LIMITING THE GAIN TO BE DISGORGED BY DEFAULTING FIDUCIARIES: THE (IR)RELEVANCE OF REMOTENESS

JESSE MARTINO*

The article analyses the High Court of Australia's recent decision: Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd ('Ancient Order'). It reasons that in light of the analysis in Ancient Order, rules of remoteness are the most principled way of explaining how the court limits the extent of a fiduciary's liability to disgorge gains. It proposes a model to circumscribe what circumstances should influence when gains may be too remote. The model consists of four propositions: rules of remoteness will operate when a breach does not involve misusing trust property; intended gains resulting from deliberate breach will never be too remote save to the extent that some gains exceed that which were intended; non-deliberate and unintended gains may be too remote if they are not reasonably foreseeable by a person in the fiduciary's position at the time of breach; and a correlation between the gain and the plaintiff's loss will generally suggest that the gains are not too remote (though not always). The article develops the propositions and concludes by assessing its potential ramifications.

CONTENTS

I INTRODUCTION

In breach of fiduciary obligation, Alpha secures a corporate opportunity intended for Beta.[1] From that corporate opportunity, Alpha creates a business and generates $1,000,000 in profits over the following few years. However, the value of the business increases because of several other factors too: market movements favour the business; it saves money in expenditure and interest;[2] it invests in shares that give rise to dividends;[3] and the profits are likely to grow for the foreseeable future.[4]

* BA, JD (UWA).

[1] These hypothetical facts are intentionally like those cases where the breach of fiduciary obligation involved the diversion of a corporate business opportunity and the plaintiff sought an account of profits. See *Warman International Ltd v Dwyer* (1995) 182 CLR 544 ('*Warman*'); *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1 ('*Ancient Order*').

[2] For example, the savings a fiduciary may make by not having to borrow money commercially at a rate of interest.

[3] See, generally *FC Jones and Sons (A Firm) v Jones* [1997] Ch 159.

[4] *Ancient Order* (n1) [24] (Kiefel CJ, Keane and Edelman JJ); *Warman* (n1) 565 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

Beta seeks an account of profits from Alpha for the full value of its business.[5] At this juncture, a fundamental question arises: at what point should Alpha no longer be liable to disgorge the gains it has made in breach of fiduciary obligation, despite a factual connection existing between those gains and their breach? That question is the subject of this article.

The question of how a defaulting fiduciary may limit the extent of their liability to disgorge gains is confusing and controversial. The question is confusing because it undermines the orthodox position that a fiduciary must disgorge all the gains they have made in breach of fiduciary obligation because of the 'absolute and disinterested loyalty' expected of fiduciaries.[6] The question is controversial because no single explanation provides a principled answer to how a fiduciary may limit the extent of their liability.[7] As a result, the potential to ascertain appropriate limits on a fiduciary's liability has not been fully realised. The current article argues that rules of remoteness are the most principled way of explaining how the court limits the extent of a fiduciary's liability. It adopts a tripartite structure.

Part I analyses the High Court of Australia's recent decision: *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* ('*Ancient Order*').[8] It draws connections between the features of rules of

---

[5] This article is solely concerned with the remedy of an account of profits, which is available for breach of fiduciary obligation: *Warman* (n1) 555 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). However, other equitable remedies are also available in this context. For example, a constructive trust: *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 421 [576] (Finn, Stone and Perram JJ) ('*Grimaldi*'). Or, equitable compensation: *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 502 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ) ('*Youyang*').

[6] *Keech v Sandford* (1726) Sel Cas t King 61; *Ancient Order* (n1) [67] (Gageler J); *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 104 (Mason J) ('*Hospital Products*') quoting *Phelan v Middle States Oil Corporation* 220 F 2d 593 (1955), 602 (Hand J) ('*Phelan*'). See also *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ) ('*Bristol*'); *Grimaldi* (n5) 344–345 [174] (Finn, Stone and Perram JJ); Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 *Law Quarterly Review* 452, 463.

[7] The extent of a fiduciary's liability has been said to have been limited on a variety of bases. For example, fairness, justice and unconscionability: *Warman* (n1) 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Chan v Zacharia* (1984) 154 CLR 178, 204–205 (Deane J) ('*Chan*'); *O'Sullivan v Management Agency and Music Ltd* [1985] 1 QB 428, 458 (Dunn LJ) ('*O'Sullivan*') that gains were not attributable to or obtained by reason of the breach: *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 [42]–[43] (Windeyer J) ('*Colbeam*'); *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101, 21–31 (Mason CJ, Deane, Dawson and Toohey JJ) ('*Dart*'); *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 393 (Gibbs J) ('*Consul*'); *Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101, 120 (Mason CJ, Deane, Dawson and Toohey JJ); *Hospital Products* (n6) 110 (Mason J); *Warman* (n1) 557 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 135 (Russel LJ) ('*Regal Hastings*'); *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 85 (French CJ, Hayne, Crennan, Gageler and Keane JJ) ('*Howard*') by the operation of a rule of remoteness: *Warman* (n1) 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Ancient Order* (n1) [15] (Kiefel CJ, Keane and Edelman JJ), [94] (Gageler J) and to prevent the unjust enrichment of the plaintiff: *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Ancient Order* (n1) [15] (Kiefel CJ, Keane and Edelman JJ), [94] (Gageler J).

