trustees. As to the date of assessment, *Street J* makes clear that the date of restoration is the appropriate date. This appears not to be the date of judgment, but rather the date on which the trustee actually complies with the court order by making a transfer of money.

#### **6.2.1.7.2 *Youyang v Minter Ellison***

In *Youyang* a settlor decided to invest in shares in a company, and transferred \$500k to a trustee for use in such investment.<sup>38</sup> It was impermissible for the trustee to invest the money before a bearer deposit certificate had been received by the settlor's

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<sup>37</sup> *Ibid* 214-5.

<sup>38</sup> *Youyang* (n 35) [7]-[22].

agent. The bearer deposit certificate included a bank's undertaking to pay \$500k to the bearer of the certificate ten years after the date of the certificate's issue.<sup>39</sup>

The trustee wrongfully invested the \$500k before a conforming certificate was received. The company went insolvent which resulted in the settlor's receiving nothing in return for the \$500k investment. The settlor sought an order against the trustee in respect of the breach. The High Court of Australia ordered the trustee to pay \$500k to the settlor plus interest from the date of breach. A single joint judgment was given by Gleeson CJ, McHugh, Gummow, Kirby, and Hayne JJ.

If the court made a *Falsification Order*, then the decision in *Youyang* provides support for the availability of such orders. The date from which interest was payable suggests that a *Falsification Order* was made, rather than a counterfactual loss order. Interest was payable from the date of breach, which makes intuitive sense under a *Falsification Order*: such an order is quantified with reference to the value of subject-matter wrongfully transferred.

However, interest's being payable from the date of breach is difficult to square with any form of counterfactual loss order. In quantifying such an order, one could construct the non-breach counterfactual so that the settlor received a conforming certificate, the trustee permissibly invested the money, and the bank paid \$500k to

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<sup>39</sup> The purpose of the certificate was to provide security for the settlor's investment: the settlor was guaranteed to receive at least the face value of their investment upon the expiry of ten years.

the settlor upon the expiry of ten years.<sup>40</sup> However under this counterfactual, interest should have been payable from the date on which the bank would have paid out under the certificate, not the date of breach. Thus the order made is difficult to make sense of under this counterfactual.

Alternatively, one could construct the non-breach counterfactual so that no certificate was received, and the trustee returned the \$500k to the settlor. Again ordering interest from the date of breach seems peculiar: intuitively it should have been the date on which the trustee would have returned the \$500k to the settlor but for the breach.

However, the High Court's reasoning suggests that they made a counterfactual loss order. This is so for two reasons. First, the court applied statements from Lord Browne-Wilkinson's speech in *Target* which are suggestive of a counterfactual approach to quantification:<sup>41</sup>

“[T]he fact that there is an accrued cause of action as soon as the breach is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred. The quantum is fixed at the date of judgment at which date, according to the circumstances then pertaining, the compensation 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. I can see no justification for

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<sup>40</sup> For the legal rules relevant in constructing the non-breach counterfactual, see 8.2.1.

<sup>41</sup> *Yoyang* (n 35) [50]. The passage is from *Target* (n 3) 437. The relevance of *Target* to the availability of *Falsification Orders* is considered at 6.2.3.1.

‘stopping the clock’ immediately in some cases but not in others: to do so may, as in this case, lead to compensating the trust estate or the beneficiary for a loss which, on the facts known at trial, it has never suffered.”

The reference to putting the ‘trust estate or the beneficiary back into the position it would have been in had there been no breach’ is suggestive of a counterfactual approach to quantification.

Second, the High Court made various comments that are only relevant if they made a counterfactual loss order. The High Court refers to findings of facts made by Brownie AJ at first instance, and to comments upon such findings made by Handley JA and Hodgson JA in the New South Wales Court of Appeal. ‘Mr Hayward’ refers to the director of the settlor:<sup>42</sup>

Brownie AJ did not find, as Handley JA later assumed he had found, that if Mr Hayward had been told about the form of the certificate he would not have been concerned and would have proceeded with the investment. The matter was accurately put in the following passage from the judgment of Hodgson JA: “There is in my opinion a world of difference between, on the one hand, an investor seeking to reverse an investment that has already been made because of a matter of the form of a certificate considered in isolation and, on the other hand, a proposed investor instructing a trustee to go ahead and make an investment notwithstanding that the party to whom the money is to be entrusted is deliberately breaching its contract by not proffering the security for the investment which it undertook to provide. In my opinion, the primary judge’s findings concerning the former matter say nothing about the latter.”

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<sup>42</sup> *Ibid* [60].

This discussion is irrelevant if the High Court made a *Falsification Order*. However, the discussion is relevant if the High Court were making a counterfactual loss order. This is because whether or not the settlor would have proceeded with the investment given the absence of a conforming bearer deposit certificate is relevant in constructing the non-breach counterfactual. Indeed the discussion excerpted above appears shortly after the High Court's following statement. 'Youyang' refers to the settlor of the trust, whilst 'Minters' refers to the trustee:<sup>43</sup>

Youyang submits that it would not have suffered the loss of \$500,000 but for the breaches of trust by Minsters. Youyang's submissions should be accepted.

As such, the rejection of the finding that the settlor's director would have proceeded with the investment is suggestive of the court's adopting a counterfactual in which the investment was not so proceeded with.

Thus, although the date from which interest was payable is suggestive of a *Falsification Order*, the court's reasoning is suggestive of a counterfactual loss order. Given this, it seems more plausible that a counterfactual loss order was made, and that there had been insufficient argument on the question of interest. If the point had been pressed, it is probable that the High Court would have ordered interest from the date on which the trustee would have returned the \$500k to the settlor but

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<sup>43</sup> *Ibid* [51].

for the breach of duty. Therefore, *Youyang* provides no support for the availability of *Falsification Orders*.

Matthew Conaglen denies this conclusion, arguing that the High Court made a *Falsification Order*:<sup>44</sup>

The result in *Youyang* is not consistent with the sort of causal analysis which *Target Holdings* suggested and which *AIB* has now confirmed is the law in England, because if the trustees had acted properly they would have received a bearer deposit certificate which would only have entitled Youyang to receive \$500,000 on 24 September 2003, not on 24 September 1993... In other words, on the causal analysis required under *Target Holdings*, there was no justification for Youyang receiving interest until its entitlement to the \$500,000 crystallised in 2003... yet the High Court... awarded the entire \$500,000 plus interest from 24 September 1993.

If one constructed the non-breach counterfactual as one in which the trustee permissibly made the investment then Conaglen is correct: the date from which interest is ordered is difficult to make sense of. However, if one constructs the counterfactual so that the trustee returns the money to the investor, then the date of breach is at least approximately correct. Furthermore, Conaglen's argument seems inconsistent with the reasoning of the High Court, and thus should be rejected.

### 6.2.1.7.3 *Libertarian Investments v Hall*

In *Libertarian*, €50m was held on trust by the defendant trustee. The trustee owed an obligation as trustee to invest this money in shares. The trustee failed to do so, and

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<sup>44</sup> Conaglen, 'Equitable Compensation for Breach of Trust: Off *Target*' (n 13) 163.

dealt with most of the money for his own purposes. The claimant beneficiary sought orders for this breach of duty. The Hong Kong Court of Final Appeal unanimously ordered the defendant to pay around £14m to the claimant. Ribeiro PJ gave the lead judgment, with which Chan PJ and Bokhary NPJ agreed. Lord Millett NPJ gave a shorter judgment, with which Chan PJ agreed. Litton NPJ also gave a shorter judgment.

Ribeiro PJ made the following statement of principles, the first being drawn from Lord Browne-Wilkinson’s judgment in *Target*:<sup>45</sup>

“...a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss... If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed...”

Where the plaintiff provides evidence of loss flowing from the relevant breach of duty, the onus lies on a defaulting fiduciary to disprove the apparent causal connection between the breach of duty and the loss (or particular aspects of the loss) apparently flowing therefrom.

...where there is (as in the present case) evidence of a breach of fiduciary duty causing loss, equity places the onus on a defaulting fiduciary to prove that such loss would have occurred in any event even if no breach had occurred.

Applying these principles to the facts, Ribeiro PJ reasoned as follows: but for the trustee’s breach of duty, the trustee would have acquired around 1.7m shares for the

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<sup>45</sup> *Libertarian* (n 28) [78], [93], [116].

trust in 2004. In 2006 the beneficiary would have decided to sell 42% of these shares for around £9.8m. There was debate as to the appropriate date for valuing the remaining 58% of the shares, and the appropriate measure of valuation. Ribeiro PJ decided to take the market value of the shares on the date of the first instance judgment in *Libertarian* given by Stone J in 2013, which was £8.84 per share.<sup>46</sup> The defendant was ordered to pay money to the claimant quantified at the sale price of the 42% of shares, plus the market price of the 58% at the time of Stone J's judgment, minus some money which had already been recovered.

Ribeiro PJ's judgment provides no support for or against the availability of *Falsification Orders*: nowhere does he reference such orders. Rather he is recognising some form of counterfactual loss claim, inquiring into what would have happened but for the breach of duty. The order made does not appear to be a *Surcharging Order* as he requires payment to the beneficiary rather than into the trust estate. However, given his emphasis in his statement of principle on loss to the trust estate, it appears that he is making a *Lesser Receipt Order*: as the beneficiary was entitled under a bare trust inquiring into loss caused to the trust estate is a workable proxy for asking how much less the beneficiary received from the trustee as a result of the breach of duty.<sup>47</sup>

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<sup>46</sup> *Ibid* [120]-[139]. That the appropriate date for valuation was at the time of Stone J's judgment is made clear by Litton NPJ at [160].

<sup>47</sup> For elaboration of this point, see 2.2.3.

However Ribeiro PJ seems to reverse the burden of proof. Rather than requiring the beneficiary to prove that loss had been suffered, he seems to require the beneficiary to provide some evidence that the breach caused loss, which then places the burden upon the trustee to disprove loss.<sup>48</sup> This is an interesting idea, though not one within the scope of this chapter, which is concerned with the availability of *Falsification Orders*.

In contrast, Lord Millett NPJ's judgment provides clear support for the availability of *Falsification Orders*. He said:<sup>49</sup>

Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. This will produce a deficit which the defendant must make good, either *in specie* or in money. Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative. The amount of the award is measured by the objective value of the property lost determined at the date when the account is taken and with the full benefit of hindsight.

The order described by Lord Millett NPJ is a *Falsification Order*. This is made clear by the references to falsifying an 'unauthorised disbursement' which leaves a 'deficit'

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<sup>48</sup> This interpretation is also made by Peter Turner, 'Measuring Equitable Compensation for Breach of Fiduciary Duty' (2014) 73(2) CLJ 257, 258-9. Turner elsewhere argues that *Target, AIB* and *Youyang* also support a reversal in the burden of proof in respect of loss: Peter Turner, 'Want of Causation as a Defence to Liability for Misapplication of Trust Assets' ch 9 in P Davies, S Douglas, and J Goudkamp (eds) *Defences in Equity* (Hart 2018). This argument is doubtful, though there is some support for this view of English law in obiter dicta in Sales LJ's judgment in *Barnett v Creggy* [2016] EWCA Civ 1004, [2017] Ch 273 [44]-[45].

<sup>49</sup> *Libertarian* (n 28) [168].

which may be required to be made good ‘in money’, the remedy being ‘restitutionary or restorative’ rather than aiming at ‘compensation for loss’, where the order is quantified with reference to the ‘objective value of the property lost’. The appropriate date for valuing the subject-matter paid out in breach is the date of judgment. This means that the quantum of an order will reduce if the value of subject-matter wrongfully transferred drops between the time of breach and the time of judgment, and increase if such value increases in that time.

*Libertarian* is a decision of the Hong Kong Final Court of Appeal, and so is not binding on the courts of England and Wales. Rather it is merely persuasive authority. Furthermore, Lord Millett NPJ’s support for the availability of *Falsification Orders* does not form the ratio of *Libertarian*, as only Bokhary NPJ agreed with Lord Millett NPJ’s reasoning in the case. Nevertheless obiter support from two judges of the court has some persuasive value.

## 6.2.2 The Duty of Care

This section outlines two authorities that support the availability of *Falsification Orders* following breach of the duty of care: *Norris v Wright*, and *Fry v Tapson*.

In *Norris v Wright*, trustees held money on trust. The settlor communicated in the declaration of trust that the trustees had power to permissibly invest this money, providing the life tenant under the trust provided consent. The trustees lent £1,908

on real security, with the consent of the life tenant. This investment was held to be within the terms of the power.<sup>50</sup> However, the trustee's investment was in breach of the duty of care. The life tenant and remainderpersons sought an order against the trustee.

Sir John Romilly MR ordered the trustee to pay £1,908 into the trust estate.

He reasoned:<sup>51</sup>

I am of opinion that this was, at the time when the mortgage was made, an insufficient security, and that the money advanced must be replaced from the time when that advance was made.

The reference to money being 'replaced' is suggestive of a non-counterfactual approach, such as taken by a *Falsification Order*. There is no inquiry into whether loss has been caused by the breach. Rather the trustee is held liable for the amount of money paid out in breach.

In *Fry v Tapson* a trustee lent £5,000 on real security. This was in accordance with the powers vested in them by the settlor's communicated intentions, but was a breach of the duty of care. The borrower defaulted and the security was deficient to cover the loan. Kay J ordered the trustees to place £5,000 into the trust estate.<sup>52</sup>

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<sup>50</sup> *Norris v Wright* (1851) 14 Beav 291, 51 ER 298, 304.

<sup>51</sup> *Ibid* 305.

<sup>52</sup> *Fry v Tapson* (1884) 28 Ch D 268, 282.

I regret to be obliged to declare them jointly and severally liable to replace the £5000.

The order seems to be a *Falsification Order*. This is because there is no inquiry into whether loss has been caused to the trust estate by the breach, and the language of ‘replace’ is suggestive of a non-counterfactual approach quantified with reference to the value of subject-matter paid out in breach.

### 6.2.3 The Rejection of *Falsification Orders*

This section outlines three authorities that reject the availability of *Falsification Orders* against express trustees for breach of the duty to follow the settlor’s communicated intentions and for breach of the duty of care: *Target*, *Collins*, and *AIB*.<sup>53</sup>

#### 6.2.3.1. *Target Holdings*

The facts of *Target* are outlined elsewhere.<sup>54</sup> In brief, a trustee held £1.5m on bare trust for a lender for use in a loan transaction. The trustee wrongfully transferred away the money, and it was not proved whether this breach had caused any loss. Whilst the trustee had power to permissibly apply the money towards the loan transaction, this power could only be exercised once the lender had received a first charge. Although the lender eventually received a first charge, receipt had not occurred when the trustee transferred the money, hence the breach of duty. The lender sought a *Falsification Order* on summary judgment. The House of Lords

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<sup>53</sup> *Target* (n 3); *Collins* (n 3); *AIB* (n 3).

<sup>54</sup> See 4.2.1.3.

refused to make any order, with Lord Browne-Wilkinson giving the only reasoned speech.

Lord Browne-Wilkinson characterised the lender's case for a *Falsification Order* as involving two alternative arguments, which he labelled 'Argument (A)', and 'Argument (B)'.<sup>55</sup> He rejected both of these arguments.

Argument (A) sought a *Falsification Order* requiring the trustee to pay around £1m into the trust estate.<sup>56</sup> The argument rested on the premise that the trustee was obligated to 'reconstitute' or 'restore' the trust estate, and the lender could then call for the money once restoration had occurred.

Lord Browne-Wilkinson rejected Argument (A). He said that once an underlying commercial transaction had been completed, a trustee cannot be ordered to reconstitute a trust estate.<sup>57</sup> On the facts, 'reconstitution' was unavailable, as the transaction had been completed through the late acquisition of the first charge. The meaning of 'reconstituting the trust estate' is ambiguous. This ambiguity gives rise to an objection to the conclusion that *Target* rejects the availability of *Falsification Orders* in all situations. The objection will be considered below.

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<sup>55</sup> *Target* (n 3) 433.

<sup>56</sup> Whilst the quantum of a *Falsification Order* is the value of subject-matter wrongfully transferred, which would be £1.5m on the facts of *Target*, the beneficiary was willing to give credit for money recouped by the beneficiary in a loan transaction. For full discussion see 4.2.1.3.

<sup>57</sup> *Target* (n 3) 436.

Argument (B) sought a *Falsification Order* on the basis that wrongfully caused loss should be assessed immediately after the breach of duty, rather than at the time of judgment.

Lord Browne-Wilkinson rejected Argument (B). The appropriate approach was to assess whether wrongfully caused loss had arisen at the time of judgment, rather than immediately after breach:<sup>58</sup>

At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put "in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation"... in my judgment those two principles are applicable as much in equity as at common law... the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong.

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.

On the facts of *Target* it had not been proved whether loss had been wrongfully caused, and thus summary judgment was refused. Whether loss had been wrongfully caused would have been determined had the case gone to trial, though it never did.

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<sup>58</sup> *Ibid* 432, 439

As such, the House of Lords refused to make a *Falsification Order* on the facts of *Target*. It is suggested that the ratio of *Target* rejects the availability of such orders for breach of the duty to follow the settlor's communicated intentions, and for breach of the duty of care. *Target* itself concerned a breach of the former duty, though Lord Browne-Wilkinson's reasoning covers both duties:<sup>59</sup>

The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law... the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss.

The reference to 'provisions of the trust instrument' includes the settlor's communicated intentions, whilst the reference to the 'general law' includes the duty of care. As such, the ratio of *Target* excludes the availability of *Falsification Orders* for both of these duties.

The first objection to this conclusion says that *Target* does not reject the availability of *Falsification Orders* because there is some reason why a *Falsification Order* should not have been made on the facts of *Target*.<sup>60</sup> Lord Millett has suggested such a reason. Writing extra-judicially as Sir Peter Millett, he said of *Target*:<sup>61</sup>

...the trustee's obligation to restore the trust property is not an obligation to restore it in the very form in which he

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<sup>59</sup> *Ibid* 434.

<sup>60</sup> See for example Paul Davies, 'Compensatory Remedies for Breach of Trust' ch 10 in R Nolan, K Low, and T Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018) 310-11.

<sup>61</sup> Sir Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *Law Quarterly Review* 214, 227.

disbursed it, but an obligation to restore it in any form authorised by the trust... The plaintiff [in *Target*] could not object to the acquisition of the mortgage or the disbursement by which it was obtained; it was an authorised application of what must be treated as trust money notionally restored to the trust estate on the taking of the account.

Although delphic in places, the idea is that the procurement of the first charge for the lender was authorised in *Target*, and this meant that no *Falsification Order* should be made in the case.<sup>62</sup> Other commentators have suggested a *Falsification Order* should not have been ordered in *Target* for a different reason, namely that the claimant had waived their claim.<sup>63</sup>

The first objection should be rejected. Given that the House of Lords refused to make a *Falsification Order* on the basis that such orders are never available, the fact that a reason not considered by the court also counted against making such an order is irrelevant to the ratio of *Target*. If such reason does exist, it at most shows that the result of *Target* is justifiable for those commentators that think *Falsification Orders* should at least sometimes be available.

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<sup>62</sup> Others have supported this view: Matthew Conaglen, 'Explaining *Target Holdings v Redfern*' (2010) 4 Journal of Equity 288; Charles Mitchell, 'Stewardship of Trust Property and Liability to Account' [2014] The Conveyancer and Property Lawyer 215, 226; Paul Davies, 'Remedies for Breach of Trust' (2015) 78(4) Modern Law Review 681, 686; Peter Watts, 'Some Aspects of the Intersection of the Law of Agency with the Law of Trusts' ch 2 in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart 2016). This view has been discussed by the High Court of Australia in *Youyang* (n 35) [45] (Gleeson CJ, McHugh, Gummow, Kirby, and Hayne JJ).

<sup>63</sup> James Edelman, 'Money Awards of the Cost of Performance' (2010) 4 Journal of Equity 122, 125-6; Peter Watts, 'Agents' Disbursal of Funds in Breach of Instructions' [2016] Lloyd's Maritime and Commercial Law Quarterly 118, 120-1.

The second objection suggests that *Target* only rejects the availability of *Falsification Orders* in situations in which any commercial or conveyancing transaction underlying the trust is complete. The objection focuses on Lord Browne-Wilkinson's following statements:<sup>64</sup>

I have no doubt that, until the underlying commercial transaction has been completed, the solicitor can be required to restore to client account [sic] moneys wrongly paid away. But to import into such trust an obligation to restore the trust fund once the transaction has been completed would be entirely artificial... In my judgment, once a conveyancing transaction has been completed the client has no right to have the solicitor's client account reconstituted as a "trust fund".

The objection rests on interpreting 'restoring' or 'reconstituting' the trust fund as relating to the appropriate quantification of the trustee's liability. In particular the objection interprets 'restoring' and 'reconstituting' as meaning that the trustee is liable for the value of any subject-matter wrongfully transferred away, as in a *Falsification Order*. This approach has been adopted as a matter of ratio by the Court of Appeal,<sup>65</sup> and at least one commentator.<sup>66</sup>

The objection should be rejected. This is because 'restoring' or 'reconstituting' should be interpreted not as relating to the appropriate quantum of the trustee's liability, but rather the appropriate place for the trustee to transfer money once the

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<sup>64</sup> *Target* (n 3) 436.

<sup>65</sup> *Knight* (n 14), for discussion of which see 6.2.1.3. Furthermore, this approach is assumed as correct by the first instance judge in *Collins v Brebner* and possibly Tuckey LJ in the Court of Appeal's hearing of the same case: (n 3) [52], [71].

<sup>66</sup> Watts, 'Some Aspects of the Intersection of the Law of Agency with the Law of Trusts' (n 62) 50.

quantum of liability has been calculated. Under this interpretation, ‘restoring’ or ‘reconstituting’ requires the trustee to pay money into the trust estate, but the appropriate quantum of liability is left open. As such Lord Browne-Wilkinson’s statements mean that a trustee cannot be ordered to pay money into the trust estate once any commercial or conveyancing transaction underlying the trust is complete. The statements have no relevance to the appropriate quantum of liability. In particular they do not leave open the availability of a *Falsification Order* where any transaction is incomplete.

There are two reasons to prefer this second interpretation of ‘restoring’ or ‘reconstituting’. First, the reason given by Lord Browne-Wilkinson for saying that ‘restoration’ or ‘reconstitution’ is unavailable where a transaction is complete is understandable on the second interpretation, but makes no sense on the first interpretation. The relevant statement is:<sup>67</sup>

The obligation to reconstitute the trust fund applicable in the case of traditional trusts reflects the fact that no one beneficiary is entitled to the trust property and the need to compensate all beneficiaries for the breach. That rationale has no application to a case such as the present. To impose such an obligation in order to enable the beneficiary solely entitled (i.e. the client) to recover from the solicitor more than the client has in fact lost flies in the face of common sense and is in direct conflict with the basic principles of equitable compensation. In my judgment, once a conveyancing transaction has been completed the client has no right to have the solicitor’s client account reconstituted as a “trust fund.”

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<sup>67</sup> *Target* (n 3) 436.

Lord Browne-Wilkinson reasons that ‘reconstitution’ reflects the fact that no one beneficiary is entitled to the trust property. Where this fact is not true there is no need for ‘reconstitution’.

