THE EQUITABLE REMEDY OF COMPENSATION

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[*The circumstances in which Equity will award monetary compensation have historically escaped close definition. Confusion with respect to this area of law predates the Judicature Acts of 1873-75 and has persisted to the present time. When equitable monetary awards have been made it has often been difficult to tell under which equitable remedy they have been awarded. The author in this article argues that Equity has long had a distinct inherent compensatory jurisdiction.*

The development of this remedy is discussed below and the occasions of significant confusion noted. The equitable remedy is distinguished in the article from common law damages. The development of the common law in the sphere of negligent misrepresentation is suggested as having superceded the role of this equitable remedy in an area in which it had hitherto been fertile. The potential for the equitable remedy of compensation to improve the range of remedies available for breach of fiduciary obligations is discussed in the final section of the article.]

1. INTRODUCTION

The Court of Chancery

> could award monetary compensation for infraction of a purely equitable right in the nature of restitution. . . .[1]

This article will examine the remedy of compensation where breach of an equitable obligation owed to another causes that other person to suffer financial loss. The well known equitable remedies where property held in a fiduciary capacity is misapplied will not be discussed.[2] Attention will be directed to the much less certain position where a breach of other equitable obligations causes financial loss. The principles applicable here are argued to be consistent with the general rules governing liability for breach of trust.

This remedy is generally believed to be defunct except as an ill-defined possibility where certain fiduciary obligations are breached. The general misconception that an award of monetary compensation is beyond the pale of Equity has led to confusion in many cases.[3] The writer hopes to lessen that misconception and contribute to an increased understanding of the potential use of this remedy.

Compensation is awarded within the inherent jurisdiction of Equity. This article neither examines the power to award damages under Lord Cairns' Act[4] nor joins the controversy whether statutory damages are available in

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[1] Meagher R. P., Gummow W. M. C. and Lehane J. R. F., *Equity: Doctrine and Remedies* (1975) 25.

[2] See e.g. Finn P. D., *Fiduciary Obligations* (1977) 111.

[3] A recent example occurs in some of the judgments in *Talbot v. General Television Corporation Pty Ltd* [1980] V.R. 224.

[4] 21 & 22 Vict. c. 27 (1858), s. 2. Corresponding provisions are found in all Australian States.

aid of purely equitable rights,[5] or where an injunction would not have awarded to protect equitable rights.[6] In the latter situation where damages have been purportedly awarded, Equity's inherent compensatory jurisdiction may provide a sounder justification. Section 2 distinguishes the remedy from damages at law, account of profits and rescission and attempts to spell out how to compute compensation in Equity.

Then the actual and potential width of this remedy will be considered. Section 3 will examine compensation outside of fiduciary obligations, tracing the imposition of equitable obligations where misrepresentations caused financial loss. The concurrent jurisdiction of Equity to grant relief against dishonest representations was well established, though rarely exercised. In certain circumstances where the representation was not known to be false the plaintiff could be given an equitable indemnity for loss suffered. A representor, who made a serious representation knowing that the representee would act upon it and was in a special position of knowledge, was obliged not to be forgetful. There was confusion as to whether such circumstances would give relief at law. How *Derry v. Peek*[7] was wrongly interpreted as destroying this equitable development will be examined. Common law developments in negligence have substantially replaced the need for a revival of compensation in this area.

Section 4 considers compensation for breach of a fiduciary obligation. It is argued that the remedy illustrated by *Nocton v. Lord Ashburton*[8] should be available wherever breaches of fiduciary obligations cause financial loss to the 'beneficiary' of the fiduciary relationship. This view is not yet accepted. Where fiduciary obligations imposed on a confidential adviser or a fiduciary purchasing from his beneficiary have been breached, compensation has been awarded. Where a fiduciary improperly sells his property to the beneficiary the remedy situation is unsatisfactory. Whilst the case law imposes difficulties, a development of compensation would be beneficial. Some of equitable compensation's potential is demonstrated where equitable duties of confidence have been breached. Acceptance of the availability of compensation would be the most appropriate method of developing the awards there being made.

2. THE REMEDY IDENTIFIED

(A) *Compensation Differentiated from Damages at Law*

The jurisdictional distinction between damages at common law and compensation in Equity is not always appreciated. Although both remedies involve monetary compensation damages were never awarded for breach of purely equitable obligations.[9] This was not altered by the Judicature Acts.[10]

[5] Argued by Spry I. C. F., *Equitable Remedies* (2nd ed. 1980) 552, 555; denied by Meagher *et. al., op. cit.* 524.
[6] Argued by Spry, *op. cit.* 544-5; denied by Meagher *et al., op. cit.* 26.
[7] (1889) 14 App. Cas. 337.
[8] [1914] A.C. 932.

Semantically, 'damages' should refer to the common law (or statutory) remedy. Monetary relief in Equity is not usually or usefully thus labelled. The general confusion in this area makes it difficult to be always sure what is meant by 'damages'. Nevertheless, damages as a legal remedy has been purportedly awarded where compensation in Equity is, or should have been, the relief available for breach of purely equitable obligations.

Some guidance as to the nature of equitable compensation occurs in *Ex parte Adamson.*[11]

> 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.[12]

The equitable action involves an actual restitution of what has been lost, or its value. Whether or not compensation is generally available to remedy breaches of equitable obligations the method of computation will be that which makes restitution for the value of the loss suffered from the breach.

This is shown by *Nocton v. Lord Ashburton*[13] which also establishes that compensatory relief in Equity is not confined to remedying misappropriation of property held in a fiduciary capacity. The appellant solicitor advised a client to release part of a mortgage security which gave the solicitor further security for his own mortgage. The plaintiff's security was inadequate when the mortgagor defaulted. While an action of negligence against the solicitor would have originally succeeded, an amendment of the pleadings, which had alleged actual fraud, was statute-barred. The House of Lords restored the findings of the trial judge that there was no fraud but affirmed the award of the Court of Appeal of damages for deceit on other grounds. The majority of their Lordships granted equitable relief on the basis of breach of fiduciary duty,[14] a matter within the exclusive jurisdiction of Equity.

Viscount Haldane in his exposition of the inherent compensatory jurisdiction observed that Equity and the common law exercised concurrent jurisdiction against actual fraud. The Court of Chancery as a Court of conscience

> could order the defendant, not . . . to pay damages as such, but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury.[15]

That relief was available to remedy this breach of fiduciary obligation.

[9] See Meagher *et al., op. cit.* 515; *Ex parte Adamson* (1878) 8 Ch.D. 807, 819.
[10] Meagher *et al., op. cit.* 515; also see 47.
[11] (1878) 8 Ch.D. 807.
[12] *Ibid.* 819 *per* James and Bagallay L.JJ. In this case the equitable wrong was misappropriation of partnership property.
[13] [1914] A.C. 932.
[14] The breach involved is discussed in Section 4 *infra.* Lord Parmoor held that the pleadings alleged negligence in the appellant's employment as a solicitor, *ibid.* 977. Lord Dunedin, if necessary, and probably Viscount Haldane would have held the same, *ibid.* 965, 946.
[15] [1914] A.C. 932, 952.

Restitution to the previous financial position was emphasised as in *Ex parte Adamson.*

Although Viscount Haldane distinguished compensation or restitution from damages the enquiry as to damages ordered by the Court of Appeal was left unaltered. The Lord Chancellor probably would have varied this to an order of compensation which may have produced a different result from damages if the appellant had objected.[16] There the question was 'of form only' and the effect of altering the form of relief to be within the 'proper mode' of an award of compensation would have been negligible.

Although compensation in Equity will often produce the same result as damages the common law and equitable remedies utilise different rules to achieve the similar goal of compensating a plaintiff for loss suffered. This can lead to significant differences in the ultimate awards. For example, common law damages in negligence and contract are subject to requirements of foreseeability and remoteness which are not relevant to Equity when it restores property or money lost by breach of an equitable obligation. This is brought out by the judgment of Street J. in *Re Dawson (deceased)*[17] which illustrates the different principles involved in the assessment of compensation in Equity and damages at law.[18]

A trustee made improper payments in New Zealand pounds which then were in parity with Australian pounds. When the liability to pay was enforced the New Zealand pounds was worth more than the Australian. Street J. awarded restitution using the exchange rate at the date of restoration. This increased the amount of Australian currency payable. His Honour did not apply the rule where damages were claimed at law that, because conversion was assessed at the date of the breach, the rate of exchange then prevailing was used.[19] Although later changes in exchange rates were too remote for inclusion as damages at law the personal obligation of a defaulting trustee to effect a restitution to the estate was not limited by common law principles concerning remoteness of damage.[20] Street J. relied on several earlier cases as showing that a defaulting

> trustee is liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter. . . . [T]he obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries is of more absolute nature than the common law obligation to pay damages for tort or breach of contract.[21]

[16] *Ibid.* 958. See also *McGrath v. Goldman* (1976) 64 D.L.R. (3d) 305 where Bouck J. declined as counsel did not press the point to compare and contrast the relief available at law and in Equity.

[17] [1966] 2 N.S.W.R. 211.

[18] While this case involved compensation for misappropriation of property by a defaulting trustee the principles of assessment used should generally apply to the wider areas of compensation discussed in this article.

[19] Note the breach-date rule at law may now not apply to foreign currency obligations, see *Miliangos v. George Frank (Textiles) Ltd* [1976] A.C. 443, especially 467-8 and Nygh P. E., 'Judgments in Foreign Currencies' (1980) 22 *Malaya Law Review* 1. For recent assaults on an inflexible breach-date rule at law see *Johnson v. Agnew* [1980] A.C. 367, 400-1 and *Malhotra v. Choudhury* [1980] Ch. 52.

[20] [1966] 2 N.S.W.R. 211, 214.

His Honour also emphasised that the equitable relief for breach of trust required the loss to be made good by a replacement of the assets, even if their value had increased dramatically between the date of breach and restoration. Therefore:

> monetary compensation . . . paid in lieu of restoring assets . . . is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation.[22]

Another possible practical distinction between an award of damages and compensation in Equity is that consequential relief appears to be unavailable when restoration is made for breach of an equitable obligation.[23] Consequential loss is recoverable in deceit and possible negligence.[24]

Recently, Brightman L.J. reluctantly held that for compensation, in contrast to damages, the tax liability of individual beneficiaries could not be taken into account to reduce the assessment.[25] There may be a potential for differences in awards of interest under the inherent equitable jurisdiction from interest awards now available at law.[26]

However, the distinctions between an award of damages and compensation are likely to become increasingly blurred. This is not just because of failure to comprehend the equitable principles. The greater flexibility now available with damages at law, especially the increased willingness of courts not to apply the general rule of assessing damages at the date of breach,[27] will make it more likely that restitution in Equity will give the same result as damages.[28]

[21] *Ibid.* 215-6. Cf. *Jacks v. Davis* (1980) 12 C.C.L.T. 298 where Anderson J. held that an equitable claim for breach of fiduciary duty was not limited by any test of reasonable foreseeability.

[22] *Ibid.* 216. Of course if the value of the assets had decreased from the date of breach the *cestui que trust* could exercise his option of taking the cash value derived from the breach plus interest. E.g. see *Re Massingberd's Settlement, Clarke v. Trelawny* (1890) 59 L.J. Ch. 107, 108.

[23] See Sealy L. S., 'Some Principles of Fiduciary Obligations' [1963] Cambridge L.J. 119, 140. But cf. *Jacks v. Davis* (1980) 12 C.C.L.T. 298 where consequential relief was awarded and the plaintiff was under a duty to mitigate.

[24] Examples are for damage to the property purchased, *Clarke v. Yorke* (1882) 47 L.T. 381, personal injuries and damage to the plaintiff's property *Nicholls v. Taylor* [1939] V.L.R. 119. Also see *Doyle v. Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158. Harkness A., 'The Measure of Damages in Negligent Mis-Statement' (1980) unpublished LL.B. (Hons) paper held in Australian National University Law School Library argues that consequential damages are available against negligent mis-statement, pp. 68-70. They were awarded in *Esso Petroleum Co. v. Mardon* [1976] Q.B. 801.

[25] *Bartlett v. Barclays Bank Trust Co. Ltd (No. 2)* [1980] 2 W.L.R. 430, 450-1. Cf. the rule of damages *Cullen v. Trappell* (1980) 29 A.L.R. 1, *British Transport Commission v. Gourley* [1956] A.C. 185.

[26] The legislation first allowing judgments at common law to carry interest is discussed in *Reis v. Carling* (1908) 5 C.L.R. 673, 676-7, 684-5. The inherent equitable jurisdiction to award interest is discussed in *Wallersteiner v. Moir (No. 2)* [1975] Q.B. 373 where interest was awarded from the date of breach.

[27] *Supra* n. 19 Willingness not to universally apply this rule may explain why the House of Lords held that damages under Lord Cairns' Act could not be assessed differently from common law damages, *Johnson v. Agnew* [1980] A.C. 367. Also in an action in detinue a plaintiff is entitled to claim the value of the chattel in money assessed at the date of judgment. *General and Finance Facilities Ltd v. Cooks Cars (Romford) Ltd* [1963] 2 All E.R. 314, *Malhotra v. Choudhury* [1980] Ch. 52, 78-9.

[28] *Jacks v. Davis* (1980) 12 C.C.L.T. 298 where Anderson J. held 'the proper measure

(B) *Compensation Distinguished from other Equitable Remedies*

1. Account of Profits

The distinction between compensation in Equity and the remedy by which Equity can give an account of profits is relatively straightforward. An account of profits is designed to prevent the wrongdoer, who has breached an equitable obligation owed to the plaintiff, from retaining any advantage derived from his default. It is immaterial whether or not the plaintiff has suffered loss. Compensation is designed to indemnify the plaintiff for his loss. It is immaterial whether the wrongdoer has made any gain. There will no doubt be occasions when the wrongdoer's gains equal the innocent party's losses but this need not be so.

The judgment of Dixon A.J. in *McKenzie v. McDonald*[29] where an award of compensation in Equity's inherent jurisdiction was made, neatly highlighted the different bases of the two remedies. The defendant breached fiduciary obligations owed to the plaintiff when he purchased her farm for £4 an acre. He later resold it for £4.10s an acre on extended terms. His Honour assessed the value of the farm to be £4.5s an acre when the defendant made the purchase. If called on to account the defendant would have been liable for the difference between his resale and initial purchasing price. However, the difference between the assessed value of the property and the initial sale price was used to indemnify the plaintiff for her loss.[30] This judgement also illustrates that a plaintiff cannot recover both compensation and an account of profits.

Compensation was not assessed by reference to the value of the farm at the date of restoration. Is this inconsistent with the nature of compensation? Should increases in value have been included? While a cursory comparison with remarks in *Re Dawson (deceased)*[31] may suggest this, it is submitted that the method of computation used in *McKenzie v. McDonald* is consistent with the principles underlying compensation in Equity.[32]

Although compensation is designed to put a plaintiff 'in as good a position pecuniarily as . . . before the injury',[33] it is imperative to ascertain the loss resulting from breach of the relevant equitable duty, that is, the position the plaintiff would have been in if there had been no breach. Where a trustee misappropriates trust property the *cestui que trust* would still have

of damages in respect of a claim for . . . breach of a fiduciary duty is the same as in a claim for damages for fraud' *ibid.* 317, though not based on orthodoxy, illustrates this trend.