[8] (2018) 265 CLR 1.

remoteness, which limit the extent of a defendant's liability to compensate for loss at law,[9] and the reasoning in *Ancient Order*. It concludes that it is possible, and appropriate, to view *Ancient Order* as lending credence to the view that rules of remoteness assist in explaining how a fiduciary may limit the extent of their liability.[10]

Part II analyses *Warman International Ltd v Dwyer* ('*Warman*') as illustrative of many cases prior to *Ancient Order* in which the court limited the extent of a fiduciary's liability by granting a fiduciary an *allowance*.[11] An allowance recognises, in appropriate cases, the contribution of the fiduciary's work and skill in generating gains.[12] Part II reviews three interpretations of an allowance.[13] It compares these interpretations against the purpose of fiduciary obligations. It concludes that considering *Ancient Order*, rules of remoteness too, are a more principled way of explaining an allowance.

Considering the findings in Part I and Part II, Part III proposes a model which specifically identifies the content of a rule of remoteness that should apply to fiduciaries. It outlines what circumstances should influence when gains may be

---

[9] Contract: *Hadley v Baxendale* (1854) 156 ER 145; *Victoria Laundry (Windsor) Ltd v Newman Industries* [1949] 2 KB 529. Negligence: *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388; *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617. Deceit: *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 ('*Doyle*'); *Gould v Vaggelas* (1995) 157 CLR 215 ('*Gould*').

[10] See generally the discussion of the case in Elise Bant and Jeannie Marie Paterson, 'Effecting Deterrence through Proportionate Punishment: An Assessment of Statutory and General Law Principles' in Elise Bant, Wayne Courtney, James Goudkamp and Jeannie Marie Paterson (eds), *Punishment and Private Law* (Hart Publishing, Oxford 2021) 25 (forthcoming) ('Effective Deterrence through Proportionate Punishment'); Elise Bant, *Inquiry into Corporate Criminal Responsibility* (Discussion Paper No 87, Australian Law Reform Commission, 28 January 2020) 9–10; James O'Hara, 'Knowing Assistance: Disgorgement of Future Anticipated Profits, Causation and Quantum' (2019) 36(8) *Company and Securities Law Journal* 613, 615; Ruth Higgins, Breach of Fiduciary Duty – Liability of Third Party Participant–Account of Profits–Causation–Extent of Accountability' (2019) 93(1) *Australian Law Journal* 20, 23; Rebecca Lee, 'Disgorgement of Unauthorised Fiduciary Gains: An Exercise in Causation?' (2017) 11 *Journal of Equity* 29, 38, 47.

[11] (1995) 182 CLR 544. Other cases where the court awarded an allowance include: *Dart* (n7) 111 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ); *O'Sullivan* (n7) 458 (Dunn LJ); *Boardman v Phipps* [1967] 2 AC 46, 104 (Upjohn LJ) ('*Boardman*').

[12] *Warman* (n1) 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[13] Mathew Harding, 'Justifying Fiduciary Allowances' in Andrew Robertson and Hang Wu Tang's (eds), *The Goals of Private Law* (Hart Publishing, 2009) 342–343; Jessica Palmer, 'The Availability of Allowances in Equity: Rewarding the Bad Guy' (2004) 21 *New Zealand Universities Law Review* 146, 162 ('Rewarding the Bad Guy'); Jessica Palmer, 'Allowances and the Search for Justification' (2016) 2 *The University of South Australia Law Review* 21, 25 ('Allowances and the Search for Justification'); Lee Aitken, 'Reconciling "Irreconcilable Principles" – A Revisionist View of the Defaulting Fiduciary's "Generous Equitable Allowance"' (1993) 5 *Bond Law Review* 49, 61; Matthew Conaglen, 'Identifying the Profit for Which a Fiduciary Must Account' (2020) 79(1) *Cambridge Law Journal* 38, 40; Charles Mitchell, 'Causation, Remoteness, and Fiduciary Gains' (2006) 17 *King's College Law Journal* 325, 329–330; Rebecca Lee, 'Causation and Account of Profits for Breach of Fiduciary Duty' (2006) *Singaporean Journal of Legal Studies* 488, 502; Graham Virgo, 'Restitutionary Remedies for Wrongs: Causation and Remoteness' in Charles Rickett (ed), *Justifying Private Law Remedies* (Oxford, 2008) 301, 326; Lusina Ho, 'Deemed Performance in Account of Profits' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2008) 183.

too remote. Nearly twenty years ago, Professor Edelman (as he then was) applied a similar model to fiduciaries.[14] Part III recognises that it is now appropriate to update this understanding.[15] The updated model consists of four propositions:

(1) Rules of remoteness will operate when a breach does not involve the misuse of trust property.
(2) If a breach is deliberate and the fiduciary intended to make resulting gains, those gains will never be too remote. There will be cases in which a breach is deliberate but some or all the gains exceed those which a fiduciary intended. In such cases, those gains may be too remote.
(3) If a breach is not deliberate, it follows that a fiduciary did not intend to make the resulting gains. Resultant gains may be too remote if they are not reasonably foreseeable by a reasonable person in the fiduciary's position at the time of breach.
(4) A gain does not need to come at the plaintiff's expense. However, if there is a correlation between the gain and the plaintiff's loss this will lend credence to, but will not be determinative of, the view that the gains are not too remote.

