Some Observations on the Application of Equitable Compensation in WA: Dempster v Mallina Holdings Ltd

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The Full Court's decision in Dempster v Mallina Holdings Ltd *raises the spectre of determining the appropriate criteria for an award of equitable compensation. This article compares the Full Court's decision with similar developments currently taking place before the Supreme Court of Canada concerning the resolution of some of the key issues surrounding an award of equitable compensation in that jurisdiction.*

Dempster v Mallina Holdings,[1] a recent decision of the Full Court of the Supreme Court of Western Australia, has once again focused attention on the use of equitable compensation as a remedy. This decision, coupled with recent pronouncements of the Supreme Court of Canada on the same subject, illustrates just how potent a weapon equitable compensation can be and how it differs quite dramatically from traditional common law methods of damage assessment.

In this commentary I wish to raise a number of troubling aspects about the damage assessment process undertaken in *Dempster* and to explore some of the difficulties apparent when resort is made to equitable compensation.

The facts in *Dempster* are well known to a Western Australian audience. Dempster, an entrepreneur, through a holding company known as Dempster

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1. (1994) 15 ACSR 1; leave to appeal to the High Court of Australia refused 5 May 1995. Much of this paper comes to similar conclusions to W Martin 'Principles of Equitable Compensation' *Civil Remedies Conference* (Perth: UWA, Aug 1995).

Nominees, entered into a joint venture with Mallina Holdings, a mineral exploration company, in which Dempster held substantial shares and was in fact both chairman and managing director. Dempster, who had considerable lobbying influence with the Western Australian government (Dempster had in fact made a sizeable contribution to the then Premier Burke's leadership fund), had proposed to Mallina that together with Dempster Holdings they should develop a proposal to secure an exclusive mandate from the Western Australian government to investigate and build a petro-chemical industry.

Mallina agreed to the idea and used its resources to assemble material to make such a proposal. The proposal was filed with Parker, the Minister for Minerals and Energy. The proposal was accepted by the Minister and it was his intention to recommend its adoption to Cabinet. Parker had proposed that it should be 'walked through' Cabinet, that is, presented by the Minister without going to other governmental departments for input. At the same time as this proposal came forward, an article in *The Western Mail* newspaper was critical of Mallina for being in arrears with royalty payments on other mineral exploration projects. The Premier, in a conversation with Minister Parker, suggested that the Mallina-Dempster proposal should not be 'walked through' but go through the normal channels. In addition, other expressions of interest would be called for publicly.

The difficulties with the Mallina-Dempster proposal were reported to Dempster. By this time Dempster had withdrawn from the directorship of Mallina but he still retained carriage of the petro-chemical project. Dempster discussed the apparent difficulties the Mallina-Dempster proposal was having with the government with Rakich, the chief executive of Mallina. In that conversation Dempster misrepresented the position to Rakich. While the government was embarrassed concerning the newspaper article and the timing of the Mallina-Dempster proposal, at no time did they communicate that it would not be accepted. However, Dempster conveyed to Rakich that while Mallina was involved, the government would not proceed with granting it an exclusive mandate. Dempster suggested that Mallina should remove itself from the proposal and accept a cash payment to reimburse it for its expenses and accept a promise to purchase stock should the proposal come to fruition. Dempster also indicated to Rakich that he had had discussions with a new partner who was prepared to enter into a joint venture with Dempster Holdings to advance the proposal. Rakich reported this conversation to the other directors who agreed to withdraw from the proposal in return for a cash payment of $150 000 (the payment represented twice the actual expenses of Mallina up to that point in time) and a promise that it would receive favourable stock consideration should the project proceed. Unbeknown to Mallina at that time, Dempster Holdings was also paid $250 000 for its share of the original venture.