This idea can be demonstrated through an example. Assume a trustee holds shares, with a discretionary trust in respect of the share income in favour of Alice, Ben, and Catherine, and a duty to hold the shares for twenty years before transferring the capital under a discretionary trust to Alice, Ben, or Catherine. Assume that after one year, the trustee misapplies the shares, and between the misapplication and time of judgment no income would have arisen on the shares.

Assuming the quantum of the trustee’s liability is determined, the trustee should not be ordered to transfer subject-matter to any beneficiary. No income has or would have arisen on the subject-matter. Furthermore, the shares themselves should not be distributed for another nineteen years. In order for the settlor’s communicated intentions to be carried out, it is necessary that the trustees place subject-matter into the trust estate, so that income can be distributed as it arises, and the capital can be distributed at the expiry of another nineteen years. There is a need to ‘compensate the beneficiaries’ so that their intended interests under the discretionary trusts can continue.

This concern was not present in *Target*, as the beneficiary was solely entitled. Furthermore, the purpose of the trust, which was to procure a first charge for the lender as security for a loan, had been fulfilled. There was thus no reason to order the trustee to place subject-matter into the trust estate.

Lord Browne-Wilkinson's reasoning makes sense if one interprets 'reconstitution' and 'restoring' as relevant to the appropriate place for the trustee to pay money. However, if one interprets these terms as relevant to quantification, this sense is lost: why should the quantum of the trustee's liability be affected by whether one or many beneficiaries are entitled to the trust fund? This loss of sense provides a reason in favour of the current interpretation of 'reconstitution' and 'restoring'.

The second reason to adopt the second interpretation of 'restoration' and 'reconstitution' is consistency with Lord Browne-Wilkinson's reason for rejecting Argument (B). As shown above, Lord Browne-Wilkinson placed great emphasis on the need to establish that loss had been caused by the breach of duty when quantifying the trustee's liability. This need was not limited to cases in which any underlying transaction was complete. This emphasis is inconsistent with interpreting 'restoration' and 'reconstitution' as germane to quantification, but is consistent with interpreting them as relevant to the appropriate place for the trustee to pay money once quantified.

### 6.2.3.2 *Collins v Brebner*

In *Collins*, an investor decided to purchase shares, and transferred £524,100 to a trustee to be held on bare trust for the investor with a power to permissibly apply the money towards the purchase of shares, providing various conditions were satisfied.<sup>68</sup> The trustee wrongfully transferred away the money, and the investment proved a bad decision for the investor. The trustee's wrongdoing caused around £125k of loss to the investor, though it was unclear whether this was due to a breach of contract, or breach of the duty to follow the settlor's communicated intentions.<sup>69</sup> The investor sought a *Falsification Order* for £524,100 and the Court of Appeal refused to make the order, instead ordering the trustee to pay £125k to the investor.<sup>70</sup> Tuckey LJ gave the only reasoned judgment.

The investor accepted that *Target* rejected the availability of *Falsification Orders* in some situations but argued that such orders were still available for fraudulent breaches of trust, that the trustee's breach in *Collins* was fraudulent, and that thus a *Falsification Order* should be made.<sup>71</sup>

Tuckey LJ rejected the investor's argument:<sup>72</sup>

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<sup>68</sup> The conditions to be satisfied were in some respects unclear: for full analysis see Chapter 8.

<sup>69</sup> The trustee also owed contractual duties. For full analysis of this ambiguity, see 7.2.1.2.

<sup>70</sup> The nature of this order is analysed in 7.2.1.2.

<sup>71</sup> *Collins* (n 3) [51].

<sup>72</sup> *Ibid* [54], [64].

There is nothing on my reading of the judgment which suggests that the principles stated by Lord Browne-Wilkinson do not apply to a fraudulent breach of trust.

I conclude that there is no principle which would entitle the claimant in this case to equitable compensation for the defendant's breach of trust for losses which were not caused by the breach.

*Collins* thus makes clear that *Target* excludes the availability of *Falsification Orders* even following fraudulent breaches of duty. *Collins* concerned a breach of the duty to follow the settlor's communicated intentions, so the scope of the ratio presumably applies to such cases. There is little discussion of the duty of care, so it is perhaps unsafe to assume that *Collins* applies to breaches of such duties.

### 6.2.3.3 *AIB Group v Mark Redler*

The facts of *AIB* were outlined elsewhere.<sup>73</sup> A trustee held around £3.3m on bare trust for a lender for use in a loan transaction. The trustee wrongfully transferred away the money, which caused about £300k of loss to the beneficiary of the trust. The beneficiary sought a *Falsification Order* for around £2.5m, and the Supreme Court refused to make such an order, instead ordering the trustee to pay around £300k to the beneficiary.<sup>74</sup> Lord Toulson and Lord Reed gave the only reasoned judgments. Lord Neuberger, Baroness Hale, and Lord Wilson agreed with both judgments.

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<sup>73</sup> See 4.2.1.4.

<sup>74</sup> It is argued in Chapter Seven that this is a *Personal Loss Order*: 7.2.2.2.

Lord Toulson rejected the general availability of *Falsification Orders*:<sup>75</sup>

...absent fraud, which might give rise to other public policy considerations that are not present in this case, it would not in my opinion be right to impose or maintain a rule that gives redress to a beneficiary for loss which would have been suffered if the trustee had properly performed its duties.

Lord Toulson makes clear that any order against the trustee should generally be quantified with reference to any loss wrongfully caused by the breach. This excludes the availability of *Falsification Orders* which are not quantified with reference to loss wrongfully caused. A possible exception is left open for fraudulent wrongs, though this is inconsistent with the Court of Appeal's interpretation of *Target* in *Collins v Brebner*.

Lord Reed also rejected the lender's argument:<sup>76</sup>

the argument assumes that liability does not depend on a causal link between the breach of trust and the loss... That proposition... was rejected in *Target Holdings*...

Similarly to Lord Toulson the focus on loss wrongfully caused excludes the possibility of a *Falsification Order*.

*AIB* concerned a breach of the duty to follow the settlor's communicated intentions. As such it is most naturally interpreted as denying the availability of *Falsification Orders* for breach of this duty. One might argue that *AIB* also excludes the availability of such orders following breach of the duty of care. This is because Lord

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<sup>75</sup> *AIB* (n 3) [62].

<sup>76</sup> *Ibid* [140].

Toulson and Lord Reed seemed to embrace the duty of care in their reasoning. Lord

Toulson said:<sup>77</sup>

All agree that the basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Where there has been a breach of that duty, the basic purpose of any remedy will be either to put the beneficiary in the same position as if the breach had not occurred or to vest in the beneficiary any profit which the trustee may have made by reason of that breach.

The ‘provisions of the trust instrument’ includes the settlor’s communicated intentions, whilst the ‘general law’ includes the duty of care. As such the rejection of the availability of *Falsification Orders* seems to apply to both.

Lord Reed said:<sup>78</sup>

The rules appropriate to a breach of duty by a trustee similarly have to be determined in the light of the characteristics of the obligation in question. This focus on the trustee’s obligations is the third and most important point. Putting the matter very broadly, compensation for the breach of an obligation generally seeks to place the claimant in the position he would have been in if the obligation had been performed.

Some of the typical obligations of the trustee of a fund are strict: for example, the duty to distribute the fund in accordance with the purposes of the trust. Others are obligations of reasonable care: for example, the duty to exercise reasonable care and skill in the management of the fund.

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<sup>77</sup> *Ibid* [64].

<sup>78</sup> *Ibid* [93]-[94].

Lord Reed's focus on compensation seems to exclude the availability of *Falsification Orders*, and his discussion is directed to cover the duty of care. Thus it is suggested that *AIB* excludes the availability of *Falsification Orders* for breaches of both the duty to follow the settlor's communicated intentions and the duty of care.

Two objections may be made against this interpretation. If either objection is successful, *Falsification Orders* remain available in certain situations post-*AIB*. It will be shown that both objections should be rejected.

The first objection is similar to the first objection considered above in relation to the proposed interpretation of *Target*. Those commentators supporting the availability of *Falsification Orders* identify some reason as to why such an order should not have been made on the facts of *AIB*, and use this as an argument for concluding that *Falsification Orders* are still available in situations dissimilar to *AIB* where this reason is inapplicable. For example, Peter Watt and James Penner suggest that the lenders in *AIB* had ratified the breach.<sup>79</sup> Lord Millett also identifies such a reason, though his argument is difficult to decipher.<sup>80</sup>

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<sup>79</sup> Watts, 'Agents' Disbursal of Funds in Breach of Instructions' (n 63) 121; James Penner, 'Falsifying the Trust Account and Compensatory Equitable Compensation' ch 7 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017) 144-50.

<sup>80</sup> Lord Millett, 'The Common Lawyer and the Equity Practitioner' (2014-5) UK Supreme Court Yearbook 193; Lord Millett, 'AIB v Redler' (2018) 32(1) *Trusts Law International* 44.

The first objection should be rejected. The commentators' discussion is relevant if one is inquiring into the justifiability of the Supreme Court's refusal to make a *Falsification Order*, but it is irrelevant in determining the ratio of the case. For the latter inquiry it is necessary to interpret Lord Toulson's and Lord Reed's reasoning. The fact that they could have adopted alternative reasoning is irrelevant to determining the ratio of *AIB* if they did not actually do so.

The second objection focuses on the fact that Lord Toulson concluded that the transaction had been completed in *AIB*. The objection argues that this fact suggests Lord Toulson thought it was important to make such a finding, and that in the absence of such a finding he would have made a *Falsification Order*. This shows that Lord Toulson thought a *Falsification Order* generally available providing any underlying commercial transaction had not been completed. Furthermore, as Lord Toulson had the support of Lord Neuberger, Baroness Hale, and Lord Wilson, this forms the ratio of the case.

It is true that Lord Toulson concluded that the commercial transaction was complete in *AIB*. The following is the relevant aspect of his reasoning:<sup>81</sup>

It was argued on behalf of the [lender] that “until the underlying commercial transaction has been completed, the solicitor can be required to restore to the client account moneys wrongly paid away.”

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<sup>81</sup> *AIB* (n 3) [72]-[74].

This argument constricts too narrowly Lord Browne-Wilkinson’s essential reasoning. Monetary compensation, whether classified as restitutive or reparative, is intended to make good a loss. The basic equitable principle applicable to breach of trust, as Lord Browne-Wilkinson stated, is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach.

When Lord Browne-Wilkinson spoke of completion he was talking about a commercial transaction. The solicitors did not “complete” the transaction in compliance with the requirements of the CML Handbook. But as a commercial matter the transaction was executed or “completed” when the loan moneys were released to the borrowers. At that moment the relationship between the borrowers and the bank became one of contractual borrower and lender, and that was a *fait accompli*.

The objection has some plausibility, as the most obvious reason that Lord Toulson considers whether the commercial transaction is complete is that it affects whether a *Falsification Order* is available.

However, the second objection should be rejected. This is because there are three reasons to doubt the conclusion that Lord Toulson considered a *Falsification Order* available providing any underlying transaction is not complete. First, an alternative interpretation of Lord Toulson’s reasoning is possible. Second, the conclusion is inconsistent with Lord Toulson’s general insistence that liability depends on loss having been wrongfully caused. Third, the conclusion is inconsistent with Lord Reed’s speech.

First, in dealing with the lender's argument, Lord Toulson appears to be giving two alternatively sufficient reasons. The first reason is that liability requires loss to be caused - 'Monetary compensation.... is intended to make good a loss'. If one accepts this reason, the completion of any commercial transaction becomes irrelevant. His discussion of transaction completion appears to be an alternative reason. It is possible to read it as: 'even if it is necessary to show that a commercial transaction is complete to exclude a *Falsification Order*, completion is present on the facts'. If one adopts this view, Lord Toulson's discussion of transaction completion makes sense, but the idea that he thought a *Falsification Order* to be generally available is denied.

Second, Lord Toulson is emphatic at multiple stages throughout his judgment that liability requires causation of loss. For example, he says:<sup>82</sup>

absent fraud... it would not... be right to impose or maintain a rule that gives redress to a beneficiary for loss which would have been suffered if the trustee had properly performed its duties.

The repeated focus on causation of loss is inconsistent with the idea that Lord Toulson thought a *Falsification Order* would be available providing any underlying transaction was incomplete.

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<sup>82</sup> *AIB* (n 3) [62]. Other examples include: [64], [67], [70], [76].

Third, Lord Reed does not question whether the commercial transaction is complete in this case. Throughout his judgment he emphasised that the trustee's liability depended on whether a loss had been caused by the breach.<sup>83</sup> It might be expected that if Lord Toulson really did mean to leave open a *Falsification Order* where the commercial transaction had been complete, either Lord Toulson or Lord Reed would have commented upon this different approach. Neither do, and Lord Reed states that he decides the case for 'reasons which are substantially the same as those of Lord Toulson'.<sup>84</sup> This casts doubt on the second objection. For the above three reasons the second objection should be rejected. As such, *AIB* excludes the availability of *Falsification Orders* for breach of the duty to follow the settlor's communicated intentions and for breach of the duty of care.

#### 6.2.4 Resolving Conflicting Authorities

As a matter of precedent, the authorities rejecting the availability of *Falsification Orders* take priority over those authorities outlined in favour of such availability. This is because *Target* and *AIB* are decisions of the House of Lords and Supreme Court respectively, and the decisions supporting availability were made by no court higher than the Court of Appeal.<sup>85</sup> Thus *Falsification Orders* are never available against express trustees for breach of the duty to follow the settlor's communicated intentions, or breach of the duty of care.

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<sup>83</sup> *Ibid* [140].

<sup>84</sup> *Ibid* [78].

<sup>85</sup> *Willers v Joyce (no 2)* [2016] UKSC 44, [2018] AC 843 [5] (Lord Neuberger).

## 6.3 Normative Reasons

This section considers whether the non-availability of *Falsification Orders* is to be lamented, by considering whether reasons exist for or against the making of such orders.

Recall that Chapter Four sought to identify three reasons against the making of a *Falsification Order*: such an order may harm a trustee's wellbeing or autonomy, contribute to a reduction of confidence in the system of private property, or treat a trustee as a mere means to an end.<sup>86</sup> It was also argued that these reasons were negated, or that it was at least permissible to act against such reasons, where the trustee subject to the order had been provided a reasonable opportunity to avoid such an order.<sup>87</sup> This section considers various other potential reasons for or against the making of such orders.

Section 6.3.1 rejects a number of existing arguments that seek to identify a reason in favour of making a *Falsification Order*. Section 6.3.2 then outlines three reasons in favour of making such an order. Each reason depends on the fact that making an order contributes to the maintenance of a rule providing for the availability of such orders. That rule deters trustees from breaching their legal

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<sup>86</sup> See 4.3.2.1 and 4.3.2.2.

<sup>87</sup> See 4.3.2.3.

duties, reduces the incentive upon trustees to fabricate evidence, and enhances settlor autonomy.

### 6.3.1 Existing Arguments

#### 6.3.1.1 Primary Duties and Rights

A number of commentators argue that trustees owe a primary duty, and that the existence of this primary duty provides a reason in favour of making *Falsification Orders*. A similar argument is made by some commentators who suggest that beneficiaries have a primary right, and that the existence of this right provides a reason in favour of making *Falsification Orders*.

As to duties, some argue that the trustee owes a primary duty to hold the subject-matter of the trust, and that this duty is only defeasible on the satisfaction of conditions for the permissible release of the subject-matter. If a trustee impermissibly releases subject-matter, a *Falsification Order* serves to enforce this undefeated primary duty. Peter Birks adopted such an argument:<sup>88</sup>

If a trustee of \$100,000 renders his account showing that the fund stands at \$90,000 because he has paid \$10,000 to his mistress, the payment to her must simply be disallowed. He remains accountable for \$100,000. It is the same with an unauthorised investment. He claims to hold mining shares bought for \$3,000. Those shares are unauthorised. The item can be disavowed, at the option of the beneficiary. There is a double obligation born of the receipt of property on trust, to account and to honour the account. That is not to say that

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<sup>88</sup> Peter Birks, 'Equity in the Modern Law: an Exercise in Legal Taxonomy' (1996) 26 University of Western Australia Law Review 1, 44-8.

ultra vires dispositions are not wrongs. They are. But their character as breaches of duty is not relevant to the state of the account. In other words, the trustee is not liable under this head for the wrong but liable because he received the given sum as a trustee and, in taking of the account, he may not take credit for an ultra vires disbursement or an ultra vires investment.

Matthew Conaglen, Jamie Glister, and Lionel Smith make similar arguments.<sup>89</sup>

The argument gains its plausibility from hypotheticals such as the following:

*Power to Invest:* a settlor transfers £1m to a trustee and communicates an intention that the trustee hold this money for ten years, but that the trustee may invest the money in Carrot shares on 1st January 2020. On 1st January 2020 the trustee wrongfully transfers the money away. It is proved that but for the breach the trustee would have invested in Carrot shares, which now, one year later, are worth £600k.

A *Surcharging Order* would obligate the trustee to pay £600k into the trust estate, as this is the extent to which the trustee has wrongfully caused the trust estate to diminish in value. A *Falsification Order* would hold the trustee liable for £1m, as this is the value of the subject-matter wrongfully transferred. Those commentators endorsing the current argument might say that a *Falsification Order* enforces the duty to follow the settlor's communicated intentions: under this duty the trustee was to continue holding the £1m unless they permissibly exercised their power to invest, which they did not.

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<sup>89</sup> Conaglen, 'Equitable Compensation for Breach of Trust: Off *Target*' (n 13) 139; Jamie Glister, 'Equitable Compensation' ch 7 in J Glister and P Ridge (eds), *Fault Lines in Equity* (Hart 2012) 143-4; Lionel Smith, 'The Measurement of Compensation Claims Against Trustees and Fiduciaries' ch 16 in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 372.

However the argument has less plausibility in relation to other examples.

Consider:<sup>90</sup>

*Duty to Invest 4*: a trustee holds £1m with a duty to invest in Pomegranate shares, and hold the shares for ten years. The trustee wrongfully transfers away the money, and now three years later the shares are worth £400k.

Assume that the duty to invest arises because the settlor communicates an intention to impose such a duty, that the duty requires investment on 1st January, and that the trustee wrongfully transfers the money on 1st January. A *Surcharging Order* would be quantified at £400k whereas a *Falsification Order* would hold the trustee liable for £1m. It is difficult to see that the duty to follow the settlor's communicated intentions can provide a reason for such an order. This is because that duty required the trustee to invest in Pomegranate shares, which are now worth £600k.

If those endorsing the current argument wanted to show that there was some reason in favour of making a *Falsification Order* in *Duty to Invest 4* they therefore must rely on some other duty than the duty to follow the settlor's communicated intentions. This is conceptually possible, as the trustee in *Duty to Invest 4* could be under two duties: a duty to invest in the Pomegranate shares on 1st January, and a separate duty to continue holding the money until it is permissibly transferred away. A *Falsification Order* could be made to enforce this latter duty. However, this move merely pushes the burden of justification away from the making of a *Falsification*

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<sup>90</sup> This hypothetical was introduced at 2.2.4.

*Order* to the existence of this second duty. A problem arises as one cannot rely on the settlor's communicated intention to ground the second duty: the settlor clearly communicated an intention to invest in Pomegranate shares. Furthermore, those endorsing the present argument provide no alternative ground for the second duty. As such the argument fails in relation to a case like *Duty to Invest 4*.

Can we say that the argument at least succeeds in relation to cases like *Power to Invest*, where the argument derived its plausibility? One problem is that the argument if accepted only justifies *Falsification Orders* where a trustee breaches a duty to hold monetary subject-matter. This is because a further premise is required to show that a duty to hold non-monetary subject-matter can be enforced by an order holding the trustee liable for the value of that subject-matter, and that premise is not provided by any of the commentators endorsing this argument.

One could limit discussion to cases where a trustee wrongfully transfers money from the trust estate. Unfortunately the argument appears to fail here too. In *Power to Invest*, the trustee owes a duty to hold the money because the settlor has exercised a power to impose such a duty upon the trustee. If one wishes to rely on this duty as a reason in favour of making a *Falsification Order*, one needs to identify any reasons in favour of granting the settlor this power, and show that such reasons justify making a *Falsification Order* in a case like *Power to Invest*. None of the above commentators provide any such justification for this power, and so their argument fails.

As to rights, some commentators argue that beneficiaries have a primary right to performance, and that this provides a reason in favour of making *Falsification Orders* where a trustee wrongfully transfers subject-matter. Different commentators adopt different labels for the argument, but for present purposes we can treat them all as instances of ‘rights’. James Penner says that a *Falsification Order* serves to ‘give effect to the beneficiary’s interest in the performance of the trust obligations by the trustee’.<sup>91</sup> Lusina Ho says that a *Falsification Order* provides the ‘beneficiary with the ideal remedy that fulfils his rights and expectation’ which pursues the ‘remedial policy’ of satisfying the ‘innocent party’s entitlement to performance’.<sup>92</sup>

The concepts of ‘right’, ‘interest’, ‘expectation’, and ‘performance’ are underdeveloped in these arguments. Leaving this aside, similar problems arise as arose in relation to the duty argument considered immediately above. First, in a case like *Duty to Invest 4* the beneficiary’s right to performance seems to be to Pomegranate shares, not the holding of money. Second, if one wished to argue that a beneficiary has a right that the trustee holds subject-matter unless they permissibly apply it, some reason needs to be given in favour of such a right. Third, the argument requires an extra unprovided premise if it is to apply to non-monetary subject-matter. Fourth, to the extent that one is relying on the settlor’s communicated

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<sup>91</sup> James Penner, ‘The Beneficiary’s Performance Interest in a Trust’ ch 9 in R Nolan, K Low, and T Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018) 280-1.

<sup>92</sup> Lusina Ho, ‘Causation in the Restoration of a Misapplied Trust Fund: Fundamental Norm or Red Herring?’ ch 8 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017) 167.

intentions to ground the beneficiary's right to performance, one needs to identify some reason in favour of giving the settlor a power to create such a right, and show that this reason provides a reason in favour of making *Falsification Orders*. Neither Penner nor Ho provide any solution to these problems, and thus their arguments fail.

### 6.3.1.2 Equitable Debt

Some commentators suggest that an analogy exists between the position of contracting parties who have wrongfully failed to pay a sum of money they promised to pay their contractual counter-party, and trustees who have wrongfully transferred away subject-matter. Debt orders are available against such contracting parties where such orders are quantified with reference to the amount the party promised to pay, without regard to the consequences of breach. Given this availability, the analogy might be said to provide a reason in favour of making *Falsification Orders* against trustees, which similarly are quantified without regard to the consequences of breach.

It is uncontroversial that debt orders are available against contracting parties who wrongfully fail to pay sums of money they have promised to pay to their contractual counter-party. As a matter of law, these orders are not quantified with reference to any losses caused by the wrongful failure to pay. Rather they are quantified with reference to the sum of money that the contracting party promised

to pay, minus any sum that has actually been paid. This is made clear by Millett LJ in *Jervis v Harris*:<sup>93</sup>

The law of contract draws a clear distinction between a claim for payment of a debt and a claim for damages for breach of contract... a debt is a definite sum of money fixed by the agreement of the parties as payable by one party to the other in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or condition... The plaintiff who claims payment of a debt need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt became due. He need prove no loss; the rules as to the remoteness of damage and mitigation of loss are irrelevant...