The balance of the article develops the propositions and concludes by assessing the model's potential ramifications. Answering the unresolved question of the relevance of rules of remoteness in limiting gains and proposing a model for interpreting their application to fiduciaries is practically important for three reasons. First, limiting the extent of a fiduciary's liability produces uncertain results.[16] The litigious history of *Ancient Order* shows that the court required Foresters to disgorge vastly different amounts at each level of appeal. At first instance, Foresters was liable to disgorge nothing.[17] Three Federal Court of Australia judges subsequently ordered disgorgement of $6,558,495.[18] One High Court judge agreed.[19] Yet four High Court judges ultimately required disgorgement of

[14] James Edelman, *Gain–Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford, Hart Publishing, 2002) 85–98, 212. Cf Mark Gergen, 'Causation in Disgorgement' (2012) 92(3) *Boston University Law Review* 855, 856; Kit Barker, 'Riddles, Remedies and Restitution: Quantifying Gain in Unjust Enrichment Law' (2001) 54(1) *Current Legal Problems* 255, 260.
[15] The model Edelman proposed is like the model proposed in this article in some respects, and it is different in others. I note that given the findings in Part II, allowances do not operate independently of the model. Gains may be too remote by virtue of a fiduciary's work or skill, or otherwise.
[16] O'Hara (n10) 615.
[17] *Lifeplan Australia Friendly Society Ltd v Woff* [2016] FCA 364 [46] (Besanko J).
[18] *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Limited* (2017) 250 FCR 1 [124]–[125] (Allsop CJ, Middleton and Davies JJ); *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Limited (No 2)* [2017] FCAFC 99 [3]–[4] (Allsop CJ, Middleton and Davies JJ).
[19] *Ancient Order* (n1) [121]–[204] (Nettle J).

$14,838,063.[20] Although the exercise will always necessarily involve, to some extent, the weighing of incommensurate factors, this disparity evidences the need for a more principled basis to guide the court's exercise of discretion. Second, as gain–based awards for equitable wrongs develop, the model will have broader application to analogous causes of action.[21] Third, very few commentators have considered this question since the High Court published its decision in *Ancient Order*.[22] None of these commentators has formulated a uniform basis for limiting the extent of a fiduciary's liability. This article contributes a response.

II 'SCOPE OF LIABILITY'

This Part analyses *Ancient Order*. It draws connections between the features of rules of remoteness, which limit the extent of a defendant's liability to compensate for loss at law, and the reasoning in *Ancient Order*. It concludes that it is possible, and appropriate, to view *Ancient Order* as lending credence to the view that rules of remoteness assist in explaining how a fiduciary may limit the extent of their liability.

A Ancient Order of Foresters v Lifeplan

1 Facts

Lifeplan, through a subsidiary, engaged in the funeral products business by providing investment products to meet the cost of pre–arranged funerals. Foresters was also involved in the funeral products business. However, its market share was significantly smaller than that of Lifeplan. Surreptitiously, senior employees of Lifeplan approached Foresters with a plan to divert as much of Lifeplan's existing funeral products business as possible to Foresters. They formalised their proposal in a five–year business concept plan. They intended to use Lifeplan's confidential information and business records to win over Lifeplan's client base and take that business for Foresters. The employees implemented the plan, in breach of their fiduciary obligation to Lifeplan. Foresters knowingly assisted in those breaches.

---

[20] Ibid [1]–[25] (Kiefel CJ, Keane and Edelman JJ), [26]–[120] (Gageler J).

[21] For example, breach of confidence: *Attorney–General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109, 280–282 (Goff LJ) ('*Attorney–General*'); *Bluescope Steel Ltd v Kelly* [2007] FCA 517 [191] (Emmett J) ('*Bluescope*').

[22] A search of the databases indicates the following: O'Hara (n10) 615; Higgins (n10) 23; Bant and Paterson, 'Effecting Deterrence through Proportionate Punishment' (n10) 25; Bant (n10) 9–10; Lee Aitken, 'Widgets' or 'Widgets'? A Heterodox Reappraisal of the Fiduciary Who 'Steals a Business': 'Account', 'Allowances', 'Consent' and Other Perplexing Issue' (2017) 44 *Australian Bar Review* 250, 256; Pauline Ridge, 'Accounting for Gains from Knowing Participation in Breach of Fiduciary Duty' (2019) 13 *Journal of Equity* 73, 74; James Covell et al, *Covell and Lupton's Principles of Remedies* (LexisNexis Butterworths, 6th edn, 2015) 247, 250.

Over two years, the breaches inflated Foresters' revenue significantly, from $1,600,000 to $24,000,000. Lifeplan's revenue correspondingly fell, from $68,000,000 to $45,000,000.

2 Result

Kiefel CJ, Gageler, Keane and Edelman JJ awarded to Lifeplan an account of profits for the 'full value' of Foresters' ongoing business, in the sum of $14,838,063.[23] The sum represented the total capital value of the business,[24] less an allowance for expenditure and a discount for projected cash flows to reflect the risk Foresters assumed in future operations of the business.[25] Their Honours did not limit the extent of Foresters' liability to only those gains generated during the initial five–year period for which Foresters operated.[26] Rather, Lifeplan recovered gains beyond the five–year period because Foresters would enjoy the advantages of the business connections the employees had appropriated from Lifeplan, for as long as the company retained those connections.[27]

3 Reasoning

Three critical points emerge from *Ancient Order*.

First, the plurality held that once a factual connection exists between the gain and the fiduciary's breach,[28] the fiduciary may prove that it would be 'inequitable' to disgorge the entire gain in one of two ways.[29] The first: by making an allowance for gains that the fiduciary's work and skill generated.[30] The second: by showing that gains were beyond the 'scope of liability' for which the fiduciary should account.[31] The first way, of making an allowance, resembles previous High Court authority.[32] The second way, of showing that gains were beyond the 'scope of liability' does not.[33] It is a new test. According to the plurality, this test involves an assessment of the extent to which gains have a 'reasonable connection' to the