[29] [1927] V.L.R. 134.
[30] *Ibid.* 146.
[31] [1966] 2 N.S.W.R. 211.
[32] This question does not relate directly to the distinction between compensation and an account of profits.
[33] *Nocton v. Ashburton* [1914] A.C. 932, 952 *per* Viscount Haldane L.C. See also *Re Dawson (deceased)* [1966] 2 N.S.W.R. 211, 215-6 *per* Street J. and *Ex parte Adamson* (1878) 8 Ch.D. 807, 819.

held it beneficially had the trustee not breached his equitable obligation. Therefore, for the *cestui que trust* to be placed in as good a position pecuniarily as before the injury, compensation must be based on the value of the property at the date of restoration (where this is higher than at the date of the equitable wrong). However, where one in a fiduciary position breaches the purchasing rule[34] as in *McKenzie v. McDonald* the beneficiary would not still have held the property had there been no breach. Rather he would have sold the property at a full and fair valuation. The equitable wrong is not the purchase but the abuse of the confidential relationship in making the purchase. Therefore the beneficiary will be in as good a position as that before the injury if compensation is limited to the difference between the actual value and the lower price received when the purchase was made.[35]

This is not to say that the actual result of *Re Dawson (deceased)* should have been different if the equitable wrong had been that which occurred in *McKenzie v. McDonald.* Then the aim would be to compensate the plaintiff for the loss of New Zealand pounds which would have occurred when the purchase was made at an undervalue. If Australian currency was the medium of the award this could only be done by using the rate of exchange prevailing when the award was made which would have increased the amount of Australian currency payable.

2. Rescission of a Contract

'Rescission' here refers to the avoidance or setting aside *ab initio* of dispositions and transactions, (usually contracts),

> which in the eyes of equity are improperly procured by innocent but material misrepresentation, equitable fraud, undue influence or other unconscionable conduct. . . .[36]

This remedy aims to restore both parties substantially to the *status quo ante.* Equity can give rescission wherever, by the exercise of its powers to take account of profits and make allowance for deterioration,

> it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.[37]

Where a party has incurred loss through entering a voidable transaction, rescission will restore that party to his former pecuniary position. It is possible that only when rescission is unavailable or no longer possible

[34] When this fiduciary obligation arises is discussed in Section 4 *infra.*

[35] Admittedly if fully informed the beneficiary may refuse to sell. Where he already knew that the fiduciary was the purchaser — as in *McKenzie v. McDonald* — one can assume that he would sell if the higher actual value was disclosed. Where the breach of the purchasing rule also involves non-disclosure of the identity of the purchaser, one cannot be certain that the beneficiary would still sell. Nevertheless this is a reasonable assumption to make in computing compensation. If the beneficiary can be persuaded to sell at an undervalue he is likely to sell at a higher fair value even if he knows it is to someone in whom he has reposed trust and confidence.

[36] Meagher *et al., op. cit.* 527. Where a contract is voidable at law by the party aggrieved Equity exercises a concurrent jurisdiction. *Ibid.* 526.

[37] *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App Cas. 1218, 1279 *per* Lord Blackburn.

because both parties cannot be restored to the *status quo ante* need the issue arise whether an award of compensation in the inherent jurisdiction of Equity is available.[38] Usually the question whether compensatory relief is available only arises when rescission is impossible.[39] However, as will be seen, *Coleman v. Myers*[40] suggests that compensation may be available where rescission is not practically just.

In contrast to rescission, compensation in Equity is essentially unilateral, returning the party who has suffered the loss to the *status quo ante*. This might place the party obliged to indemnify the plaintiff in a worse position than before the relevant transaction, as in *Nocton v. Lord Ashburton*.[41] Unless the equitable wrongdoer made a profit as large as the innocent party's loss, he will be worse off than originally when obliged to make restitution. Since an award of compensation will often be onerous for the liable party, it is, as will be seen, available against breaches of equitable obligations less frequently than rescission.

3. COMPENSATION OUTSIDE OF FIDUCIARY OBLIGATIONS

(A) *Equitable Compensation when Representation Dishonestly Made*

> [I]n cases of actual fraud the Courts of Chancery and of Common Law exercised a concurrent jurisdiction from the earliest times.[42]

An early example of compensation in Equity's concurrent jurisdiction is *Colt v. Woollaston*.[43] Indeed until *Pasley v. Freeman*[44] fraudulent misrepresentations made by persons not parties to the transaction induced by their fraud were not redressed at common law.[45]

After 1789 the Court of Chancery maintained and occasionally exercised its jurisdiction to award compensatory relief to a plaintiff seeking to recover sums lost by knowingly false representations.[46] Nevertheless, usually it

[38] It may be an open question whether a person who is unwilling to rescind should be entitled to compensation.

[39] E.g. *Nocton v. Ashburton* (release of the mortgage security not with the misbehaving fiduciary); *McKenzie v. McDonald* (intervention of third parties); *ReCape Breton Co.* (1885) 29 Ch.D. 795 (company elected not to rescind and resold the property).

[40] [1977] 2 N.Z.L.R. 225, discussed Section 4.

[41] [1914] A.C. 932.

[42] *Nocton v. Lord Ashburton* [1914] A.C. 932, 951 *per* Viscount Haldane L.C. See also *Robinson v. Abbott* (1894) 20 V.L.R. 346, *per* Holroyd J.

[43] (1723) 2 P. Wms. 154; 24 E.R. 679.

[44] (1789) 3 T.R. 51; 100 E.R. 450.

[45] Sheridan L. A., *Fraud in Equity* (1957) 28. Professor Sheridan refers to Spence G., *Equitable Jurisdiction of the Court of Chancery* (1846) Vol. I, 622 and a *dictum* of Jekyll M.R. in *Trenchard v. Wanley* (1723) 2 P. Wms. 166, 167, 24 E.R. 685 as showing that the view of Lord Mansfield in *Bright v. Eynon* (1757) 1 Burr. 390, 396; 97 E.R. 365, 368 that all frauds for which relief could be granted in Equity were also redressable at common law was wrong.

[46] Despite the decision of Lord Erskine in *Clifford v. Brooke* (1806) 13 Ves. 131; 33 E.R. 244, *Colt v. Wollaston* was followed in several cases after 1789. E.g. *Sowerby v. Warder* (1791) 2 Cox 268; 30 E.R. 124, *Green v. Barrett* (1826) 1 Sim. 45; 57 E.R. 495. See also *Hill v. Lane* (1870) L.R. 11 Eq. 215, *Ramshire v. Bolton* (1869) L.R. Eq. 294 and Sheridan *op. cit.* 29.

declined to grant relief in the nature of damages for mere deceit where damages at law would have been an adequate remedy.[47]

There are no examples of compensatory relief in the concurrent jurisdiction where deceit could be established since *Derry v. Peek*[48] The explanation for cessation of this concurrent jurisdiction probably is the adequacy of the common law remedy of damages for deceit. There is now no advantage in seeking equitable relief 'in the nature of damages'. Viscount Haldane in *Nocton v. Lord Ashburton*, after referring to the concurrent jurisdiction of the Court of Chancery in actual fraud, noted

> the greater freedom which, in early days, the Court of Chancery exercised in admitting the testimony of parties to the proceedings. . . . Moreover, its remedies were more elastic.[49]

These former advantages no longer exist in a deceit action, with its well established principles for awarding damages.

(B) *Equitable Compensation where Dishonesty not Established*

1. Developments Prior to *Derry v. Peek*

Before *Derry v. Peek*[50] equitable compensatory relief had been decreed where misrepresentations were made without knowledge of their falseness by persons not subject to fiduciary obligations. The main impetus behind the imposition of an equitable obligation to make the representation good, by the payment of compensation if necessary, was possession by the representor of information which would have enabled him to know the true facts. There was much confusion as to the position at law where it was generally believed that an action would lie as well.

The earliest example is *Burrowes v. Lock*.[51] The trustee of a fund was specifically asked by the plaintiff, who was intending to purchase part of the equitable interest, whether the *cestui que trust* was absolutely beneficially entitled to his share of the fund. The trustee represented that he was and could therefore make a good assignment. However, there was a prior encumbrance on the fund assigned to the plaintiff of which the trustee had received notice. A bill was filed to compel the trustee to make up the deficiency in the trust fund due to the prior encumbrance. Although the trustee pleaded that he did not recollect the prior encumbrance he was obliged to make good his representation that the assignor was entitled to £288 (if the assignor could not make up the deficiency). He was personally liable to compensate the plaintiff for that part of the £288 lost due to the prior encumbrance.

[47] *Robinson v. Abbott* (1894) 20 V.L.R. 346, 366 *per* Holroyd J.
[48] (1889) 14 App. Cas. 337.
[49] [1914] A.C. 932, 951-2. The greater freedom at Chancery to admit the defendant's testimony was pointed out by Lord Eldon in *Evans v. Bicknell* (1801) 6 Ves. 174; 31 E.R. 998.
[50] (1889) 14 App. Cas. 337.
[51] (1805) 10 Ves. 470; 32 E.R. 927.

Sir William Grant held that this demand against the trustee was properly made in Equity, quoting Lord Eldon in *Evans v. Bicknell*:[52]

> [I]t is a very old head of equity; that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false.[53]

Although Lord Eldon had referred to a representation known to be false, here the plaintiff needed only to show that the representation was false and that the representor had knowledge of the contrary facts for him to be fixed with that knowledge.

> The Plaintiff cannot dive into the secret recesses of his heart: so as to know, whether he did or did not recollect the fact; and it is no excuse to say, he did not recollect it. At least it was gross negligence to take upon him to aver positively and distinctly, that *Cartwright* was entitled to the whole fund, without giving himself the trouble to recollect, whether the fact was so or not; without thinking upon the subject.[54]

This case did not purport to overthrow the general rule that a person making an honest misrepresentation where the contrary facts were unknown was not liable at law or in Equity to make it good.[55] 'Gross negligence' is not failure to comply with knowledge obligations imposed on a 'reasonable trustee' at law. The above quotation illustrates that it was the ability of the defendant to recall the truth arising from possession of the actual facts and his positive and distinct misrepresentation which made his conduct grossly negligent. The trustee also knew the reliance which was to be placed upon his representation. Thus it was not made casually. Subsequent cases supporting the availability of compensation emphasised the misrepresentation being made deliberately or on a solemn occasion.

It is suggested that sound policy reasons influenced this award of equitable relief. The decision relieved a plaintiff from the difficulties of proving the precise mental state of the representor when it could be assumed that the representor would know facts of which he had notice. Then a plaintiff could justifiably expect the representor not to make a representation contrary to the information in his possession.

Breach of this equitable obligation is within 'fraud' in Equity.[56] There was little discussion here of the position at law. The defendant unsuccessfully objected that the relief sought was a claim for damages. Sir William Grant emphasized that the claim was properly made in Equity but did not decide whether relief was available at law.

Several later cases approving the comment of Sir William Grant, that the plaintiff did not need to prove actual dishonesty, involved representations

[52] (1801) 6 Ves. 174; 31 E.R. 998.
[53] (1805) 10 Ves. 470, 475; 32 E.R. 927, 929.
[54] (1805) 10 Ves. 470, 476; 32 E.R. 927, 929.
[55] See *Merewether v. Shaw* (1789) 2 Cox 124, 134-5; 30 E.R. 58, 62 *per* Lord Thurlow L.C., *Dyer v. Dyer* (1682) 2 Chan. Cas. 108; 22 E.R. 869.
[56] 'Fraud' in Equity covered a wider field than at law. See *Chesterfield v. Janssen* (1751) 2 Ves. Sen. 125; 28 E.R. 82. *Story's Equity Jurisprudence* 12th ed. (1877) Vol. I, 186. However, an exclusive definition of fraud in Equity does not exist.

known to be false.[57] However, *Burrowes v. Lock* was followed in *Slim v. Croucher*[58] where actual dishonesty was not established. A loan was made on the security of a lease which the borrower had claimed to be entitled to. Previously the lender had requested and received written intimation from the defendant lessor of his intention to grant the borrower the lease. The lessor knew that the request was made in connection with the impending loan and purported to grant the lease which the borrower then mortgaged to the lender. Since the lessor had earlier granted the same lease to the borrower who had assigned it for value the lender's security was worthless when the borrower defaulted.

A bill was filed in Chancery to compel the lessor to pay to the plaintiff the loan and interest thereby lost. The misrepresentation was held to be 'of a fact'.[59] The Court accepted that the defendant may have forgotten his prior grant of the lease but held that the Court of Equity had jurisdiction which it should exercise to direct the award sought. Lord Campbell L.C. viewed this case as indistinguishable from *Burrowes v. Lock*.[60] He emphasised that in both cases there was no fiduciary relationship between the representor and representee who were strangers. As the defendant had actual prior notice of the grant which he had previously made the same reasons existed for imposing an equitable obligation as in *Burrowes v. Lock*.

However, Lord Campbell expressly stated that relief was also available at law.[61] Nevertheless, this was

> a much fitter case for a Court of Equity than for a Court of law, because a Court of law could only have left it to a jury to assess the damages; whereas here, by the superior powers of the Court of Equity, justice can be done between the parties in the most minute detail.[62]

In the light of *Derry v. Peek*[63] no action of deceit lies where a defendant merely ought to have known the falsity of his representation. However, *Slim* was not premised on the misconception that relief was available at law. Rather the equitable remedy was available in spite of the assumed remedy at law which the defendant had argued was the only possible remedy.

Lord Campbell L.C. mentioned 'a general claim to damages which a Court of Equity earlier could not have assessed, but distinguished it from misrepresentations of a fact where there was no difficulty in computing the loss.[64] This suggests that compensation in Equity was more suited to

[57] E.g. *Price v. Macaulay* (1852) 2 De. G.M. & G. 339; 42 E.R. 903 and *Lake v. Brutton* (1856) 8 De. G.M. & G. 440; 44 E.R. 460. Also the equitable remedy applied in these cases was not compensation.

[58] (1860) 1 De. G.F. & J. 518; 45 E.R. 462.

[59] *Ibid.* 524; E.R. 465 *per* Lord Campbell L.C. It is probably incorrect to regard this as a misrepresentation of an existing fact. See text n. 8 *infra*.

[60] (1805) 10 Ves. 470; 32 E.R. 927.

[61] (1860) 1 De G.F. & J. 518, 573; 45 E.R. 462, 464.

[62] *Ibid.* 524; E.R. 464-5.

[63] (1889) 14 App. Cas. 337.

[64] (1860) 1 De G.F. & J. 518, 524; 45 E.R. 462, 465. Cf. *Whitmore v. Mackeson* (1852) 16 Beav. 126; 51 E.R. 725, an equitable suit within the concurrent jurisdiction refused on the ground that *inter alia* the amount of damages due to a misrepresentation

remedying a misrepresentation of a specific fact than of a more general state of affairs. This may be because payment of a specific sum to make a representation good is only possible where the representation is sufficiently specific. The amount required to make good a representation that A is credit-worthy is less clear than where A is represented as entitled to a specific sum or an asset of a particular value, although in both cases the loss suffered in reliance upon the misrepresentation may be clear.

There are no clear applications of compensation where the misrepresentations were not dishonest apart from the 'special circumstances' found in *Burrowes* and *Slim*. Observations, sometimes confused, of Romilly M.R. supported a wider application of the relief granted in the above cases. However, these *dicta* have been confined to situations which do not rely on compensation to enforce representations. Thus their potential to expand the circumstances where Equity would award compensation against misrepresentations was not fulfilled.

In *Re Ward*[65] Romilly M.R. stated there was a long established principle at law and in Equity

> that if a man who makes to another person, upon a solemn occasion, an assertion upon which that person acts, he lies under an obligation to make good his assertion.[66]

However, the assertion here was made by a solicitor in his official character to the Court. Subsequent cases and writers regard the decision as based on the inherent disciplinary jurisdiction of the (now) Supreme Court over solicitors as officers of the Court.[67]

In *Stephens v. Venables (No. 2)*[68] Romilly M.R. made his widest statement supporting a general equitable jurisdiction to award compensation for

> the enforcement of truth in all the transactions of mankind, . . . compelling any person to make good his assertion, when the person to whom it has been made has acted on the faith of it.[69]

The defendant was not compelled to pay compensation as his words did not sufficiently clearly convey the alleged false representation. Again these remarks have not been followed up.

A potentially wide ambit for equitable compensation to enforce representations as to intention was suggested by comments in *Hammersley*

as to the character or credit of another, as distinguished from stating a fact to be true, could only be determined in a Court of law by an action for damages.

[65] (1862) 31 Beav. 1; 54 E.R. 1037.