The following example illustrates the nature of the debt order:

*Gambling Skateboarder*: Kevin contracts with Leila to sell his skateboard for £80, with payment due on Monday. Leila breached her duty to pay the money on Monday. It is now Friday. It is clear that had Leila paid Kevin the £80 on Monday, Kevin would have wasted the money gambling on Wednesday.

A debt order would require Leila to pay £80 to Kevin. This is quantified by asking what sum of money Leila promised to pay under the contract, and whether she has paid it. It is irrelevant to consider the consequences of breach. The fact that Kevin would have gambled away the money on Wednesday is irrelevant.

A debt order bears some similarity to a *Falsification Order*: neither are quantified with reference to loss wrongfully caused, but rather with reference to what was promised to be paid and what was wrongfully transferred respectively.

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<sup>93</sup> *Jervis v Harris* [1996] Ch 195 (CA) 202-3.

Some have drawn an analogy between contracting parties and trustees. The classic exposition of this analogy can be found in the joint judgment of James and Baggallay LJJ in *Re Collie, ex p Adamson*:<sup>94</sup>

The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt.

James Edelman also places reliance on the analogy:<sup>95</sup>

A and B enter an agreement. For consideration, B promises to hold \$1 million on trust for A. B promises to repay \$1 million to A if the money is not used for a particular purpose. The money is not used for the particular purpose. Is B required to repay it to A as he had promised?

For at least the last three centuries, the same answer to this question would be given at common law as in equity. At common law there is a contract. B promised to repay the money to A if it was not used for a purpose. It had not been used for that purpose. A debt arose. Loss need not be proved. A claim could be brought for the debt. Similarly, in equity, a bill could be brought against B as a trustee requiring him to account for the \$1 million. Since B cannot prove an authorised disbursement, B would be liable to reconstitute the fund.

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<sup>94</sup> *Re Collie, Ex p Adamson* (n 30) 819. Lord Toulson refers to this comment in *AIB* (n 3) [61].

<sup>95</sup> James Edelman, 'An English Misturning with Equitable Compensation' ch 5 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017) 91. See also: Edelman, 'Money Awards of the Cost of Performance' (n 63) 125. Lionel Smith draws some analogy between a *Falsification Order* and the contractual claim for specific performance, though it appears his purpose is not to justify the *Falsification Order* but rather to point out that both claims are non-counterfactual in nature: Smith, 'The Measurement of Compensation Claims Against Trustees and Fiduciaries' (n 89) 372. Andrew Burrows frames a number of commentators' views in the terms of equitable debt: Andrew Burrows, 'Limitations on Compensation' ch 4 in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP 2003) 46.

The implication here is that some analogy exists between the positions of contracting parties and trustees, and that this analogy in some way provides a reason in favour of making *Falsification Orders*.

The argument is plausibly limited in scope. If successful it would only justify *Falsification Orders* in relation to monetary subject-matter wrongfully transferred by a trustee. This is because debt orders enforce promises to pay sums of money, not promises to transfer non-monetary forms of subject-matter. One could attempt to expand the argument to other forms of subject-matter by drawing an analogy with orders for specific performance in contract law, which may require contracting parties to transfer non-monetary forms of subject-matter that they have promised to transfer. Such orders also do not require loss to have been caused by a breach of duty. However, given that specific performance orders are not generally available as a matter of law, such an argument will have limited success.<sup>96</sup>

The problem with the argument is that no commentator identifies any reason to draw the analogy between contracting parties and trustees. Without such a reason, it is impossible to determine whether any such analogy provides a reason in favour of making *Falsification Orders*. If one were to identify a reason in favour of making debt orders, and illustrate that this reason is also applicable to the making of

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<sup>96</sup> *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL).

*Falsification Orders*, then the argument may succeed.<sup>97</sup> In the absence of such identification, the argument fails.

## 6.3.2 Reasons in Favour

### 6.3.2.1 Trustee Deterrence

One reason in favour of making a *Falsification Order* is that the making of such an order contributes to the maintenance of a rule providing for the availability of such orders, where that rule deters trustees from wrongfully transferring subject-matter. For the argument to succeed it must be demonstrated that there is a reason to deter trustees from wrongfully transferring subject-matter, that a rule providing for the availability of *Falsification Orders* achieves this deterrence, and that the making of particular *Falsification Orders* contributes to the maintenance of the rule.

It is worth noting that a number of judges and commentators attempt to justify the making of *Falsification Orders* on the basis of this argument. For example, in *Target* the Court of Appeal by majority made a *Falsification Order*, and Peter Gibson gave the following reason in favour of making the order:<sup>98</sup>

If this appears harsh treatment of a defaulting trustee, it has to be acknowledged that equity has always treated a

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<sup>97</sup> Nicholas McBride suggests that one reason in favour of making contractual debt orders is that the making of such orders maintains the existence of a rule providing for the availability of such orders, where that rule facilitates trade between people by increasing the ability of people to act as though they trust one another: Nicholas McBride, 'Markets' ch 1 in *Key Ideas in Contract Law* (Hart 2017) 10-12. It is not clear that such a reason would justify making *Falsification Orders* against trustees, as it is not obvious that a rule providing for *Falsification Orders* would increase the ability of people to act as though they trust one another.

<sup>98</sup> *Target Holdings v Redfern Ltd* [1994] 1 WLR 1089 (CA) 1106.

defaulting trustee severely, no doubt... in exercise of its jurisdiction to keep persons in a fiduciary capacity up to their duty.

Though not discussing *Falsification Orders*, Briggs J stated in *Harris v Kent* that:<sup>99</sup>

... the law may occasionally operate harshly towards trustees, *pour encourager les autres*...

In discussing *Falsification Orders*, Charles Mitchell has argued:<sup>100</sup>

Trustees control other people's property, in circumstances where their opportunities for abuse of power and neglect of duty are many, where their opportunities for suppressing evidence of such wrongdoing are many, and where their beneficiaries' opportunities to monitor their activities are few. Hence they must be held to a stringent performance standard, as a deterrent measure...

In comparing *Falsification Orders* with counterfactual loss orders, Paul Davies has argued the following. The reference to 'action to enforce the primary obligations' is a reference to a *Falsification Order*.<sup>101</sup>

The compensatory remedy is less likely to deter the fiduciary from committing a breach of trust and failing to meet the high standards traditionally demanded by equity than an action to enforce the primary obligations of the trustee.

Matthew Conaglen, Lusina Ho, and Matthew Harding have also noted the deterrence value of a rule providing for the availability of *Falsification Orders*.<sup>102</sup>

<sup>99</sup> *Harris v Kent* [2007] EWHC 463 (Ch) [158] (emphasis in original). As early as the turn of the 19th century, judges have been making deterrence-based arguments in favour of rules applicable to trustees: see *Caffrey v Darby* (1801) 31 ER 1159, 6 Ves 488, 496 (Lord Eldon).

<sup>100</sup> Charles Mitchell, 'Equitable Rights and Wrongs' (2006) 59(1) *Current Legal Problems* 267, 287.

<sup>101</sup> Davies, 'Remedies for Breach of Trust' (n 62) 694.

<sup>102</sup> Conaglen, 'Equitable Compensation for Breach of Trust: Off *Target*' (n 13) 139; Ho, 'Causation in the Restoration of a Misapplied Trust Fund' (n 92) 168; Matthew Harding, 'Equity and the Value of Certainty in Commercial Life' ch 7 in D Klimchuk, I Samet, and H Smith (eds), *The Philosophical Foundations of the Law of Equity* (OUP 2019 forthcoming) 151 - cited with permission of the author.

As to the first point, this argument assumes that there is a reason in favour of deterring trustees from wrongfully transferring away subject-matter. This assumption might be grounded by identifying some value in trustees' complying with their legal obligations as to the transfer of subject-matter. Alternatively it might be grounded in the communicative value of demonstrating that the law takes a first stance towards trustees. This may bring confidence to those seeking to use the trusts facility.

As to the second point, it must be shown that a rule providing for *Falsification Orders* actually deters some trustees from wrongfully transferring away subject-matter. The strength of the reason identified by this argument will depend on the amount of deterrence actually achieved. If one trustee is deterred, this will provide a fairly weak reason, whereas if one thousand trustees are deterred this will provide a stronger reason. The deterrent would function by providing trustees with an incentive against breach: being held liable for the value of any subject-matter paid out, with no regard to the consequences of breach. This may make trustees considering a deliberate breach to think again, or make trustees exercise more care in determining the content of their legal obligations.

As to the third point, the making of particular *Falsification Orders* is necessary to maintain the value of deterrence. If orders were not made in situations where the rule provided, the incentive upon trustees against breach would be reduced.

If accepted, this argument provides a reason in favour of making *Falsification Orders* following breach of the duty to follow the settlor's communicated intentions and breach of the duty of care, as transfers in breach of either duty could be deterred. As to the non-monetary subject-matter, one could argue that valuation should take place on whichever date between breach and judgment that the subject-matter is at its highest value: this will ensure the greatest deterrent. The argument perhaps provides a reason in favour of ordering the trustee to pay money towards the purpose of the trust, which may require payment to the trust estate, or to some person. This will increase the deterrence effect upon trustees who wish to divert subject-matter from the purposes of the trust elsewhere.

One might object to the present argument on the basis that it doesn't explain feature (3) of the *Falsification Order*, namely that the quantum of the order is the value of subject-matter wrongfully transferred. If one's concern was deterring trustees, then why stop at this quantum? Surely the higher the quantum the greater the deterrence?<sup>103</sup>

The objection must be accepted: it is highly plausible that a higher quantum would lead to greater deterrent effects. However, there may be reasons against adopting a higher quantum: it may lead to a greater reluctance to act as trustee,

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<sup>103</sup> For a similar objection in relation to orders following breach of fiduciary duties, see Lionel Smith, 'The Motive Not the Deed' ch 4 in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths 2003) 60-1.

trustees may charge more for their services, trustees' insurance premiums may increase, and subject-matter thus diverted from the purposes for which a settlor set up a trust. So whilst the present argument cannot alone explain feature (3), perhaps feature (3) is a rough way of achieving deterrence whilst avoiding these reasons against.

### 6.3.2.2 Trustee Incentives

One reason in favour of making *Falsification Orders* is that the making of such orders contributes to a rule providing for the availability of such orders, where the existence of that rule reduces the incentive upon trustees to fabricate evidence. To establish this argument it must be shown that there is a reason in favour of reducing the incentive upon trustees to fabricate evidence, that the existence of a rule providing for *Falsification Orders* reduces such an incentive, and that the making of particular *Falsification Orders* contributes to the maintenance of this rule.

As to the first point, there is a reason in favour of reducing incentives upon trustees to fabricate evidence. There is a reason against trustees fabricating evidence, as such fabrication involves dishonest and deceitful conduct on the part of the trustee, who may be attempting to prioritise their own interests over the interests of those they are duty-bound to represent: the people interested under the trust.<sup>104</sup> There is a reason in favour of reducing the incentive upon trustees to fabricate

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<sup>104</sup> *Cowan v Scargill* [1985] Ch 270; *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch).

evidence, as this reduces the likelihood that the trustee will act contrary to this reason. Furthermore, reducing such an incentive may have communicative value.

As to the second point, a rule providing for the availability of *Falsification Orders* reduces the incentive upon trustees to fabricate evidence. Consider a state of affairs in which only counterfactual loss orders are available against a trustee, and a trustee wrongfully transfers subject-matter from a trust estate. In such a circumstance there is an incentive upon a trustee to fabricate evidence to make it appear that no or little loss has been caused by the breach. This incentive exists both prior to and post breach. For example a trustee may seek to fabricate evidence to show that but for the breach they would have permissibly made a bad investment, or that a beneficiary would have squandered subject-matter upon its receipt.

Now consider a state of affairs in which a rule exists providing for the availability of *Falsification Orders*. In the example discussed in the prior paragraph the incentive upon a trustee to fabricate evidence is reduced. This is because there is less incentive upon the trustee to argue that any loss wrongfully caused was less than the value of the subject-matter paid out in breach: if made, a *Falsification Order* would obligate the trustee to pay money equal to the value of such subject-matter. Thus a rule providing for the existence of *Falsification Orders* reduces the incentive upon trustees to fabricate evidence.<sup>105</sup>

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<sup>105</sup> Thank you to Joshua Getzler for this point. For a similar thought, see Ho, ‘Causation in the Restoration of a Misapplied Trust Fund: Fundamental Norm or Red Herring?’ (n 92) 168.

As to the third point, the making of a particular *Falsification Order* contributes to the maintenance of this rule. If such orders were not made in all situations provided for by the rule, the rule would be less effective at reducing the incentive upon trustees to fabricate evidence.

The present argument provides a reason in favour of making *Falsification Orders* following breach of both the duty to follow the settlor's communicated intentions and the duty of care. This is because the incentive to fabricate evidence exists and can be reduced in respect of both duties. It is not clear that the argument provides a reason in favour of adopting a particular date for valuing non-monetary subject-matter, or that it provides reason for ordering the trustee to pay money to one place rather than another, for example the trust estate rather than a beneficiary.

Similarly to the argument focusing on trustee deterrence, the present argument does not by itself explain feature (3) of the *Falsification Order*, that the quantum of the order is the value of any subject-matter wrongfully transferred. This is because the incentive upon trustees to fabricate evidence would be reduced even further if the quantum of the order was doubled. However, feature (3) may be seen as a rough way of balancing the reduction of trustee incentives with other important values, such as reducing the costs of using the trust facility.

### 6.3.2.3 Settlor Autonomy

One reason in favour of making *Falsification Orders* is that doing so maintains a rule providing for the availability of such orders, where the existence of that rule has a valuable consequence, namely enhancing the autonomy of prospective settlors. Although it may have wider application, the argument as presented will focus on bare trusts where a settlor transfers subject-matter to a trustee for use in a particular transaction.

To establish the argument, it must be shown that there is a reason in favour of enhancing the autonomy of prospective settlors, that a rule providing for the availability of *Falsification Orders* enhances this autonomy, and that the making of particular *Falsification Orders* contributes to the maintenance of this rule.

As to the first point, there is a reason in favour of enhancing people's autonomy. In relation to individuals, having and exercising autonomy is one feature of leading a valuable life. In relation to companies, a company's having and exercising autonomy makes it more probable that the goals of that company are achieved, which may benefit those people interested in that company: most obviously the company's employees, creditors, and shareholders. As prospective settlors are people, there is a reason in favour of enhancing their autonomy.

As to the second point, a rule providing for the availability of *Falsification Orders* enhances the autonomy of prospective settlors. This is because such a rule renders the trusts facility more certain in its implications. The focus will be on prospective settlors who are considering whether to use the trusts facility so as to use subject-matter in some particular transaction, such as making a secured loan, or purchasing subject-matter. Examples of a trust's being used for such purposes include *Target*, *AIB*, and *Giambrone*.<sup>106</sup> The availability of *Falsification Orders* enhances the autonomy of such prospective settlors in two ways.

First, a settlor may see value in using the trusts facility, but be worried about the risk of placing subject-matter in the control of another, the trustee. The availability of *Falsification Orders* reduces the perception of this risk by providing an easily understandable remedy following breach, deterring the trustee from wrongdoing,<sup>107</sup> reducing the incentives upon trustees to fabricate evidence,<sup>108</sup> and guaranteeing that the value of the subject-matter provided by the settlor will be either returned to the settlor or applied towards the transaction selected. This reduction in the perception of risk makes it more likely that the settlor will use the trusts facility, so increasing the chance that the settlor will derive the value they saw in the facility.

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<sup>106</sup> *Target* (n 3); *AIB* (n 3); *Various Claimants v Giambone and Law (A Firm)* [2017] EWCA Civ 1193, [2018] PNLR 2. The decision in *Giambone* is analysed at 5.2.2.1.5.

<sup>107</sup> See 6.3.2.1.

<sup>108</sup> See 6.3.2.2.

Second, a rule providing for the availability of *Falsification Orders* brings greater certainty to the quantum of orders available against trustees following a wrongful transfer. If the quantum of such orders were limited to losses wrongfully caused, this would be uncertain from the perspective of a prospective settlor.<sup>109</sup> In contrast, the availability of *Falsification Orders* ensures that there is a floor on recovery: the trustee will always be liable for the value of any subject-matter wrongfully transferred. This certainty promotes settlor autonomy as it helps the settlor to predict the consequences of breach, and decide whether the use of the trusts facility is one that serves the settlor's purposes.

Matthew Harding makes a similar argument concerning the benefits of certainty:<sup>110</sup>

From the *ex ante* perspective of the party seeking to utilise legal facilities in transaction planning, flexibility in adjudication may not be the first priority. Instead, of greater importance might be a high degree of certainty about the implications of adopting one or another legal structure or arrangement and its entailed norms. Presumably such certainty is especially prized by parties who seek to entrust funds to others pending the completion of transactions...

...consider the position of the party in the United Kingdom who is to entrust funds pursuant to a transaction in a post-*Target Holdings* and *AIB* environment. *Ex ante*, such a party has assurance that the trustee will be compelled to compensate for losses occasioned by any failure to adhere to instructions in relation to the disbursement of the funds... She lacks any guarantee that her instructions themselves will

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<sup>109</sup> Such orders include the *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order*.

<sup>110</sup> Harding 'Equity and the Value of Certainty in Commercial Life' (n 102) 150-1.

be followed, whether voluntarily or by compulsion; compensating for losses occasioned by a failure to conform to instructions is not the same as guaranteeing that conformity. There are thus reasons to think that this party enjoys less certainty in relation to the transaction she is about to enter than a party who enjoys the guarantee of conformity that characterises equity's traditional approach to common account cases. In particular, where a party enjoys a guarantee of conformity, she need not attempt to work through various counterfactual scenarios when assessing the risk associated with the transaction.

The phrases 'common account' and 'guarantee of conformity' refer to *Falsification Orders*.

As to the third point, the making of particular *Falsification Orders* is necessary to maintain a rule providing for the availability of such orders. If such orders were not always made where the rule requires, this would increase the concern and uncertainty for prospective settlors considering making a declaration of trust, so decreasing settlor autonomy.

The present argument provides a reason in favour of making *Falsification Orders* following breach of the duty to follow the settlor's communicated intentions, and breach of the duty of care. This is because the settlor may have concerns about a trustee's failing to carry out the settlor's decisions and about a trustee's being careless with the subject-matter of the trust, and the availability of *Falsification Orders* reduces both of these concerns. Furthermore the availability of *Falsification Orders* can bring

greater certainty to settlors in respect of the quantum of orders following breaches of either type of duty.

The present argument perhaps provides a reason in favour of valuing non-monetary subject-matter at the time of its peak value between breach and judgment: a rule providing for such orders is likely to reduce the concern of a prospective settlor to the greatest extent.

Does the argument provide a reason to order a trustee to transfer money to a particular place? Perhaps the best solution in terms of decreasing the concern of settlors and rendering the implications of using the trust facility more certain is as follows. If money can still be applied towards the relevant transaction, then the trustee should be ordered to place money into the trust estate. If money cannot be so applied, then the trustee should be ordered to transfer the money to the beneficiary under the bare trust.

One might object to the present argument in a similar way to those presented above: it provides no explanation of feature (3) of the *Falsification Order*, that the quantum of such an order is the value of any subject-matter wrongfully transferred. Presumably settlor concern would be reduced if the quantum was higher. The response is similar to that made above: perhaps feature (3) is a way of balancing the goal of augmenting settlor autonomy with other values, such as keeping the costs of

trusts law to a minimum. This latter value itself may even contribute to settlor autonomy.

## 6.4 Conclusion

This chapter has considered the availability of *Falsification Orders*. Section 6.2 argued that such orders are not available against trustees as a matter of law. This is because a number of authorities rejecting the availability of such orders - namely, *Target*, *Collins*, and *AIB* - take precedence over a number of authorities supporting the availability of such orders.

Section 6.3 identified three reasons in favour of making a *Falsification Order*, based on the ability of such an order to contribute to a rule providing for the availability of such orders. This rule deters trustees from wrongfully transferring subject-matter, reduces the incentive upon trustees to fabricate evidence, and increases the autonomy of prospective settlors. All three reasons apply in favour of making an order following both breach of the settlor's communicated intentions and breach of the duty of care, though the argument provided for the final reason was limited to bare trusts where the settlor decided to apply subject-matter towards some transaction.

The *Falsification Order* is defined with two ambiguities: one concerning the date for assessing the value of non-monetary subject-matter, and another concerning the

appropriate place for ordering the trustee to transfer money. Arguably the reasons focusing on trustee deterrence and settlor autonomy provide a reason in favour of assessing non-monetary subject-matter at the date on which its value is highest between the date of breach and date of judgment.

Arguably the reason focusing on settlor autonomy provides a reason in favour of ordering a trustee to pay money into the trust estate if the money can still be applied towards any transaction the settlor decided to enter into, but to the settlor if the money cannot be so applied.

# VII

## *Personal Loss Orders*

### **7.1 Introduction**

#### **7.1.1 Chapter Aims**

This chapter considers two questions. First, does legal authority provide support for or against the availability of *Personal Loss Orders*? Second, are there reasons for or against the making of such orders? The inquiry is limited to express trustees of trusts for persons who have breached either the duty to follow the settlor's communicated intentions or the duty of care. The availability of *Personal Loss Orders* in favour of any person will be considered, including beneficiaries under fixed trusts and bare trusts, objects under discretionary trusts and powers of appointment, and people to whom the trustee could not permissibly distribute subject-matter from the trust estate.

Recall:<sup>1</sup>

*Personal Loss Order*: a court order obligating a trustee to pay money to a person, where the quantum of liability is the extent to which the trustee has wrongfully caused a loss to that person all things considered.

A *Personal Loss Order* has a number of features. It obligates (1) a trustee, (2) to transfer money to a person, (3) where the quantum of liability is the extent to which the trustee has wrongfully caused the person a loss a things considered. Given (3) the *Personal Loss Order* is an example of a counterfactual loss order, where counterfactuals

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<sup>1</sup> The concept of a *Personal Loss Order* is explored in detail in 2.2.5.

are constructed and compared to determine whether a loss has been wrongfully caused.<sup>2</sup>

Recall the following hypothetical:<sup>3</sup>

*Profit:* Derek is obligated to pay any income from a trust estate to Philippa on the 1st January of every year. In 2019, Derek pays ten days late. This breach causes Philippa to miss an investment opportunity which would have led to a £15k profit.

A *Personal Loss Order* would obligate Derek to transfer £15k to Philippa, as this is the extent to which Derek has wrongfully caused Philippa a loss all things considered, through the lost investment opportunity. In contrast, a *Lesser Receipt Order* would require no action of Derek, as he has not wrongfully caused Philippa to receive less valuable subject-matter from the trust estate.

Further recall this hypothetical:

*Company Rescue:* a trustee holds £1m and is obligated to invest the money in Berry shares and hold the shares for ten years. The trustee wrongfully fails to invest the money, which causes Berry Ltd to go insolvent. Thomas is also a shareholder in Berry, and the breach causes Thomas a loss of £50k due to a diminution in the value of his shareholding.

A *Personal Loss Order* would require the trustee to transfer £50k to Thomas for the losses that the trustee wrongfully caused.

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<sup>2</sup> The legal rules for constructing and comparing counterfactuals are considered in Chapter Eight.

<sup>3</sup> This and the following hypothetical were introduced in 2.2.5.