Dempster Holdings and the new partner entered into a joint venture

under the name of Petrochemical Industries Company Ltd ('PICL'). PICL advanced a proposal largely relying upon the work undertaken by Mallina which was eventually accepted by the government. Subsequently PICL sold its interest in the venture for $400 million. Although PICL was an equal joint venture between Dempster Holdings and the new partner the division of the sale proceeds was $50 million to Dempster, the remaining sum to the new partner. Ipp J, the trial judge, noted that 'no explanation was proffered for the very strange difference in the consideration received by the two equal shareholders'.[2]

An action was brought by two minority shareholders of Mallina against Dempster and his nominee company. The plaintiffs alleged that Dempster was in breach of his fiduciary obligation owed to Mallina as a partner in a joint venture in that he misled Mallina as to the exact content of his discussions concerning the difficulty the government had with Mallina's involvement. By misrepresenting those discussions Dempster secured the withdrawal of Mallina and the substitution of a new partner and thereby advanced the chances of the project's acceptance of which he had a 50 per cent share. In addition, it was alleged that Dempster did not disclose the payment made directly to himself at the time the cash payment to reimburse Mallina's expenses was made.

The trial judge found that Dempster lay in a fiduciary relationship with Mallina and that such an obligation had been breached when Dempster had knowingly misrepresented the true facts of his conversations with the government to Rakich. In addition, Dempster had failed to exercise candour and honesty in respect of the payment he had received.

The remedy favoured by Ipp J was equitable compensation. Starting with the profit from the sale of Dempster's share in the joint venture, $50 million, Ipp J allowed a number of deductions which had been expended by Dempster. After these deductions Dempster was left with a notional profit of $38 million. Rather than awarding this in full, Ipp J turned to measure the likelihood of Mallina having successfully gained the exclusive mandate if it had retained its position in the joint venture. Ipp J evaluated that chance at 60 per cent and thus awarded $22 million for lost opportunity or chance to make a profit.

On appeal, the Full Court affirmed Ipp J's judgment. However, Rowland J, with whom Pidgeon and Seaman JJ concurred, went further and suggested that either an account or even constructive trust may have been available. Indeed, references in Rowland J's judgment suggest that he would have awarded the full $38 million as equitable compensation without a deduction based on evaluating the chance of Mallina's success had it remained a partner in the joint venture.

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2. *Biala Pty Ltd v Mallina Holdings Ltd (No 2)* (1993) 11 ACLC 1082, 1105.

How is it that an asset (the research undertaken by Mallina before it withdrew from the joint venture) worth somewhere in the vicinity of $400 000, can lead to a damages award of $22 million two years after its appropriation? The stark magnitude of the difference illustrates just how potent equitable compensation can be. Yet it also raises concerns on how divergent from common law assessments the remedy can be and what juristic reasons warrant the departure.

In *Dempster*, the substantive cause of action was based upon breach of fiduciary duty. Since a fiduciary duty is only recognised in equity, an appropriate equitable remedy is all that is available. Equitable remedies which give rise to monetary compensation divide into essentially two categories: (i) those which are restitutionary-based and seek to restore to the plaintiff the unjust enrichment gained by the defendant at the plaintiff's expense, and (ii) those which attempt to compensate the plaintiff for actual losses.

In the former category lie the remedies of constructive trust, account of profits, and restitutionary damages.[3] To found a restitutionary remedy three criteria must be met: there must be an enrichment of the defendant, a corresponding detriment experienced by the plaintiff, and the absence of any juristic reason for the enrichment.[4] Applying this analysis to *Dempster*, one can quickly see that any restitutionary remedy is inappropriate. While there has been a detriment suffered by Mallina — it has not been able to participate in a joint venture which ultimately proved very profitable — there is no unjust enrichment experienced by the defendant. Dempster Holdings did not increase its participation in the subsequent successful joint venture. It held a 50 per cent share with Mallina, and it held the same share with the new partner. The party that has been enriched is the new partner but it has a juristic reason justifying the enrichment and that is the fact that it was an innocent purchaser of Mallina's interest in the joint venture.

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3. There is no readily accepted definition of restitutionary damages. By restititionary damages, I mean any monetary compensation which is awarded to the plaintiff measured as either a saving of expenditure or accrual of gain by the defendant. The important point is that the determination of damages is made by focusing upon the unjust enrichment of the defendant and not by focusing upon the actual losses experienced by the plaintiff. See further M Tilbury, 'Restitutionary Damages' *Civil Remedies Conference* supra n 1.