[66] *Ibid.* 7; E.R. 1039, citing *Pasley v. Freeman* (law) and *Burrowes v. Lock* (equity). Also see *Money v. Jorden* (1852) 15 Beav. 370, 377; 51 E.R. 581, 584 (reversed (1854) 5 H.L.C. 185; 10 E.R. 868).

[67] See e.g. *Cordery on Solicitors* (6th ed. 1968) 158 ff. and *Re Dangers' Trusts* (1889) 41 Ch.D. 178. In *Low v. Bouverie* [1891] 3 Ch. 82, 92 the successful defendant's argument: 'In *Re Ward* the position of the solicitor made it his duty to make correct statements, and this case stands on quite a different footing' suggests that the duty was a special one owed to the Court.

[68] (1862) 31 Beav. 124; 54 E.R. 1084.

[69] *Ibid.* 127-8; E.R. 1086.

v. De Biel,[70] especially from Lord Cottenham in Chancery.[71] Although the decision was probably not then based on contractual analysis,[72] in *Maunsell v. Hedges*[73] the House of Lords unequivocally confined it to contractual liability. Attempts by Sir John Stuart V.C. in a series of cases to treat *Hammersley* as allowing enforcement of representations as to intention outside of contract[74] were finally scotched by the House of Lords in *Maddison v. Alderson*.[75] Thus *Hammersley* cannot now be used to support equitable compensatory relief in enforcing representations.

In several cases *Burrowes*[76] and *Slim*[77] seem to be accepted in *dicta* as good law; e.g. where rescission for misrepresentation was sought[78] and where a purchaser of land sought relief against a misrepresenting vendor.[79] In *Eaglesfield v. Marquis of Londonderry*[80] Jessel M.R. referred to *Burrowes* and *Slim* as authority for the defendants' liability to make good a representation that certain shares were 'No. 1 Preference Stock' or repay the plaintiff's purchase money.[81] However, the Court of Appeal overruled his decision on the ground that there had only been a common misconception of law and not a misrepresentation of fact. A *dictum* of Cotton L.J. in *Shroeder v. Mendl*[82] reaffirmed that Equity could give compensatory relief in rare circumstances where misrepresentations were not knowingly false.

Thus by the 1880's there was a fair amount of support for the compensatory award made in *Burrowes v. Lock*[83] and *Slim v. Croucher*.[84] Where the representor had possession of a specific fact and knowledge that the party seeking the particular information was going to rely on the representation received he was under an equitable obligation not to forget that fact of which he had notice. Failure to do this was redressable by equitable compensation although there was no dishonesty, contract or fiduciary relationship. The representor was obliged to make his specific representation good by replacing the loss suffered by the other party due to the untrue

70 (1845) 12 Cl. & Finn. 45; 8 E.R. 1312.

71 *Ibid.* 61n.; E.R. 1320. Cf. Lord Lyndhurst in the House of Lords. *Ibid.* 78-9; E.R. 1327.

72 Argued by Jackson D., 'Estoppel as a Sword' (1965) 81 *Law Quarterly Review* 84, 92.

73 (1854) 4 H.L.C. 1039; 10 E.R. 769.

74 *Prole v. Soady* (1859) 2 Giff. 1; 66 E.R. 1, *Loffus v. Maw* (1862) 3 Giff. 592; 66 E.R. 544, *Thomson v. Simpson* (1870) L.R. 9 Eq. 497.

75 (1883) 8 App. Cas. 467.

76 (1805) 10 Ves. 470; 32 E.R. 927.

77 (1860) 1 De G.F. & J. 518; 45 E.R. 462.

78 *Pulsford v. Richards* (1853) 17 Beav. 87, 94; 51 E.R. 965, 968, *Re Overend, Gurney & Co.; Ex parte Oakes and Peek* (1867) L.R. 3 Eq. 576, 624.

79 *Phelps v. White* (1880) 5 L.R. Ir. 318, *Brownlie v. Campbell* (1880) 5 App. Cas. 925, 936. Lord Selborne L.C. was of opinion that *Burrowes* and *Slim* were decided because of the defendants' special knowledge of the relevant facts but were inapplicable here, where an innocent misrepresentation occurring in the particulars of a sale was repeated during pre-contractual negotiations.

80 (1876) 4 Ch.D. 693.

81 *Ibid.* 705-6.

82 (1877) 37 L.T. 452, 454.

83 (1805) 10 Ves. 470; 32 E.R. 927.

84 (1860) 1 De G.F. & J. 518; 45 E.R. 462.

representation. The potential to expand the range of circumstances where this equitable obligation could be imposed suggested by various *dicta* had not been realised.

2. *Derry v. Peek* and its Aftermath

Prior to *Derry v. Peek*[85] there was confusion as to whether a common law action of deceit was available for misrepresentations made outside of actual dishonesty. In *Smith v. Chadwick*,[86] a deceit action, the Equity lawyers comprising the Court of Appeal had diverging views as to what was required for liability.[87]

In another case, Lindley L.J. stated that, if a defendant *bona fide* believed his representation, having known but forgotten the true state of things '*Burrowes v. Lock* and *Slim v. Croucher* are conclusive that an action for damages would be maintainable against him'.[88] He noted that in *Slim v. Croucher* Lord Campbell and Knight Bruce L.J. considered that there was also a remedy at law.[89] Lindley L.J. thus not only approved *Burrows* and *Slim*; he seemed to view the equitable remedy as concurrently available with relief at law. With respect to relief at law, these remarks contradict his view of deceit in *Smith v. Chadwick*.[90] Nevertheless they may explain his later belief that *Derry v. Peep* by requiring knowledge of falsity for common law fraud also prevented the equitable relief. It is not clear if 'damages' here meant equitable compensation, legal damage or both.

In *Derry v. Peek* directors misrepresented in a company prospectus that its incorporating Act gave a right to use steam power. The issue was whether a mis-statement made without reasonable grounds for belief was fraud at common law. Stirling J. adverted to the existing divergent views but found that the beliefs were not so unreasonable as to the fraud. The Court of Appeal held this time that deceit was established because the mis-statements were made without reasonable grounds for belief.[91] However, the Law Lords (all common lawyers) held that in an action of deceit the plaintiff must show that a false representation was made knowingly, without belief in its truth or recklessly without caring whether it was true or false.

The leading judgment of Lord Herschell distinguished the action for deceit from

[85] (1889) 14 App. Cas. 337.
[86] (1882) 20 Ch.D. 27.
[87] See *ibid.* 44, *per* Jessel M.R. (a careless statement which the representor ought to have known was true); *ibid.* 75 *per* Lindley L.J. (that the defendant not believe the truth of the representation). It is unclear what Cotton L.J. meant by a 'reckless misrepresentation' *ibid.* 68. Cf. his view in *Weir v. Bell* (1878) 3 Ex.D. 238, 242, with *Arkwright v. Newbold* (1881) 17 Ch.D. 301, 320 and *Shroeder v. Mendl* (1877) 37 L.T. 452, 454.
[88] *Mathias v. Yetts* (1882) 46 L.T. 497, 506.
[89] *Ibid.*
[90] (1882) 20 Ch.D. 27, 75.
[91] (1887) 37 Ch.D. 541, 565 *per* Cotton L.J., 578 *per* Sir James Hannen, 585 *per* Lopes L.J.

cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given.[92]

Burrowes v. Lock[93] was such an example where it was no defence that the answer was made honestly. *Burrowes* and *Slim*[94] were not expressly overruled but were treated as irrelevant to this action of deceit.

While a money bill in Equity was a different form of action from deceit, the real issue is whether a distinction of substance exists between the circumstances where equitable compensation had been awarded for non-fraudulent misrepresentation and those where common law damages were refused in *Derry v. Peek.* If not, it is more strongly arguable that *Derry v. Peek* overturned the equitable awards.

The distinction drawn by Lord Herschell above did not advert to whether the awards in *Burrowes* and *Slim* were within the concurrent or exclusive jurisdiction of Equity. Of necessity *Derry v. Peek* destroys the argument that an action of deceit could be available if the representation was made honestly.

Lord Herschell emphasised that in cases like *Burrowes* the representor was 'a person within whose special province it lay to know a particular fact'.[95] In *Burrowes* and *Slim* this was because the defendants had actual notice of the fact. It is difficult to see why it was not in the special province of the defendant company directors to know the fact they mis-stated. Arguably they were in a far better practical position to know whether their company was authorised to use steam than prospective investors. However, they did not have the same special province to know this fact as did the defendants in *Burrowes* and *Slim* who had actual notice of the relevant fact. It was not established that they had been informed that consent to the use of steam could be refused and then had forgotten this. Rather they had no reasonable grounds for their belief given the terms of the incorporating Act. Also the Act was theoretically available for all to study whereas the fact mis-stated in *Burrowes* and *Slim* was peculiarly within the knowledge of the representor. Admittedly this is a rather fine distinction.

On this view, while *Burrowes* and *Slim* were not overruled by *Derry v. Peek,* compensation could now only be awarded if the misrepresentation was contrary to facts of which the defendant had actual notice.[96] Any possibility of Equity expanding the range of 'special circumstances' where

[92] (1889) 14 App. Cas. 337, 360.
[93] (1805) 10 Ves. 470; 32 E.R. 927.
[94] (1860) 1 De G.F. & J. 518; 45 E.R. 462.
[95] (1889) 14 App. Cas. 337, 360.
[96] Lord Bramwell mentioned the 'equitable rule' allowing rescission for material, non fraudulent misrepresentation but said, 'To found an action for damages there must be a contract and breach, or fraud' *ibid.* 347. While this could be construed as denying the possibility of equitable compensation in any circumstances apart from fraud at law Lord Bramwell did not directly address himself to the remedy decreed in *Burrowes.*

compensation would be available to include the making of a representation without reasonable grounds for belief had been scotched.

Despite the above view, *Derry v. Peek* was interpreted as having a more devastating effect on equitable compensation:

(a) *Burrowes Confined to Estoppel where Action not Based on the Representation*

In *Low v. Bouverie*[97] beneficiaries sought a loan on the security of their interest in a trust fund. The plaintiff asked whether the interest was unencumbered. The trustee replied that it was subject to certain encumbrances but forgot several prior encumbrances of which he had received notice. As a result, when the borrower became bankrupt the plaintiff's security was worthless. The action was to have the trustee declared liable for the loan interest thereby lost. North J. held that the trustee was liable referring to *Slim v. Croucher* and *Burrowes v. Lock.*[98]

In allowing the defendant's appeal, the Court if Appeal examined the effect of *Derry v. Peek*[99] on *Burrowes*[1] and *Slim.*[2] Lindley L.J. stated,

> until that case was decided, it was generally supposed to be settled in Equity that liability was incurred by a person who carelessly, although honestly, made a false representation to another about to deal in a matter of business upon the faith of such representation: *Burrowes v. Lock; Slim v. Croucher.* This general proposition is, however, quite inconsistent with *Derry v. Peek.*[3]

Derry v. Peek did not apply where there was a legal obligation on the defendant to give the plaintiff correct information.[4] Nor did it affect the law relating to warranties or estoppel. Estoppel was not a cause of action but a rule of evidence precluding a person from denying the truth of a previous statement.[5] This is the orthodox view of estoppel by representation. Lindley L.J. hinted that the trustee in *Burrowes* acted dishonestly but Bowen L.J. treated the case as correct and untouched by *Derry v. Peek* on estoppel,[6] with the trustee being estopped from denying that the assigned fund was unencumbered.

However, the Court held that *Slim v. Croucher* was incorrect. Kay L.J. stated,

> The doctrine of estoppel seems scarcely applicable. The representation relied on in *Slim v. Croucher* was more like a contract or promise than the statement of an existing fact. . . . [T]here seems to have been no consideration to support a contract.[7]

[97] [1891] 3 Ch. 82.
[98] *Ibid.* 90.
[99] (1889) 14 App. Cas. 337.
[1] (1805) 10 Ves. 470; 32 E.R. 927.
[2] (1860) 1 De G.F. & J. 518, 45 E.R. 462.
[3] [1891] 3 Ch. 82, 100 and see text at n. 78 *supra.* While *Derry v. Peek* is inconsistent with this general proposition it is argued that *Burrowes* and *Slim* involved more than a careless misrepresentation.
[4] *Ibid.* When this legal obligation arose was not specified.
[5] *Ibid.* 101 *per* Lindley L.J., 106 *per* Bowen L.J.
[6] *Ibid.*
[7] *Ibid.* 109, Lindley L.J. *ibid.* 102 stated simply that *Slim* could not be supported on the ground of estoppel.

This views Lord Campbell as incorrect in stating that the misrepresentation was 'of a fact'.[8] In *Slim* the lendor would not have advanced money just because the lessor represented that he could grant a lease. His representation of intention, that he *would* grant the lease, was vital. The representation, being as to future intention and not a contractual promise, could not be enforced because of *Jorden v. Money*.[9] If this were the sole limitation on *Slim v. Croucher*[10] there would be a considerable scope for equitable compensation.[11] Thus if the lessor in *Slim* represented, not that he would grant a lease to the borrower, but that he had already done so, forgetting his grant to someone else, this would be misrepresentation of a fact. The case would be within those special circumstances making the misrepresentation improper in Equity where equitable compensation had been awarded.

However, if estoppel could not be a cause of action as Lindley and Bowen L.JJ. emphasised, then equitable compensation could not be awarded in the above example. Even if the lessor in *Slim* could be estopped from denying a representation of fact, the lender would need to rely on that representation and not some existing right (such as that of a beneficiary against his trustee) to establish the action.[12]

Nevertheless in *Low v. Bouverie*,[13] each member of the Court of Appeal indicated that the plaintiff would have been entitled to relief had the representation been sufficiently clear. The relief would not be the damages for misrepresentation claimed, but an order on the defendant as 'trustee' for the plaintiff to pay the beneficial interest in question, with the defendant estopped from asserting the undisclosed encumbrances.[14] That relief, supposedly based on estoppel, was refused because the representation was held to be sufficiently ambiguous to mean that the defendant was only referring to those encumbrances he knew of.[15]

This decision which has been accepted as showing that *Burrows* is confined to the use of estoppel as a shield and that otherwise equitable compensation is not available to make a good representation requires further analysis for two reasons.

8 (1860) 1 De G.F. & J. 518, 524; 45 E.R. 462, 265.
9 (1854) 5 H.L.C. 185; 10 E.R. 868.
10 (1860) 1 De G.F. & J. 518; 45 E.R. 462.
11 Cf. Meagher *et al.*, *op. cit.* 362.
12 See Sheridan L. A., 'Equitable Estoppel today' (1952) 15 *Modern Law Review* 325, 330.
13 [1891] 3 Ch. 82.
14 [1891] 3 Ch. 82, 103 *per* Lindley L.J., 106 *per* Bowen L.J., 113 *per* Kay L.J. Meagher *et al.*, *op. cit.* 362 incorrectly infer that because Bowen L.J. stated that estoppel by itself could not found a claim to relief that he would not have allowed the claim of the plaintiff if the representation had been as unambiguous as in *Burrowes*. Although, this would be the logical inference to draw, Bowen L.J. at 106 states that relief is unavailable as estoppel because the representation was not clear enough.
15 *Ibid.* 103 *per* Lindley L.J.

First, *Burrowes v. Lock*[16] was not decided by Sir William Grant on the basis that the trustee's refusal to hand over the unencumbered share was the cause of action as Lindley L.J. suggested.[17] The cause of action was based on the special circumstances of the representation (especially the trustee's prior notice of the facts) which demonstrated at least 'gross negligence'. Nevertheless *Burrowes* could have been decided on the first basis. Because the beneficiary assigned his whole interest to the plaintiff, the plaintiff now had the former beneficiary's rights against the defendant for an account of the trust property. This is a claim based on the plaintiff's position as beneficiary and existing apart from the representation; the trustee could be estopped from denying his assertion that there was no prior charge.[18] Given the earlier beliefs that *Burrowes* and *Slim* were decided within the concurrent jurisdiction where relief was available at law[19] it is possible that this interpretation of *Burrowes* was considered to be the only way the case could survive *Derry v. Peek*.[20] As seen, *Slim*[21] could not be thus interpreted.