## 7.1.2 Chapter Summary

Section 7.2 will consider the legal authorities relevant to the availability of *Personal Loss Orders*. It will be argued in 7.2.2 that such orders are available for breach of the duty to follow the settlor's communicated intentions in favour of beneficiaries under both fixed and bare trusts. This argument relies on Briggs J's decision in *Harris v Kent*, the Supreme Court's decision in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, and the Court of Appeal's decision in *Ahmed v Ingram*.<sup>4</sup> It is unclear whether such orders are available for breaches of the duty of care, or in favour of other people.

Section 7.3 will consider potential reasons in favour of or against making *Personal Loss Orders*. 7.3.1 will reject a number of arguments seeking to identify a reason against making such orders. 7.3.2 will outline three reasons in favour of making such orders, which focus on facilitating people's relying on the trustee's performance of their legal duties, providing settlors with options to benefit people, and reducing incentives upon trustees to breach their legal duties so as to cause loss to some person.

Section 7.3.3 will outline a reason against the making of a *Personal Loss Order*, which focuses on rendering trustees liable for extensive and unforeseeable liability.

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<sup>4</sup> *Harris v Kent* [2007] EWHC 463 (Ch); *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503; *Re Ahmed (A Debtor)* [2018] EWCA Civ 519, [2018] BPIR 535.

Section 7.3.3 will proceed to propose a rule which furthers the values identified in 7.3.2 but avoids this objection.

Section 7.3.3 will propose a rule providing for the availability of *Personal Loss Orders* where a trustee breaches the duty to follow the communicated intentions of the settlor, the settlor had communicated in the declaration of trust that one purpose of the duty breached was to provide a benefit to some person, and the trustee's breach causes that person to not receive that benefit. A *Personal Loss Order* should be available in favour of that person to compensate for not receiving the benefit, in respect of losses that were reasonably foreseeable at the time of the declaration of trust. This rule would not apply for breach of the duty of care, but would apply in favour of any person that satisfied the identification condition.

## **7.2 Legal Authorities**

This section will demonstrate that *Personal Loss Orders* are at least sometimes available against trustees. Such orders are available for breach of the duty to follow the settlor's communicated intentions in favour of beneficiaries under bare trusts and fixed trusts. It is less clear whether such orders are available for breach of the duty of care, or in favour of objects under discretionary trusts or powers of appointment.

## 7.2.1 Red Herrings

The decisions in this section appear at first blush to support the availability of *Personal Loss Orders*. However, upon proper inspection they provide no such support.

### 7.2.1.1 Decisions Supporting *Lesser Receipt Orders*

Whilst it might be argued that the following decisions support the availability of *Personal Loss Orders*, a proper reading shows that they provide support for *Lesser Receipt Orders*.

#### 7.2.1.1.1 *Target Holdings*

The facts of *Target Holdings Ltd v Redferns* were outlined elsewhere.<sup>5</sup> In brief, a trustee held £1.5m on bare trust for a lender for use in a loan transaction. The trustee wrongfully transferred away the money, and it was not proved whether this breach had caused any loss. The lender sought a *Falsification Order* on summary judgment. The House of Lords refused to make any order, with Lord Browne-Wilkinson giving the only reasoned speech.

In outlining the principles applicable to determining a trustee's liability for breach of trust, Lord Browne-Wilkinson said:<sup>6</sup>

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

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<sup>5</sup> See 4.2.1.3. *Target Holdings Ltd v Redferns* [1996] AC 421 (HL).

<sup>6</sup> *Ibid* 439.

which, using hindsight and common sense, can be seen to have been caused by the breach.

It might be argued that the reference to making ‘good a loss in fact suffered by the beneficiaries’ which ‘can be seen to have been caused by the breach’ is supportive of a *Personal Loss Order*, as it seems to require a trustee to pay money to a person where the quantum of liability is the extent to which the trustee has wrongfully caused a loss to that person.

However, the better view is that Lord Browne-Wilkinson’s speech provides no support for the availability of *Personal Loss Orders*. All depends on what Lord Browne-Wilkinson meant by the phrase ‘loss in fact suffered by the beneficiaries’. There are two possibilities. First, he might have meant ‘loss all things considered’, which would be supportive of a *Personal Loss Order*. Second, he might have meant loss in the sense of a person’s receiving less valuable subject-matter from the trust estate, which would be supportive of a *Lesser Receipt Order*.

The better conclusion is that Lord Browne-Wilkinson meant loss in the second sense. This is because earlier in his speech Lord Browne-Wilkinson used the word ‘compensation’ to refer to making good a loss in the second sense, in the absence of contrary indication it is reasonable to suppose Lord Browne-Wilkinson is employing the same concept of loss throughout his speech, and there is no such contrary indication.

Earlier in his speech, Lord Browne-Wilkinson considered a hypothetical in which a trustee holds subject-matter on trust for A for life remainder to B, the trustee wrongfully transfers away this subject-matter, and then A dies.<sup>7</sup> Lord Browne-Wilkinson said that B could seek an order requiring the trustee to pay ‘compensation’ to B, where the measure of compensation was ‘the difference between what the beneficiary has in fact received and the amount he would have received but for the breach of trust’. Here ‘compensate’ does not refer to making good a loss to the beneficiary all things considered, but rather making good a loss through having received less valuable subject-matter.

In the absence of contrary indication, it is reasonable to suppose that Lord Browne-Wilkinson is using ‘loss in fact suffered by the beneficiaries’ to refer to the same concept of loss outlined in the previous paragraph. As there is no such contrary indication, the better view is that Lord Browne-Wilkinson’s speech provides no support for the availability of *Personal Loss Orders*.

#### **7.2.1.1.2 *Hulbert v Avens***

The facts of *Hulbert v Avens* were outlined elsewhere.<sup>8</sup> In brief, trustees wrongfully failed to pay capital gains tax, a beneficiary sought an order against the trustees for

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<sup>7</sup> This hypothetical is analysed in detail in 5.2.2.1.2.

<sup>8</sup> See 5.2.2.1.3. *Hulbert v Avens* [2003] EWHC 76 (Ch), [2003] WTLR 387.

this breach, and HH Richard Seymour QC refused to make the order. In refusing the order, HH Richard Seymour QC outlined the following principles:<sup>9</sup>

The particular principles which are relevant are that equitable compensation falls to be assessed as at the date of trial in the light of all the information then available as to whether the relevant trust fund, or, if by the date of trial the trust has come to an end, beneficiary, has actually sustained a loss as a result of a breach of trust, and, if so, the amount of such loss.

One might argue that the reference to a beneficiary's having 'actually sustained a loss as a result of a breach of trust' is supportive of the availability of *Personal Loss Orders*.

However, the argument should be rejected. In two other places in his judgment HH Richard Seymour QC uses the word 'loss' to refer to a person's receiving less subject-matter from a trust estate, rather than focusing on that person's position all things considered. Subject to contrary indication it seems plausible to assume he is employing the same concept of loss throughout his judgment, and there is no such contrary indication.

First, HH Richard Seymour QC cited from Lord Browne-Wilkinson's speech in *Target*:<sup>10</sup>

...in the ordinary case where a beneficiary becomes absolutely entitled to the trust fund the court orders, not

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<sup>9</sup> *Ibid* [56].

<sup>10</sup> *Ibid* [45].

restitution to the trust estate, but the payment of compensation directly to the beneficiary. The measure of such compensation is the same, ie the difference between what the beneficiary has in fact received and the amount he would have received but for the breach of trust.

Here the focus is on the beneficiary's receipt, not the beneficiary's loss all things considered.

Second, HH Richard Seymour QC treated the fact that the beneficiary had 'received more from' her trust fund than she would 'but for the breaches of trust' as a conclusive reason against making the order sought.<sup>11</sup> Again the focus is on the beneficiary's receipt, not on the beneficiary's position all things considered. Thus, *Hulbert* provides no support for the availability of *Personal Loss Orders*.

#### 7.2.1.1.3 *Giambrone*

The facts of *Various Claimants v Giambrone and Law (A Firm)* were outlined elsewhere.<sup>12</sup> In brief, a trustee wrongfully transferred away money, and the Court of Appeal ordered the trustee to pay money to a beneficiary, equal to the value of the money wrongfully transferred. Jackson LJ gave the leading judgment, with which Underhill LJ and Moylan LJ agreed in all respects relevant to current discussion.

Jackson LJ made the following framing of principle:<sup>13</sup>

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<sup>11</sup> *Ibid* [56].

<sup>12</sup> See 5.2.2.1.5. *Various Claimants v Giambrone and Law (A Firm)* [2017] EWCA Civ 1193, [2018] PNLR 2.

<sup>13</sup> *Ibid* [53].

Lord Browne-Wilkinson [in *Target*] said... that equitable compensation makes good the loss suffered by the beneficiaries “which, using hindsight and common sense, can be seen to have been caused by the breach”.

It might be argued that this principle supports the availability of *Personal Loss Orders*, as it focuses on compensating beneficiaries for loss ‘suffered by the beneficiaries’.

However the better view is that Jackson LJ meant loss in the sense of the beneficiary’s receipt, rather than the beneficiary’s position all things considered, and thus supports a *Lesser Receipt Order* rather than a *Personal Loss Order*. This is for two reasons. First, immediately after the above framing of principle, Jackson LJ said:<sup>14</sup>

The Supreme Court [in *AIB*] held that principles of equitable compensation required the trustee to restore the trust fund, if still in existence, to the position in which it would have been but for the trustee’s breach and, if the trust were no longer subsisting to pay compensation to the beneficiary on the same basis.

Here any payment to the beneficiary is ‘on the same basis’ as the impact of a trustee’s breach on the trust estate. This link with the loss to the trust estate is suggestive of a focus on the beneficiary’s receipt of subject-matter from the trust estate, rather than the beneficiary’s loss all things considered.<sup>15</sup>

Second, the statement said to support a *Personal Loss Order* is a paraphrase of Lord Browne-Wilkinson’s speech in *Target*. As considered above, the better

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<sup>14</sup> *Ibid* [54].

<sup>15</sup> This point is explained in more detail in 2.2.3.

interpretation of Lord Browne-Wilkinson's speech is that it supports a *Lesser Receipt Order* but not a *Personal Loss Order*. This makes it more probable that Jackson LJ meant to refer to a *Lesser Receipt Order*.

### 7.2.1.2 Breach of Contract or Breach of Trust?

Although the facts of *Collins v Brebner* were considered in Chapter Six, a fairly detailed analysis of the case is necessary for present purposes. In brief, a trustee wrongfully transferred away £524,100, the Court of Appeal refused to make a *Falsification Order* requiring the trustee to pay £524,100 to a beneficiary, and instead ordered the trustee to pay £125k to the beneficiary to compensate for losses caused by the trustee's wrongdoing.<sup>16</sup>

Whether *Collins* supports the availability of *Personal Loss Orders* depends on the nature of the order against the trustee to pay £125k. It will be demonstrated that it is unclear whether this order was made for a breach of the duty to follow the settlor's communicated intentions or for a breach of contract, and that it is more plausible that it was made for a breach of contract. As such *Collins* provides no support for the availability of *Personal Loss Orders*.

To demonstrate these points, further consideration of the facts of *Collins* are necessary. A purchaser wished to purchase a 50% shareholding in a company. The

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<sup>16</sup> *Collins v Brebner* [2000] Lloyd's Rep PN 587 (CA). The facts of *Collins* and the refusal to make a *Falsification Order* were discussed in 6.3.3.2.

shares of the company were initially held 50:50 by Mr Mendez and Mr Ibanez. The agreement reached by the three parties was that the purchaser would purchase Mr Mendez's shares, and Mr Ibanez would transfer 25% of the issued share capital to Mr Mendez.

The purchaser instructed the defendant to act as solicitor and trustee in the transaction, transferring £524,100 to the defendant for use in the share purchase. The defendant owed a contractual duty to bring about a 50:25:25 split in shareholding and a contractual duty to pay the £524,100 to Mr Mendez.

It is trite law that where a party acts as solicitor and trustee the content of their duties as trustee do not necessarily match the content of their contractual duties.<sup>17</sup> The defendant's duties as trustee are unclear in two respects: first it is unclear whether the trustee had a duty to pay the money to Mr Mendez or merely a power; and second, it is unclear whether ensuring a 50:25:25 split in shareholding was a necessary condition for the permissible release of the money or whether the trustee owed a duty to satisfy this condition. There are no discussion of these points in the Court of Appeal and HH Mark Hedley's decision at first instance is unreported and unavailable.

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<sup>17</sup> For the classic exposition of this distinction see *Bristol & West BS v Mothew* [1998] Ch 1 (CA) 22-4 (Millet LJ).

The defendant breached its contractual and trustee duties by paying the money to Mr Ibanez rather than Mr Mendez. Mr Mendez transferred his shareholding to the purchaser, but Mr Ibanez retained his shares with the result that the company became deadlocked with the purchaser and Mr Ibanez each holding half of the issued share capital.

As stated above, the Court of Appeal ordered the trustee to pay £125k in compensation to the purchaser. Tuckey LJ gave the only reasoned judgment. The order aimed to compensate for three heads of loss. First, £16k spent investigating the true destination of the £524,100 that should have been paid to Mr Mendez. Second, around £80k lost interest on money that the purchaser invested in the company because of the deadlock. Third, £29k spent aiding Mr Mendez in attempts to procure a transfer of Mr Ibanez's shareholding.

One might argue that the Court of Appeal made a *Personal Loss Order* and that *Collins* thus provides authority for the availability of such orders. One could focus on the heads of loss: they clearly focus on the financial position of the beneficiary all things considered rather than any subject-matter received by the beneficiary from the trust estate. However the success of this argument depends on whether the Court of Appeal's order was made in respect of a breach of contract or a breach of trust. It seems more plausible that the order was made for breach of contract. As

such the better conclusion is that *Collins* provides no support for the availability of *Personal Loss Orders*.

The Court of Appeal do not expressly state whether the order was made in respect of a breach of contract or a breach of trust. They state that the order made was in response to ‘wrongdoing’.<sup>18</sup> This is clearly ambiguous between breach of contract and breach of trust.

Is there any implicit suggestion that the order was made in respect of a breach of trust? If only one of the breaches of duty could have caused the losses recovered, this would mean the order was made at least in part in respect of that breach of duty. However, it can be said that either breach of duty caused the recovered losses.

As to the contractual duty, the defendant breached their contractual obligations by paying the money to the incorrect person and failing to ensure a 50:25:25 split in shareholding. Straightforwardly, these breaches caused the three losses recovered.

As to the trusts duty, the analysis is slightly less straightforward, though it is possible to conclude that the breach of duty caused the losses recovered. If one constructs a non-breach counterfactual in which the trustee transferred the money to

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<sup>18</sup> *Collins* (n 16) [82], [85] (Tuckey LJ).

the correct person and ensured the 50:25:25 split in shareholding, then it can be said that the breach of trust caused the losses recovered.<sup>19</sup>

Given the uncertainty mentioned above concerning the content of the trustee's duties in *Collins*, there are a number of routes to constructing the counterfactual in this way. First, if the trustee owed a duty to ensure the 50:25:25 split in shareholding and transfer the money to Mr Mendez this would be the only appropriate construction. Second, if the trustee's duty was something different - such as a duty to hold the money with a power to permissibly transfer the money to Mr Mendez - then if but for the trustee's breach the trustee would have permissibly transferred the money to Mr Mendez and ensured the appropriate shareholding, then again this would be the appropriate construction.

One might argue that there is indication that the Court of Appeal implicitly treat the order as made for breach of trust. Tuckey LJ's judgment focuses extensively on trusts law principles, such as the appropriate interpretation of *Target Holdings* and the application of *Target Holdings* to the facts, before concluding that an order should be made for losses caused by 'wrongdoing'. Given that Tuckey LJ did not qualify his references to wrongdoing with the word 'contractual' and given that such references immediately follow his discussion of trusts law principles, one might assume that

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<sup>19</sup> On the legal rules for constructing counterfactuals see Chapter Eight.

Tuckey LJ's order was made in respect of a breach of trust. To similar effect is the following statement:<sup>20</sup>

The judge expressed his conclusion on these arguments as follows: "In my judgment I should be guided by the decision in *Target* and by the distinction there drawn between the position where a transaction has or has not been completed. In my view it is entirely artificial to say otherwise in this case than that the transaction has been completed. Accordingly the Plaintiff's remedy is dictated by his loss and not by an obligation on the Defendant to reconstitute the trust fund.

However, this argument should be rejected. It is possible that Tuckey LJ thought the losses were recoverable for breach of contract, but throughout his judgment was considering whether a *Falsification Order* should be available for breach of trust so as to augment the defendant's liability. We have no reason to conclude that he also saw the losses as recoverable for breach of trust.

Furthermore, if the Court of Appeal's order was for breach of trust, one might expect detailed discussion on the content of the trustee's duties and on the appropriate non-breach counterfactual for quantifying the order requiring the compensation of loss. However, as indicated above the Court of Appeal do not engage with these questions. Thus it seems probable that the order was made for breach of contract. As such *Collins* is unsound authority for the availability of *Personal Loss Orders* against trustees.

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<sup>20</sup> *Collins* (n 16) [52] (Tuckey LJ).

## 7.2.2 Authorities Supporting *Personal Loss Orders*

This section outlines three authorities supporting the availability of *Personal Loss Orders*.

### 7.2.2.1 *Harris v Kent*

In *Harris v Kent*, trustees held shares on bare trust for a beneficiary. The trustees were obligated to hold the shares unless the beneficiary consented to a particular transaction concerning the shares. The trustees wrongfully exchanged these shares for different shares, without the beneficiary's consent. The beneficiary subsequently went bankrupt, and his rights against the trustees vested in his trustee in bankruptcy. However, by the time of court proceedings the trustee in bankruptcy had assigned the rights back to the beneficiary. The beneficiary sought an order against the trustee in respect of the wrongful share exchange.

The beneficiary sought an order quantified at the value of the shares wrongfully transferred away, with the value assessed at the time of breach. Briggs J refused this order, stating that the quantum of any order would be the losses caused by the relevant breach of duty.<sup>21</sup>

In determining whether a loss had been caused, Briggs J constructed the non-breach counterfactual so that the trustee asked the beneficiary for consent to a share exchange including a clause precluding the assignment of the acquired shares within

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<sup>21</sup> *Harris* (n 4) [1], [129]-[132].

one year from the date of exchange, and the beneficiary gave the relevant consent.<sup>22</sup> During this year the beneficiary's rights vested in the trustee in bankruptcy, and upon expiry of the year the trustee transferred the acquired shares to the trustee in bankruptcy upon the latter's demand. The trustee in bankruptcy would then have sold the shares. The breach counterfactual was constructed so that the trustee wrongfully acquired the shares, but they did not form part of the trust estate as the beneficiary had rejected them.<sup>23</sup>

Comparing these counterfactuals Briggs J concluded that £795,285 of loss had been wrongfully caused. This was the value of the shares at the date on which the trustee in bankruptcy would have sold the shares but for the breach of trust. Thus Briggs J ordered the trustees to pay £795,285 to the beneficiary.

Does the order made in *Harris* and the reasoning used to justify this order provide support for the availability of *Personal Loss Orders*? One complication is that the case concerned an order made in favour of a beneficiary, assuming that the beneficiary should receive the same order as the order that would have been granted in favour of the trustee in bankruptcy had the trustee in bankruptcy sought an order prior to assigning the rights against the trustee back to the beneficiary. Given this it might be suggested that *Harris* only supports the availability of certain orders in favour of

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<sup>22</sup> For analysis of Briggs J's construction of the non-breach counterfactual see 8.2.1.2.4.

<sup>23</sup> For analysis of whether wrongfully held subject-matter forms part of the trust estate, see 8.2.2.1.2.

trustees in bankruptcy, in respect of the bankrupt's estate. However, there seems little reason to distinguish between a trustee in bankruptcy's recovering for a bankrupt's estate, and a beneficiary's recovering for their personal estate, and Briggs J draws no such distinction in his judgment. It is suggested that to the extent that *Harris* supports the availability of orders in favour of trustees in bankruptcy, it also supports the availability of such orders in favour of beneficiaries.

Following this line of thinking, if *Harris* supports the availability of orders in favour of trustees in bankruptcy where the quantum of the order is the extent to which the trustee has wrongfully caused the bankrupt's estate to be worse-off, then this also supports the availability of *Personal Loss Orders*. If however *Harris* merely supports the availability of orders in favour of trustees in bankruptcy where the quantum is the extent to which the trustee has wrongfully caused the trustee in bankruptcy to receive less valuable subject-matter from the trust estate, *Harris* merely supports the availability of *Lesser Receipt Orders*.

It is suggested that Briggs J's reasoning focuses on the loss wrongfully caused to the bankrupt's estate all things considered, and thus that *Harris* provides support for the availability of *Personal Loss Orders*. This is for two reasons.

First, Briggs J valued the shares on the date on which the trustee in bankruptcy would have sold the shares had the trustee not breached the duty. The adoption of

this date makes sense if one was seeking to determine the loss caused to the bankrupt's estate all things considered. It is not obvious why this date would be adopted if one was seeking to determine the extent to which the bankrupt's estate had been caused to receive less valuable subject-matter from the trustee.

Second, Briggs J focused on loss to the bankrupt's estate rather than the extent to which the estate had received less valuable subject-matter from the trustee:<sup>24</sup>

In my judgment, the loss caused by the Kents' breach of trust was therefore that Mr Harris's trustee in bankruptcy (whose claim is being sued upon in this action by way of assignment) was deprived of the opportunity to realise the shares in Plc by then held by the Kents as constructive trustees by way of an orderly sale in the market commencing, but not necessarily concluding, on 19th July 2000.

For these two reasons it seems that the order was quantified with reference to the loss wrongfully caused to the bankrupt's estate, and thus *Harris* supports the availability of *Personal Loss Orders*. Although the order was quantified with reference to the position of the bankrupt's estate, the order required the trustees to pay money to the beneficiary, as the trustee in bankruptcy had assigned their rights to the beneficiary. Had this assignment not occurred, the order would have required the trustee to pay money to the trustee in bankruptcy.

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<sup>24</sup> *Harris* (n 4) [141].

One objection to the conclusion that *Harris* supports the availability of *Personal Loss Orders* against express trustees is that *Harris* concerned constructive trustees, where the relevant trust arose on the basis of a proprietary estoppel.<sup>25</sup>

The objection does not necessarily succeed.<sup>26</sup> Whether the ratio of *Harris* extends to express trustees depends on the reasoning adopted by Briggs J in justifying the order made. If that reasoning is applicable to breaches of duty by express trustees then the ratio of *Harris* extends to such trustees.

In making the order, Briggs J is applying the legal concept of ‘equitable compensation’ as derived from the decision in *Target*.<sup>27</sup> As *Target* concerned express trustees who had breached the duty to conform to the settlor’s communicated intentions, this suggests that Briggs J’s reasoning extends also to the breach of such duties by express trustees. There is nothing in Briggs J’s judgment limiting his decision to breaches of duty by constructive trustees. As such the objection should be dismissed.

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<sup>25</sup> The reasoning supporting the conclusion that a trust was formed can be found at [119]-[123].

<sup>26</sup> This follows from the discussion in 1.2.

<sup>27</sup> *Harris* (n 4) [124]-[141].