4. This criterion is drawn from Canadian jurisprudence and in particular the decisions of the Canadian Supreme Court in *Pettkus v Becker* (1980) 117 DLR (3rd) 257; *Hunter Engineering v Syncrude Canada Ltd* (1989) 57 DLR (4th) 321; *Lac Minerals v Int Corona Resources Ltd* (1989) 61 DLR (4th) 621. Although Australian courts have not advanced to the same extent the notion of unjust enrichment which underpins the Canadian developments, nevertheless, they have recognised that this form of analysis is useful: see *Pavey and Mathews v Paul* (1987) 162 CLR 221, 227, 256-257; *David Securities v Cth Bank of Aust* (1992) 175 CLR 353, 375. See also A Mason 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238.

In the Full Court's decision in *Dempster*, Rowland J suggested that either an account of profits or a constructive trust could be available. Clearly, an account is inappropriate because there has been no profit made by Dempster Nominees. Similarly, an argument for a remedial constructive trust is unfounded if it is based on the desire to effect restitution or to return 'trust property'. In the former there has been no enrichment and in the latter there is no trust property held by Dempster Nominees.[5]

One possible argument in support of a restitutionary remedy is to find a benefit in the hands of Dempster Nominees. Ipp J suggested that by replacing Mallina, Dempster received the following benefit. First, he got a far more desirable partner with huge wealth and influence. Secondly, he avoided the liquidity problems Mallina was experiencing and, thus, could be assured of receiving his project management fees. The benefit flowing to Dempster is not necessarily the actual profit that accrued from the eventual sale of his half-share but, rather, that it made it much more likely that the government would proceed with the proposal. However, these factors which make the arrangement attractive to Dempster also underscore the vulnerability of Mallina as a partner and uncertainty whether it would have been successful had its name gone forward on the joint venture. Had Mallina remained a partner, the government might well have rejected the proposal based on a lack of liquidity. Nevertheless, it has been accepted for some time that it is appropriate to grant a constructive trust or account of profits made by a fiduciary even though those same profits could not have been made by the innocent plaintiff. In these circumstances a constructive trust or account may be imposed for its prophylactic effect to ensure that fiduciaries are kept up to the mark. This approach highlights the deterrent or punitive effect of imposing a constructive trust.[6] However, this remedy can not be taken too far. The High Court of Australia has recently suggested that while fiduciaries are to be held 'at a level higher than that trodden by the crowd,' there is, nevertheless, some proportionality to be struck particularly where the increase in profits has been generated through the expenditure of the

5. One way around the lack of trust property held by Dempster Nominees proffered by Rowland J was to view the transaction as a transfer from Mallina directly to PICL with joint ownership of an undivided half-share by Dempster Nominees and the new partner. Mallina would be able to argue that the loss of their asset, information relating to the project, was indirectly acquired by Dempster Nominees rather than exclusively by the new partner. This argument was not made by counsel before the court. It would also be difficult to support the argument concerning how PICL was owned in light of the appreciable differences in value given the respective shares of PICL's owners and accepted by the trial court. One consequence of accepting a constructive trust would be to award the full value of Dempster's share rather than assessing the compensation as based upon loss of a chance to gain by Mallina.

6. Eg *Regal Hastings Ltd v Gulliver* [1967] 2 AC 134; *Phipps v Boardman* [1976] 2 AC 46.

fiduciary's skill, efforts, property and resources, and the risk involved.[7]

The equitable alternative to remedies based upon unjust enrichment is to compensate the plaintiff for his or her actual losses through an award of equitable compensation. Despite dicta to the contrary in *Dempster*, equitable compensation is solely concerned with quantifying the plaintiff's actual losses. As in the common law assessment of compensatory damages, these are not related to any gains made by the defendant, although that information may be helpful in quantification.

Equitable compensation differs markedly from common law damages despite the similarities in ostensible goals. One area of divergence is the extent to which causation, foreseeability and remoteness play a role as limiting principles. In *Re Dawson (deceased)*,[8] a case which has received wide endorsement for its exposition of equitable compensation principles,[9] Street J held that a trustee was required to make complete restitution to the trust estate without regard to considerations of causation, foreseeability and remoteness. While this approach is appropriate where the fiduciary's breach has resulted in actually appropriating the res, or part thereof, of the trust, it can prove particularly blunt where the breach of fiduciary duty is a failure to attain a requisite level of care. This issue came to light in the Supreme Court of Canada's decision in *Canson Enterprises Ltd v Boughton & Co.*[10] The plaintiff had purchased a property upon which it built a warehouse. The defendant, the plaintiff's solicitor, was aware that a secret profit had been made by the vendor of the property but had not informed the plaintiff of this fact. The warehouse suffered structural damage owing to the negligence of engineers employed to supervise its construction. Judgment was obtained against the engineers but not all the losses were recovered. The plaintiff then brought an action against the defendant for the outstanding