Secondly, the statements that the defendant would have been 'estopped' from denying the other encumbrances (and bound to pay over the whole fund bar disclosed encumbrances) if he had unambiguously represented there were no other encumbrances, is inconsistent with the assertion that estoppel is not a cause of action. Lindley L.J. stated that the order would not have been damages for misrepresentation but an order on the defendant as 'trustee' for the plaintiff.[22] Although this could have occurred in *Burrowes*, this plaintiff had no rights against the defendant as trustee apart from the misrepresentation.[23] He had a mortgage of the beneficial interest. This was simply a security interest. On default by the original *cestui que trust* there was no assignment of the interest to the plaintiff. Therefore there was no trustee — beneficiary relationship. The position was more akin to that in *Slim* where there was only a security interest.

In this writer's view the apparent preparedness of the Court of Appeal in *Low v. Bouverie*[24] to make the defendant liable for an unambiguous misrepresentation of fact is not orthodox use of estoppel. Such an award would be based on the misrepresentation. It would be indistinguishable from the awards made in *Burrowes* and *Slim*, based on misrepresentation,

16 (1805) 10 Ves. 470; 32 E.R. 927.

17 [1891] 3 Ch. 82, 101. See Sheridan, *Fraud in Equity* 36 and 15 *Modern Law Review* 325, 329. Note if this was the cause of action there would be no need to refer to the 'gross negligence' of the representation since estoppel can now be used strictly to prevent assertion of a contrary fact to that represented See Fleming *The Law of Torts* (5th ed. 1977) 634.

18 This interpretation of the case is used by Farwell J. in *Exploring Land and Minerals Co. Ltd v. Kolckmann* (1906) 94 L.T. 235, 237.

19 See e.g. the dicta of Lindley L.J. in *Mathias v. Yetts*, text at n. 88 *supra*.

20 (1889) 14 App. Cas.

21 (1860) 1 De G.F. & J. 518; 45 E.R. 462.

22 [1891] 3 Ch. 82, 103.

23 See Jackson D., 'Estoppel as a Sword' (1965) 81 *Law Quarterly Review* 84, 97 and *Williston on Contracts* (2nd ed. 1937) para. 1508.

24 [1891] 3 Ch. 82.

which the Court of Appeal here held could no longer be justified because of *Derry v. Peek*.

The same is argued for the award almost made in *Porter v. Moore*[25] where a trustee unambiguously represented to mortgagees of the trust fund that he had received no notice of a prior charge. The mortgagees would have succeeded in an equitable action, claiming that the trustee held the defaulting beneficiary's share 'in trust' for the mortgagees, being estopped from setting up in discharge prior encumbrances, except for the mortgagees' misrepresentation and concealment of a material fact. Again the mortgagees would have no rights against the defendant as trustee apart from the misrepresentation.

Thus the statements that estoppel could not be a cause of action in *Low* are inconsistent with *dicta* in both that case and *Porter* allowing for awards against the defendants as 'trustee' for the plaintiffs. It should be possible for later courts to expose this inconsistency and to affirm the availability of equitable compensation. Then attention could be refocussed on determining in which special circumstances equitable obligations should be imposed. For example, were it not for the inequitable conduct of the plaintiffs *Porter* would be indistinguishable from *Burrowes* in the circumstances surrounding the misrepresentations. However, there have been only a few very tenuous suggestions that awards of compensation in Equity as made in *Burrowes* and *Slim*, are possible against a non-fraudulent misrepresentation of fact.

Vaughan Williams L.J. in *Williams v. Pinckney*[26] remarked,

> The common-law doctrine of estoppel is . . . part of the law of evidence, and is not the same as the equitable doctrine. You cannot found an action on it as you can in equity.[27]

This suggests that in Equity, the estoppel can be used to found an action, which is equivalent to saying that the action is founded on the misrepresentation. However, neither *Slim* nor *Burrowes* were referred to and the comment was only made during argument. Therefore its authority is slight.

Interesting possibilities arise from remarks of Lord Macnaghten in *Balkis Consolidated (Ltd) v. Tomkinson*.[28] The original owner transferred shares to persons who were registered as proprietors of the shares. The original owner then fraudulently executed a transfer of the shares to the innocent plaintiff who sent the transfer to the company and received a certificate of ownership. When the plaintiff re-sold the shares the company refused to register the purchase, having discovered he was not the real owner. The plaintiff sued the company for the price of shares he had to purchase to fulfil his contract. The House of Lords held that the company was estopped by its certificate from denying that the plaintiff Tomkinson was the proprietor

25 [1904] 2 Ch. 367.
26 (1898) 67 L.J. Ch. 34.
27 *Ibid.* 37.
28 [1893] A.C. 396.

of the shares. Therefore he was entitled to damages sustained from the wrongful refusal to register.

Lord Macnaghten is quoted as saying:

> The remarks in *Low v. Bouverie* . . . are *obiter dicta*, it was decided on the facts. *Slim v. Croucher* . . . is said to have been overruled by *Derry v. Peek* which had nothing to do with it. The old doctrine of misrepresentation seems to have fallen out of date.[29]

This suggests strongly that his Lordship viewed *Slim v. Croucher*[30] and the award there made as good law. However, apart from only occurring during argument, the comment is not found in either the Appeal Cases' or the All England Law Reports Reprint[31] citations and has no apparent direct relevance to the preceding argument in the Weekly Reporter citation. These factors substantially reduce the authority of the remark.

Nevertheless comments in Lord Macnaghten's judgment could suggest that this action was based on the non-fraudulent misrepresentation. His Lordship stated,

> The company are not asked to make good their representations by transferring shares to Tomkinson. They are called upon to pay damages in order to compensate Tomkinson for loss to which he has been put by reason of their misrepresentation.[32]

Clearly an action of deceit could not be founded upon the misrepresentation. Perhaps this could be viewed as an award of equitable compensation based on the circumstances surrounding the misrepresentation. The company was in a special position of knowledge having already registered the transfer of the shares which it later misrepresented belonged to the palintiff. Also Lord Macnaghten's apparent comment during argument suggests he rejected the wider view of *Derry v. Peek*[33] expressed in *Low v. Bouverie*.[34]

The above suggestion must be tentative. Lord Macnaghten did not unequivocally state that the cause of action was based on the misrepresentation thought it was the cause of the loss. No other Law Lord adverted to that possibility and the case can stand within the doctrine of estoppel as a shield. The action appears to be based on rights arising from the plaintiff's certificate of ownership and the wrongful refusal to register the transfer of a registered owner of the shares. The only defence of the company was that the certificate was untrue. Since this was due to its misrepresentation the company was prevented from adducing evidence to support the defence.

It thus has been accepted that there is no doctrine in Equity that a person who made an untrue representation could in the absence of fraud be compelled to make it good.[35] This writer has argued that this conclusion need not have been reached from *Derry v. Peek* and that, despite this

29 (1893) 42 W.R. 204, 205.
30 (1860) 1 De G.F. & J. 518; 45 E.R. 462.
31 [1891-4] All E.R. Rep. 982.
32 [1893] A.C. 396, 410.
33 (1889) 14 App. Cas. 337.
34 [1891] 3 Ch. 82.
35 E.g. *White and Tudor's Leading Cases in Equity* (8th ed. 1910) Vol. I, 474.

finding in *Low v. Bouverie*, the remedy which the Court of Appeal would have been prepared to award belies that view. Nevertheless the contrary view is firmly established. As Lord Macnaghten observed, 'The old doctrine of misrepresentation seems to have fallen out of date'.[36]

(b) *Compensation for Misrepresentation not Upheld Within the Exclusive Jurisdiction of Equity by Nocton v. Lord Ashburton*

In *Nocton v. Lord Ashburton* Viscount Haldane reasserted that in addition to its concurrent jurisdiction

> the Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in that Court as cases of fraud, yet did not necessarily import the element of dolus malus.[37]

This exclusive jurisdiction was not affected by *Derry v. Peek*.[38]

In awarding equitable compensation the judges in *Burrowes v. Lock*[39] and especially *Slim v. Croucher*[40] accepted the existence of an action at law. It has been argued that the decisions were not premised on the availability of an action of law. In fact in *Slim* the equitable remedy was available, although, and not because, a remedy at law was believed to exist. If the Chancery judges had held that there was no available action at law, but, because of the defendant's special position of knowledge and other factors, purely equitable duties not to make misrepresentations would be imposed then these compensation awards need not have been affected by the latter restricted view of fraud at common law. This was not to be. There were occasional appreciations that the equitable obligations could be breached though legal obligations of honesty had been satisfied. Generally it was felt that, in a vague sort of way, relief was available at law too. This made it more likely that *Derry v. Peek* would also stifle the equitable obligations imposed on representors.

An *obiter dictum* of the trial judge, Holroyd J., in *Robinson v. Abbott*[41] supports the view that *Burrowes* and *Slim* were good authority within the exclusive jurisdiction despite *Derry v. Peek*.

> There is certainly one kind of action which may fairly be called an equitable action of deceit, by reason of the nature of the deceit simply, and not of the nature of the relief. When a person is induced to enter into a contract with another upon the faith of a representation, false in fact, made to him by a third party who knows that he intends to act upon it, and who might by inquiry have ascertained that the representation was false, but whether through forgetfulness, stupidity, or mistake believes it to be true, and has made it honestly, a court of equity will nevertheless compel such third party to make good his representation: *Burrowes v. Lock; Slim v. Croucher*.[42]

[36] (1893) 42 W.R. 204, 205.
[37] [1914] A.C. 932, 952.
[38] (1889) 14 App. Cas. 337.
[39] (1805) 10 Ves. 470; 32 E.R. 927.
[40] (1860) 1 De G.F. & J. 518, 45 E.R. 462.
[41] (1894) 20 V.L.R. 346. The case involved a breach of fiduciary obligations.
[42] *Ibid*. 366-7.

His Honour noted that *Derry v. Peek*[43] shows that an action for damages at law could never have been maintained. Thus these misrepresentations are seen as 'deceit' or fraud in Equity with the action being exclusively equitable. The special circumstances contemplated are somewhat wider than in *Burrowes* and *Slim*. If the obligations were purely equitable the restrictions imposed in *Derry v. Peek* would not affect these cases.

However, this view was not adopted in *Nocton v. Lord Ashburton.*[44] Viscount Haldane treated *Evans v. Bicknell,*[45] *Burrowes v. Lock*[46] and *Slim v. Croucher*[47] as instructive as to the character of the Equity jurisdiction especially in so far as it is concurrent.[48] Lord Dunedin, by stating that when 'fraud' is used in the older Chancery cases without consideration of whether there is actual dishonesty, 'all the cases are based upon the existence of fiduciary relationship, and subsequently the breach of duty arising',[49] also appears to exclude *Burrowes* and *Slim* from the exclusive jurisdiction. Thus, it was not accepted that the equitable relief of compensation formerly awarded against certain honest mis-representations made outside of fiduciary relationships can be imposed within the exclusive jurisdiction.

3. The Development of Similar Obligations in the Tort of Negligence

While it has been argued that equitable compensation should be regarded as available (where there is a misrepresentation of fact), at least in the special circumstances occurring in *Burrowes* and *Slim* a resurrection of the remedy here is most unlikely. This is due to the well known recent imposition of common law duties of care in making representations where special relationships, outside of contractual or fiduciary ones, exist. The path by which this occurred is well known and need not be repeated in detail here.

The view that *Derry v. Peek* meant that outside of contract an innocent but negligent misrepresentation could never give rise to an action at law[50] was not definitively overthrown until *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd.*[51] Utilisation of *dicta* in *Nocton v. Lord Ashburton* leaving open the future development of obligations of care at law arising from the 'relationship' of the parties[52] was of prime importance in *Hedley Byrne.*[53]

[43] (1889) 14 App. Cas. 337.
[44] [1914] A.C. 932.
[45] (1801) 6 Ves. 174; 31 E.R. 998.
[46] (1805) 10 Ves. 470; 32 E.R. 927.
[47] (1860) 1 De G.F. & J. 518; 45 E.R. 462.
[48] [1914] A.C. 932, 952-3. His Lordship did not refer to *Robinson v. Abbott.* Arguably too much should not be made of this *dicta.* Viscount Haldane probably desired to further restrict *Derry v. Peek,* see Sir Frederick Pollock, '*Norton v. Lord Ashburton*' (1915) 31 *Law Quarterly Review* 93, 94 and more explicitly in his letter to Holmes J.: *Holmes-Pollock Letters* (1942) Vol. 1, 215.
[49] *Ibid.* 964.
[50] *Le Lievre v. Gould* [1893] 1 Q.B. 491.
[51] [1964] A.C. 465. See also Denning L.J. (dissenting) in *Candler v. Cane Christmas & Co.* [1951] 2 K.B. 164, 179-84.
[52] [1914] A.C. 932, especially 947, 948, 951.
[53] [1964] A.C. 465, especially 484, 486, 508-10, 522-3.

Now special relationships can give rise to duties of care at law outside of contract and antecedent fiduciary obligations.

This common law development, which ameliorates a major area where Lord Dunedin's comment in *Nocton* that, 'in certain cases where common justice demanded a remedy, the common law had none forthcoming . . .',[54] was formerly true, may have incorrectly transposed equitable rules to the common law.[55] For example, both Denning L.J. in *Candler v. Crane Christmas & Co.*[56] and the Law Lords in *Hedley Byrne*[57] construed *Nocton* as an example of liability for negligence. Nevertheless, given the abrupt cessation of equitable developments in compensation against misrepresentations where the representor had notice of the relevant fact, the twentieth century developments in negligence provide a satisfactory framework within which courts can evolve principles to establish in which 'special circumstances' an obligation of care in making statements should be imposed.

The 'duty of care' concept at law contracts with the equitable methodology where, as has been seen, the issue was which 'special circumstances' gave rise to an obligation not to make an inaccurate representation. While it is inappropriate to examine those circumstances where a *Hedley Byrne* duty of care can arise,[58] they outnumber those in which equitable obligations of accuracy, remediable by compensation, had been applied. Thus the better view, despite contrary suggestions in the Privy Council, appears to be that actual or represented ability to obtain the true facts, without actual knowledge of them, can give common law obligations of care.[59] The availability of compensation had not been considered where incompetent advice, rather than wrong facts, was proffered. Earlier it was suggested that compensation may only have been effective where the fact misrepresented was sufficiently specific for restitution of the sum lost to make the representation good.[60] No such limitation applies to the award of damages. A misrepresentation as to credit-worthiness could be remedied by damages though this may not make the representation literally true.

Although the common law framework for imposing duties of care in the making of certain representations has relieved the major problems arising

54 [1914] A.C. 932, 964.
55 Meagher *et al., op. cit.* 46.
56 [1951] 2 K.B. 164, 177.
57 [1964] A.C. 465, 484.
58 Examples in this rapidly expanding area of the law are *Ross v. Caunters* [1979] 3 W.L.R. 605 and *Watts v. Public Trustee for Western Australia* [1980] W.A.R. 97.
59 The narrow view that the common law duty is imposed only on those whose business it is to provide information or advice calling for special skill and competence, or who represent that they possess such special skill and competence, *Mutual Life and Citizens' Assurance Co. Ltd v. Evatt* [1971] A.C. 793, has not been followed by the English Court of Appeal—*Esso Petroleum Co. Ltd v. Mardon* [1976] Q.B. 801, 827, *Howard Marine and Dredging Co. Ltd v. A. Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574, 591, 600. The Australian High Court has now effectively rejected this limitation in *L. Shaddock and Associates Pty Limited v. The Council of the City of Parramatta* judgment delivered on 28th October, 1981.
60 See text at n. 64 *supra.*

from the stifling of the formerly available equitable relief, the principles there developed may still have some beneficial applications. For example, it is now probable that the possession of special knowledge will usually give rise to a duty of care in negligence.[61] There may in fact be circumstances where it would be appropriate to require accuracy in representations. Even though the remedy of equitable compensation may not need to be revived, the principles formerly applied in Equity are worthy of consideration as the common law continues to develop.