### 7.2.2.2 *AIB Group*

The facts of *AIB* were outlined elsewhere.<sup>28</sup> In brief, a trustee held around £3.3m on bare trust for a lender for use in a loan transaction. The trustee wrongfully transferred away the money, which caused about £300k of loss to the beneficiary of the trust. The beneficiary sought a *Falsification Order* for around £2.5m, and the Supreme Court refused to make such an order, instead ordering the trustee to pay around £300k to the beneficiary. Lord Toulson and Lord Reed gave the only reasoned judgments. Lord Neuberger, Baroness Hale, and Lord Wilson agreed with both judgments.

The reasoning employed by Lord Toulson and Lord Reed must be interpreted to determine whether it provides any support for the availability of *Personal Loss Orders*. Lord Reed suggested that the order aimed to compensate for loss caused to the trust estate. ‘Redler’ refers to the trustee, ‘AIB’ refers to the lender-beneficiary, and ‘Barclays’ refers to the first chargee whose charge the beneficiary’s charge was subject to:<sup>29</sup>

In these circumstances, applying the approach to the assessment of equitable compensation which I have explained, it appears to me that the loss to the trust estate as a result of Redler’s breach of trust proved to be £273,777.42: that amount proved to be the pecuniary value of the difference between a first ranking security and one which was postponed to Barclays’. That was also the loss to AIB, who were absolutely entitled to the trust estate.

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<sup>28</sup> See 4.2.1.4.

<sup>29</sup> *AIB* (n 4) [141].

With respect, this reasoning seems mistaken, as no loss was caused to the trust estate by the breach of duty. The non-breach counterfactual was constructed so that the trustee permissibly applied the money from the trust estate towards the loan transaction.<sup>30</sup> As the trust estate was empty in the non-breach counterfactual it cannot be said that the breach caused the trust estate to diminish in value. Thus a *Surcharging Order* would require no action of the trustee.

Lord Reed might be suggesting that he was making a *Lesser Receipt Order*, given his reference to ‘loss to the trust estate’ and the fact that the beneficiary was absolutely entitled to the trust estate. As stated in Chapter Two, in some circumstances the quantum of a *Lesser Receipt Order* will be the same as any wrongfully caused loss to the trust estate, if one assesses the loss to the trust estate just before the time for distribution.<sup>31</sup>

However, this interpretation seems problematic given the non-breach counterfactual adopted in *AIB*. That counterfactual was constructed so that the trustee permissibly applied the money towards the loan transaction once the lender had received a first charge from the borrower. The lender received no subject-matter from the trust estate in the non-breach counterfactual, and as such it cannot be said

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<sup>30</sup> For discussion of the construction of the non-breach counterfactual in *AIB*, see 8.2.1.2.1.

<sup>31</sup> See 2.2.3.

that the breach caused the lender to receive less valuable subject-matter from the trust estate. Thus a *Lesser Receipt Order* would require no action of the trustee.

The more obvious interpretation of *AIB* is that the Supreme Court made a *Personal Loss Order*. This is supported by the following comments of Lord Toulson:<sup>32</sup>

The basic equitable principle applicable to breach of trust, as Lord Browne-Wilkinson stated, is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach.

In this case, proper performance of the obligations of which the trust formed part would have resulted in the solicitors paying to Barclays the full amount required to redeem the Barclays mortgage, and, as Patten LJ said, the bank would have had security for an extra £300,000 or thereabouts of its loan.

On the facts of the present case, the cost of restoring what the bank lost as a result of the solicitors' breach of trust comes to the same as the loss caused by the solicitors' breach of contract and negligence.

The focus here is the impact of the trustee's breach on the financial position of the lender-beneficiary. This is supportive of a *Personal Loss Order*.

However, comments made by Lord Reed might suggest that he did not view the court as making a *Personal Loss Order*. In particular Lord Reed seems to suggest that a beneficiary cannot recover more than their 'entitlement under the trust':<sup>33</sup>

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<sup>32</sup> *AIB* (n 4) [73], [76].

<sup>33</sup> *Ibid* [90]-[91], [108].

If property has been misapplied... the property must be restored by the trustee. If the property cannot be restored in specie, the trustee must restore the trust fund to the position it would have been in but for the breach, by paying into the fund sufficient pecuniary compensation to meet that objective.

... another remedy can be sought where the trust is no longer subsisting, namely the payment of compensation directly to the beneficiary absolutely entitled to the trust fund. The liability, in that situation, is to compensate the beneficiary for the diminution in the value of the trust fund which was caused by the breach of trust, to the extent of the beneficiary's interest.

The direct payment of equitable compensation to the beneficiary is procedurally different from the reconstitution and distribution of the trust fund, but the end result should not be different: otherwise the beneficiary would receive something other than his entitlement under the trust.

'Entitlement under the trust' is open to a number of interpretations. On the facts of *AIB* it might mean £3.3m as that was the amount held on bare trust for the beneficiary. Alternatively it might mean nothing, as this was the subject-matter that the trustee transferred to the beneficiary in the non-breach counterfactual, given that any first charge would have been granted by the lender. Finally it might mean the value of the first charge, as this was the subject-matter the trustee caused to be received by the beneficiary, by using the money held on trust in the loan transaction.

We can reject the second interpretation as this is inconsistent with the order made in *AIB*. Both the first and third interpretation are consistent with the order made in *AIB*, but inconsistent with the order being a *Personal Loss Order*. If for

example the beneficiary would have used the £300k lost as a result of the breach of trust in a profitable investment making £50k, the first and third interpretation would exclude recovery of the £50k. However, £50k would plausibly be recoverable under a *Personal Loss Order*.

Thus the reasoning of Lord Reed does not support the wider ratio adopted by a Lord Toulson supporting the availability of *Personal Loss Orders*. However, given that the remainder of the Supreme Court agreed with both judges, and that Lord Reed's reasoning seems not to justify the order made, it is suggested that Lord Toulson's reasoning forms the ratio of *AIB* which supports the availability of *Personal Loss Orders* against trustees.

### 7.2.2.3 *Ahmed v Ingram*

In *Ahmed*, a bankruptcy petition was presented concerning Mr Ahmed. Mr Ahmed subsequently transferred shares away. Bankruptcy legislation resulted in the recipients of these shares holding them on constructive trust. Mr Hosking was appointed as Mr Ahmed's trustee in bankruptcy in June 2009, though resigned and was replaced by Mr Ingram and Mr Miller in April 2010. The transferees as constructive trustees were obligated to transfer the shares to Mr Hosking upon his appointment in June 2009, though wrongfully failed to do so. The shares were eventually transferred to the trustees in bankruptcy in February 2015.

The shares had dropped in value between June 2009 and February 2015. The trustees in bankruptcy thus sought an order compensating for this drop in value following the wrongful failure to transfer the shares. The Court of Appeal granted an order requiring the trustees to pay compensation to the trustees in bankruptcy. Gloster LJ gave the only reasoned judgment, with which Patten and David Richards LJ agreed.

In determining whether loss had been wrongfully caused, the court constructed the non-breach counterfactual so that the trustees complied with their obligation to transfer the shares, Mr Hosking as trustee in bankruptcy failed to sell them, Mr Ingram and Mr Miller as replacement trustees in bankruptcy sold the shares in June 2010, and that the shares were sold to a family rather than on the open market, as the shares related to a private family-run company.<sup>34</sup> The breach counterfactual was constructed so that the shares were transferred to the replacement trustees in bankruptcy in February 2015. The loss wrongfully caused was the difference between the value of the shares in June 2010 and February 2015.

It falls to be determined whether *Ahmed* provides support for the availability of *Personal Loss Orders*. The case concerned an order made in favour of a trustee in bankruptcy. There seems little reason to distinguish between trustees in bankruptcy recovering in behalf of a bankrupt's estate and people recovering for their personal

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<sup>34</sup> *Ahmed* (n 4) [58]-[61].

estate, and there is no trace of such a distinction in the Court of Appeal's reasoning.<sup>35</sup> As such if the Court of Appeal quantified the order with reference to loss wrongfully caused to the bankrupt's estate all things considered, it is suggested that *Ahmed* supports the availability of *Personal Loss Orders*.

In places it seems the Court of Appeal saw themselves as making a *Surcharging Order*.<sup>36</sup>

In *Target Holdings*, Lord Browne-Wilkinson made it clear that, in cases of breach of trust, the remedy is restoration of the trust estate and the relevant loss for which compensation is payable must be *the actual loss* caused by the actions or omissions of the subject trustee; in other words, when determining loss, the court is required to look at the actual loss suffered by the trust estate.

However the Court of Appeal clearly did not make a *Surcharging Order*. First, such an order requires the payment of money into the trust estate, whereas the order in *Ahmed* required the trustees to pay money to the trustees in bankruptcy. Second, such an order quantifies liability with reference to the loss caused to the trust estate, whereas the order in *Ahmed* focuses on the position of the bankrupt's estate.

The better view is that the Court of Appeal made an order in favour of the trustees in bankruptcy for loss wrongfully caused to the bankrupt's estate by the

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<sup>35</sup> A similar point was made in relation to *Harris* above: 7.2.2.1.

<sup>36</sup> *Ahmed* (n 4) [56].

trustees all things considered. This is so for two reasons. First, in criticising the reasoning of Proudman J, the first instance judge, the Gloster LJ said:<sup>37</sup>

In accordance with *Target Holdings* and *AIB* she was, in my judgment, required to identify at least: (i) what constituted the breach of trust; (ii) when it occurred; [and] (iii) what was the loss actually caused to the estate as a result of the breach of trust...

The word ‘estate’ refers to the bankrupt’s estate, rather than the trust estate. In the previous paragraph Gloster LJ stated that ‘the bankrupt’s estate suffered *an actual loss*’, and in the absence of contrary indication, it seems safe to assume that the word ‘estate’ appearing in the paragraph after this statement refers similarly to the bankrupt’s estate.<sup>38</sup> The focus of the Court of Appeal is thus on loss caused to the bankrupt’s estate by the breach of duty.

Second, the Court of Appeal treated as relevant both the date on which the trustees in bankruptcy would have actually sold the shares had the trustees not wrongfully failed to transfer them, and also the person who would have purchased these shares. These facts are clearly relevant if one is assessing the loss wrongfully caused to the bankrupt’s estate. Such facts are not so obviously relevant if one was quantifying, say, a *Lesser Receipt Order*.

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<sup>37</sup> *Ibid* [37].

<sup>38</sup> *Ibid* [36].

One might object to this conclusion that *Ahmed* provides supports the availability of *Personal Loss Orders* against express trustees on the basis that *Ahmed* concerned constructive trustees. This is the same objection as the one considered above concerning *Harris* and the response is the same.<sup>39</sup> The important question is whether the Court of Appeal embrace express trustees in their reasoning. Given that the Court of Appeal applied the legal concept of equitable compensation, derived from cases such as *Target* and *AIB*, and did not expressly limit the principles applied to constructive trustees, the ratio of *Ahmed* properly extends to express trustees.

## 7.2.3 Scope of Availability

### 7.2.3.1 Which Duty?

It has been argued that *Harris*, *Ahmed* and *AIB* support the availability of *Personal Loss Orders*. *AIB* concerned a breach of the duty to follow the settlor's communicated intentions, and thus seems to support the availability of such orders for breach of that duty.

One might argue that the ratio of *AIB* extends to the duty of care. As stated above, the ratio of the decision is contained in Lord Toulson's judgment.<sup>40</sup> Furthermore, Lord Toulson's reasoning seems to extend to the duty of care:<sup>41</sup>

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<sup>39</sup> See 7.2.2.1.

<sup>40</sup> See 7.2.2.2.

<sup>41</sup> *AIB* (n 4) [64].

All agree that the basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Where there has been a breach of that duty, the basic purpose of any remedy will be either to put the beneficiary in the same position as if the breach had not occurred... Placing the beneficiary in the same position as he would have been in but for the breach may involve restoring the value of something lost by the breach or making good financial damage caused by the breach.

The phrase 'general law' includes the duty of care. Given that this statement seems to support *Personal Loss Orders*, by recognising that orders are available against trustees to place the beneficiary in the same position as they would have been but for the breach, it might be suggested that such support extends to breaches of the duty of care. However, this does not seem the safest suggestion to accept.

### **7.2.3.2 In Favour of Whom?**

Both *Harris* and *Ahmed* concerned orders made in favour of people to whom a trustee wrongfully failed to distribute to under a fixed trust. As such the authorities might provide support for the availability of *Personal Loss Orders* in favour of fixed trust beneficiaries, where the trustee has wrongfully failed to distribute subject-matter to such beneficiaries.

In *AIB* a *Personal Loss Order* was made in favour of a beneficiary under a bare trust. Thus we can assume that *AIB* supports the availability of such orders in favour of such beneficiaries. However there is no indication that such orders would be

made in favour of fixed trust beneficiaries, or objects under a discretionary trust or power of appointment.

However, consider the following variation of the facts of *AIB*: a settlor transfers £3.3m to a trustee obligating the trustee to hold the money on bare trust for the settlor, but provides a power for the trustee to permissibly invest the money in real security to create a secured loan relationship between a borrower and a third party. A condition for permissible investment is that a first charge is received by the third party. The trustee breaches its duty by paying out the money when the third party has only a second charge, and this breach causes the third party loss of £300k.

Does *AIB* support the availability of a *Personal Loss Order* to enable the third party to recover £300k from the trustee? The distinction with *AIB* is that the third party is not also the beneficiary under the bare trust. It is unclear whether the Supreme Court would make a *Personal Loss Order* on such facts, but intuitively it might be thought that they would. If so, *Personal Loss Orders* would be available in favour of a wide class of people.

## 7.3 Normative Reasons

This section considers possible arguments for and against the making of a *Personal Loss Order*. First, it rejects a number of arguments suggesting that there is a reason against making such an order. Second, it sketches three reasons in favour of making

such an order. Third, it paints a reason against making such an order. Fourth, it proposes a rule providing for such orders in circumstances that advance the three reasons in favour whilst avoiding the reason against.

### 7.3.1 Existing Arguments

This section considers a number of existing arguments seeking to identify a reason against making a *Personal Loss Order*. It will be demonstrated that these arguments do not succeed in identifying a reason against making such an order.

#### 7.3.1.1 Scope of the Trustee's Duty or Responsibility

A number of commentators argue that there is a reason against making *Personal Loss Orders* because such an order would obligate a trustee to compensate a person for a loss wrongfully caused to that person, and a trustee has not assumed or undertaken responsibility for such a loss. For example Jamie Glister says:<sup>42</sup>

The idea is that liability is limited because the trustee only assumes responsibility for the management of the trust assets, not for the further risk of what mismanagement of those assets might do to the beneficiary's wider economic position.

James Penner makes a similar point:<sup>43</sup>

...trust undertakings are implicitly less extensive than contractual undertakings, where liability for damages arising from consequential losses can be seen to be part of the implied undertakings.

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<sup>42</sup> Jamie Glister, 'Breach of Trust and Consequential Loss' (2014) 8 *Journal of Equity* 235, 255-6.

<sup>43</sup> James Penner, 'The Beneficiary's Performance Interest in a Trust' ch 9 in R Nolan, K Low, and T Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018) 285.

Although not expressly stated, those commentators who endorse this argument would presumably not object to the making of any other order considered by this thesis, such as a *Surcharging Order*. The target of the objection seems to be exclusively *Personal Loss Orders*.

The argument contains a number of premises. First, the fact that a trustee has not assumed or undertaken responsibility for a loss is a reason against ordering the trustee to compensate for such loss. Second, often trustees do not assume or undertake responsibility for losses wrongfully caused to people, including beneficiaries under fixed and bare trusts. Thus, there is a reason against making a *Personal Loss Order* against such trustees.

In assessing the argument it is worth noting that neither Glister nor Penner define the concepts of ‘undertaking’ or ‘assuming’ responsibility. For this reason alone, their arguments are problematic. However one can assess the argument by ascribing some definitions to these concepts.

One possibility is that ‘undertaking’ or ‘assuming’ responsibility is the communication of an intention to obligate oneself, coupled with an intention to obligate oneself by so communicating.<sup>44</sup> On this definition, the second premise of the argument will generally be sound: one might suspect that few trustees

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<sup>44</sup> The definition draws on Joseph Raz’s discussion of promises: Joseph Raz, ‘Promises and Obligations’ ch 12 in PMS Hacker (ed), *Law Morality and Society* (Clarendon 1977) 211-9.

communicate an intention to obligate themselves in respect of losses wrongfully caused to beneficiaries.

However, the first premise becomes problematic. It is not obvious why the lack of an undertaking to perform some action provides a reason against ordering someone to perform that action. It is true that the existence of an undertaking may provide a reason in favour of making an order, or negate a reason against making such an order. But if *Glister* or *Penner* wish to make the latter point, they have failed to identify the reason against making a particular order that the existence of an undertaking is said to negate. Furthermore, if the premise was true, then the lack of an undertaking provides a reason against making many orders throughout private law, such as orders following a successful tracing exercise, orders following breach of the no-conflict and no-profit duties would fall into this category,<sup>45</sup> orders to pay damages following many torts, such as nuisance or trespass,<sup>46</sup> and orders to pay compensatory damages following a breach of contract.<sup>47</sup> As such the first premise seems unsound.

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<sup>45</sup> *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250; *Foskett v McKeown* [2001] 1 AC 102 (HL). Compare commentators who see the obligations arising under the no profit and no conflict rules as voluntarily undertaken: James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 *Law Quarterly Review* 302.

<sup>46</sup> *Livingstone v Rawyards Coal Co* (1880) 5 AC 25 (HL); *Forsyth-Grant v Allen* [2008] EWCA Civ 505, [2008] Env LR 41.

<sup>47</sup> *Robinson v Harman* (1848) 1 Ex 850, 154 ER 363.

An alternative possibility is that ‘undertaking’ or ‘assuming’ responsibility means communicating acceptance of a certain role or position. On this definition the first premise of the argument is weaker and perhaps easier to justify: perhaps there is a reason against making orders against a person qua trustee unless that person has communicated acceptance of the position of trustee.

However, the second premise seems problematic: many trustees communicate acceptance to being a trustee. Thus it seems difficult to conclude that there would be a reason against making a *Personal Loss Order* in many cases, especially if it was known that trusteeship entailed a risk of being subjected to a *Personal Loss Order*.

In addition to the focus on ‘assuming’ or ‘undertaking’ responsibility, Penner points to a distinction between orders available against trustees, and orders available against contracting parties. He says that ‘trust undertakings are implicitly less extensive than contractual undertakings’ as ‘liability for damages in respect of consequential losses’ can be viewed as part of a contractual undertaking but not a trust undertaking.

The suggested distinction should be rejected. On the first meaning of undertaking, it seems that neither contracting parties nor trustees undertake liability for consequential losses. In contract law, providing no valid exclusion clause applies, contracting parties are prima facie liable for any losses wrongfully caused to the

contractual counter-party.<sup>48</sup> This is so regardless of whether the contracting party has undertaken responsibility for such responsibility.

On the second meaning of undertaking, providing trusteeship was legally defined so as to include the possibility of being subjected to a *Personal Loss Order*, both contracting parties and trustees could be said to have undertaken responsibility for consequential losses to either the counter-party or some person. As such the distinction fails.

### 7.3.1.2 The Knowledge of Trustees

James Penner makes a number of arguments concerning the knowledge of trustees, and suggests that these arguments provide reasons against the making of *Personal Loss Orders*. Penner considers the following example:<sup>49</sup>

Because of the trustee's misapplication of the trust property, say making an unauthorised investment, Hazel, the income beneficiary, receives half the income in 2014 that she would have done if the authorised investment was retained. Let us also assume that Hazel can establish, on the standard 'but for' test of causation, that but for this reduction in her income she would have been able to make a profitable investment herself; instead, because of the reduced income, she could not afford it, and so can prove that the trustee's breach caused her a loss of profits.

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<sup>48</sup> *Robinson* (n 47). Prima facie, as recovery is subject to a number of hurdles such as remoteness, mitigation, and limitation.

<sup>49</sup> James Penner, 'Falsifying the Trust Account and Compensatory Equitable Compensation' ch 7 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017) 155.

A *Personal Loss Order* would obligate the trustee to compensate Hazel for her lost profits in this example, which is similar to *Profit* considered above. Penner suggests there is a reason against making such an order, because such an order would:<sup>50</sup>

...make the trustee liable for *foreseeable* losses occasioned by, say, the late distributions to Hazel in the example above. Which aspects of a beneficiary's financial wherewithal are supposed to be within the contemplation of the trustee?... It is not clear what would justify placing this burden of investigation on the trustee. Moreover, it might be argued that a trustee should have no right, much less a duty, to know about any particular beneficiary's access to other funds.

Here Penner is objecting to making an order obligating a trustee to compensate for foreseeable losses wrongfully caused. Plausibly his objections would also strike against making a *Personal Loss Order*, and so will be considered here.

Penner's arguments seem to be levelled against a rule providing for the availability of particular orders, and so his suggestion that particular orders should not be made is presumably on the basis that making such an order provides a precedent for such a rule. First, Penner says that it is difficult to justify a 'burden of investigation on the trustee' and that it might be argued that the trustee should have no 'duty' to know about any particular beneficiary's access to other funds. If Penner means that no duty should be placed on a trustee to investigate the financial positions of beneficiaries under the trust, this does not provide a reason against a

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<sup>50</sup> *Ibid* 156 (emphasis in original).

rule providing for *Personal Loss Orders*. Such a rule would not entail imposing such a duty upon the trustee.

Second, Penner suggests that ‘a trustee should have no right’ ‘to know about any particular beneficiary’s access to other funds’. Again this is misplaced: the existence of a rule providing for *Personal Loss Orders* would not entail a right on the trustee to have access to any information concerning the beneficiary.

Although not developed, perhaps Penner’s concern is the ability of a person to predict the legal consequences of their actions with reasonable certainty. In the present context this might be particularly important at the time people are deciding whether to accept or reject trusteeship, or at the time for performance of an obligation. Perhaps Penner’s concern is that a rule providing for orders compensating people for foreseeable losses wrongfully caused would render the legal consequences of a trustee’s actions too uncertain, and that this would provide reason against the adoption of such a rule. Such a concern would plausibly be even stronger in relation to a rule providing for the availability of *Personal Loss Orders*, as such orders have no foreseeability condition on recovery. This unpredictability may be exacerbated if a trustee had no right to information concerning the financial position of people who may be impacted by a trustee’s breach.

One may be concerned that this rule of law argument has strayed too far from the meaning of Penner's remarks to be considered as Penner's objection. As such, the objection will be considered and developed in detail below.<sup>51</sup> For now it is worth stating that the objection seems not to provide a reason against making any sort of order against trustees for loss wrongfully caused all things considered, but rather a reason in favour of potential liability under such an order reasonably predictable.

### 7.3.1.3 The Liberty to Exploit Economic Opportunity

James Penner argues that the law does not protect one's liberty to exploit economic opportunities, and that this provides a reason against the making of *Personal Loss Orders*. He says:<sup>52</sup>

In general, tortfeasors are not liable to their victims for economic loss that does not directly follow from damage to the victim's person or to his tangible property. Why this is so, why a tortfeasor is not subjected to unlimited liability for all the economic losses his victim suffers that can be shown to flow from his wrong, is a controversial issue, but following Stevens, the most satisfactory rationale for this position is this: the law does not protect your liberty to exploit economic opportunities for profit. It indirectly protects this liberty by prohibiting interferences to your person and property and, in the case of a beneficiary of a trust, by empowering the beneficiaries to claim distributions under a trust to which they are entitled. But the law does not make anyone, including wrongdoers, insurers of your economic well-being, even if their wrongful actions alter to your detriment the economic context in which you operate.