7. *Warman International Ltd v Dwyer* (1995) 128 ALR 201. In this case the High Court had to deal with the situation where a fiduciary had breached his duty when he acted against his employer's interests in securing an agency away from the employer and in a company created by the fiduciary. The High Court held that the fiduciary was required to account for the profits made through the agency for the period the court thought appropriate that the agency would have stayed with the employer's company. While reiterating the prophylactic nature of the remedy in these cases the High Court was very mindful of the unjust enrichment analysis in quantifying the approach adopted to undertake an account of profits. See also the criticism of this case for its lack of guidance on when to invoke an account of profits over equitable compensation in L Aitken 'Account or Compensation in the High Court' (1995) 69 Aust L Journ 782. On this point the High Court simply allowed the plaintiff an election between either an account of profits or equitable compensation.

8. [1966] 2 NSWR 211.

9. It has been accepted in Canada by *R v Guerin* (1984) 13 DLR (4th) 321; in the UK by Brightman LJ in *Bartlett v Barclays Bank Ltd* [1980] Ch 515, 543; in NZ by *Day v Mead* [1987] 2 NZLR 443; and in Australia by *Cth Bank v Smith* (1991) 102 ALR 453 and *Hill v Rose* [1990] VR 129.

10. (1991) 85 DLR (4th) 129.

damages based upon a claim for equitable compensation arising from the solicitor's breach of fiduciary duty to inform the plaintiff about the secret profit. Evidence before the court was accepted that, had the plaintiff been aware of the secret profit, it would not have continued with the purchase. Applying a simple 'but for' test, the plaintiff argued that it was entitled to the outstanding funds.

Although agreeing on the final result — namely, that the plaintiff could not recover from the defendant except for the damages which flowed directly from the failure to disclose the secret profit — the judgments of the Supreme Court adopted two distinct approaches.

La Forest J, writing for the majority, argued that the more onerous 'but for' approach may be appropriate where a 'person has c*ontrol* of property which in the view of the court *belongs* to another', but it is inappropriate where 'a person is under a fiduciary duty to perform an obligation where equity's concern is simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on'.[11] Later on in his judgment La Forest J stated:

> The truth is that barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.[12]

In the absence of any differing policy considerations the plaintiff should be kept to an assessment process which mirrors the common law.

The minority's opinion, rendered by McLachlin J, does not draw the same distinction between fiduciaries who have control of property and those subject to a bare duty of care. Rather, different considerations apply to the quantification of equitable compensation because the fundamental nature of a fiduciary differs from that of a tortfeasor or contract breaker. Her Honour stated:

> While foreseeability of loss does not enter into the calculation of compensation for breach of fiduciary duty, liability is not unlimited. Just as restitution in specie is limited to the property under the trustee's control, so equitable compensation must be limited to loss flowing from the trustee's acts in relation to the interest he undertook to protect.... In the case of breach of fiduciary duty, as in deceit, we do not have to look to the consequences to judge the reasonableness of the actions. A breach of fiduciary duty is wrong in itself, regardless of whether a loss can be foreseen. Moreover the high duty assumed and the difficulty of detecting such breaches makes it fair and practical to adopt a measure of compensation calculated to ensure that fiduciaries are 'kept up to their duty'.[13]

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11. Id, 146.
12. Id, 148.
13. Id, 160-161.

The damages did not flow from the breach of fiduciary duty of the defendant which was confined to the conveyancing aspects of the transaction.

The Supreme Court of Canada has again returned to these same issues in its decision in *Hodgkinson v Simms.*[14] The plaintiff was an investor who sought advice from the defendant, an accountant who had expertise in the use of multi-unit residential buildings as tax shelters. The defendant gave the plaintiff advice to invest in a development which, unbeknown to the plaintiff, was promoted by a company which had a financial relationship with the defendant. The development did generate tax savings but unfortunately, due to a 'down-turn' in the property market, the plaintiff incurred appreciable losses on the capital value of the property. Evidence was accepted that the plaintiff would not have proceeded with this particular investment if he had known of the relationship between the defendant and the property developer. The plaintiff sought equitable compensation, measured as the decline in value of the property, from the defendant for its breach of fiduciary duty in failing to make proper disclosure.