4. COMPENSATION FOR BREACH OF FIDUCIARY OBLIGATIONS OF GOOD FAITH

In *Nocton v. Lord Ashburton*[62] Viscount Haldane L.C. maintained that Courts of Equity had power in the inherent and exclusive jurisdiction to award compensation; at least where fiduciary obligations were breached. This Section attempts partially to remedy the dearth of analysis of compensation in this area. Where a relationship of confidence and trust gives rise to fiduciary obligations certain acts of a fiduciary, which otherwise may be permissible, are deemed wrongful by Equity.[63]

The proposition that compensation is available where breaches of fiduciary obligations cause financial loss is not usually even contemplated. Recognition of its general availability would aid beneficiaries to recover financial loss suffered due to breach of a fiduciary obligation where other equitable remedies are inappropriate or inapplicable and would enable purported awards of 'damages' for breach of equitable obligation to be more correctly developed. The narrow range of fiduciary obligations discussed in this Section reflects the paucity of cases awarding compensation. Whilst this paucity illustrates that often traditional equitable remedies are sufficient, there will be situations where the most suitable remedy is compensation. These may arise where fiduciary obligations other than those discussed here are breached.[64] Until the legitimacy of compensation as an equitable remedy is understood its potential utility will be impeded.

(A) *Failure to Disclose a Conflict of Duty and Interest by a Confidential Adviser*

A confidential adviser is not, as a fiduciary, subject to an equitable 'duty of care' in advising. Where advice is given from a position of conflict of duty and interest without sufficient disclosure the confidential adviser is liable in Equity for *inter alia* losses thereby suffered by the beneficiary,

[61] See n. 59 *supra*.
[62] [1914] A.C. 932, 952.
[63] See generally Finn, *op. cit.* for discussion of the principles and rules evolved for imposing fiduciary obligations.
[64] A possible example is undue influence where the remedy has always been rescission. *Coleman v. Myers* [1977] 2 N.Z.L.R. 225 suggests that compensation may be possible here. This is discussed in text at n. 95 *infra*.

whether or not the advice is 'negligent'. A confidential adviser may also now be in a special relationship giving rise to a duty of care at law in advising under the *Hedley Byrne* principles. As will be seen, some Canadian cases wrongly, it is submitted, suggest that here fiduciary obligations can be breached without there being a conflict of duty and interest where advice is 'careless'.

Nocton v. Lord Ashburton (which saved compensation in the exclusive jurisdiction from a threatened extinction due to the very wide interpretations then being given to *Derry v. Peek*[65]) is an example of compensation against a confidential adviser breaching duties of good faith. Nocton was in a clear position of conflict of duty and interest when he advised Lord Ashburton to release part of his mortgage security.[66] However, only the finding that a plea of negligence based on the contractual retainer was statute barred necessitated consideration of compensation.

Viscount Haldane negated actual fraud but did not believe that a negligence action was the only alternative.

> There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in Chancery to enforce compensation for breach of a fiduciary obligation.[67]

His Lordship then demonstrated that *Derry v. Peek* left untouched cases within the exclusive jurisdiction of Equity where actual dishonesty was not established, of which common instances were breaches of fiduciary obligation.[68] Although probably a demurrer for want of equity would have lain to a bill which merely claimed damages for negligence against a solicitor it seems that his duty and fiduciary obligation was breached here because

> a solicitor has had financial transactions with his client, and has handled his money to the extent of . . . getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a mortgage of his own. . . .[69]

Thus the conflict of duty and interest was critical.

As for possible remedies,

> Courts of Equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him.[70]

Here compensation was the only possible equitable remedy. Nocton did not directly profit from his breach of fiduciary duty. Unlike the attorney in *Bulkey v. Wilford*[71] he could not be made to account as a constructive

[65] (1889) 14 App. Cas. 337.
[66] The material facts are outlined in Section 2 text at n. 13 *supra*.
[67] [1914] A.C. 932, 946.
[68] *Ibid.* 952.
[69] *Ibid.* 956.
[70] *Ibid.* 956-7. The damages award of the Court of Appeal was not varied, *ibid.* 958, discussed Section 2 text at n. 16 *supra*.
[71] (1834) 2 Cl. & Fin. 102; 6 E.R. 1094.

trustee for his profit.[72] Nor was property improperly acquired which Nocton could be ordered to replace. There was no direct transaction with Lord Ashburton which could be rescinded.

In *Holmes v. Walton*[73] Virtue J. held a solicitor liable in Equity for loss due to breach of a fiduciary duty. The solicitor negligently represented to his client that a company, of which he was chairman of directors, was a good investment and induced the client to make an unsecured loan to it. On the company's liquidation repayment of the principal and interest became impossible. That plaintiff claimed relief in Equity and, alternatively, damages for negligence.

A remedy at law was available because of the solicitor-client relationship. However, Virtue J. emphasised that he was awarding compensation for breach of a fiduciary duty in rejecting the defendant's argument that because the case involved negligence the measure of damages could not include lost interest. Virtue J. distinguished *Woods v. Martins Bank Ltd*[74] where no allowance for interest was made, or even sought, against a bank and its manager for negligently advising a client on an investment as a common law action.[75] His Honour then quoted Viscount Haldane in *Nocton*[76] as showing that the Court could decree compensation which may vary from damages for deceit or negligence, and that interest was recoverable. Here a patent conflict of duty and interest arose from the defendant's's position in the company in which he advised the plaintiff to invest. Presumably this extra factor meant that the careless advice breached a fiduciary obligation.

Despite the defendant's argument, interest probably was recoverable as damages for negligence. The fact that interest was not sought in *Woods v. Martins Bank Ltd* probably explains why it was not awarded (especially as Salmon J. was also prepared to find a fiduciary relationship).[77] Loss of interest where negligent advice leads to loss of an investment is reasonably foreseeable.[78] Therefore this compensation award may have had less practical effect than the defendant's argument suggested.

As noted, some Canadian decisions suggest that a confidential adviser, not in a position of conflict of duty and interest is subject to a fiduciary obligation not to be careless. In *Culling v. Sansai Securities*[79] Anderson J. stated,

> where there has been a breach of a fiduciary relationship between broker and customer . . . the existence of a conflict of interest or a secret profit is not always an essential element.[80]

[72] It was not discussed whether Nocton financially benefitted from Lord Ashburton's release. Even if he did, the benefit may have been less than Lord Ashburton's loss and compensation would be more effective.
[73] [1961] W.A.R. 96.
[74] [1959] 1 Q.B. 55.
[75] [1961] W.A.R. 96, 97.
[76] [1914] A.C. 932, 956-7, 958.
[77] [1959] 1 Q.B. 55, 72.
[78] See *Polkinghorne v. Holland* (1934) 51 C.L.R. 143.
[79] (1974) 45 D.L.R. (3d) 456.
[80] *Ibid.* 463. Here a conflict of duty and interest existed.

This *dictum* was applied by Bouck J. in *Farish v. National Trust Co. Ltd.*[81] The defendant, trustee of the plaintiff's retirement savings plan, neither made a secret profit nor was in a position of conflict of duty and interest when it negligently dealt with the plaintiff's investment, thereby increasing his taxation obligations. The plaintiff recovered the extra tax liability, plus accounting expenses, incurred on the grounds of negligent mis-statement and breach of a fiduciary obligation of care. Bouck J. stated that, because the defendant represented itself as qualified to advise on retirement income plans and because of the nature of the association between the parties, it was in a fiduciary relationship towards the plaintiff.[82] There was no discussion of why a conflict of duty and interest was unnecessary. This duty of care seems to be the same as that now owed in negligence.

If a fiduciary whose function it is to give advice is subject to a general duty to be careful, as these Canadian decisions suggest, then compensation would be available whenever careless advice by such fiduciary led to financial loss. In this writer's opinion this is not Anglo-Australian law.

Nor would there be any practical advantage for beneficiaries of fiduciary relationships if there was a general 'duty of care' on fiduciary advisers. In the above Canadian decisions negligence for breach of a duty of care, owed to a client or someone in a 'special relationship' was also established. Indeed, in *Nocton* and *Holmes v. Walton* where compensation for breach of a fiduciary obligation was stated to be the appropriate award, damages for negligence would also have been satisfactory except for peculiar factors. Thus in *Nocton* the pleadings had prevented negligence being alleged. In *Holmes* the defendant, incorrectly it has been submitted, argued that interest lost could not be recovered at law. 'Special relationships' where the common law now imposes duties of care outside of fiduciary relationships and contract appear to exist whenever a confidential adviser subject to fiduciary obligations proffers advice. Today if the facts of *Nocton v. Lord Ashburton* arose outside of a contractual relationship the confidential solicitor would probably be liable in negligence.[83] The wheel has come full circle. A common law duty of care (first established outside of fiduciary relationships in *Hedley Byrne* with its expansive view of *Nocton*) will usually arise when a fiduciary obligation would be imposed on a confidential adviser.

Thus it is unlikely to be necessary to rely for an adequate remedy on any breach of fiduciary obligation by a confidential adviser who also gives careless advice. Equitable compensation may be frequently an effective remedy, especially since the misbehaving adviser often will neither have entered into a contract which the beneficiary can rescind nor have made a

81 (1975) 54 D.L.R. (3d) 426, 435.
82 *Ibid.* See also *Boyd v. Ewachniuk* [1975] 4 W.W.R. 210, 215 *per* Andrews J.
83 *Midland Bank Trust Co. Ltd and Another v. Hett, Stubbs and Kemp* [1978] 3 W.L.R. 167.

profit for which an account can be decreed. However, now a practically similar result can be achieved by the better known action at law. It is still inappropriate to follow the Canadian approach and assimilate the fiduciary obligations imposed on confidential advisers with their duty of care at law. Whilst for breach of such a fiduciary obligation there is likely also to be a remedy at law, this is not always so where other fiduciary obligations are breached. Failure to appreciate that compensation was awarded in cases such as *Nocton* for breach of a specifically fiduciary and not legal obligation could lead to the erroneous view that compensation is available only where an action in negligence is also possible.

(B) *Violation of the Purchasing Rule by a Fiduciary*

A purchase by a person subject to fiduciary obilgations in relation to specific property of that property can be avoided by the beneficiary unless after full disclosure he consented to the fiduciary's dealing and full value was given.[84] The availability of compensation, where this equitable rule is breached for a beneficiary who is unable or unwilling to avoid the sale,[85] is demonstrated by the judgment of Dixon A.J. in *McKenzie v. McDonald*.[86]

The plaintiff wanted to sell her farm for £4.10s per acre. Although informed by a land valuer that the land was worth that amount, the defendant estate agent persuaded the plaintiff not to insist on that price and later bought her farm at an undervalue. The farm, valued at £2,300 (£4.00 per acre), was exchanged for the defendant's shop which was valued at £2,000, though only worth £1,550, with the balance paid by the defendant. Later the defendant resold the farm for £4.10s per acre on extended terms.

The fiduciary obligation of full disclosure had been breached. Rescission was now impossible because the defendant had sold the farm to third parties. Dixon A.J. described *Nocton v. Ashburton* as showing

> that the jurisdiction to remedy breaches of fiduciary duty extends to decreeing compensation to the person whose confidence had been abused.[87]

As noted in Section 2 compensation was assessed on the difference between the market value of the farm at the time of purchase and the lower price paid by the defendant. The farm was really worth £2,445 (575 acres at £4.5s per acre rounded up). The defendant in effect had paid £1,850 (£300 cash plus the actual value of the shop, £1,550). The defendant was given the option of paying the difference of £595 (comprising £145 for the undervaluation of the farm and £450 for the overvaluation of the shop), or retaining the shop for $2,000 and paying £145.[88]

[84] Finn *op. cit.* 170.
[85] *Ibid.* 189.
[86] [1927] V.L.R. 134.
[87] *Ibid.* 146.
[88] The second option is discussed in text at n. 67 *infra*.

Dixon A.J. held that common law actions for deceit and negligence would have failed.[89] Some breaches of the purchasing rule also involve negligent misrepresentation, e.g. if a fiduciary positively misrepresents the property's value. Frequently this will not be so. Where a fiduciary purchaser fails to fully disclose his information, compensation may be the only way for the benefiicary to recover any loss suffered on the sale. This contrasts with the position where a confidential adviser who gives careless advice in breach of his fiduciary obligations will also be liable in negligence.

While in *McKenzie v. McDonald* an account of profits, giving the plaintiff a larger sum, appears to have been possible,[90] there will be situations where an account is either impossible or less attractive for a beneficiary than compensation. For example, after the wrongful purchase the value of the property may slump so that the fiduciary has to sell at a loss. Or by re-selling at the same price the misbehaving fiduciary may enable a third party to profit from his default. If the third party is unaware of the fiduciary's confidential position with respect to that property or is not worth suing compensation may be the only appropriate means of redress.

Another use of compensation against a misbehaving fiduciary who caused the beneficiary's property to be purchased by another person at an undervalue but did not benefit to the extent of the plaintiff's loss is shown by *Walsham v. Stainton.*[91] J.S. and H.S. who were confidential agents of a company, depressed the purchase price of its shares through false accounts and concealments. Fifty five shares belonging to G were sold much below their real value; fifteen to J.S. and forty to H.S. Later a bill of Chancery was filed against their executors for equitable relief with respect to all the shares.

Obviously J.S. made no profit from the forty shares sold to H.S. It was still held that as J.S. stood in a fiduciary position with respect to the shareholders[92] and was a party to the fraud, he as well as H.S. were liable to G for the real value of those shares. Thus J.S. could be made to compensate for G's loss due to the breach of fiduciary duty even if another misbehaving fiduciary derived the benefit. This remedy would particularly assist a beneficiary where the other misbehaving fiduciary was insolvent or could not be located.

McKenzie v. McDonald appears to be the only Australian example of a compensation award when the purchasing rule has been breached. However, a significant recent New Zealand case, *Coleman v. Myers*[93] may be viewed as a complex example of a breach of the purchasing rule. It also demonstrates

[89] [1927] V.L.R. 134, 147.
[90] *Ibid.* 146.
[91] (1863) 1 De G.J. & S. 678; 46 E.R. 268.
[92] Today the conventional wisdom is that directors do not owe any fiduciary duties to individual shareholders. See Finn, *op. cit.* 11, 65 ff. for criticism of the traditional view.
[93] [1977] 2 N.Z.L.R. 225.

the potential for further use of compensation and the present confusion surrounding this remedy.

The circumstances were intricate. The defendants, a father and son, were the chairman and managing director of essentially a family company possessing large cash reserves and some valuable properties. The son made a takeover offer of $4.80 a share through another company of which he was the unrevealed sole owner. The defendants recommended acceptance of the offer and when the 90% acceptance required to allow compulsory acquisition was achieved the plaintiffs reluctantly accepted. Some of the company properties were sold. These proceeds plus existing cash reserves were temporarily loaned to the son's company to pay for the shares. Then substantial capital dividends were declared. This left the son as sole owner with remaining interests worth several million dollars.

On discovering the offeror's identity the plaintiffs alleged *inter alia* fraud, breach of fiduciary duty and negligence. They sought rescission and alternatively damages. Mahon J. dismissed the action but the Court of Appeal upheld it and awarded 'damages'.

All members of the Court of Appeal accepted that these directors breached fiduciary duties owed to the plaintiff shareholders arising particularly from the family nature of the company and the position of the defendants in the company and the wider family.[94] The breaches included deliberate or careless misleading statements made to shareholders on matters material to the proposed takeover. Also there were non disclosures of material facts (e.g. an earlier property consultant's report that the company's value substantially exceeded $4.80 per share) of which the defendants knew or had reason to suspect that the shareholders were inadequately informed.