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<sup>51</sup> See 7.3.3.

<sup>52</sup> Penner 'Falsifying the Trust Account and Compensatory Equitable Compensation' (n 49) 156.

Let us assume that a *Personal Loss Order* involves protecting a person's liberty to exploit economic opportunities. There are a number of problems with Penner's argument. First, Penner provides no reason why the law should not protect one's liberty to exploit economic opportunities for profit. There are many obvious instances where the law's approach has insufficient justification, and it is possible that the current context provides another example.

Second, one could interpret Penner's argument as one from consistency: if the law in other areas does not protect one's liberty to exploit economic opportunities for profit, then consistency requires that *Personal Loss Orders* are not made. The problem is that it is doubtful whether the law has a general aversion to protecting people's liberty to exploit economic opportunities for profit. In the contractual context, orders to pay damages for profits lost as a result of a breach of contract perhaps exemplify such protection, and are very common.

Admittedly in the tortious context, there is a general rule limiting recovery for pure economic loss in negligence. However, one might think a stronger analogy exists between express trustees and contracting parties, than between express trustees and tortious wrongdoers. Both express trustees and contracting parties had the option of avoiding any legal obligations through not accepting trusteeship, or through not contracting. This option is not generally available to parties who might come under duties in negligence. The availability of this option might be thought to

make it more justifiable to hold a party liable in respect of harm wrongfully caused to another's liberty to exploit economic opportunities. Penner gives us no reason for thinking the tort analogy more apposite than the contractual analogy. As such his argument should be rejected.

## 7.3.2 Reasons in Favour

### 7.3.2.1 Facilitating Reliance

One reason in favour of making *Personal Loss Orders* is that such orders contribute to the maintenance of a rule providing for the availability of such orders, where that rule has a valuable consequence. In particular, the rule facilitates the ability of people to plan their life in reliance upon the actions of trustees.

For the argument to succeed it must be demonstrated that there is a reason in favour of facilitating people in planning their life in reliance upon a trustee's compliance with their legal obligations, that a rule providing for the availability of *Personal Loss Orders* facilitates such reliance, and that the making of particular *Personal Loss Orders* contributes to the maintenance of such a rule.

As to the first point, there is value in people being able to plan their life, and in particular being able to plan their life with reference to the probable actions of other people. This increases the autonomy of the person making the plans, helps them to adopt long-term projects, and facilitates their pursuit of the good. In the present

context, there is value in a person's being able to rely on a trustee's complying with their legal obligations. This value provides a reason in favour of facilitating such reliance. A person may rely on a trustee's complying with a range of obligations, such as an obligation to distribute subject-matter to that person, to invest in particular shares, or to sell land held on trust.

As to the second point, a rule providing for the availability of *Personal Loss Orders* facilitates such reliance. When a person plans in reliance on a trustee's complying with their legal obligations, such a person may be making such a plan so as to provide some benefit to themselves. A person set to receive a certain sum of money from a trustee on the 1st January may make plans concerning the use of that money, for example where to invest it. Such plans are intended to provide a benefit to that person, by increasing the value of their capital. Alternatively a person may delay selling their shares in a company on the basis that the trustee is obligated to invest money in the company, and that such shares may increase in value. Such a plan is intended to benefit the person through the increase in value of their share capital.

The availability of *Personal Loss Orders* increases the probability that such people will secure the benefit of their plans. A person may be cautious before planning in reliance on a trustee's complying with their legal obligations, as any benefit the person intends to procure for themselves through making the plan will generally only be procured if the trustee actually complies with their obligation. However the

making of a *Personal Loss Order* would obligate the trustee to compensate the person to the extent that the trustee has wrongfully caused a loss to that person all things considered. A rule providing for the availability of such orders reduces the need for caution by increasing the probability that a person will receive the benefit they seek to procure, so facilitating the ability of such a person to plan in reliance on the trustee's complying with their legal obligations.

As to the third point, the making of particular *Personal Loss Orders* contributes to the maintenance of a rule providing for the availability of such orders. This is because if particular orders were not always made where the rule provided for such availability, the value of the rule in facilitating people's ability to plan in reliance on the trustee's complying with their legal obligations would be eroded.

This argument provides a reason in favour of making *Personal Loss Orders* for breach of the duty to follow the settlor's communicated intentions, and for breach of the duty of care. The strength of the reason identified in this argument depends on the likelihood that people will plan in reliance upon a trustee's complying with their legal obligations. This likelihood will be affected by a number of factors, including the type of legal obligation and the type of person seeking to rely. Perhaps the probability is highest for beneficiaries under fixed trusts or bare trusts, who are relying on a trustee's complying with an obligation to distribute subject-matter to that beneficiary. It seems less probable that an object under a discretionary trust of

capital to be distributed in twenty years will rely on the trustee's complying with their duty of care in the following few months.

A number of objections can be levelled against this argument. First, should the availability of *Personal Loss Orders* be limited to those who can prove they have relied on the trustee's complying with their duties? If the valuable consequence of the existence of a rule providing for the availability of such orders is the facilitation of people's abilities to rely on a trustee's compliance with their legal obligations, is there any reason in favour of making such orders in favour of people who have never relied upon the trustee's complying with their obligations?

The objection should be rejected. One could adopt a rule where the availability of *Personal Loss Orders* was subject to the condition that the person in whose favour the order is to be made must prove that they planned in reliance on the trustee's complying with their legal obligations. But there is reason to think that a rule providing for the availability of such orders without such a condition would be better in facilitating people to plan in reliance on the trustee's compliance with their legal obligations. This is because the existence of such a condition raises an additional hurdle to a person's receiving any intended benefit of their plan, and so reduces the probability that such a person will receive such a benefit. This reduction in probability increases the reason for caution in relying upon a trustee's complying

with their legal obligations, and so reduces the ability of people to plan in reliance on such compliance.

Second, does the argument justify feature (3) of a *Personal Loss Order*, namely that the quantum of such orders is the extent to which the trustee has wrongfully caused loss to a person all things considered? If one was seeking to protect the ability of people to make plans in reliance on a trustee's complying with their legal obligation, can such protection not simply be made by providing for the availability of orders seeking to undo any wasted expenditure? Assume for example that a person is making investment plans concerning £40k due to them under a fixed trust, that they spend £3k in making such plans, that the trustee wrongfully fails to distribute the £40k on time, and that this breach causes £20k lost profit to the person. A *Personal Loss Order* would obligate the trustee to pay £20k to the person. But would the availability of orders obligating the trustee to transfer £3k not suffice?<sup>53</sup>

The objection should be rejected for a similar reason to why the first objection was rejected. A rule providing for the availability of orders seeking to compensate for wasted expenditure would facilitate planning in reliance upon a trustee's

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<sup>53</sup> In the contract literature this distinction is often referred to as one between reliance loss and expectation loss: Lon Fuller and William Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 52, 373; Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *Law Quarterly Review* 628. For interesting judicial discussion of this distinction, see *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd* [2010] EWHC 2026 (Comm), [2011] 2 All ER (Comm) 155.

complying with legal obligations to a lesser extent than a rule providing for the availability of *Personal Loss Orders*. This is because the availability of *Personal Loss Orders* serves to increase the probability that a person will receive any intended benefit of their plan, whereas the availability of orders providing for the recovery of wasted expenditure does not increase this probability.

### **7.3.2.2 Providing Settlers with a Valuable Option**

One reason in favour of making *Personal Loss Orders* is that they contribute to the maintenance of a rule providing for the availability of such orders where the existence of that rule has a valuable consequence. That consequence is the increasing of the autonomy of prospective settlers, by providing such settlers with an option to benefit people.

To establish the argument, it must be demonstrated that there is a reason in favour of providing settlers with an option to benefit people, that a rule providing for the availability of *Personal Loss Orders* provides settlers with such an option, and that the making of particular *Personal Loss Orders* contributes to the maintenance of such a rule.

As to the first point, providing settlers with the option to benefit a person is of value, as it provides the settlor with a valuable option: the ability to exercise their will

so as to benefit some person. Deciding to benefit some other person brings value to one's life.<sup>54</sup>

As to the second point, the availability of *Personal Loss Orders* provides settlors with an option to benefit people. One might object to this on the basis that *Personal Loss Orders* are unnecessary to provide the settlor such an option. A rule granting the power to settlors to impose obligations upon trustees would surely suffice for such purposes? If a settlor wished to give another the use of subject-matter at a particular time, they could impose an obligation upon a trustee to transfer such subject-matter to that other at the appropriate time. If a settlor wished to obligate a trustee to use money so as to maintain a house owned by another, the settlor could impose an obligation upon a trustee to do so. If this objection is sound, then there is no reason in favour of recognising the availability of *Personal Loss Orders*, as the power to impose legal obligations upon a trustee is sufficient.

The objection should be rejected. Although the power to impose legal obligations upon a trustee does provide the settlor with an option to confer benefits upon people, a rule providing for the availability of *Personal Loss Order* enhances this option by making it more likely that the benefit is actually conferred. The availability of *Personal Loss Orders* increases such likelihood in two ways: first, by acting as an incentive upon the trustee to comply with their obligations; and second, by providing

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<sup>54</sup> For other ways in which trusts may contribute to a settlor's life, see Nicholas McBride, 'The Law of Transactions' ch 5 in *The Humanity of Private Law* (Hart 2019) 173-6.

for the availability of orders that obligate a trustee to compensate a person for any loss wrongfully caused by the trustee.

Consider an example where a settlor decides to transfer money to a beneficiary in January 2020, and wishes to invoke a trustee to carry out this decision. Furthermore, assume that the settlor's motivation for such a decision is to benefit the beneficiary with the use of this money through January 2020, so that the beneficiary can make investments. If *Personal Loss Orders* were unavailable then the only way in which the beneficiary would benefit from the use of the money is if the trustee complied with their obligation. However if such orders were available, the trustee can be ordered to compensate the beneficiary for any benefits that would have been received had the trustee complied with their obligation. If the beneficiary would have invested the money and made a £15k profit, the trustee would be ordered to pay £15k to the beneficiary.

As to the third point, the making of *Personal Loss Orders* contributes to the maintenance of a rule providing for the availability of such orders, as if such orders were not made this would decrease the chance that any benefits the settlor wished to confer were actually conferred, so reducing the settlor's autonomy.

The Supreme Court's decision in *AIB* provides a good demonstration of this argument. In that case a settlor decided to make an investment in real security. They

decided to use a trustee to carry out this decision. The settlor decided that the trustee should not transfer away the money until a first charge over land was received by the settlor, or the means of procuring such a first charge had been acquired. The clear purpose of this decision was to confer a benefit on the settlor, namely that the settlor would be secured to the full extent of the loan. The trustee breached this duty by paying out the money too early, with the result that the settlor received only a second charge. As a result of receiving the second charge, the settlor received around £300k less than they would have done had a first charge been received. The making a *Personal Loss Order* in this case increases the likelihood that the settlor receives the intended benefit of the obligation breached.<sup>55</sup>

This argument provides a reason in favour of making *Personal Loss Orders* following breaches of the duty to follow the settlor's communicated intentions, but not following breaches of the duty of care. That is because the argument focuses on providing options to settlors to confer benefits on others, where this option is exercised through communicating intentions in the declaration of trust. The argument provides a reason in favour of making *Personal Loss Orders* in favour of a variety of people: beneficiaries under fixed and bare trusts, objects under discretionary trusts and powers of appointment, and people not falling within these categories.

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<sup>55</sup> It is possible that this argument provides a reason in favour of making a *Personal Loss Order* on the tweaked facts of *AIB* considered at 7.2.3.

Does the current argument provide a reason in favour of making *Personal Loss Orders* following any breach of the duty to follow the settlor's communicated intentions, or should there be some condition on availability such as the settlor having clearly expressed that the purpose of imposing a particular obligation upon the trustee is to confer a benefit on some person?

From the perspective of the present argument, a rule that did not include such a condition would be better for augmenting settlor autonomy than a rule that did include such a condition. This is because a rule such as the former would make it more likely that any benefit a settlor wished to confer was actually conferred, thereby increasing the autonomy of settlors. However adopting such a rule would mean that *Personal Loss Orders* were available against trustees to compensate for lost benefits wrongfully caused, even where the relevant settlor had not decided to confer such a benefit. This may be seen as an undesirable consequence. The adoption of a rule with such a condition on availability will be considered again below, where an objection to making *Personal Loss Orders* will be considered.<sup>56</sup>

### 7.3.2.3 Trustee Incentives

One reason in favour of making *Personal Loss Orders* is that the making of such orders contributes to the maintenance of a rule providing for such orders. That rule has

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<sup>56</sup> See 7.3.3.

value as it reduces trustees' incentives to commit legal wrongs so as to cause harm to people.<sup>57</sup>

To establish the argument it must be shown that there is a reason in favour of reducing the incentive upon trustees to breach their legal duties so as to cause harm to people, that a rule providing for the availability of *Personal Loss Orders* reduces this incentive, and that the making of particular *Personal Loss Orders* contributes to the maintenance of this rule.

As to the first point, the argument assumes that there is a reason in favour of reducing the incentive upon trustee to breach their legal obligations so as to cause harm to people. This assumption may be grounded in a number of ways: reducing such incentive may reduce the number of legal wrongs committed, may reduce the situations in which a trustee acts with the bad motive of causing harm to people, and may have communicative value by showing that the law takes a firm stance on trustees.

As to the second point, a rule providing for the availability of *Personal Loss Orders* reduces this incentive. A trustee may wish to cause harm to a person, and may believe that breaching a legal duty will cause such harm. In such a case the trustee has an incentive to breach their legal obligation. However, the availability of *Personal*

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<sup>57</sup> This argument bears a similarity to that presented in favour of making *Surcharging Orders* in 4.3.1.1.

*Loss Orders* reduces this incentive, as a trustee might be ordered to compensate a person for any loss wrongfully caused by the trustee. In such a circumstance the trustee's wish would not be met.

As to the third point, the making of particular *Personal Loss Orders* contributes to the maintenance of the rule providing for such orders. If particular orders were not always made in situations provided for by the rule, the incentive upon trustees would be reduced by a lesser extent.

### **7.3.2 Reasons Against**

Chapter Four identified three reasons against making *Personal Loss Orders*, but argued that such reasons were either negated or that it was permissible to act inconsistently with such reasons where the trustee subject to such an order had had a reasonable opportunity to avoid liability.<sup>58</sup> This section considers a further reason against making a *Personal Loss Order*.

#### **7.3.2.1 Extensive and Unforeseeable Liability for Trustees**

One possible reason against the making of a *Personal Loss Order* is that the making of such an order would provide authoritative precedent for the existence of a rule providing for the availability of such orders, and that this rule would have a negative consequence. In particular a consequence of this rule would be that trustees could be subjected to extensive and unforeseeable liability for breach of their legal

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<sup>58</sup> See 4.3.2.

obligations. The following discussion develops the ideas of James Penner, considered above.<sup>59</sup>

To establish this argument, it must be demonstrated that the making of a *Personal Loss Order* would provide precedent for the existence of a rule providing for the availability of such orders, that such a rule would render trustees open to extensive and foreseeable liability, and that there is a reason against rendering trustees open to such liability.

As to the first point, within the doctrine of precedent in English law, a court's making a particular type of order will count as a precedent in favour of the existence of a legal rule providing for the availability of such orders. This is so even if the court communicates an intention that the making of such an order will not count as a binding precedent.<sup>60</sup>

As to the second point, a rule providing for the availability of *Personal Loss Orders* would leave trustees open to extensive and unforeseeable liability for breach of their obligations. Liability under a *Personal Loss Order* has the potential to be in some respects more extensive and unforeseeable than liability under the other orders considered in this thesis. This is because *Personal Loss Orders* focus on losses wrongfully

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<sup>59</sup> See 7.3.1.2.

<sup>60</sup> See generally, Rupert Cross and James Harris, 'Ratio Decidendi and Obiter Dictum' ch 2 in *Precedent in English Law* (4th Clarendon 1991).

caused to a person all things considered, whereas the other orders focus in some way on the trust estate. For the same reason liability has the potential to be more unforeseeable: it seems plausible to suppose it is easier for a trustee to predict the consequences of their actions for the trust estate, than for a person.

Both the extent and foreseeability of liability will depend on the scope of availability of *Personal Loss Orders*. For example, liability has the potential to be more extensive if *Personal Loss Orders* are available in favour of any person, as compared with being available in favour of a more limited class such as beneficiaries under fixed trusts. Furthermore liability has the potential to be more extensive if such orders are, for example, available for breach of the both the duty to follow the settlor's communicated intentions and the duty of care, as opposed to, say, just duties to distribute subject-matter to beneficiaries.

As to the third point, there are multiple reasons against opening a trustee to extensive and unforeseeable liability. First, trustees may demand a higher price for their services, due to the increase in potential liability undertaken, and the fact of such increase may cause their insurance premiums to rise. For anyone who thinks that trusts law serves a value of using legal subject-matter for a purpose other than the payment of trustees, trustees demanding higher fees is bad as it decreases the amount of subject-matter to be devoted to such purpose.

Second, the permissibility of ordering a trustee to pay money from their personal estate to people or into trust estates may depend on whether that trustee had a reasonable opportunity to avoid being subjected to such liability.<sup>61</sup> The predictability of the trustee's potential liabilities may be relevant in assessing the reasonableness of any such opportunity: the greater the unforeseeability of such liability, the less reasonable the opportunity.

Third, one might place value on prospective trustees' being able to predict their potential liabilities. This ability to predict enables such people to plan their lives, and in particular decide whether becoming a trustee is beneficial for them, and any terms they should insist on in return. Uncertain liabilities make such predictions difficult.

If one accepts this argument, one way of dealing with the argument is to adjust the rule providing for the availability and scope of such orders, so as to reduce the extent and unforeseeability of potential liability. With this in mind, the law could adopt a rule whereby *Personal Loss Orders* are available in fairly limited situations.

Such a rule could provide for a *Personal Loss Order* where a settlor communicates in the declaration of trust that the purpose of a duty imposed by the settlor is to provide a benefit to some person, the trustee breaches that duty, and the trustee's

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<sup>61</sup> For more on this argument, see 4.3.2.3.

breach causes that person not to receive that benefit. Such an order could contain a remoteness limit, merely requiring a trustee to pay for losses that were reasonably foreseeable at the time of the declaration of trust. Such a rule would render the potential liability of trustees less extensive and less unforeseeable, as orders would only be available in favour of people whom the settlor has identified as intended to benefit from the imposition of a duty, and only in respect of losses wrongfully caused to such a person that were reasonably foreseeable.

Such a rule would provide some of the benefits outlined in the previous sections: it would enable the person identified to rely on a trustee's performance of their legal obligation; it would provide settlors with an option to benefit people providing such settlors communicate that such a person is intended to benefit from the trustee's compliance with the duty to follow the settlor's communicated intentions; it would reduce the trustee's incentive to breach such an obligation so as to cause harm to a person where the purpose of the obligation is communicated by the settlor to be to benefit that person.

This rule would permit recovery in a case like *AIB*: in that case it was clear that the purpose of the duty against transferring the money prior to the lender's receiving a first charge was to ensure the lender had a first charge securing their loan, and that the losses sustained through not receiving such a first charge were reasonably foreseeable at the time of the declaration of trust.

The rule would plausibly also permit recovery on the tweaked facts of *AIB* considered above: providing one purpose of the duty breached was to ensure the third party received a first charge securing the loan, and that the losses caused through breach of this duty were reasonably foreseeable at the time of the declaration of trust, the fact that the third party was not a beneficiary under the bare trust is irrelevant.

The rule would permit recovery in *Profit* providing that the settlor of the trust communicated that a purpose of Derek's duty to distribute money to Philippa was to provide Philippa with investment opportunities, and that the loss suffered by Philippa was reasonably foreseeable at the time of the declaration of trust.

The rule would also permit recovery in *Company Rescue* providing that the settlor communicated that one purpose of the trustee's duty to invest in Berry shares was to save a diminution in the value of Thomas's shareholder, and providing that the drop in value of the shareholding was reasonably foreseeable at the time of the declaration of trust.

## 7.4 Conclusion

This chapter has considered *Personal Loss Orders*. Section 7.2.2 argued that *Personal Loss Orders* are available as a matter of law in favour of beneficiaries under bare

trusts and fixed trusts for breach of the duty to follow the settlor's communicated intentions.

Section 7.3.2 suggested that there are three reasons for making a *Personal Loss Order*, which all stem from the fact that such orders contribute to the maintenance of a rule providing for the availability of such orders. Such a rule facilitates people in relying upon trustee's complying with their legal obligations, enhances the autonomy of settlors by providing an option to confer benefits upon people, and reduces the incentive upon trustees to breach their legal duties so as to cause harm to a person.

Section 7.3.3 suggested that a reason against such a rule is that it would provide for extensive and unforeseeable liability upon trustees. To take account of this objection, a rule was proposed whereby *Personal Loss Orders* should be available for breach of the duty to follow the settlor's communicated intentions, where the settlor communicates that a purpose of a particular duty is to provide a benefit to a person, the trustee breaches that duty, and the breach causes that person not to receive that benefit. Recovery should be limited to losses that were reasonably foreseeable at the time of the declaration of trust. Such a rule would avoid the objection by rendering trustees' liability less extensive and unforeseeable, and would still further the three values outlined in the previous paragraph.

# VIII

## The Construction and Comparison of Counterfactuals

### 8.1 Introduction

Three of the orders considered in this thesis are counterfactual loss orders.<sup>1</sup> To quantify such an order, one must construct and compare two counterfactuals to determine whether loss has been wrongfully caused by the trustee. This chapter outlines the rules for constructing and comparing these counterfactuals.

To determine whether loss has been wrongfully caused by the trustee, one must construct and compare a non-breach counterfactual and a breach counterfactual. For example, if a trust estate is more valuable in the non-breach counterfactual, then the trustee has wrongfully caused that trust estate to diminish in value. A *Surcharging Order* would obligate the trustee to transfer money into the trust estate equal to the extent of this diminution.

A similar process is used to quantify a *Lesser Receipt Order* or *Personal Loss Order*, though the focus of comparison is different: a *Lesser Receipt Order* focuses on the value of any subject-matter received by a person from the trust estate, whilst a *Personal Loss Order* focuses on the position of a person all things considered.

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<sup>1</sup> The term ‘counterfactual loss order’ was introduced in 2.2.1.

One claim of this thesis is that the legal authorities use the phrase ‘equitable compensation’ to refer to a number of distinct orders, including the *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order*.<sup>2</sup> As the authorities provide rules for how to construct and compare counterfactuals to quantify orders for equitable compensation, we can assume that the same rules apply in respect of each order.

Section 8.2 will outline the rules for constructing the non-breach and the breach counterfactual. Section 8.3 will outline the rules for comparing these counterfactuals to determine whether a loss has been suffered.

## **8.2 Constructing Counterfactuals**

### **8.2.1 The Non-Breach Counterfactual**

This section outlines three stages for constructing the non-breach counterfactual. First, one must determine the content of the duty breached. Second, one must determine what would have happened but for the breach of this duty, assuming that the trustee would have complied with any other duties that would have arisen. Third, facts included in the counterfactual under stage two may be changed.