---

[23] *Ancient Order* (n1) [2] (Kiefel CJ, Keane and Edelman JJ), [120] (Gageler J).
[24] Ibid.
[25] Ibid [8] (Kiefel CJ, Keane and Edelman JJ).
[26] Ibid [16] (Kiefel CJ, Keane and Edelman JJ), [108] (Gageler J).
[27] Ibid [16] (Kiefel CJ, Keane and Edelman JJ).
[28] Ibid [13] (Kiefel CJ, Keane and Edelman JJ).
[29] Ibid.
[30] Ibid [13] (Kiefel CJ, Keane and Edelman JJ) citing *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 398 (Isaacs, Gavan Duffy, Rich, Starke and Dixon JJ) ('*Birtchnell*'); *Dart* (n7) 111 (Mason CJ, Deane, Dawson and Toohey JJ).
[31] *Ancient Order* (n1) [15] (Kiefel CJ, Keane and Edelman JJ).
[32] See *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). See also other cases where the court granted a fiduciary an allowance: *Dart* (n7) 111 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ); *O'Sullivan* (n7) 458 (Dunn LJ); *Boardman* (n11) 104 (Upjohn LJ).
[33] See Part II.

breach.[34] No precise formula is necessary to form the content of the test.[35] Rather, the plurality considered all the circumstances, including whether the fiduciary deliberately breached their fiduciary obligation, and whether they desired to make gains.[36]

Second, Gageler J assessed the extent to which a fiduciary could limit the extent of their liability against the stringency of fiduciary obligations and the vindication that an account of profits seeks to provide if a fiduciary breaches that obligation.[37] That stringency exists for two purposes: to deter fiduciaries from breaching their fiduciary obligations;[38] and to prevent fiduciaries from gaining from their own wrong, thereby becoming unjustly enriched.[39] In light of this reasoning, his Honour considered the exercise a question of evaluative judgment informed by equitable principle: not merely one of equitable discretion, or factual connection.[40] Consideration of the source of the gain, the nature of the business, and the other circumstances of the case would influence whether it would be inequitable for the fiduciary to disgorge the entire gain.[41]

Third, Gageler J stated that normative limitations as they apply at law do not constrain the inquiry into a factual connection.[42] However, Gageler J held that the fiduciary may use the types of facts which courts use at law to determine the effect of other contributing causes, such as facts which establish that a loss is too remotely connected to a wrong, to prove that it would be 'inequitable' to disgorge the entire gain.[43] Other contributing causes may include the fiduciary's work and

---

[34] *Ancient Order* (n1) [15] (Kiefel CJ, Keane and Edelman JJ) citing the following US cases as examples: *Frank Music Corp v Metro–Goldwyn–Mayer Inc* 886 F 2d 1545, 1553 (Fletcher J) ('*Frank Music*'); *Polar Bear Productions Inc v Timex Corp* 384 F 3d 700, 714 (MacDonald J).

[35] *Ancient Order* (n1) [15] (Kiefel CJ, Keane and Edelman JJ).

[36] Ibid [16] (Kiefel CJ, Keane and Edelman JJ) citing Restatement Third, Restitution and Unjust Enrichment, §51 citing *Falk v Hoffman* 135 NE 243 ('*Falk*').

[37] *Ancient Order* (n1) [84] (Gageler J) citing *Youyang* (n5) 502 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

[38] *Ancient Order* (n1) [9] (Kiefel CJ, Keane and Edelman JJ), [78] (Gageler J). See also *Bray v Ford* [1896] AC 44, 51 (Hershell LJ) ('*Bray*'); *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 [161] (Mason P), [306]–[414] (Heydon JA) ('*Digital Pulse*'); *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[39] *Ancient Order* (n1) [78] (Gageler J). See also *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[40] *Ancient Order* (n1) [94] (Gageler J). This article will use the term 'factual connection' not 'factual causation'. See Part IB1.

[41] Ibid [93] (Gageler J). See also *Vyse v Foster* (1872) LR 8 Ch App 309, 331 (James LJ) ('*Vyse*'); *Grimaldi* (n5) 409 [526] (Finn, Stone and Perram JJ) quoting *Scott v Scott* (1963) 109 CLR 649, 661 (McTiernan, Taylor and Owen JJ) ('*Scott*'). It appears Gageler J is referring here to principles of apportionment, which traditionally allow a trustee of a mixed fund to distinguish what gains are attributable to themselves and which are attributable to other sources: *Hospital Products* (n6) 110 (Mason J). I note that apportionment may only occur if an antecedent profit–sharing arrangement exists: *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). However, no such arrangement existed on the facts in *Ancient Order*.

[42] *Ancient Order* (n1) [89] (Gageler J).

[43] Ibid [90] (Gageler J).

skill.[44] Further factors that will bear on the evaluative judgment are whether disgorging the entire gain would give the plaintiff a windfall;[45] the extent to which the fiduciary's gain reflects uncompensated loss on the plaintiff's part;[46] the severity of the breach (although the remedy's purpose is not to punish);[47] and the extent of the fiduciary's culpability.[48] Gageler J also held that the remedy should not leave the plaintiff unjustly enriched.[49]

B The Function of Rules of Remoteness

The analysis the court undertook in *Ancient Order* shares parallels with the features of rules of remoteness as they apply at law.