The writer treats this case as a breach of the purchasing rule since the non-disclosure and misrepresentations breached obligations owed because the defendants acted in a confidential position in relation to the plaintiff's shares which the son finally purchased. The fiduciary obligation could be differently categorized, e.g. breach of the obligations of a confidential adviser in giving advice when in a position of conflict of duty and interest. Alternatively, the purchase was procured by misuse of the dominion of the defendants over the plaintiffs from their relationship of influence.[95] Thus Cooke J. referred to undue influences cases[96] and stated that here, whilst the facts were not closely comparable, the conditions of inequality of bargaining power and confidentiality were satisfied.[97] To the extent that

[94] Possible ramifications from this imposition of fiduciary obligations toward shareholders are beyond this article's scope. See e.g. Cooney B. S., 'The Impact of Coleman v. Myers on Directors' Duties and the Financing of Takeovers' (1980) 4 *Auckland University Law Review* 103.

[95] See Finn, *op. cit.* ch. 16 for discussion of this second head of undue influence.

[96] E.g. *Tufton v. Sperni* [1952] 2 T.L.R. 516 and *Lloyds Bank Ltd v. Bundy* [1975] Q.B. 326.

[97] [1977] 2 N.Z.L.R. 225, 332.

this case is an example of undue influence its support for the availability of compensation may have far wider effects. Undue influence is a growth area for the imposition of fiduciary obligations. Also there appears to be no reference to compensation as a possible remedy in earlier undue influence cases.[98] The possible ways of classifying the fiduciary obligation breached here support the writer's view that compensation should be generally available where fiduciary obligations are breached.

Cooke and Woodhouse JJ. also held for the plaintiffs on the issue of negligence. However, this duty of care arose under the Companies Amendment Act 1963 (N.Z.). The recommendation to sell at $4.80 was not made with reasonable care for the interests of the shareholders. Woodhouse and Casey JJ. held that there was fraudulent misrepresentation by the son.

The majority of the Court (Woodhouse J. dissenting) held that it would not be practically just to the defendants to rescind the share purchases. Rescission 'would put the appellants in a much better position than . . . if there had been no breach of duty'.[99] After rescission the plaintiffs would again be minority shareholders but no longer subject to statutory compulsory acquisition. Following the takeover and restructuring of the company there had been substantial capital dividends and growing company prosperity. Cooke J. decided that the likely result without the breach of duty would have been a takeover. The plaintiffs would not have received the substantial benefits due to the reorganization of the company.[1]

Therefore the Court's approach to the plaintiff's claim for damages was most important. The plaintiffs did not specifically seek equitable compensation. Nevertheless, Cooke J. (with whom Casey J. agreed) affirmed that some form of monetary compensation was available against breach of a fiduciary duty. His Honour noted that the defendant did

> not contend that monetary compensation or damages may not be awarded for breach of fiduciary duty. That such an award may be made is shown by the speech of Viscount Haldane L.C. in *Nocton v. Lord Ashburton, . . . Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* . . . and *Mutual Life and Citizens' Assurance Co. Ltd v. Evatt* . . . are other high authorities pointing in the same direction. Since the fusion of common law and equity and the twentieth century developments in the law of negligence, any argument to the contrary would be of unattractive technicality, but as no such argument was advanced by any counsel the point need not be taken further.[2]

B. Rider considers

> that Cooke and Casey JJ. took it for granted that damages could be awarded for breach of a fiduciary duty. . . . With the greatest respect this may be doubted.[3]

[98] Cf. *Treadwell v. Martin* (1976) 67 D.L.R. (3d) 493 where a conveyance of land vitiated by undue influence was not set aside but 'damages' based on the difference between the value of the property and the price paid were awarded illustrates a situation where compensation would be the appropriate remedy.

[99] [1977] 2 N.Z.L.R. 225, 361 *per* Cooke J.

[1] *Ibid.*

[2] *Ibid.* 359-60.

[3] Rider B. A. K., 'A Special Relationship on the Special Facts' (1978) 41 *Modern Law Review* 585, 588.

However, this writer suggests the above remarks of Cooke J. may and should be interpreted as addressed to compensation as an equitable remedy. While 'monetary compensation or damages' is ambiguous, Cooke J. later stated: 'there may be differences between compensation, for breach of fiduciary duty and damages for negligent advice'.[4] This suggests that Cooke J. appreciated the distinction of substance between 'compensation' and 'damages', and that only compensation could be awarded for breach of fiduciary duty.

Even if this surmise be correct, the ambiguity in the comments of Cook J. on remedy exemplifies the confusion existing as to the distinction between compensation in Equity and damages at law. Also Cooke J.'s reference to 'the fusion of common law and equity' is unhelpful. The Judicature System did not fuse the principles of law and Equity.[5] The fusion comment is particularly unfortunate as it could be believed that the remedy accepted by Cooke J. requires acceptance of the 'fusion fallacy'. This is clearly not so. Indeed *Nocton v. Lord Ashburton* emphasized that compensation is imposed in the exclusive jurisdiction of Equity.

The subsidiary reliance of Cooke J. on the common law developments initiated by *Hedley Byrne v. Heller,* both to support the availability of compensation and to suggest that where fiduciary obligations are breached relief would additionally be available in negligence, may also cause confusion. As shown earlier, the common law developments will often make breach of the fiduciary obligation imposed on a confidential adviser actionable in negligence. Nevertheless, compensation may be appropriate where a fiduciary obligation is breached and a common law of care is inapplicable. Thus in *Coleman v. Myers*, without their statutory obligations, the directors may not have been caught by the *Hedley Byrne* principles. Even if they would have been, had the breach in *Coleman* only involved non-disclosure it may improperly stretch common law concepts to treat this as actionable misrepresentation. The obligation laid down in *Hedley Byrne* only arises when advice is proffered. On the other hand a failure to say anything may breach fiduciary obligations of full disclosure. Thus compensation might be the only possible way for a plaintiff to recover actual losses.

There was a difference of judicial opinion as to the nature of the relief granted in *Coleman v. Myers*. Cooke J. said he

> would award the appellants compensation for the sale of their shares at $4.80 in August 1972 when, but for the breaches of duty by the directors, they would have had good prospects of obtaining a higher price. In some cases there may be differences between compensation for breach of fiduciary duty and damages for negligent advice. In this case I do not think it would be practicable to draw any distinction.[6]

[4] [1977] 2 N.Z.L.R. 225, 361.
[5] See Meagher *et al., op. cit.* 42 ff.
[6] [1977] 2 N.Z.L.R. 225, 361.

His Honour awarded compensation for breach of fiduciary duty though he saw this quantum as indistinguishable from that available for damages. The difference between the fair value of the shares at the time of purchase (held to be $7.00 per share) and the price paid of $4.80 per share, plus interest up to the date of judgment, was awarded. Casey J., accepting the approach of Cooke J., also described the remedy as compensation.[7] As in *McKenzie v. McDonald* the value of the shares was estimated at the date of the improper purchase and not at this higher value at the date of judgment. The writer suggests that this method of computation accords with the restitutionary nature of compensation on the same grounds as the award made in *McKenzie v. McDonald* considered earlier.[8]

On the other hand Woodhouse J. accepted the valuation of $7.00

> for the purpose of calculating a proper award of damages (which in any event is the remedy for the claim under the head of negligence). . . .[9]

Thus His Honour considered that common law damages were available because of breach of obligations at law. While his view that rescission should be granted obviated the need to consider alternative remedies no support was given to the majority view that compensation was available.

Coleman v. Myers thus highlights the potential for applying compensation. The different possible fiduciary obligations which were breached support the view that compensation can be used to recoup loss suffered by breaches of all types of fiduciary obligations. The case suggests that compensation can be awarded where it would be more 'practically just' than rescission, though rescission is still possible. However, the failure to clearly distinguish compensation from damages for negligence and the assumption that a remedy at law would always be also available does not help to clarify the basis of a compensatory award.

(C) *Promoters or Directors Selling their Property to their Company in Breach of Fiduciary Obligations*

> [A] person who has undertaken to discharge any duties for another in the purchase of property, cannot sell his own property to that other without fully disclosing his own personal interest in the matter.[10]

Sales by directors and promoters to their company are subject to this fiduciary obligation. A sale in breach of the obligation gives the company the option to avoid the contract. Situations where rescission is not sought or is no longer possible and the original purchase of the property improperly sold was not an independent breach of fiduciary duty will be considered. The position regarding compensation is confused. There is some support for this remedy but the basis upon which it could operate is far from clear.

[7] *Ibid.* 379.
[8] See Section 2, text at n. 30 ff. *supra.*
[9] [1977] 2 N.Z.L.R. 225, 328.
[10] Finn, *op. cit.* 223.

Acceptance of the availability of compensation could greatly improve the position of a wronged purchaser against the misbehaving fiduciary.

The Court of Appeal in *In re Cape Breton Coy*[11] held by majority that an account of profits was unavailable unless the original purchase of the property was a breach of fiduciary duty. A director purchased a specific property in which he already had an interest for his company without disclosing the interest. On discovering this the company elected to retain the property. It was later sold for a loss. A contributory sought to make the director liable for misfeasance under section 165 of the Companies Act 1862 which gave a summary method of enforcing existing legal or equitable rights.[12]

Cotton and Fry L.JJ. held that since rescission was now impossible no relief could be given against the misbehaving fiduciary. The director had not originally acquired his interest on behalf of the company so was not liable for the excess of the price paid by the company over his original purchase price. Also he was not liable for the excess of the price paid by the company over the then actual value of the property (the secret profit attributable solely to the improper non-disclosure) as this would be making a new contract between the parties. Bowen L.J. rejected this view and would have awarded the latter sum to the company as a secret profit.[13]

The House of Lords dismissed the appeal *sub nom Cavendish Bentinck v. Fenn*[14] on the different grounds that the evidence failed to prove either that the director had not disclosed his interest or that the sale price was above the true value.

Lord Herschell in *dicta* considered that if a company agent, employed to purchase goods of any description in the market, sold his own goods above the market price he would be liable to the company for the excess. He would not affirm that this applied where the agency was only for specific property.[15] This supports the Court of Appeal decision on the facts of the specific agency. Where specific property has no established market price this has been regarded as material in preventing courts from awarding pecuniary relief.[16] However, Lord Watson rejected the Court of Appeal view that an account of profits was unavailable if rescission was impossible.[17]

According to Lord Macnaghten the Companies Act misfeasance provision referred to 'misfeasance in the nature of a breach of trust resulting in in a loss to the company'.[18] Also

[11] (1885) 29 Ch.D. 795.
[12] *Ibid.* 800; on appeal *sub nom. Cavendish Bentinck v. Fenn* (1887) 12 App. Cas. 652, 669.
[13] (1885) 29 Ch.D. 795, 809.
[14] (1887) 12 App. Cas. 652.
[15] *Ibid.* 659.
[16] *Jacobus Marler Estates Ltd v. Marler* (1916) 114 L.T. 640 n., text at n. 44 *infra*.
[17] (1887) 12 App. Cas. 652, 665.
[18] *Ibid.* 669.

> if a person in the position of Mr. Fenn abstained from disclosing his interest, and thus led the board to purchase the property for more than it was really worth, it would be very difficult for him to escape from the charge of fraud.[19]

This 'fraud', in the nature of a breach of trust, clearly refers to breach of an equitable obligation. The natural inference from these remarks is that the company could recover loss caused by this equitable fraud. These *dicta* support the ability of Equity to compensate for loss where a fiduciary who sells his property for more than it is worth breaches his obligation of full disclosure. This logically is a separate issue from the availability of an account of profits.

These comments in the House of Lords have been largely ignored. The view of the majority of the Court of Appeal that secret profits made on the resale cannot be recovered is accepted as the law. First followed in *Ladywell Mining Co. v. Brookes*,[20] the view has been adopted by the Privy Council[21] and the High Court of Australia.[22]

However, *In re Leeds and Hanley Theatres of Varieties Ltd*[23] is arguably an example of equitable compensation given the unavailability of an account of profits. Promoters purchased property, conveyed it to their trustee and caused it to be sold to the company at an increased price without disclosing their interest in the sale. Rescission was now impossible. Wright J. held both that the promoters bought the property as trustees for the intended company and that the company could maintain a deceit action.

The Court of Appeal affirmed this decision on different grounds holding that the promoters were not trustees for the unformed company when they purchased the property. Vaughan Williams and Stirling L.JJ. held that the promoters had breached fiduciary obligations to fully disclose that they were the beneficial vendors.[24] While not excluding other possible grounds, Romer L.J. held that the prospectus contained fraudulent misrepresentations.[25] Stirling L.J. also agreed with this finding.

Vaughan Williams L.J. concluded that for this breach of fiduciary duty the company was

> entitled to a remedy . . . in the nature of damages. . . . The authorities are not all perfectly conclusive that there is no remedy by way of an account of profits, but I prefer to say that, whether there is such a remedy or not, I am clear that there is a remedy in the shape of damages.[26]

[19] *Ibid.* 671. *Cf.* Lord Watson, *ibid.* 665-6.
[20] (1887) 35 Ch.D. 400.
[21] *Burland v. Earle* [1902] A.C. 83.
[22] *Peninsula and Oriental Steam Navigation Co. v. Johnson* (1938) 60 C.L.R. 189; *Tracy v. Mandalay Pty Ltd* (1953) 88 C.L.R. 215.
[23] [1902] 2 Ch. 809.
[24] *Ibid.* 823 *per* Vaughan Williams L.J., 831-3 *per* Stirling L.J.
[25] *Ibid.* 827-8.
[26] *Ibid.* 825.
[27] Done by Meagher *et al.*, *op. cit.* 47.
[28] [1902] 2 Ch. 809, 833 *per* Vaughan Williams L.J. for the Court.
[29] *Ibid.* 815 *per* Wright J.; 826-7 *per* Vaughan Williams L.J.

If this meant legal damages the comments could be criticised for falling into the 'fusion fallacy'.[27] However, the expressions 'in the nature' and 'in the shape' of damages indicate that His Lordship did not regard this remedy as identical to damages at law. Romer L.J. awarded legal damages relying on common law fruad. It is unclear how Stirling L.J. viewed the award given that he accepted that there was actual fraud but probably relied on the wider ground of equitable fraud.

The Court accepted 'that the true measure of the damages is the amount of profit which was made by the promoting company',[28] but did not indicate how this profit was measured. The original £12,000 award was probably confirmed because, while far less than the loss to the company, it represented the maximum value of assets of the promoting company against which judgment could be enforced.[29]

Palmer's Company Precedents[30] considers that this case allows a company to recover damages from a promoter who sells previously acquired property in breach of his fiduciary obligation of full disclosure and thus practically disposes of the difficulties from the non-availability of an account of profits.[31] *Palmer's Company Law*[32] expresses an equivalent view on the availability of damages in sales by a promoter or director.[33] Neither text considers the jurisdictional basis of 'damages' for breach of a fiduciary obligation. Inferencial support for the argument that the award is compensation in Equity and can be assessed consistently with the liability of defaulting trustees comes from an Australian Company Law text.

> Failure to disclose as above may entitle the company . . . to damages: *Re Leeds and Hanley Theatres of Varieties*. . . . As to the measure of damages: see *Benjamin v. Wymond* (1884) 10 V.L.R. (Ed.) 3; *Ardlethan Options Ltd v. Easdown* (1915) 20 C.L.R. 285.[34]

In the two cases referred to for quantifying 'damages' equitable monetary relief was based on restoring misappropriated trust property.

The relief award in *Proprietary Mines Ltd v. MacKay*,[35] is of interest. A promoter assigned a worthless chose in action, in return for shares in the plaintiff company which he promoted, in breach of his fiduciary obligation of full disclosure. Rescission was unavailable as the plaintiff had assigned the claim. The promoter was ordered to deliver up his shares for cancellation. However, this was not possible for those shares which he had already sold to innocent purchasers. The trial judge applying *Re Cape Breton Co.* held that the promoter was not accountable for his profits as the property had not been originally acquired for the plaintiff company.[36] However, the

[30] 17th ed. by K. W. Mackinnon and R. Buchannan-Dunlop (1956) Part I.
[31] *Ibid.* 31.
[32] Schmitthoff C. M., Kay M. and Morse C. K., *Palmer's Company Law* (22nd ed. 1976) 1.
[33] *Ibid.* 169, 674.
[34] Wallace G. and Young J. McI., *Australian Company Law and Practice* (1965) 157.
[35] [1939] 3 D.L.R. 215.
[36] [1938] 3 D.L.R. 631, 638 *per* McTague J.