The minority judgment, given by McLachlin J, did not find a fiduciary relationship between the parties although a breach of contract existed. The damages which arose from the decline in property values were attributable to the general market conditions and were not caused by the defendant's breach.

The majority opinion, given by La Forest J, found a fiduciary relationship which had been breached. While this case was not a trust property-like situation, it nevertheless warranted a high level of equitable compensation so that like minded fiduciaries in the position of the defendant would be deterred from abusing their relationship. La Forest J saw this decision falling within the ambit of the need to recognise a different policy from that which would be pursued if the defendant was confined to common law damages measured as the amount required to disgorge any secret profits if discovered. The common law remedy was seen as being insufficient to guard against this type of abusive behaviour.

What emerges from the Supreme Court of Canada's decisions is that equitable compensation should clearly be available where property has been taken from the trust. Where the breach of fiduciary duty mirrors that of a similar common law duty, La Forest J would only depart from common law assessment principles where some compelling policy reason justifies a more onerous level of quantification. The deterrence or punishment aspect of equitable compensation is given explicit recognition when equitable compensation is awarded in these types of case.[15] McLachlin J adopted a

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14. [1994] 9 WWR 609.

15. See the reference to *Canson* supra n 10 in *Hodgkinson v Simms* id, 653: 'Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing

more flexible approach preserving the higher levels of equitable compensation for all manners of breach of fiduciary duties in recognition of the higher duties that a fiduciary relationship entails.[16] Apart from a modified concept of causation McLachlin J stated that equitable compensation should be assessed with the full benefit of hindsight.[17]

Applying La Forest J's approach to the facts in *Dempster* one first has to identify how the common law would approach the assessment and then determine whether the context of the dispute justifies a higher award.

The closest common law action available in *Dempster* is deceit. The starting point in assessing damages for deceit is to quantify what it would take to restore the plaintiff to the status quo ante, and any other consequential losses. Because of the defendant's deceit the plaintiff gave up a valuable asset worth around $400 000 (the price paid by the new partner to buy into the joint venture) of which it received only $150 000. In addition, it is arguable as a consequential loss that it lost an opportunity to participate in a joint venture which was ultimately very profitable. Could this consequential loss be recovered at common law?

Robyn Carroll has recently argued that courts have commonly awarded damages for loss of a commercial opportunity where the following criteria have been met. First, the plaintiff is able to show 'wrongful conduct by the defendant, be it breach of contract, a tort, or contravention of a relevant statutory provision; secondly, that he or she has suffered loss or damage; thirdly, a causal link between the wrongful conduct and the loss or damage; and fourthly, the value of the loss or damage'.[18] Finally, the loss must be substantial and not merely speculative. Clearly all these criteria are met in *Dempster*; in fact, the route adopted by Ipp J closely resembles this approach. Ipp J measured the lost opportunity to profit, assessing that possibility at 60 per cent. In the Full Court, Rowland J made reference to this method of assessment citing, in particular, the High Court's decision in *Poseidon Ltd v Adelaide Petroleum NL.*[19] He said:

> It [*Poseidon*] also draws attention to the way in which our law progresses in tending to obliterate traditional distinctions between remedies in contract, tort and some

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defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law.... Thus, properly understood, *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded.'

16. References to *Canson* supra n 10 in *Dempster* supra n 1; both trial and full court refer only to McLachlin J's judgment.
17. *Canson* supra n 10, 162.
18. R Carroll 'Damages for Loss of a Commercial Opportunity' *Civil Remedies Conference* supra n 1.
19. (1994) 120 ALR 16.

> statutory remedies, and perhaps a logical extension of that trend would include damages in equity.[20]

It would appear that a common law assessment of damages for deceit would achieve the same goal as that obtained through the use of equitable compensation. Turning to La Forest J's second issue, is there anything in this case which would justify a higher level of damages? In this case the fiduciary duty to 'display the utmost candour and honesty' is similar in ambit to that encompassed in the tort of deceit. There is no obvious reason why the damage assessment process should differ. As the actual result in *Dempster* shows, there is little to be gained in a more punitive process than that obtainable at common law. This is perhaps one of those situations where equity can borrow from the common law. However, it must be recalled that dicta in the Full Court's decision suggest that they would have been equally comfortable with awarding the full $38 million profit as equitable compensation.