1 At Law

The term 'remoteness' is used at law to limit the extent to which a defendant is liable to compensate a plaintiff for loss.[50] Its precise meaning is ambiguous. Some regard remoteness as an aspect of causation.[51] Others do not.[52] Others regard causation and remoteness as separate, though related, issues.[53] Adopting this last perspective, this article understands 'causation' to deal only with the establishment of a factual connection between the loss and the wrong. It understands 'remoteness' to deal with the scope of protection afforded at law once the court establishes a factual connection.[54] Accordingly, rules of remoteness ask: is the loss, which bears a factual connection to the wrongdoing, too remotely connected to the wrongdoing

---

[44] Ibid [92] (Gageler J) citing *Grimaldi* (n5) 407–410 [520]–[531] quoting *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1279 (Blackburn LJ); *Hospital Products* (n6) 109–110 (Mason J).
[45] *Ancient Order* (n1) [92] (Gageler J) citing *Warman* (n1) 561–562 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Guinness Plc v Saunders* [1990] 2 AC 663, 701–702 (Templeton and Goff LJ) ('*Guinness*'); *Digital Pulse* (n38) [332] (Mason P). However, these factors cannot be 'catalogued in advance': *Ancient Order* (n1) [94] (Gageler J).
[46] *Ancient Order* (n1) [94] (Gageler J).
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ); *McCrohon v Harith* [2010] NSWCA 67 [52], [60] (McColl JA; Campbell JA and Handley AJA agreeing).
[51] Simon Deakin, Angus Johnson and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford, 6th edn, 2008) 244, 245; Geoffrey Samuel, *Law of Obligations and Legal Remedies* (London, 2nd edn, 2011) 211, 227.
[52] Henry McGregor, *McGregor on Damages* (London, 18th edn, 2009) [1–024], [4–023], [6–002].
[53] Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford, 3rd edn, 2004) 74–75 ('Remedies for Torts and Breach of Contract'); Roger Halson, 'Remedies for Breach of Contract' in Michael Furmston (ed), *The Law of Contract* (London, 2nd edn, 2003) [8.84]–[8.88]; Donald Harris, David Campbell and Roger Halson, *Remedies in Contract and Tort* (London, 2nd edn, 2002) 84, 296; John Murphy, *Street on Torts* (Oxford, 12th edn, 2007) 135, 140; Sirko Harder, *Measuring Damages in the Law of Obligations* (Hart Publishing, 2010) 17, 20.
[54] Ibid.

to make the wrongdoer legally responsible for the loss?[55]

In asking this, rules of remoteness recognise that the loss may be an unusual or distant consequence of the wrong, or that an intervening event may be more likely to have caused the loss.[56] Courts invoke these rules to prevent a defendant being liable for losses that may have a proximate cause or wrongs that may have ripple effects and far–reaching consequences.[57] As courts have considered this question from time to time in the context of compensatory damages at law, rules of remoteness have become sophisticated.[58] Further, they possess different characteristics depending upon which cause of action, at law, is in operation.[59] For the purposes of this Part, the above, broad framework and definition of the concept, applies.[60]

2 In Equity

In contrast to rules of remoteness as they apply at law, rules governing the extent of a fiduciary's liability to disgorge gains in Equity[61] are comparatively underdeveloped.[62] An objection to using rules of remoteness as they apply at law by analogy in Equity is that it represents 'fusion fallacy',[63] as their heritage lies in loss–based cases where policy concerns are different.[64] The response to this objection is that courts should be able to learn from other areas of private law, and to borrow appropriate concepts in a careful manner.[65] The assertion that 'Equity is different' can lead courts to fail to interrogate whether a fiduciary should, as a matter of policy, be liable to disgorge all gains made in breach of fiduciary

---

[55] Katy Barnett, 'Equitable Compensation and Remoteness: Not So Remote from the Common Law After All' (2014) 38(1) *University of Western Australia Law Review* 48, 47; Mitchell (n13) 327.
[56] Mitchell (n13) 327; Deakin, Johnson and Markesinis (n51) 244–245; Samuel (n51) 227; Burrows, 'Remedies for Torts and Breach of Contract' (n53) 74–75; Halson (n53) [8.84]; Harris, Campbell and Halson (n53) 135; Jane Stapleton, 'Cause–in–Fact and the Scope of Liability for Consequences' (2003) 119 *Law Quarterly Review* 388, 390.
[57] Mitchell (n13) 327.
[58] Ibid; Barnett (n55) 49.
[59] See Part III.
[60] Part III explores precisely which rule of remoteness should apply to fiduciaries in different contexts.
[61] The article uses Equity with a capital 'E' to refer to the rules, principles and remedies historically administered by the Court of Chancery.
[62] Barnett (n55) 49; Mitchell (n13) 327; Edelman (n14) 212.
[63] See R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines & Remedies* (LexisNexis Butterworths, 3rd edn, 1992) 194 [5–280].
[64] Despite this, courts are slowly recognising that rules of remoteness are relevant to fiduciaries: *Celanese International Corp v BP Chemicals Ltd* [1999] RPC 203, 219 (Laddie J) citing *Imperial Oil v Lubrizol* [1996] 71 CPR 26, 30 (Hugessen, J); *Frank Music* (n34) 1553 (Fletcher J); *Hodgkinson v Simms* [1994] 3 SCR 377, 383–384, 387–388; *Kao Lee & Yip v Koo Hoi Yan* [2003] 3 HKLRD 296, 340 [143], 343–344 [158] (Ma J) cited in *Ancient Order* (n1) [22] (Kiefel CJ, Keane and Edelman JJ).
[65] Barnett (n55) 50.

obligation.[66]

C The Application of Rules of Remoteness in Ancient Order

In *Ancient Order*, the plurality indicated that the resolution of the case required no 'revision of principle' and therefore was consistent with previous High Court authority.[67] However, it is fitting to view the plurality's 'scope of liability' concept and the evaluative analysis undertaken by Gageler J as the operation of a rule of remoteness.[68] The justification for this approach is that a fiduciary need not disgorge a gain, notwithstanding the gains' factual connection to the breach, where, according to a rule of remoteness, the court regards that gain as too remote from the breach.[69] This view accepts that there is a factual connection between the gain and the breach of fiduciary obligation.[70] However, it argues that if Equity required only a factual connection between the gain and the breach to justify ordering disgorgement, disgorgement could be 'potentially unlimited' and might bring about hardship to the fiduciary.[71] A rule of remoteness remedies this situation.