Ontario Court of Appeal held that the defendant was liable to account to the company by way of compensation, indemnity or damages'[37] for the value of the resold shares.

Masten J.A. stated that the promoter had violated his fiduciary obligation to make full disclosure, and was guilty of negligence. See the judgment of Lord Parmoor in *Nocton v. Lord Ashburton*.[38] However, Lord Parmoor found negligence against Nocton 'in his employment as a solicitor'.[39] Here there was no contractual relationship so negligence could not be established by relying on Lord Parmoor's judgment. Nor, it is submitted, was there negligence within the later *Hedley Byrne* principles as no representation was actually made. The promoter's non-disclosure only breached a fiduciary duty.

Masten J.A. concluded from *Re Leeds and Hanley Theatres* that the non-disclosure was a breach of fiduciary duty which

> gives to the company an enforceable claim for indemnity and compensation or for damages even if rescission cannot be granted.[40]

His Honour saw *Nocton v. Lord Arshburton* as applicable as obligations imposed on promoters were only an example of fiduciary obligations. By noting that in *Nocton* 'indemnity and compensation was the more appropriate remedy'.[41] Masten J.A. demonstrated appreciation that an equitable award was being made.

Nevertheless he did not clearly distinguish compensation from an account of profits arguing that the dissent of Bowen L.J. in *Re Cape Breton* was established law.[42] As will be seen, the dissent of Bowen L.J. that an account of secret profits is available has not been accepted in Australia. Unfortunately the other judgments throw little light on the underlying basis of the award made.[43] Despite these uncertainties the case can be seen as illustrating the inherent equitable compensatory jurisdiction. The relief sought and more analytical judgment of Masten J.A. support this view while none of the other judgments specifically oppose it.

Serious obstacles in applying compensation where specific property is sold arise from *Jacobus Marler Estates Ltd v. Marler*.[44] A promoter sold his property to his company without adequate disclosure. Where the right to descission was lost Lord Parker considered that the principal 'may be able to recover damages from the agent for negligence in the performance

37 [1939] 3 D.L.R. 215, 216 (headnote).
38 *Ibid.* 240.
39 [1914] A.C. 932, 977.
40 [1939] 3 D.L.R. 215, 246.
41 *Ibid.* 246-7.
42 *Ibid.* 241, 248.
43 *Ibid.* 254 *per* Fisher J.A., 232 *per* Robertson C.J.O. and see also the decision of the Supreme Court of Canada which dismissed the defendant's appeal 'on the grounds stated by [Robertson C.J.O.]' [1941] 1 D.L.R. 240, 241 *per* Duff C.J.C. (orally for the Court).
44 (1916) 114 L.T. 640 n.

of his duties'.[45] This may refer to common law negligence. However, without obligations of full disclosure arising from the fiduciary relationships it would not be 'negligent' to allow the company to purchase property. Lord Parker emphasised that he was talking about 'fiduciary relationships'.[46] The better opinion, supported by later comments of Dixon J., is that damages here refers to equitable compensatory relief for breach of a fiduciary obligation.

Lord Parker accepted that an agent selling his principal shares in breach of a fiduciary obligation may be liable for the excess of their market value. However, if specific property without a market value was sold

> the court will not fix a new price between the parties. In such a case the measure of damages will be the principal's loss in the whole transaction. If he has suffered no such loss there can be no damages.[47]

Since no loss on the whole transaction was proved, no relief was available against this defaulting promoter.

Acceptance by the Australian High Court of the need to show a loss on the whole transaction makes the extent of any possible application of compensation in this area very uncertain. In *Peninsular and Oriental Steam Navigation Co. v. Johnson*[48] the managing agent of a colliery company bought machinery on its own behalf. It later sold this to the colliery company without disclosing its interest. Rescission was no longer possible. The High Court, following *Re Cape Breton*, rejected the claim for an account of profits.

It was also claimed that the defendant, managing director of both the managing agent and colliery company, was liable in damages for breach of duty in causing the sale at an increased price. Latham C.J., in comments similar to those in *Jacobus Marler Estates*, stated that damages for breach of duty were not possible because there was no evidence that the colliery company suffered damage.[49] Whether the duty breached was a legal or fiduciary obligation was not expressly stated. Dixon J. emphasised that Lord Parker's statement that the measure of damages must be the loss on the whole transaction.

> supposes . . . that the question arises between a vendor who is a fiduciary agent . . . and a purchaser who is his principal.[50]

Thus 'damages' refers to a remedy for breach of fiduciary obligations. *McKenzie v. McDonald* demonstrated Dixon J.'s appreciation of the difference between damages at law for negligence and pecuniary restitution in Equity for breach of fiduciary obligations.

However, Dixon J. accepted Lord Parker's comments that courts cannot fix a new contract price between parties.

[45] *Ibid.*
[46] *Ibid.* 641.
[47] *Ibid.*
[48] (1938) 60 C.L.R. 189.
[49] *Ibid.* 213.
[50] *Ibid.* 250.

> To allow a measure of compensation based on the difference between the estimated value of the property when acquired and the price given is to go back to the dissenting judgment of Bowen L.J., which, however cogent it may appear, has not been accepted.[51]

To show that the price paid exceeded the real value at the time of sale was not enough for compensation. Dixon J. refused relief on the ground that no attempt was made to show the colliery company made a 'loss on the whole transaction' without specifying what would show such a loss.

Thus in Autralia where the misbehaving fiduciary — vendor is not a constructive trustee of the purchased property and rescission is impossible there can be no account of profits. *P. & O.* seems to accept that there can be compensation for 'loss on the whole transaction' from this breach of fiduciary obligation. The scope of the remedy is limited and uncertain.

The apparent rule preventing estimation of the market value of specific property to assess the damages suffered may be based on a faulty hypothesis. The distinction drawn in *Jacobus Marler Estates Ltd v. Marler* between property with an established market value (where a fiduciary could be liable for the price received in excess of this value) and specific property (where the court could fix a new price) probably wrongly suggests that a court in its equitable jurisdiction cannot estimate market values. In the old case of *Green v. Folgham*[52] where a form of compensation was based on the value of a secret recipe the Court directed that the parties proceed to a trial at law to determine this value. The machinery of the common law courts was apparently then more appropriate to estimate market value. However, now a court exercising equitable jurisdiction can estimate the value of specific property. This was done in *McKenzie v. McDonald. Coleman v. Myers* demonstrates such an estimate in a highly complex situation. The reticence of the courts to estimate a specific value in this situation is most unfortunate.

Part of the problem here is to clearly distinguish an account of profits from compensation. While, as has been seen, the remedies are different, the excess of the sale price over the market price will often measure both the loss of the beneficiary and the improper gain made by the promoter or other fiduciary. The High Court in *P. & O. Steamship Navigation Co. v. Johnson* seemed determined to prevent an award of the same quantum as the unavailable accounting remedy.

If this nebulous 'loss on the whole transaction' can never be established then cases which could be construed as examples of compensation (such as *Leeds & Hanley Theatres* and *Proprietary Mines v. MacKay*) could not be applied in Australia. Hopefully the phrase is not meaningless and there are situations where such a loss could be established. If a plaintiff concentrates on showing his loss rather than the defendant's profit a court may more easily find a loss on the whole transaction. For example, this loss may be

[51] *Ibid.; cf. dicta* in *Tracy v. Mandalay Pty Ltd* (1953) 88 C.L.R. 215, 239.
[52] (1823) 1 Simons and Stuart 398; 57 E.R. 159.

the price paid less not only the estimated market value but also the value of middleman costs which would have been incurred if the sale did not involve the fiduciary's property and took place in the open market. Whilst suggestions of what will occur are tentative, efforts should be made to establish criteria for showing a loss on the whole transaction so that compensation can give substantial relief to the purchaser who has suffered financially from his fiduciary's breach of duty. *Re Leeds and Hanley Theatres* and *Proprietary Mines v. MacKay* can be properly regarded as applications of the compensatory remedy though they give little guidance on computation of loss. The suggested development would ameliorate the position of a wronged purchaser unable to rescind his contract with the misbehaving fiduciary.

(D) *Beneficiary Induced to Buy Misbehaving Fiduciary's Property — 'Qualified Rescission'*

An interesting line of Victorian decisions suggested that relief, labelled 'rescission', which restored only the innocent party to the *status quo ante* was possible where a beneficiary held property purchased from a misbehaving fiduciary.

Ballantyne v. Raphael[53] involved actual fraud though fiduciary obligations were also breached. The plaintiffs were induced to join a purchasing syndicate by the represented membership of a person whose judgment they trusted but who was a vendor of the property. Rescission was declined since other syndicate members were not entitled to relief. However, Hodges J. ordered the vendors to repay the plaintiffs' money and to indemnify them against all claims in respect of the purchase. The plaintiffs were to re-transfer their interest in the land to the vendors. Equivalent relief was adopted that year in two similar cases.[54] There was no indication as to the value of the interest when re-transferred in relation to its value when sold to the plaintiffs.

This relief was followed in *Curwen v. Yan Yean Land Co. Ltd*[55] when shares purchased by the plaintiff were worthless at the time of relief. The defendant Lyon induced the plaintiff to pay £1,000 for shares in a land company he was forming by fraudulent concealing that he and two others, represented as agreeing to take shares, were vendors of land to the company. The plaintiff brought an action against the company and Lyon to have his name removed from the register and the £1,000 repaid with an indemnification, or for damages and an indemnity against Lyon.

Initially Webb J. held that the parties could not be put in the *status quo ante* by removal of the plaintiff's name from the register. Although no

[53] (1889) 15 V.L.R. 538.
[54] *MacVean v. Woolcott* (1889) 11 Australian Law Times 74 by A'Beckett J., *Long v. Pfaff* (unreported) by Hodges J.
[55] (1891) 17 V.L.R. 64; 745 (on appeal).

reasons were given, the shares were worthless and the company was not shown to be a party to the concealment. (A court may now be more likely to fix the conduct of such a promoter to the company so as to give relief against it.[56]) Instead, Lyon was ordered to repay £1,000 to the plaintiff and indemnify him against liability or loss from being a shareholder. Then the plaintiff was to transfer his shares to the defendant. In effect while the plaintiff's name remained on the company's register, Lyon was subject to the burdens and any benefits of owning the shares.

On appeal, Hood J. affirmed this judgment as being damages for fraudulent misrepresentation. However, Higinbotham C.J. and A'Beckett J. supported the relief on wider grounds. They held that the judgment was for qualified rescission, restitution and an indemnity.[57] The Chief Justice also stressed that damages in the legal sense of the word were not awarded to the plaintiff. The repayment of the purchase price and indemnity were aspects of the necessary *restitutio in integrum* to return the plaintiff to his old position. The contract remained with the company but was effectively rescinded from the plaintiff's position.[58]

This 'qualified rescission' differs from the usual examples of rescission. Only the plaintiff was restored to the *status quo ante*. Assuming that the shares originally had value, the defendant, having to repay the full purchase price plus an indemnity for now wortheless shares, was worse off than before. While in this respect 'qualified rescission' resembles compensation in Equity it is also distinct from that remedy. Because an order that the plaintiff return the property, with relief from the consequences of ownership, was held to be possible the Court had no need to consider how to measure loss which the plaintiff would have suffered if the order could not have been made. It effectively compensated the plaintiff for any decrease in the value of the shares after his purchase. This form of relief continued the defendant's responsibility for any decrease in the shares' value until the date of judgment.

Since 'qualified rescission' can make a defendant substantially worse off than before it should not be as frequently available as actual rescission. The majority in *Curwen* did not specify limits on the availability of this award. However, there the promoter, by failing to disclose that he was the vendor to an independent company directorate, breached fiduciary obligations owed to the plaintiff as a future shareholder.[59] Although the plaintiff's contract was not with the misbehaving fiduciary it is suggested that because the

[56] Gower L. C. D., *Modern Company Law* (4th ed. 1979) 377.

[57] (1891) 17 V.L.R. 745, 751 *per* Higinbotham C.J. with whom A'Beckett J. in effect agreed.

[58] *Ibid.* 752.

[59] A promoter's fiduciary obligations of disclosure extend to present and future shareholders where the directors are not independent. See e.g. *Gluckstein v. Barnes* [1900] A.C. 240, 259 *per* Lord Robertson.

company was Lyon's creature that he should be seen as having sold his property to the plaintiff in breach of obligations of full disclosure.

In *Robinson v. Abbott*[60] this relief was awarded where solely a fiduciary obligation was breached. A solicitor persuaded clients to invest in a land company with which he was connected. He accepted their purchase money and without disclosing that he was the vendor transferred his own shares. It was held that this was done without any actual fraud, dishonest motive or intention.

Although the company was in liquidation with worthless shares, the Full Victorian Supreme Court (Williams J. *dubitante*) affirmed the decision of Holroyd J. that the plaintiffs were entitled to repayment of their purchase money and calls made, as well as an indemnity against future calls. This relief could be given outside of actual fraud against transactions in breach of fiduciary obligations though the parties could not be put in the *status quo ante*. The defendant's argument that because of recent English decisions the earlier Victorian cases were only supportable when an action of deceit would be available was rejected.

Holroyd J. considered that by offering his shares the solicitor volunteered that they were safe and was liable to make this representation good by pecuniary compensation, or indemnity or both if this was untrue.[61] This relief for breach of equitable obligations differed from damages for deceit.[62] His Honour considered that it was inaccurate to call the relief 'qualified rescission'.[63]

The majority of the Supreme Court preferred to classify the relief as a type of rescission.[64] A'Beckett J. noted that this remedy was very hard on the defendant as the shares had been valuable and were now worthless. It was

> available . . . where there is no fraud in the ordinary sense, but there is a breach of duty to fulfil obligations which the Court holds that the defendant should have performed.[65]

These obligations were clearly imposed because of the defendant's position of trust and confidence in the fiduciary relationship.

Williams J. doubted that the remedy given in *Ballantyne v. Raphael* could be applied without fraud. He would have held that rescission was no longer possible as *restitutio in integrum* could not be substantially had since the shares were now valueless.

[60] (1894) 20 V.L.R. 346.

[61] *Ibid.* 364. As noted Section 3 *supra*, his Honour accepted *Burrowes v. Lock* and *Slim v. Croucher* as examples of compensation where equitable obligations were breached.

[62] *Ibid.* 366.

[63] *Ibid.* 368.

[64] Madden C.J. described the relief in *Curwen v. Yan Yean Land Co.* as 'rescission of the contract' *ibid.* 381. A'Beckett J. stated during argument 'it is rescission. It certainly is exactly the same for all practical purposes', *ibid.* 373, but considered that the issue of correct terminology was minor, *ibid.* 384.

[65] *Ibid.* 383.

Robinson v. Abbot was approved in *McKenzie v. McDonald* by Dixon A.J. who seemed to view it as demonstrating the Court's wide powers to grant rescission, without needing to restore parties precisely to their former position if substantial restitution could be achieved.[66] This wider power of 'rescission' was impossible in *McKenzie* as the farm, now subject to third party rights, could not be reconveyed. Therefore compensation was awarded.

However, the plaintiff could reconvey the shop transferred by the defendant as part of the purchase price for £450 more than it was worth. Dixon A.J. considered that

> *Ballantyne v. Raphael* and *Curwen v. Yan Yean Land Co. Ltd* were dealt with in *Robinson v. Abbot* in a manner which seems to show that if the defendant desires to take the shop in specie there is no reason why he should not be permitted to do so.[67]

Thus the defendant could either pay the full value of the plaintiff's loss or take over the shop at the value originally charged to the plaintiff which would count for £450 of his liability to compensate. This gave the defendant greater flexibility in paying the required compensation. In *Curwen v. Yan Yean Land Co.* the wrongdoer was compelled to repay the full purchase price of the shares and an indemnity. Then he was 'permitted'[68] to become the holder of worthless shares. Here however, the defendant's option was one of substance. If he did not wish to repay the full purchase price of the shop he could pay the assessed sum as compensation. Thus if the value of the shop had fallen below £1,550 the defendant was not compelled to take over the shop and thus to effectively compensate the plaintiff for loss incurred after breach of the purchasing rule.