Given that the non-breach counterfactual is used to quantify *Surcharging Orders*, *Lesser Receipt Orders*, and *Personal Loss Orders*, the focus is on facts relevant in determining the subject-matter within the trust estate, the value of any subject-

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<sup>2</sup> See in particular 3.2.

matter received by a person from the trust estate, and the position of people all things considered. Whilst the latter two inquiries present few difficulties, determining the subject-matter within the trust estate is somewhat more complex.

The trust estate is defined in Chapter Two as a collection of subject-matter held by a trustee on the same terms.<sup>3</sup> In determining the subject-matter within the trust estate, one must consider the subject-matter that initially constitutes the trust estate, whether any subject-matter has been removed from the trust estate, and whether any subject-matter has been added to the trust estate. Subject-matter will be removed when transferred away by a trustee, or when it is no longer held on the same terms. Subject-matter will be added when transferred to a trustee and held on the same terms as the original declaration of trust.

### 8.2.1.1 Stage One: the Content of the Duty Breached

Under stage one, it is necessary to determine the content of the duty breached, so as to eliminate any counterfactual involving a breach of this duty for use as the non-breach counterfactual. In *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, Lord Reed made clear the importance of this step:<sup>4</sup>

The rules appropriate to a breach of duty by a trustee similarly have to be determined in the light of the characteristics of the obligation in question. This focus on

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<sup>3</sup> See 2.2.1.

<sup>4</sup> *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1504 [93]. Other relevant statements of this point can be found in *Target Holdings Ltd v Redfern* [1996] AC 421 (HL) 432-4 (Lord Browne-Wilkinson) and *AIB* [76] (Lord Toulson).

the trustee's obligations is the... most important point. Putting the matter very broadly, compensation for the breach of an obligation generally seeks to place the claimant in the position he would have been in if the obligation had been performed.

The method for determining the content of the duty breached depends on whether the trustee breached the duty to follow the settlor's communicated intentions, or the duty of care. In the former case the content of the duty will be determined by interpreting the declaration of trust. In the latter case the content of the duty will be determined by inquiring which actions would involve the trustee's exercising such care and skill as was reasonable in the circumstances.<sup>5</sup>

It is worth noting that identifying the action constituting the breach of duty will not be sufficient to determine the content of the duty breached. For example, if a trustee wrongfully transfers away subject-matter, this breach is consistent with a number of different duties. The trustee may have been under an obligation to hold the subject-matter, sell the subject-matter, or transfer the subject-matter to someone other than the transferee.<sup>6</sup>

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<sup>5</sup> Trustee Act 2000, s 1(1). In situations where the statutory duty of care does not apply, the common law duty of care may apply. The content of the common law duty appears to be the same as the content of the statutory duty: *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch), [2015] WTLR 373 [93] (Newey J).

<sup>6</sup> A trustee's argument failed by virtue of overlooking this point in *Lloyds TSB Bank Plc v Markandan & Uddin (A Firm)* [2012] EWCA Civ 65, [2012] 2 All ER 884. The trustee sought to avoid liability by arguing that but for their breach of duty they would have acted in a way that meant no loss had been caused. The Court of Appeal rejected the argument as the way the trustee said they would have acted would also have been a breach of the duty breached: [63]-[67].

*Various Claimants v Giambrone and Law (A Firm)* demonstrates how the quantum of liability can turn upon arguments over how to define the content of the duty breached under stage one.<sup>7</sup> The facts of *Giambrone* were outlined elsewhere, though will be considered again to illustrate the present point.<sup>8</sup> A purchaser decided to invest in land under construction in Italy.<sup>9</sup> Italian law required that such a purchaser would receive a particular form of guarantee, so as to protect them from losses in various situations. The purchaser transferred a deposit to a trustee for use in the purchase, who held the deposit on bare trust for the purchaser, with a power to permissibly apply the money towards the purchase providing that the purchaser had received a conforming guarantee.

The trustee wrongfully paid out the money when no conforming guarantee had been received: this was a breach of the duty to follow the settlor's communicated intentions. The purchaser eventually received a guarantee but it was not conforming. Furthermore, the purchase turned out to be a bad decision for the purchaser: they received no interest in land nor the return of their deposit. They sought summary judgment, seeking an order against the trustee obligating the trustee to pay the value of the deposit to the purchaser. The Court of Appeal made the order.<sup>10</sup> Jackson LJ

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<sup>7</sup> *Various Claimants v Giambrone and Law (A Firm)* [2017] EWCA Civ 1193, [2018] PNLR 2.

<sup>8</sup> See 5.2.2.1.5.

<sup>9</sup> There were multiple purchasers in *Giambrone*, though it is sufficient for present purposes to focus on just one purchaser.

<sup>10</sup> It is argued in Chapter Five that this was a *Lesser Receipt Order*: 5.2.2.1.5.

gave the main judgment, with which Underhill LJ and Moylan LJ agreed on all points relevant for present purposes.

One disagreement between the parties concerned the content of the trustee's duty. This disagreement affected the appropriate non-breach counterfactual, whether a loss had been suffered, and thus the quantum of the trustee's liability.

The trustee argued their liability should be zero based on the fact that their duty was to procure a guarantee for the purchaser and transfer the deposit to the vendor. If this was true the non-breach counterfactual would be one in which a conforming guarantee was received and the deposit paid-out, and no loss would have been wrongfully caused: a conforming guarantee would have provided the purchaser with no protection in the circumstances that occurred.

However, Jackson LJ preferred the purchaser's argument that the trustee's duty was to hold the deposit unless a conforming guarantee was received.<sup>11</sup> As such the trustee's duty-based argument for their preferred non-breach counterfactual failed.<sup>12</sup>

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<sup>11</sup> In accepting this argument, Jackson LJ distinguished *Target* and *AIB* on unconvincing grounds: *Giambrone* (n 7) [60]-[64]. He considered the trustees in *Target* and *AIB* had duties to take active steps in procuring the security, whilst the trustee in *Giambrone* did not. There are two points of criticism: first, it is not explained why this justifies the different result in *Giambrone* (liability for the entirety of the money paid out in breach) to that reached in *Target* and *AIB* (liability for the difference in value between conforming and non-conforming security); and second, there is no evidence in *Target* or *AIB* that the trustees in those cases owed a duty to take active steps in procuring the security. For similar criticism: Paul Davies, 'Equitable Compensation and the *SAAMCO* Principle' (2018) 134 *Law Quarterly Review* 165, 167.

<sup>12</sup> A further feature of the Court of Appeal's construction of the non-breach counterfactual is considered below: 8.2.1.2.2.

## 8.2.1.2 Stage Two: What Would Have Happened?

### 8.2.1.2.1 The General Position

Once counterfactuals in which the trustee breaches the relevant duty have been excluded by stage one, there may still remain a number of counterfactuals that could be selected for use as the non-breach counterfactual. Stage two selects between these counterfactuals by asking what would have happened had the trustee not breached the relevant duty, assuming full compliance with any other duties that might have arisen upon the trustee. Briggs J, as he then was, described this process in *Harris v Kent*:<sup>13</sup>

The “but for the breach’ analysis called for by the application of the basic equitable principle requires the court to decide what would hypothetically have happened if, instead of committing the breach of trust, the [trustee] had in all respects complied with their fiduciary obligations.

*AIB* demonstrates how the quantum of the trustee’s liability can depend on arguments over what would have happened but for the breach of duty under stage two. The facts of *AIB* were outlined elsewhere.<sup>14</sup> In brief, a trustee held around £3.3m on bare trust for a lender for use in a secured loan transaction. The trustee could only permissibly apply the money towards the loan transaction once the lender had received a first charge over land from the borrower. The trustee wrongfully transferred away the money, the lender received only a second charge,

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<sup>13</sup> *Harris v Kent* [2007] EWHC 463 (Ch) [132].

<sup>14</sup> See 4.2.1.4.

the borrower defaulted on the loan, and the proceeds of sale were insufficient to meet the debt owed to the first chargee and the entirety of the lender's debt.

The lender and the trustee disagreed over the appropriate construction of the non-breach counterfactual for use in quantifying any counterfactual loss orders. Their disagreement was caused by a dispute over what would have happened but for the trustee's breach of duty. The lender argued that but for the breach the trustee would have returned the £3.3m to the lender, and that the non-breach counterfactual should be constructed to include these facts. The trustee's liability under such a counterfactual would be around £2.5m.

However, the Court of Appeal preferred the trustee's argument. The trustee argued that but for the breach the trustee would have permissibly applied the money in the loan transaction, once the lender had received a first charge over the borrower's land, and that the non-breach counterfactual should be constructed to include these facts. The trustee's liability under this counterfactual was around £300k, which was the quantum of the order made by the Court of Appeal and upheld by the Supreme Court.

In accepting the trustee's argument, the Court of Appeal relied on a finding of fact made by Judge David Cooke at first instance.<sup>15</sup> The following is Judge David Cooke's reasoning on the point. 'AIB' refers to the lender, 'the solicitors' refers to the trustee and 'Barclays' refers to the bank:<sup>16</sup>

Since the breach alleged is the payment out without authority, it seems to me the question may be approached in principle on one of two bases, namely what would the outcome have been if the solicitors had either: (i) in fact dealt with the trust funds in the manner they were authorised to do, or (ii) instead of making the unauthorised payment that they did, had asked the bank for its instructions at that point, disclosing the reasons why the payment was outside their existing authority.

In either case... the answer is the same on the facts of this case. There would have been a short delay while the solicitors obtained a redemption figure in a form that bound Barclays to release its charge, they would have paid the amount to Barclays and in due course have received that release and registered AIB's charge as a first charge. I am in no doubt that, in the somewhat implausible scenario that the solicitors, realising that they did not have a valid redemption quotation, approached AIB for instructions rather than simply dealing with the matter themselves, AIB would not have withdrawn from the transaction but simply instructed them to carry on with it, complying with their existing instructions. It was clear from the evidence that AIB as a whole was anxious to lend to the borrowers, and that the domestic remortgage was being driven by the need to facilitate the business lending which the bank was very keen to make.

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<sup>15</sup> The argument was not fully considered at first instance, because Judge David Cooke concluded that the trustee only wrongfully transferred £300k, rather than £3.3m. This conclusion was overturned in the Court of Appeal, and unchallenged in the Supreme Court: *AIB* (n 4) [16] (Lord Toulson).

<sup>16</sup> *AIB Group (UK) Plc v Mark Redler & Co (A Firm)* [2012] EWHC 35 (Ch), [2012] PNLR 16 [40]-[41].

Thus the trustee's liability depended on what would have happened but for the trustee's breach of duty: if the loan money would have been returned liability would be around £2.5m, but as the loan money would have been permissibly advanced to the borrower, liability was around £300k.

### 8.2.1.2.2 Powers to Use Money in Transactions

A number of cases share a resemblance to one another, though reach different conclusions on liability. These differences are explained with reference to the inquiry under stage two. In each case, a trustee holds money on bare trust for a beneficiary, where the trustee has a power to permissibly apply the money towards some sort of transaction: examples include the purchase of land and the advancing of a loan. In each case some condition must be satisfied for the power to be permissibly exercised, and in each case the trustee wrongfully transfers the money before this condition is satisfied.

When orders are sought against the defaulting trustees, a range of judicial responses have resulted: some courts hold the trustee liable for the value of the money paid away, whilst other courts hold the trustee liable for the extent to which the beneficiary would have been better-off if the condition for the permissible exercise of the power had been satisfied and the transaction gone through. These differences are explained by differing conclusions under stage two of constructing the non-breach counterfactual.

In some cases, it was determined that but for the breach the trustee would have transferred the money to the beneficiary, a counterfactual in which this occurred was adopted, and the trustee held liable for the value of money wrongfully transferred.<sup>17</sup> In other cases, it was determined that but for the breach the trustee would have permissibly applied the money towards the transaction, a counterfactual in which this occurred was adopted, and the trustee ordered to pay money to the beneficiary equal to the extent to which the beneficiary would have been better off had the transaction gone through following satisfaction of the relevant condition.<sup>18</sup> Some cases refuse summary judgment so that the factual issue of what happened but for the breach could be determined.<sup>19</sup>

The Court of Appeal's decision in *Giambrone* can be criticised for failing to engage with this question under stage two. The facts are outlined above.<sup>20</sup> Recall that under stage one of constructing the non-breach counterfactual Jackson LJ preferred the purchaser's argument that the trustee's duty was one to merely hold the deposit on trust, rather than a duty to procure a guarantee for the purchaser and

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<sup>17</sup> *Alliance and Leicester BS v Edgestop* [1999] Lloyd's Rep PN 868 (Ch) 870 (Hoffmann J); *Lloyds TSB Bank v Markandan & Uddin* (n 6) [63]-[64] (Rimer LJ). It might be objected that it is ambiguous whether Hoffmann J makes a counterfactual loss order in *Edgestop*, as it is possible that he made a *Falsification Order*. However, Hoffmann J asked whether the lender in *Edgestop* would have proceeded with the transaction had the trustee not breached their duty, and such inquiry would be irrelevant if he was making a *Falsification Order*. This suggests a counterfactual loss order was made. Furthermore, Lord Browne-Wilkinson in *Target* interprets *Edgestop* as making a form of counterfactual loss order: *Target* (n 4) 440.

<sup>18</sup> *Collins v Brebner* [2000] Lloyd's Rep PN 587 (CA) [67]-[68] (Tuckey LJ); *AIB* (n 4) [14], [76] (Lord Toulson), [140] (Lord Reed).

<sup>19</sup> *Target* (n 4) 440-41; *Bristol and West BS v May* [1996] PNLR 138 (Ch) 171 (Chadwick J).

<sup>20</sup> See 8.2.1.1.

apply the deposit towards the purchase of land. Thus one could not assume that the appropriate non-breach counterfactual was one in which a guarantee was received and the deposit applied.

However after reaching a conclusion on the content of the trustee's duty, Jackson LJ immediately concluded that the non-breach counterfactual was one in which the trustee retained the deposit and then returned it to the purchaser. This reasoning can be criticised as it fails to ask the appropriate question under stage two: what would have happened but for the breach? In particular, would the trustee have continued to hold the deposit and then return it to the purchaser, or would the purchaser have received a conforming guarantee and the trustee applied the deposit in the sale transaction. If the former is true, the Court of Appeal's order in *Giambrone* is justifiable on the basis of reasoning not adopted by the court. If the latter is true, then the order is incorrect.<sup>21</sup>

It is possible that the explanation for the Court of Appeal's failing to engage with this question is that there were insufficient findings of fact made at first instance. Two proceedings had taken place before Foskett J, and in neither proceeding was a finding of fact made on the question what would have happened but for the trustee's breach of duty. Foskett J gives no explicit reason as to why he did not consider this question, though there is some ground for believing he thought it

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<sup>21</sup> This criticism is also made by Davies, 'Equitable Compensation and the *SAAMCO* Principle' (n 11) 168.

unnecessary to answer.<sup>22</sup> In such circumstances, unless the Court of Appeal felt competent to make the finding of fact itself, the case should have been remitted to trial to determine this factual question.

### 8.2.1.2.3 Multiple Investment Options

Where a trustee owes a duty to invest subject-matter, but could permissibly make a number of different investments, one must select which investment occurs in the non-breach counterfactual. This is important in determining for example which subject-matter falls within the trust estate. There is a conflict of authority on this question. The situation is exemplified by the following examples:

*Duty to Invest 5:* a trustee holds £1m on trust, with a duty under the declaration of trust to invest in either Banana shares or Orange shares on 1st January. The trustee wrongfully transfers away the £1m. The Banana shares are now worth £1.4m and the Orange shares are worth £1.7m.

*Duty to Invest 6:* a trustee holds £1m on trust, with a duty under the declaration of trust to invest in either Banana shares, Orange shares, or Apple shares on 1st January. In breach of the duty of care, the trustee invests in Car shares, which are now worthless. The Banana shares are now worth £1.4m and the Orange shares are worth £1.7m.

But for the breach in each example, the trustee would have had two permissible investment options: to invest in Banana shares or Orange shares. One must determine which investment is made in the non-breach counterfactual. In these examples the difference affects the trustee's liability by £300k.

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<sup>22</sup> *Various Claimants v Giambrone and Law (A Firm)* [2015] EWHC 3315 (QB) [17]; [2015] EWHC 1946 (QB) [9]-[11].

Throughout the first half of the 19<sup>th</sup> century, a number of cases grappled with this question. Some hold the trustee liable for the capital sum that should have been invested plus interest, though this seems inconsistent with stage one of constructing the non-breach counterfactual: retaining the money would be a breach of the duty to invest.<sup>23</sup> Some held the trustee liable for the investment which was most beneficial to the trust.<sup>24</sup> The rule was eventually settled by the Court of Appeal in Chancery in *Robinson v Robinson*, where a rule was adopted constructing the non-breach counterfactual so as to include the least profitable investment.<sup>25</sup>

In *Robinson*, the settlor of the trust had communicated an intention that the trustees should sell certain subject-matter and invest the proceeds of sale in either real securities or government securities. The trustees wrongfully delayed in selling the subject-matter, and an order was sought holding the trustees liable for the loss caused through not investing in the government securities, as this was the investment which would have produced the most profit to the trust. The Court of Appeal in Chancery refused the order. Lord Cranworth LJ gave the only reasoned judgment:<sup>26</sup>

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<sup>23</sup> *Marsh v Hunter* (1822) 6 Madd 295, 56 ER 1103 (Ch); *Shepherd v Moulds* (1845) 4 Hare 500; 67 ER 746 (Ch).

<sup>24</sup> *Hockley v Bantock* (1833) 2 Mylne & Keen 437; 39 ER 1010 (Ch); *Watts v Girdlestone* (1843) 6 Beavan 188, 49 ER 797 (Ch); *Ames v Parkinson* (1844) 7 Beav 379; 49 ER 1111 (Ch). One commentator has suggested a rule whereby the non-breach counterfactual is presumed to be that most beneficial to the trust, subject to the trustee's showing that they would have acted in some different way: Paul Davies, 'Compensatory Remedies for Breach of Trust' ch 10 in R Nolan, K Low, and T Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018) 328.

<sup>25</sup> *Robinson v Robinson* (1851) 1 De GM & G 247, 42 ER 547 (CA).

<sup>26</sup> *Ibid* 551.

Where a man is bound by covenants to do one of two things, and does neither, there [sic] in an action by the covenantee, the measure of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee: and the same principle may be applied by analogy to the case of a trustee failing to invest in either of two modes equally lawful by the terms of the trust.

Thus *Robinson* supports the proposition that a trustee will only be held liable for the least profitable investment that could have been permissibly made but for the breach of duty. Thus in the examples under consideration, the non-breach counterfactual would be constructed so that the trustee invested in Banana shares, as these were the least profitable investment.

However, the rule as stated in *Robinson* is seemingly in conflict with the rule in *AIB*: the latter case asks what would have happened but for any breach of the relevant duty?<sup>27</sup> Applying the *AIB* rule to the current situation, one should ask which investment the trustee would have permissibly made but for the breach of trust, rather than the *Robinson* rule which asks which permissible investment would have been least profitable. These rules conflict, and the *AIB* rule takes priority by virtue of stemming from a decision of the Supreme Court, given the *Robinson* rule stems from a decision of the Court of Appeal in Chancery.<sup>28</sup>

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<sup>27</sup> The approach in *AIB* is in accordance with the rule adopted in contract law, where one constructs the non-breach counterfactual with reference to how a defendant would have acted, rather than with reference to whichever permissible action was least onerous for the defendant: *Durham Tees Valley v BMIBaby* [2010] EWCA Civ 845, [2011] 1 All ER (Comm) 731.

<sup>28</sup> *Willers v Joyce (no 2)* [2016] UKSC 44, [2018] AC 843 [5] (Lord Neuberger).

Prior to *AIB*, judicial doubts had been voiced in relation to the *Robinson* rule in the context of orders following breach of the duty of care. In the Court of Appeal's decision in *Nestle v National Westminster Bank Plc*, Dillon LJ rejected the *Robinson* rule, whilst Staughton LJ said he would be reluctant to follow it.<sup>29</sup> Rather, each judge thought the non-breach counterfactual should be constructed with reference to what a prudent trustee was likely to have achieved but for the breach of duty.<sup>30</sup> Dillon and Staughton LJ thus appear to accept that a rule similar to that later adopted in *AIB* is applicable following breach of the duty of care. More recently, the *AIB* rule has been applied by Richard Spearman QC in *Daniel v Tee* following breach of the duty of care through making careless investments.<sup>31</sup> This confirms that the *AIB* rule also applies to breaches of the duty of care.

### 8.2.1.2.4 Duties that Would Have Arisen But For the Breach

As stated above, stage two asks what would have happened but for the breach, *assuming that the trustee complied with any duties that would have arisen*. This is so even if it is clear that the trustee would not have complied with such duties. For example, if a trustee wrongfully transferred away subject-matter, and but for the breach would have been obligated to transfer this subject-matter to a beneficiary, the non-breach

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<sup>29</sup> *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260 (CA) 1268 (Dillon LJ), 1280 (Staughton LJ). *Nestle* is discussed in greater detail at 4.2.2.1.

<sup>30</sup> *Ibid* 1280 (Staughton LJ).

<sup>31</sup> *Daniel v Tee* [2016] EWHC 1538 (Ch), [2016] 4 WLR 115 [156]. *Daniel* is discussed in greater detail at 4.2.2.5.

counterfactual is constructed so that this transfer is made, irrespective of whether the trustee would have complied with this obligation.

*Harris v Kent* provides an example from the caselaw.<sup>32</sup> The facts were outlined in detail elsewhere, though repeated discussion is necessary to illustrate the present point.<sup>33</sup> Trustees held shares on trust, with a duty to hold the shares for a beneficiary unless the beneficiary under the trust consented to some transaction. The trustees wrongfully exchanged these shares for different shares. The beneficiary subsequently went bankrupt, and all his rights were vested in his trustee in bankruptcy. However, the trustee in bankruptcy assigned these rights back to the beneficiary who then sought an order against the trustee in respect of the wrongful share exchange.<sup>34</sup>

In constructing the non-breach counterfactual, Briggs J asked what would have happened but for the breach of duty. He concluded that the trustee would have asked the beneficiary for consent to the exchange, and that the beneficiary would have given the required consent.<sup>35</sup> Subsequently, the beneficiary would have gone bankrupt and the trustee in bankruptcy would have requested the trustees to transfer the subject-matter of the trust for the purpose of raising funds for the bankruptcy. This request would have imposed an obligation upon the trustee to transfer the

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<sup>32</sup> *Harris v Kent* [2007] EWHC 463 (Ch).

<sup>33</sup> See 7.2.2.1.

<sup>34</sup> *Harris* (n 32) [70] (Briggs J).

<sup>35</sup> *Ibid* [132]-[134].

subject-matter to the trustee in bankruptcy. The non-breach counterfactual was constructed so that this obligation was complied with.

### 8.2.1.3 Stage Three: Changing Facts

Once the non-breach counterfactual has been constructed under stage two, there is support in obiter dicta for changing facts within this constructed counterfactual.

Consider the following example:<sup>36</sup>

*Gems*: A trustee is obligated to hold ten gemstones on trust, with no powers to permissibly transfer the subject-matter. On Monday the trustee wrongfully sells one gemstone for £1m and dissipates the proceeds. On Wednesday a thief enters the vault and steals the remaining gemstones in such a way that the trustee breaches no duty.