1 Kiefel CJ, Keane and Edelman JJ

The function of a rule of remoteness, on the plurality's analysis, is to explain how gains are beyond the 'scope of liability' for which the fiduciary should account.[72] At law, courts commonly use the adjective 'reasonable' and the phrase 'scope of

---

[66] Steven Elliott, 'Remoteness Criteria in Equity' (2002) 65 *Modern Law Review* 588, 594; Jeffery Berryman, 'Equitable Compensation for Breach by Fact–Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals' (1999) 37 *Alberta Law Review* 95, 112.

[67] *Ancient Order* (n1) [1] (Kiefel CJ, Keane and Edelman JJ). A consideration of all the Australian cases decided after *Ancient Order* has not revealed any difference in approach between *Warman* and *Ancient Order*. See, for example: *Brusa v Brusa* [2020] WASC 362 [62] (Hill J); *J & E Vella Pty Ltd v Hobson* [2020] NSWCA 188 [42] (Bell P, Basten and White JJA); *Lewis v Australian Capital Territory* (2020) 381 ALR 375 [148] (Edelman J); *Uon Pty Ltd v Hoascar* [2020] WASC 271 [187] (Archer J); *Raindale Holdings Pty Ltd v Hundermark* [2019] WASC 276 [9]–[14] (Smith J); *CellOS Software Ltd v Huber (No 2)* [2020] FCA 505 [11]–[29] (Beach J); *Ultra Management (Sports) Pty Ltd v Zibara* [2020] FCA 31 [188]–[190] (Greenwood J); *Blong Ume Nominees Pty Ltd v Semweb Nominees Pty Ltd* [2019] SASCFC 151 [178] (Kourakis CJ, Stanley and Lovell J); *Huang v Aucare Dairy (Aust) Pty Ltd* [2019] FCA 2030 [66]–[68] (Moshinsky J); *Ahrkalimpa Pty Ltd v Schmidt (No 3)* [2018] VSC 68 [32]–[37] (Elliott J); *Bullhead Pty Ltd v Brickmakers Place Pty Ltd (in liq) (No 2)* [2019] VSCA 7 [23]–[28] (Kurou, McLeish and Hargrave JJ); *Furlong v Wise & Young Pty Ltd (No 2)* [2018] NSWSC 1987 [24]–[25] (Sackar J); *Schmidt v Otway Livestock Exports Pty Ltd* [2020] VSCA 193 [183]–[189] (Kyrou, Hargrave and Emerton JJA).

[68] See Bant and Paterson, 'Effecting Deterrence through Proportionate Punishment' (n10) 28; Bant (n10) 9–10; O'Hara (n10) 615; Higgins (n10) 23; Lee (n10) 47.

[69] Harding (n13) 352.

[70] Mitchell (n13) 331–316; Robert Grantham and Charles Rickett, *Enrichment and Restitution in New Zealand* (Oxford, Hart Publishing, 2000) 467; Andrew Burrows, *The Law of Restitution* (Butterworths, 2nd edn, 2002) 500–501 ('*The Law of Restitution*'); Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985), 351–355 ('*An Introduction to the Law of Restitution'*).

[71] Grantham and Rickett (n70) 487.

[72] *Ancient Order* (n1) [15] (Kiefel CJ, Keane and Edelman JJ).

liability' to describe normative and evaluative tests.[73] The circumstances that are relevant to the plurality's analysis, which are also normative and evaluative in their inquiry, support this view. Further, these circumstances are *ex–ante* in their inquiry, in that they look ahead to future returns or prospects generated by the breach.[74] For example, their Honours considered that anticipated or unrealised future gains rather than just actual profits are recoverable,[75] and if a fiduciary intended to generate ongoing gains,[76] those gains will not lack a 'reasonable connection' to the breach.[77] The normative, evaluative and *ex–ante* nature of the inquiry connects with a rule of remoteness analysis because the inquiry directs attention toward whether a fiduciary's conduct *should* attract liability. In this vein, a fiduciary may not need to disgorge some gains because on a normative level, non–deliberate and unintentional conduct should not attract liability. Such conduct bears a distant connection to the wrong.[78] In the author's view, rules of remoteness are particularly applicable to cases such as *Ancient Order*. This is because it is readily conceivable that where the gain is an ongoing business, business evolution and changing circumstances will inevitably render some gains as too distantly connected to the breach.

2 Gageler J

On Gageler J's analysis, a broad assessment of evaluative considerations perform the function of a rule of remoteness.[79] As above, Gageler J stated that the fiduciary may use the types of facts which courts use at law to determine the effect of other contributing causes, such as facts which establish that a loss is too remotely connected to a wrong, to prove that it would be 'inequitable' to disgorge the entire gain.[80] In the author's view, this is an explicit recognition that rules of remoteness, as they apply at law, are available for use by analogy in Equity. However, their use should be in a different way.[81] His Honour stressed that the court views these rules through a different lens.[82] That is, these factors are relevant in Equity only to the

---

[73] Ibid.
[74] Ibid [16] (Kiefel CJ, Keane and Edelman JJ), [108] (Gageler J). See also O'Hara (n10) 615; Higgins (n10) 23; Ridge (n10) 74.
[75] *Ancient Order* (n1) [23]–[24] (Kiefel CJ, Keane and Edelman JJ).
[76] Ibid [16] (Kiefel CJ, Keane and Edelman JJ).
[77] Ibid.
[78] I note the similarities between this style of analysis and the statement in *Warman*, namely that in the case of an ongoing business (rather than an asset) it may be 'inappropriate' and 'inequitable' to compel a fiduciary to disgorge the entire gain 'over an indefinite period': *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[79] Bant and Paterson, 'Effecting Deterrence through Proportionate Punishment' (n10) 28; Bant (n10) 9–10.
[80] *Ancient Order* (n1) [90] (Gageler J).
[81] Ibid.
[82] Ibid.

extent they assist a fiduciary in discharging the onus of justifying the 'private advantage' they have obtained.[83] To that extent, the onus of proof in determining whether gains are too remote is different to the onus of proving whether losses are too remote. In Equity, the *fiduciary* uses the rule to limit their liability.[84] At law, the *plaintiff* uses the rule, who must show that any loss is not too remote.[85] Nevertheless, the reasoning process is similar. The court undertakes the same style of analysis.