McLachlin J's approach to *Dempster* would be to measure the actual losses as a consequence of breach, including loss of opportunity,[21] using the full benefit of hindsight. Ostensibly, this was the approach adopted by Ipp J[22] when he measured the loss of chance and opportunity to profit from the joint venture. However, it is questionable whether Ipp J measured this loss 'with the full benefit of hindsight'. Viewed from the time of trial — that is, viewed with the benefit of hindsight, the joint venture had been successful and a true picture of its profitability, namely $38 million, was known. If, on the other hand, it is doubtful that a similar level of profitability would have been obtained had Mallina not withdrawn from the joint venture, then that is an admission that the actual profits made by Dempster Nominees are attributable to the new partner's involvement and are not an accurate measure of the lost opportunity experienced by Mallina.[23]

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20. *Dempster* supra n 1, 57.
21. McLachlin J specifically refers to loss of opportunity in *Canson* supra n 10, 163 based upon her analysis of what the Canadian Supreme Court had endorsed in *R v Guerin* supra n 9. In *Guerin* the court had assessed equitable compensation for breach of a fiduciary duty owed to an Indian band by the Crown. The Crown had negotiated the lease of the land on behalf of the Indian Band to be used as a golf course. The Crown did not get the return on the lease that the Indian Band understood to have been promised when they gave the Crown the right to enter into such a lease. According to McLachlin J, the Indian Band was entitled to equitable compensation 'for the value of what they had lost because of the breach, namely, the opportunity to enter into a more favourable arrangement. The value of this lost opportunity was based not on the common law tort or contract measure of what might have reasonably been foreseen at the time, but on the equitable approach looking at what actually happened to values in later years': see *Canson* supra n 10, 161.
22. *Biala v Mallina* supra n 2, 1105.
23. See the similar conclusion reached by Martin supra n 1.

CONCLUSION

There are two troubling aspects which emerge from the decision in *Dempster*. First, the assessment of equitable compensation undertaken by Ipp J and approved in the Full Court is based upon the law elucidated in *Re Dawson*;[24] yet by evaluating the loss of a chance, Ipp J did not take into account the full benefit of hindsight. He has in effect considered the assessment process at the date of breach of fiduciary duty but, properly, without regard to foreseeability or remoteness.

The second troubling aspect concerns how closely the defendant would have come to losing the full $38 million as equitable compensation if the Full Court had pursued more fully its inclination to impose either a constructive trust or account of profits. As has been argued earlier, neither remedy should have been considered in this context although clearly they were.

Underlying both aspects is the disturbing fact that equitable jurisprudence in Western Australia has yet to develop sufficient prescriptive content concerning the appropriateness or assessment of equitable compensation or, indeed, the underpinnings of true restitutionary-based remedies of account or remedial constructive trust. However, Western Australia is not alone. While Canada's senior appellate court has significantly developed this area recently, there are still obvious differences in approach.

There is great attraction in La Forest J's approach to equitable compensation which requires articulation of what particular policy is being pursued to justify exceeding the cautious and developed approach of common law damages assessment. The difficulty with McLachlin J's position is that it does not give hortatory guidance on when it is appropriate to impose the full rigours which accompany equitable compensation. The justification that a fiduciary relationship differs appreciably from similarly placed common law duties is more an argument for the imposition of punitive damages to deter or punish[25] than a reason to move to different forms of compensatory assessment. As both the Supreme Court of Canada and the High Court of Australia have recently reiterated, the stringent rule which requires a fiduciary to account should not be 'transformed into a vehicle for the unjust enrichment of the plaintiff'.[26] Of course, nothing said here undermines the role of restitutionary remedies where both an unjust enrichment and a corresponding detriment are present.

24. Supra n 8.

25. The Canadian Supreme Court has recognised the distinct role of punitive damages and has coupled that to equitable compensation: *Norberg v Wynrib* (1992) 92 DLR (4th) 449; *KM v HM* (1992) 96 DLR (4th) 289.

26. See the quote of La Forest J set out at supra n 15, and the Full Court in *Warman International Ltd v Dwyer* supra n 7, 211-212.