Since 1927 the 'qualified rescission' cases seem to have faded from judicial consideration. Their effect was to put the innocent beneficiary in the *status quo ante*. Because property could be reconveyed, this relief resembled rescission in form and, except as applied in *McKenzie v. McDonald*, made the defendant bear loss from a slump in the property's value up to the date of judgment.[69] This relief sits uneasily with those restrictions on possible relief against misbehaving promoters/directors (selling their property where rescission is impossible) previously considered. There is technically a factual distinction between the situation where a beneficiary holds worthless property which can be technically reconveyed and where this is impossible because the property has been re-transferred to third parties or is otherwise unavailable. Whether 'qualified rescission' is available to a beneficiary still holding property worth less than the price for which it was sold by the misbehaving promoter or director is far from clear.

[66] [1927] V.L.R. 134, 146; see *supra* for discussion of the facts and compensation award made in *McKenzie*.
[67] *Ibid.* 147.
[68] (1891) 17 V.L.R. 745, 752 *per* Higinbotham C.J.
[69] See Section 2, for the argument that compensation based on property values at the time of breach of the purchasing rule is consistent with equitable principles.

(E) *Breach of the Equitable Duty of Confidence*

Breach of confidence is an increasingly important action and is not confined to contractual situations, though there is dispute as to its theoretical basis.[70] The relief available to recover actual financial loss caused by breach of a purely equitable duty of confidence will be considered. The issue of such relief has arisen relatively recently in the history of this action. Usually the confidential information has had a direct commercial value. It is submitted that those cases awarding 'damages' for breach of confidence are best 'regarded as modern developments in the compensatory jurisdiction of Equity . . .'.[71] Apart from this inherent compensatory jurisdiction these awards are difficult to justify. Acceptance of equitable compensation will provide the best framework in which to develop this relief.

In the early case of *Green v. Folgham*[72] relief similar to compensation was awarded by Leach V.C. The defendant, held to be a trustee of a secret ointment recipe, had to account for profits made from sale of the ointment in breach of the trust. No injunction was granted against further use of the secret. Although it was impossible to direct a sale of the secret for the plaintiff beneficiaries' benefit the Court could

> inquire what would be the value of this secret to sell, provided it could be made the subject of sale . . . this value is more fit for the consideration of a jury than of the Master. . . .[73]

That the plaintiffs were paid the value of the information of which they were deprived by the trustee's breach of duty while the defendant retained use of the secret is somewhat akin to compensation. It is unlikely today that this information could be properly capable of being the subject matter of a trust. However, an equitable duty of confidence would ordinarily be owed by a defendant receiving such a secret to its discloser. A compensatory award — based on the estimated market value of a 'sale' of this information — would achieve the same result as was then achieved through remedying a breach of trust.

Lord Cairns' Act was relied on without further discussion to award statutory damages where an injunction was declined in *Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd.*[74] A confidential idea was misused in *Nichrotherm Electrical Co. Ltd v. Percy.*[75] Although Harman J. found that there was no contract between the parties and no injunctive relief was

[70] See e.g. Stuckey J. E., 'The Equitable Action for Breach of Confidence: Is Information Ever Property?' (1981) 9 *Sydney Law Review* 402; Ricketson S., 'Confidential Information — A New Proprietary Interest?' (1978) 11 *M.U.L.R.* 223, 289; Gareth Jones, 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 *Law Quarterly Review* 463; North, 'Breach of Confidence: Is There a New Test?' (1972) 12 *Journal of the Society of Public Teachers of Law* 149; Forrai, 'Confidential Information — A General Survey' (1971) 6 *Sydney Law Review* 382.

[71] Finn, *op. cit.* 167.

[72] (1823) 1 Simons and Stuart 398; 57 E.R. 159.

[73] *Ibid.* 406-7; E.R. 162.

[74] (1948) 65 R.P.C. 203, 219.

[75] [1956] R.P.C. 272.

sought he directed a general inquiry as to damages caused by breach of the equitable duty of confidence. Lord Cairns' Act was not invoked. The Court of Appeal upheld this award on the different ground that there was a breach of an implied contractual term of confidence.[76] In a *dictum* Lord Evershed M.R. stated:

> If . . . the confidence infringed is one imposed by the rules of equity, then the remedy would be, *prima facie*, by way of injunction or damages in lieu of an injunction under Lord Cairns's Act.[77]

Whether this award could have been made under Equity's inherent jurisdiction and independently of Lord Cairns' Act was not considered. If the strict construction of Lord Cairns' Act adopted by Meagher, Gummow and Lehane[78] is correct that Act could not properly have been invoked. Harman J., if awarding damages at law, would have been guilty of the 'fusion fallacy'.[79]

The Court of Appeal did not acceptably identify the basis of its damages award for breach of a purely equitable duty of confidence in *Seager v. Copydex Ltd.*[80] While negotiating for the defendant company to market his patented carpet grip, the plaintiff disclosed details of his unpatented carpet grip, the 'Invisigrip'. Later the defendant applied to patent a grip similar to 'Invisigrip' using the same name. Its assistant manager who had been present at the confidential interview was named as the inventor.

The Court of Appeal held that the defendant, having unconsciously used information received in confidence, was liable for breach of confidence. This was not based on an implied contract.[81] The plaintiff was entitled to damages (to be assessed by a Chancery Master) on the basis of reasonable compensation for use of the confidential information. Lord Denning M.R. stated:

> It may not be a case for injunction or even for an account, but only for damages, depending on the worth of the confidential information to [the defendant] in saving him time and trouble.[82]

The Court did not advert to Lord Cairns' Act or to possible problems of principle in applying it to give damages for breach of purely equitable obligations, especially where an injunction would not be granted. Nor did it refer to the inherent compensatory jurisdiction of Equity which is submitted to be an acceptable basis for the award. Probably the award was wrongly premised on the 'fusion fallacy'.[83]

[76] [1957] R.P.C. 207.
[77] *Ibid.* 213.
[78] *Op. cit.* 524.
[79] Argued by Gareth Jones, *op. cit.* 491 who also denies that Harman J. could have relied on Lord Cairns' Act. For discussion of the 'fusion fallacy' see Meagher *et al.*, *op. cit.* 41-3. But *cf.* Jolowicz who argues that the Act has effected a limited fusion of law and Equity: Jolowicz J. A., 'Damages in Equity — A Study of Lord Cairns' Act' (1975) 34 *Cambridge Law Journal* 224.
[80] [1967] 1 W.L.R. 923.
[81] *Ibid.* 931.
[82] *Ibid.* 932.
[83] See Meagher *et al.*, *op. cit.* 47.

The plaintiff proposed two bases for assessing his damages to the Chancery Master. One used the value of capitalised royalties and the other the value of business lost in manufacture of the plaintiff's potential carpet grip while the defendant's 'Invisigrip' was on the market. The defendant proposed using reasonable remuneration to a consultant for providing information of a like kind. The question of the correct basis was referred back to the Court of Appeal in *Seager v. Copydex Ltd (No. 2)*.[84]

Again the Court did not discuss the inherent jurisdiction of Equity to award a pecuniary remedy for breach of an equitable duty. It held that the measure of damages depended upon the nature of the confidential information. Lord Denning M.R. (with whom Salmon and Winn L.JJ. agreed) specified three categories of confidential information. The first, involving 'no particularly inventive step', was obtainable by employing any competent consultant. Its value was the fee which a consultant would charge. The second was more special. Its higher value was 'not merely a consultant's fee, but the price which a willing buyer — desirous of obtaining it — would pay for it'.[85] Examples were commercially valuable trade secrets not sufficiently novel to be patentable. The final category which was 'very special indeed' involved patentable information. While a royalty could not be awarded as damages the Court 'could give an equivalent by a calculation based on a capitalisation of a royalty'.[86]

The task of determining the type of information involved here and then assessing damages was delegated to a patent judge. On paying these damages, the defendant could exploit the 'Invisigrip' carpet grip and own the invention. The analogy of damages for conversion, whereby a satisfied judgment in trover transfers property in the goods to the defendant, was applied by Lord Denning M.R. to support this holding.

As J. E. Stuckey suggests this analogy with common law damages for misappropriated property would have been more helpful had the option of the plaintiff desiring to keep the chattel to sue in detinue (which gave the defendant the election of delivering up the chattel or paying damages) and the inherent jurisdiction of Equity to order specific delivery of a chattel (where damages at common law would be inadequate or where the defendant acquired possession of it through the abuse of a fiduciary relationship) been noted by Lord Denning.[87] Fully applying this analogy to compensation for breach of confidence the court has a discretion to award an injunction (effectively allowing the plaintiff to 'keep' the information) or monetary compensation. Where the nature of the information was sufficiently 'special' an injunction and an account of profits would be granted against the misbehaving confidant. Otherwise

[84] [1969] 1 W.L.R. 809.
[85] *Ibid.* 813.
[86] *Ibid.*
[87] See Stuckey, *op. cit.* 421-2; Meagher *et al.*, *op. cit.* Ch. 22, espceially 511-2, 513-4.

compensation would be awarded on analogy with the remedy in trover. As was held in *Seager v. Copydex (No. 2)* the information would be 'sold' to the defendant at a value calculated as between a willing buyer and a willing seller, and the plaintiff 'paid' in monetary compensation.[88]

On this analysis, compensation after which the secret passed to the defendant would be inequitable only if the information had a potential commercial value existing apart from that value due to its secrecy which had been lost.

Interfirm Comparison (Australia) Pty Ltd v. Law Society of New South Wales[89] illustrates a situation where compensation in Equity could be awarded in a relatively straightforward manner. The defendant Law Society received the plaintiff's confidential questionnaire during negotiations in relation to a proposed survey of its members. Ultimately a third person was engaged to do the survey. The defendant improperly sent a copy of the plaintiff's questionnaire to the third person.

Because there was no evidence of copying or use of the plaintiff's questionnaire in the preparation of the one ultimately used an injunction was refused. Bowen C.J. in Eq. held that the plaintiff was

entitled to an award of damages assessed on the basis of what would be fair remuneration to the plaintiff for permission to the defendant to use its . . . questionnaire in the way in which the defendant did in fact use it. . . .[90]

Given the nature of the information and the breach which occurred, the plaintiff's entitlement to the fee which it would have charged for this use of the documents was equivalent to compensation for the value of the information if sold. Again, the compensatory jurisdiction of Equity was not adverted to although it was emphasized that equitable obligations had been breached.

The issue of pecuniary relief for breach of an equitable duty of confidence arose recently in *Talbot v. General Television Corporation Pty Ltd.*[91] Although hinted at, the inherent compensatory jurisdiction was not thoroughly considered. The defendant made unauthorized use of a television programme concept communicated by the plaintiff in circumstances importing confidence. As well as granting an injunction against further unauthorized use Harris J. ordered an inquiry as to 'damages' suffered from the past unauthorized use. Harris J. took a wide view of the Victorian equivalent of Lord Cairns' Act, describing it as 'the most obvious source, and perhaps the only source, of a power to award such damages'.[92] Marks J. who conducted the inquiry also broadly construed Lord Cairns' Act. Some of his comments suggest that it was not necessary to fuse or transpose the common law concept of damages as the assessment could be based upon

[88] Stuckey, *op. cit.* 422-3.
[89] (1975) 5 A.L.R. 527.
[90] *Ibid.* 548.
[91] [1980] V.R. 224.
[92] *Ibid.* 241.

money compensation which . . . Courts of Equity would award to restore to the plaintiff the value he has lost in the rights those courts recognized as belonging to him.[93]

Unfortunately the discussion is not particularly clear and the Full Court in affirming the award of Marks J. did not consider the appropriate basis for the award.

Where breach of an equitable obligation of confidence causes a financial loss which can be relieved by the award of a money sum this writer concludes that such awards are best explained as applications of the compensatory jurisdiction of Equity as reaffirmed in *Nocton v. Lord Ashburton.* The recent cases while lacking an adequate explanation for the 'damages' awarded demonstrate the potential for using compensation in this area. The possible rationale that the legal damages are available to remedy equitable wrongs is incorrect. It is not certain that Lord Cairns' Act extends to this situation although there are judicial suggestions that it does.[94] Where this obligation of confidence is purely equitable it is reasonable to treat this as a situation where in the exclusive jurisdiction of Equity compensation can be awarded.

In the area discussed of commercially valuable information there exist few guidelines for computing compensation. The 'protean quality of information'[95] makes it difficult to estimate what is required to finally restore a plaintiff to his position prior to the breach of his confidence. Nevertheless, relief based on the value for which the information would be sold between a willing buyer and a willing seller seems to be a satisfactory general criterion. There may be more serious difficulties in using Equity's compensatory jurisdiction to remedy breaches of personal confidence where the damage suffered by the discloser through the confident's breach of duty will rarely be directly measurable in financial terms.[96] Compensation, being based on specific restitution for the value of what has been lost, seems more appropriate for recovering identifiable financial loss or specific property than for granting solatium for personal suffering or loss of reputation caused by breach of a personal confidence. Whilst compensation may have a role there,[97] the major scope for a principled development of techniques with which to remedy losses due to breach of this equitable duty will be where the confidential information had a commercial value.

93 *Ibid.* 243.

94 E.g. *Nichrotherm v. Percy* [1957] R.P.C. 207, 214 *per* Lord Evershed M.R.; *English v. Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93, 111 *per* Slade J.; *Talbot v. General Television Corporation Pty Ltd* [1980] V.R. 224, 241 *per* Harris J.

95 Finn, *op. cit.* 168.

96 See Stuckey, *op. cit.* 430-2; Law Commission Working Paper No. 58 *Breach of Confidence* (1974) para. 48; *Coco v. A.N. Clark (Engineers) Ltd* [1969] R.P.C. 41, 50.

97 *Cf.* the undeveloped possibility of compensation for breach of personal confidence suggested by comments in *Woodward v. Hutchins* [1977] 1 W.L.R. 760, 764 *per* Denning M.R. 765 *per* Bridge L.J.

5. CONCLUSION

Compensation under the inherent jurisdiction of equity to make restitution to a person suffering financial loss from a breach of an equitable obligation owed to him has been applied more widely than is generally supposed. Formerly it was awarded outside of fiduciary relationships in range of 'special circumstances' including those where the representor had actual notice of facts contrary to the representation made on a serious occasion. Whether or not the criticisms made by the writer of the reasons for the demise of this jurisdiction are correct is now of little practical importance due to development in the law of negligence. However, it was seen that the principles formerly applied by Equity may now assist the common law evolution, particularly in the imposition of obligations of accuracy.

Certainly compensation is not defunct where relationships of trust and confidence exist. In the writer's opinion compensation should be regarded as an available remedy whenever breach of a fiduciary obligation leads to financial loss. Often where a fiduciary obligation (such as that on a confidential adviser to disclose a conflict of duty and interest) is breached, a duty at law will also have been breached. However, it is important that compensation not be confused with legal damages. Compensation will be available in situations where no legal duty may have been breached. An example is breach of the purchasing rule. Often the better known equitable remedies adequately cope with breaches of fiduciary obligation. Where they do not (such as where a fiduciary improperly sells his property to the beneficiary) compensation should be available. Where equitable duties of confidence are breached compensation could be developed to provide monetary relief on a sound doctrinal basis. This relief may well be available against breaches of fiduciary obligation other than those discussed in this article. A potential example is undue influence as *Coleman v. Myers* tends to indicate.

Given the dearth of detailed dicussion of compensation in the case law the above views are somewhat speculative. Even if compensation cannot be applied as widely as the writer contends, it is not as esoteric a remedy as may have been assumed. Nor is it founded on common law principles. It is hoped that compensation will be seriously considered as a possible form of equitable relief so that its potential to achieve a just result will not be dissipated.