If one asks what would have happened but for the trustee's breach of trust, the ten gemstones would have been stolen. If one constructs the non-breach counterfactual to include this fact, the trustee will not be liable under a counterfactual loss order, as but for the breach all gemstones would have disappeared.

However, Lord Toulson in *AIB* said:<sup>37</sup>

It is good sense and good law that if a trustee makes an unauthorised disbursement of trust funds, it is no defence to

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<sup>36</sup> The example is borrowed from James Penner, 'Falsifying the Trust Account and Compensatory Equitable Compensation' ch 7 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017) 152.

<sup>37</sup> *AIB* (n 4) [58]. A similar rule is adopted in the tort context: *Baker v Willoughby* [1970] AC 467 (HL). Problems arise when attempting to reconcile this rule with other rules of causation: *Jobling v Associated Dairies* [1982] AC 794 (HL). For discussion of possible solutions to these problems, see Robert Stevens, 'Causation' ch 6 in *Torts and Rights* (OUP 2007) 137-44.

a claim by the beneficiary for the trustee to say that if he had not misapplied the funds they would have been stolen by a stranger. In such a case the actual loss has been caused by the trustee.

Applying Lord Toulson's approach to *Gems* would involve changing the fact that the thief would have stolen the gemstone wrongfully transferred by the trustee so that the gemstone remains in the trust estate in the non-breach counterfactual. This would result in the trustee being liable for the value of the gemstone under a counterfactual loss order, most plausibly a *Surcharging Order*.

## 8.2.2 The Breach Counterfactual

Once the non-breach counterfactual has been constructed, one must construct the breach counterfactual, so that the counterfactuals can be compared to determine whether a loss has been wrongfully caused. There are two stages: first one must establish what has happened since the breach of duty, and second one must consider whether any facts should be changed in the counterfactual selected under stage one.

### 8.2.2.1 Stage One: What Has Happened?

Stage one establishes what has happened since the breach of duty. In particular one must consider whether any subject-matter is in the trust estate, whether any subject-matter has been distributed to people from the trust estate, and the positions of people whose positions the trustee may have affected. These inquiries are relevant in quantifying *Surcharging Orders*, *Lesser Receipt Orders*, and *Personal Loss Orders* respectively.

### 8.2.2.1.1 The General Position

*Latchworth v Dryer* illustrates how benefits received following the breach of duty may serve to reduce the trustee's liability.<sup>38</sup> Mr Dryer and an accountant held around €13m on trust for a family investment company, for the purposes of investment. Mr Dryer was in fact a fraudster, and was wrongfully transferring away the money rather than making investments. To give the impression that the investments were operating successfully, he remitted certain sums back to himself and the accountant as trustees. The company sought an order against Mr Dryer for €13m, arguing that the sums remitted should be ignored when quantifying liability. HH Judge Pelling QC rejected this argument:<sup>39</sup>

It would be wrong to damnify Mr Dryer in the repayment of that part of the trust fund which has, albeit in discreditable circumstances, been repaid...

As such the remitted sums were considered in the breach counterfactual for the purposes of determining whether the breach of duty had caused a loss.

One must also consider any orders that are made for the same breach of duty. For example, assume a trustee wrongfully transfers £1m, causing the trust estate to diminish in value by £1.4m, and a *Falsification Order* is made obligating the trustee to pay £1m into the trust estate. If a *Surcharging Order* is sought, this will be limited to

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<sup>38</sup> *Latchworth Ltd v Dryer* [2016] EWHC 3424 (Ch), [2017] EWHC 1089 (Ch). *Latchworth* took place over two hearings. The report of the second hearing is available, though the report of the first hearing is not.

<sup>39</sup> *Ibid* [12].

£400k. This is because compliance with the *Falsification Order* will reduce the loss to the trust estate by £1m.<sup>40</sup>

#### 8.2.2.1.2 Facts Relevant to Determining the Trust Estate

As stated above, a trust estate is a collection of subject-matter held by a trustee on the same terms.<sup>41</sup> Determining which subject-matter falls within the trust estate in the non-breach counterfactual generally gives rise to few difficulties. Determining the trust estate in the breach counterfactual is not so simple: problems are created by the possibility of a trustee holding subject-matter in breach of duty. Such wrongful holding is not possible in the non-breach counterfactual, as the counterfactual is constructed so that the trustee commits no breach of duty.

Wrongful holding gives rise to the question of whether the subject-matter held in breach of duty forms part of the trust estate in the breach counterfactual. Subject-matter held in breach of duty may be wrongfully acquired or wrongfully retained. The rules for each form of wrongful holding somewhat differs.

Where a trustee wrongfully acquires subject-matter, whether that subject-matter forms part of the trust estate depends on the duty breached. If a trustee breaches the duty to follow the settlor's communicated intentions, then the acquired subject-matter by default does not form part of the trust estate. If the trustee

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<sup>40</sup> The issue of multiple available orders is considered in more detail in 2.3.4.

<sup>41</sup> See 8.2.1 and 2.2.1.

breached the duty of care in acquiring subject-matter, the subject-matter forms part of the trust estate. *Re Salmon* stands for both of these propositions.<sup>42</sup>

The facts of *Re Salmon* were outlined elsewhere.<sup>43</sup> In brief a trustee breached the duty of care whilst entering a secured loan transaction over land, where the land proved insufficient security for the loan. £480 remained outstanding from the borrower, and the Court of Appeal ordered the trustee to pay £60 to a life tenant whose one-sixth interest in the trust capital had fallen into possession.<sup>44</sup>

Since the breach of trust, the trustee had been replaced by new trustees. In resisting the order sought, the original trustee argued that he should have been given the opportunity to purchase the mortgaged land, and that the new trustees' failure to offer him such opportunity precluded any order against him. The Court of Appeal rejected this argument. Cotton LJ said:<sup>45</sup>

...there is a fallacy in this argument; it is founded on treating the mortgage as not being part of the trust estate. That view is wrong. The money was invested according to the terms of the trust, though without due care, and the mortgage was from the first a part of the trust estate... The case is entirely distinct from that of an investment outside the terms of the trust, which the cestui que trust must accept or reject.

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<sup>42</sup> *Re Salmon* (1889) 42 Ch D 351 (CA).

<sup>43</sup> See 5.2.2.2.1.

<sup>44</sup> It is argued in Chapter Five that this is a *Lesser Receipt Order*. *Ibid.*

<sup>45</sup> *Re Salmon* (n 42) 368.

Where a trustee has acquired subject-matter in breach of the duty to follow the settlor's communicated intentions, the subject-matter does not form part of the trust estate, though this is merely a default position.<sup>46</sup> If all beneficiaries under the trust decide to adopt the acquisition, it forms part of the trust estate. Viscount Dunedin made this point in *Wright v Morgan*:<sup>47</sup>

Now if a trustee has made an improper investment, the law is well settled. The cestui que trustent as a whole have a right, if they chose, to adopt the investment and to hold it as trust property. But if there is not unanimity then it is not trust property...

Where the beneficiaries collectively adopt a wrongful acquisition there is conflicting first instance authority as to whether this precludes the seeking of an order in respect of the breach of trust.<sup>48</sup> If adoption precludes a claim, then presumably this would mean the beneficiaries could not both adopt and seek a *Surcharging Order*, *Lesser Receipt Order*, *Falsification Order* or *Personal Loss Order* for the breach of duty. There seems little reason to preclude the beneficiaries from adopting and also pursuing a claim.<sup>49</sup> Given that the relevant authorities are both decisions of the High Court, and given

<sup>46</sup> This default position appears to be overlooked by Paul Davies, 'Compensatory Remedies for Breach of Trust' (2016) 2(1) CJCCL 65, 75.

<sup>47</sup> *Wright v Morgan* [1926] AC 788 (PC) 798-9 (Viscount Dunedin). See also *Re Patten and Edmonton Union Poor Guardians* (1883) 52 LJ Ch 787 (Ch) 789 (Pearson J); *Re Jenkins and HE Randall & Co's Contract* [1903] 2 Ch 362, 365-6 (Swinfen Eady J). Alternatively to adopting wrongfully acquired subject-matter, it may be possible to acquire a lien over it to secure any personal claim: *Francis v Francis* (1854) 5 De GM&G 108; 43 ER 811; *Re Biddulph, Ex parte Norris* (1868-9) LR 4 Ch 280 (CA in Ch); *Foskett v McKeown* [2001] 1 AC 102 (HL) 129-30 (Lord Millett).

<sup>48</sup> *Thornton v Stokill* (1855) 1 Jur (NS) 571 (Ch) refuses the combination of such claims. *Re Lake* [1903] 1 KB 439 permits the combination of such claims. For general discussion, see Lusina Ho, 'Causation in the Restoration of a Misapplied Trust Fund: Fundamental Norm or Red Herring?' ch 8 in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart 2017) 172.

<sup>49</sup> The contrary view is taken by Charles Mitchell and Stephen Watterson, 'Remedies for Knowing Receipt' ch 4 in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) 125, Fn 58.

that such decisions do not bind the High Court as a matter of precedent, it is suggested that a future High Court should permit beneficiaries to both adopt subject-matter wrongfully acquired, and also seek an order in respect of the breach.<sup>50</sup>

If a trustee wrongfully retains subject-matter the legal rules are less clear as to whether the subject-matter forms part of the trust estate. Where a trustee has retained subject-matter in breach of the duty to follow the settlor's communicated intentions, some authorities have ordered the sale of the subject-matter and required the trustee to make up the difference between the amount that would have been received on a permissible sale, and the late sale, with no reference to mutual consent of all beneficiaries.<sup>51</sup> This might suggest that the default rule is that the subject-matter forms part of the trust estate. The writer knows of no authority concerning subject-matter retained in breach of the duty of care.

A further question is whether the beneficiaries acting in concert can choose to adopt wrongfully retained subject-matter, so as to exclude sale on the grounds of the subject-matter being wrongfully retained. The writer knows of no authority on point, though it is suggested that an analogy could be drawn with cases permitting the adoption of wrongfully acquired subject-matter, discussed in the prior

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<sup>50</sup> *Willers v Joyce (no 2)* (n 28) [5] (Lord Neuberger).

<sup>51</sup> *Devaynes v Robinson* (1857) 24 Beav 86, 53 ER 289 (Ch); *Fry v Fry* (1859) 27 Beav 144, 54 ER 56 (Ch).

paragraph. As above, if adoption was permitted, there seems little reason to deny the availability of additional orders in respect of the breach.

If a trustee acquires subject-matter in breach of the duty to follow the settlor's communicated intentions, but then exchanges it for subject-matter that is within the scope of a trustee's power to invest, there is obiter authority suggesting that the subject-matter becomes part of the trust estate.<sup>52</sup>

### 8.2.2.2 Stage Two: Changing Facts

Once the breach counterfactual has been partially constructed under stage one, it is possible that some facts might be altered under stage two. The following example demonstrates a possible situation where such facts might be altered:

*Kind Uncle*: a trustee holds £1m for three children. The trustee wrongfully transfers away the £1m. Before any order is sought against the trustee, an uncle pays £600k into the trust bank account. The uncle would not have made the payment but for the breach of duty.

The rule in contract and tort concerning these sorts of benefits is to ignore them when constructing the breach counterfactual and calculating the defendant's liability for any breach of duty.<sup>53</sup> It is probable that a similar rule would apply in the trusts context. Thus, rather than constructing the breach counterfactual to include the £600k received by the uncle, that receipt would be ignored, the trust estate would be

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<sup>52</sup> *Re Massingberd's Settlement, Clark v Trelawney* (1890) 63 LT 296 (CA).

<sup>53</sup> An example: *Hamilton-Jones v David & Snape* [2003] EWHC 3147 (Ch), [2004] 1 WLR 924. For general discussion see *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 [11]-[13] (Lord Sumption), [45]-[50] (Lord Mance), [96]-[100] (Lord Neuberger); Andrew Burrows, 'Compensating Advantages' ch 8 in *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th OUP 2019).

defined as empty in the breach counterfactual, and the trustee plausibly held liable for £1m.

## 8.3 Comparing Counterfactuals

Once two counterfactuals have been constructed, it is necessary to compare the counterfactuals to consider whether a loss has been wrongfully caused. This section illustrates this process of comparison.

The comparison to be drawn depends on the nature of the order being quantified. When quantifying a *Surcharging Order*, one must determine whether the trust estate is of less value in the breach counterfactual than in the non-breach counterfactual. When quantifying a *Lesser Receipt Order*, one must determine whether the beneficiary has received subject-matter of less value from the trust estate in the breach counterfactual than in the non-breach counterfactual. When quantifying a *Personal Loss Order*, one must determine whether some person is worse-off in the breach counterfactual than in the non-breach counterfactual.

On the same set of facts, it is possible that multiple orders will be available, and thus multiple comparisons will need to be made. Consider the following example:

*All Orders*: a trustee holds £1m on trust with an obligation to pay the income of the trust estate to Adele until 2025, an obligation to distribute £200k to Benny in 2017, and an obligation to transfer any remaining capital to Catherine in 2025. In 2017 the trustee wrongfully pays Benny three days

late, which causes Benny to miss a £50k investment opportunity. The trustee then wrongfully transfers away £300k. It is now 2020 and the trustee's breach has caused £15k less income to arise on the trust estate.

In the non-breach counterfactual, the trustee would distribute £200k to Benny in 2017, Benny would invest this money at a profit of £40k, the trustee would not wrongfully transfer away £300k, and £15k additional income would arise and be distributed to Adele. The trust estate would contain £800k.

In the breach counterfactual, Benny has not made the £40k profit, Adele has received £15k less income, and the trust estate contains £500k.

Comparing these counterfactuals, in the breach counterfactual the trust estate's value is £300k lower, Adele has received £15k less from the trust estate, and Benny is £40k worse-off due to missing the investment opportunity. A *Surcharging Order* would require the trustee to pay £300k into the trust estate, a *Lesser Receipt Order* would require the trustee to pay £15k to Adele, and a *Personal Loss Order* would require the trustee to pay £40k to Benny.

## 8.4 Conclusion

This chapter has outlined the relevant legal rules for constructing and comparing the non-breach counterfactual and breach counterfactual for the quantification of

the counterfactual loss orders considered in this thesis. Those orders are the *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order*.

In constructing the non-breach counterfactual one must determine the content of the duty breached, ask what would have happened but for any breach of that duty, assuming that the trustee would have complied with any other duties arising, and possibly make some changes to these facts. In constructing the breach counterfactual one must determine what has happened following the breach of duty, and possibly make some changes to these facts.

In comparing the counterfactuals, one must consider whether the trust estate has diminished in value, whether a person has received less valuable subject-matter from the trust estate, and whether a person is worse-off, in the breach counterfactual. A *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order* respond to these three forms of loss respectively. Careful attention must be paid when determining the trust estate for the purposes of quantifying a *Surcharging Order*, especially in relation to subject-matter wrongfully held by the trustee.

# IX

## Conclusion

### 9.1 Introduction

This thesis considered five orders and answered two questions concerning these orders. The five orders were the *Surcharging Order*, *Subject-Matter Distribution Order*, *Lesser Receipt Order*, *Falsification Order*, and *Personal Loss Order*. The two questions were whether these orders are available as a matter of English law, and whether there are reasons for or against the making of these orders. The focus was on express trustees of trusts for persons following breach of the duty to follow the settlor's communicated intentions and the duty of care.

This chapter will summarise the conclusions reached upon these questions, and identify a number of further questions for further exploration that are raised by the thesis.

### 9.2 Summary of Conclusions

#### 9.2.1 The Descriptive Question

Upon the descriptive question, this thesis concluded that *Surcharging Orders*, *Subject-Matter Distribution Orders*, *Lesser Receipt Orders* and *Personal Loss Orders* are all sometimes

available against express trustees of trusts for persons as a matter of English law.<sup>1</sup>

*Falsification Orders* are never available against such trustees.<sup>2</sup>

*Surcharging Orders* are available following breach of both the duty to follow the settlor's communicated intentions, and the duty of care. However, such orders are only sometimes available where a relevant trust has come to an end. The precise scope of this exception is uncertain.

*Subject-Matter Distribution Orders* are available following breach of the duty to follow the settlor's communicated intentions by failing to distribute subject-matter to a beneficiary under a fixed trust. The possibility was raised that such orders would not be made where a settlor communicates in the declaration of trust that following a wrongful failure to distribute subject-matter to a beneficiary the subject-matter should not be distributed to that beneficiary.

*Lesser Receipt Orders* are available following breach of both the duty to follow the settlor's communicated intentions and the duty of care, in favour of beneficiaries under fixed trusts and bare trusts, where a trustee has wrongfully caused a beneficiary to receive less money from a trust estate. Whilst arguable, it is somewhat unclear whether such orders are available where a beneficiary has been caused to

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<sup>1</sup> See 4.2, 5.2, and 7.2 respectively.

<sup>2</sup> See 6.2.

receive less valuable non-monetary subject-matter from a trust estate. Assuming such orders are available in such situations, the authorities are silent on the appropriate date for valuing non-monetary subject-matter. The authorities are also silent on whether such orders can be made in favour of the objects under a discretionary trust or power of appointment.

*Personal Loss Orders* are available following breach of the duty to follow the settlor's communicated intentions in favour of beneficiaries under fixed trusts and bare trusts. Whilst arguable, it is unclear whether such orders are available following breach of the duty of care. The authorities are silent on whether such orders can be made in favour of people other than beneficiaries.

A framework for quantifying the counterfactual loss orders under discussion - the *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order* - was also provided. In assessing whether loss has been wrongfully caused for the purposes of these orders, one must construct and compare two counterfactuals - the non-breach counterfactual, and the breach counterfactual.<sup>3</sup>

The non-breach counterfactual is constructed in three stages. First, one must determine the content of the duty breached. Second, one ask what would have happened had the trustee complied with this duty, assuming that the trustee would

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<sup>3</sup> See Chapter Eight.

have complied with any duties that would have arisen. Third, one may adjust facts included in the counterfactual under stage two.

The breach counterfactual is constructed in two stages. First, one must determine what has happened subsequent to the breach of duty. Second, one may adjust facts included in the counterfactual under stage one.

To compare the counterfactuals, one must ask whether the trust estate is more valuable, whether a person has received more valuable subject-matter from the trust estate, and whether a person is better-off all things considered in the non-breach counterfactual. If an affirmative answer is given to any of these three questions, a loss has been wrongfully caused by the trustee. A *Surcharging Order*, *Lesser Receipt Order*, and *Personal Loss Order* if made would obligate a trustee to compensate for these respective losses.

### **9.2.2 The Normative Question**

A number of reasons were identified for and against the making of each of the five orders. Where reasons against arose, possibilities for furthering the values underpinning the reasons for the five orders whilst avoiding harm to the values underpinning the reasons against the five orders were explored.

Two reasons were identified in favour of making a *Surcharging Order*. These reasons were underpinned by the values of reducing the incentive upon trustees to breach their legal duties with bad motives, and protecting the financial value of trust estates.<sup>4</sup>

One reason was identified in favour of making a *Subject-Matter Distribution Order*, which was underpinned by the value of facilitating beneficiaries to plan their life in reliance upon the receipt of subject-matter from a trust estate. This reason was also one of the two reasons identified in favour of making a *Lesser Receipt Order*. The other reason was underpinned by the value of increasing access to justice, through facilitating settlement and reducing the need for litigation. These reasons counted in favour of valuing non-monetary subject-matter for the purpose of a *Lesser Receipt Order* at the time at which the beneficiary receives that subject-matter in the non-breach counterfactual.<sup>5</sup>

Three reasons were identified in favour of making a *Falsification Order*. These reasons were underpinned by the values of deterring trustees from breaching their legal duties by transferring subject-matter from the trust estate, reducing the

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<sup>4</sup> See 4.3.1.

<sup>5</sup> See 5.3.2.

incentive upon trustees to fabricate evidence, and enhancing the autonomy of prospective settlors.<sup>6</sup>

The first and third reasons arguably count in favour of valuing non-monetary subject-matter at the time at which its value is highest between the date of breach and judgment. The third reason arguably counts in favour of ordering a trustee to pay money into the trust estate if it is possible to apply that money towards a transaction that the settlor decided to enter-into in the declaration of trust, and to the settlor if such application is not possible. The reasons do not themselves explain the quantum of a *Falsification Order*, as the values underpinning each reason would be furthered to a greater extent by a higher quantum. Thus the reasons need to be supplemented by other reasons if one wished to explain the quantum of the order.

Three reasons were identified in favour of making a *Personal Loss Order*. These reasons were underpinned by the values of facilitating the ability of people to plan their life in reliance upon trustees' conforming to their legal obligations, enhancing the autonomy of prospective settlors, and reducing the incentive upon trustees to breach their legal obligations with bad motives.<sup>7</sup>

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<sup>6</sup> See 6.3.2.

<sup>7</sup> See 7.3.2.

Three reasons were identified against making a *Surcharging Order*, *Lesser Receipt Order*, *Falsification Order*, and *Personal Loss Order*. These reasons were underpinned by the values of trustee wellbeing and autonomy, confidence in the system of private property within a particular state, and not treating people as mere means to ends.<sup>8</sup> It was suggested that these reasons were negated, or at least that it was permissible for a court to act inconsistently with these reasons, where the trustee subject to an order has had a reasonable opportunity to avoid being subjected to that order.<sup>9</sup>

One reason was identified against making a *Personal Loss Order*. This reason was underpinned by the value of not subjecting trustees to extensive and unforeseeable liability. A rule was proposed whereby *Personal Loss Orders* would be available for breach of the duty to follow the settlor's communicated intentions, where the settlor had communicated that the purpose of a particular duty was to protect a person from a type of loss, and the breach had caused a loss of that type. Any order should be limited to losses that were reasonably foreseeable at the time of the declaration of trust. This rule is intended to further the values identified above, whilst avoiding harm to the value identified in this paragraph.

## 9.3 Further Questions

This thesis raises a number of questions for further exploration.

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<sup>8</sup> See 4.3.2.1 and 4.3.2.2.

<sup>9</sup> See 4.3.2.3.

First, this thesis considered the availability of five orders against express trustees, but excluded the questions of interest and standing from the scope of the thesis.<sup>10</sup> It would be profitable to consider who does and who should have standing to enforce the orders considered in this thesis, and whether interest is or should be available in respect of such orders.

Second, this thesis has provided an in-depth analysis of the court orders available against express trustees. One criticism of the literature prior to this thesis was the failure to discriminate clearly between the five orders considered in this thesis. Armed with the concepts developed in this thesis, it would be profitable to consider the court orders that are and should be available against constructive trustees, dishonest assistants, and knowing recipients.

Third, this thesis identified a number of normative arguments often made in the literature, where insufficient grounding is given for these arguments. First, commentators often argue that there is a reason against treating a person as a mere means to an end.<sup>11</sup> Second, commentators often argue that whether a person has a reasonable opportunity to avoid some cost affects the permissibility of imposing that cost on that person.<sup>12</sup> However, commentators rarely provide grounds for either of

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<sup>10</sup> See 1.3.

<sup>11</sup> See 4.3.2.2.

<sup>12</sup> See 4.3.2.3.

these arguments. It would be profitable to consider possible grounds for the arguments, and the possible impact that these arguments may have upon private law.

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