3 Aligning Remoteness for Fiduciaries with the Approach at Law

Another reason for recognising that rules of remoteness operate in *Ancient Order* is that the reasoning places the process of attributing gains to fiduciaries more in line with the approach at law, specifically in tort.

(a) Separating Factual and Legal Causes

First, in tort, the plaintiff must establish a factual connection between the loss and the breach before turning to consider whether a wrongdoer should legally be responsible for loss they factually caused.[86] *Ancient Order* mirrors this approach. First, the plurality established a factual connection between the gain and the breach, applying a 'but for' test.[87] This analysis did not involve assessing the extent of Foresters' liability by reference to legal causes, such as considerations of remoteness.[88] Rather, if gains would not have been made 'but for' the breach, Foresters' was *prima facie* liable to disgorge the entire gain.[89] Second, and only after they established a factual connection, did consideration turn to whether some gains were too remote.[90]

The court has not stated such an approach explicitly in cases where a

---

[83] Ibid [94] (Gageler J) citing *Birtchnell* (n30) 398 (Isaacs, Gavan Duffy, Rich, Starke and Dixon JJ).
[84] *Ancient Order* (n1) [13] (Kiefel CJ, Keane and Edelman JJ), [91] (Edelman JJ); *Warman* (n1) 561–562 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[85] *Ancient Order* (n1) [90]–[91] (Gageler J).
[86] Note, the test in tort did not traditionally conduct the inquiry in two distinct phases. Instead, a single test combining factual and legal causes asked whether, as a matter of common sense, a defendant's conduct constituted a cause of the loss: *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310; *March v E & MH Stramere Pty Ltd* (1991) 171 CLR 506. However, ultimately, the determination of causation at law 'inevitably involves two questions: a question of historical fact as to how particular harm occurred; and a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person': *Wallace v Kam* (2013) 250 CLR 375 [11]–[14] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) ('*Wallace*').
[87] *Ancient Order* (n1) [9] (Kiefel CJ, Keane and Gageler JJ), [88] (Gageler J). See, recently: *UVJ & Ors v UVH & Ors* [2020] SGCA 49; Alex Yeung and Jason Fee, 'Limiting the Fiduciary's Account of Profits: But–For Causation?' (2020) *Trusts and Trustees* 1, 6.
[88] Ibid.
[89] Ibid.
[90] *Ancient Order* (n1) [13] (Kiefel CJ, Keane and Edelman JJ), [91] (Gageler J).

plaintiff seeks an account of profits. Before *Ancient Order*, the language and analysis of the court indicated that the two exercises occurred in parallel.[91] The language the court used considered together factual causes, such as 'profits flowing from the breach' and 'profits derived by reason of the breach', and legal causes, such as 'profits within the scope of the fiduciary's obligation' and gains 'attributable' to the breach.[92] The analysis the court undertook bundled together a consideration of factual and legal causes as the inquiry involved the identification of a factual connection but also assessed the extent of a fiduciary's liability based on policy factors, such as the moral culpability of a fiduciary.

(b) Fiduciary Obligations as Wrongs

Second, the reasoning in *Ancient Order* involves understanding fiduciary liability as assessed by reference to the extent to which a defendant has *breached* an *obligation* they owe to a plaintiff – an approach consistent with that in tort.[93] Historically, when a fiduciary obtained an unauthorised gain, the consensus was that it must be given to the plaintiff, not on the basis of any wrongdoing by the fiduciary, but rather based on the plaintiff's primary right to it.[94] The effect of fiduciary obligations was therefore not 'if you wrongfully gain, it must be disgorged'. Rather, it was 'you cannot gain from the fiduciary relationship, because anything you extract from it will not belong to you'.[95] This view arose because the

---

[91] For example, whether 'profits made [were] attributable to the breach': *Colbeam* (n7) [42]–[43] (Windeyer J); *Dart* (n7) 21–31 (Mason CJ, Deane, Dawson and Toohey JJ); *Consul* (n7) 393 (Gibbs J) whether 'profits [were] obtained by the infringement': *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, 407 (Sheppard, Burchett and Heerey JJ) whether 'the particular benefits…flowed ... in breach of ... duty': *Hospital Products* (n6) 110 (Mason J) whether gains were obtained 'by reason of (the breach)': *Warman* (n1) 557 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Regal Hastings* (n7) 149 (Russel of Killowen LJ) and whether gains were obtained 'by reason or by use of (the breach)': *Howard* (n7) 85 (French CJ, Hayne, Crennan, Gageler and Keane JJ).

[92] Ibid.

[93] For example, in tort, wrongdoing must satisfy causation, remoteness and mitigation.

[94] Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 *Journal of Equity* 87, 90 ('Deterrence, Prophylaxis and Punishment in Fiduciary Obligations'); Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another' (2014) 130 *Law Quarterly Review* 608, 610 ('Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another'); Peter Millett, 'The Common Law and the Equity Practitioner' (2015) *UK Supreme Court Yearbook* 193, 193–194 ('The Common Law and the Equity Practitioner'); Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *Law Quarterly Review* 214, 221–222 ('Equity's Place in the Law of Commerce'); Peter Millett, 'Bribes and Secret Commissions' (1993) 1 *Restitution Law Review* 7, 10 ('Bribes and Secret Commissions'); Peter Millett, 'Bribes and Secret Commissions Again' (2012) 71 *Cambridge Law Journal* 583, 585 ('Bribes and Secret Commissions Again').

[95] See *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] 3 WLR 353. See also Lionel Smith, 'Constructive Trusts and the No–Profit Rule' [2013] *Commonwealth Law Journal* 260, 265; Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (n94) 90; Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another' (n94) 610; Millett, 'Equity's Place in the Law of Commerce' (n94) 221–222; Millett, 'Bribes and Secret Commissions' (n94) 10; Millett, 'Bribes and Secret Commissions Again' (n94) 585.

profit rule is framed in terms of whether gains are acquired 'by *use* of a fiduciary position' which suggests that liability arises from the mere fact of a gain having been made.[96] This understanding derives from old trustee cases disabling trustees from asserting that they have acted wrongfully by treating fiduciaries as 'good men' who always intend to disgorge gains made by use of their position.[97] If one were to accept this view, referred to as the primary rule of attribution model, there remains no scope for rules of remoteness to operate because the rule functions on an all–or–nothing basis. However, the analysis in *Ancient Order* rejects this view.

Ancient Order understands fiduciary obligations as imposing obligations, the breach of which constitutes a wrong, triggering a secondary obligation to disgorge gains.[98] The view finds judicial support elsewhere.[99] For example, in *Hospital Products Ltd v United States Surgical Corporation Ltd*, Mason J held that a fiduciary is '*not* to promote his personal interest by making … a gain'.[100] In this respect, Mason J framed liability arising upon a fiduciary breaching an obligation, not from the mere fact of having made a gain.[101] Three points support viewing fiduciary obligations in the way *Ancient Order* contemplates. First, upon the breach of a fiduciary obligation, the court does not automatically hold gains *in specie* for the plaintiff through a constructive trust.[102] Rather, courts have always determined which gains are attributable to the breach and which gains are not.[103] If fiduciary obligations were primary rules of attribution, this analysis would not occur. Second, the primary rule of attribution approach assumes fiduciaries are 'good men' who

---

[96] *Regal Hastings* (n7) 144 (Russel LJ).

[97] See Peter Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (2011) 32 *Sydney Law Review* 389, 390 ('Account of Profits for Breach of Fiduciary Duty'); Millett, 'Bribes and Secret Commissions Again' (n94) 585.

[98] *Swindle v Harrison* [1997] 4 All ER 705, 720 (Evans LJ) ('*Swindle*'). The court has required a 'reasonable connection' between consequential gains and the breach: *CMS Dolphin v Simonet* [2001] BCLC 704 [140] (Lawrence Collins J) ('*CMD Dolphin*'). See also the discussion in Lee (n10) 35.

[99] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Chan* (n7) 189 (Deane J); *Maguire v Makaronis* (1997) 188 CLR 449, 468 (Brennan CJ, Gaudron, McHugh and Gummow JJ) ('*Maguire*'); *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 206 (Goff and Browne–Wilkinson LJ) ('*Henderson*'); *Swindle* (n98) 720 (Evans LJ); *CMS Dolphin* (n98) [140] (Lawrence Collins J).

[100] *Hospital Products* (n6) 103 (Mason J). Other statements to this effect include that 'liability for account of profits arises because of specific equitable wrongdoing': *Glazier Holdings Pty Ltd v Australian Men's Health Pty Ltd (No 2)* [2001] NSWSC 6 [36] (Austin J).

[101] This way of viewing fiduciary obligations may have arisen from the expansion of negligence liability after *Donoghue v Stevenson* [1932] AC 562 where lawyers may have become accustomed to conceptualising every case of bad behaviour in terms of duty and breach.

[102] Australian courts will not impose constructive trusts if the demands of justice and good conscience would be satisfied without its imposition: *Grimaldi* (n5) 422–423 [583] (Finn, Stone and Perram JJ) citing *John Alexander's Clubs* (2010) 241 CLR 1, 45 [128] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); *Hospital Products* (n6) 110 (Mason J).

[103] *Ancient Order* (n1) [15] (Kiefel CJ, Keane and Edelman JJ); *Warman* (n1) 561–562 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Hospital Products* (n6) 110 (Mason J). See also *Brady v Stapleton* (1952) 88 CLR 332, 336 (Dixon CJ and Fullager J) ('*Brady*'); *Docker v Somes* (1834) 2 My & K 655, 664–665 (Brougham LJ) ('*Docker*'). See, recently: Yeung and Fee (n87) 10.

always intend to disgorge gains made by use of their position.[104] However, courts routinely grant allowances by reference to the extent of a fiduciary's dishonesty.[105] If fiduciary obligations were primary rules of attribution, fiduciaries must disgorge all gains regardless of the culpability or innocence of the fiduciary. Third, although the primary rule of attribution model posits that plaintiffs are entitled to gains as a matter of right, an allowance is a 'matter of discretion not of right'.[106] Accordingly, implicitly recognising that wrongdoing is the basis upon which a fiduciary is to disgorge gains, *Ancient Order* undertook an assessment of the extent of a connection between the breach and the gain, which Foresters should disgorge.[107] This approach is consistent with that in tort and permits the view that some gains may bear too remote a connection to the breach to require disgorgement.

This Part reasoned that *Ancient Order* is the first decision of the High Court to recognise, explicitly, that rules of remoteness assist in explaining how a fiduciary may limit the extent of their liability. Three steps brought this argument to full view. The Part reviewed the reasoning in the case. Then, it explored the features of rules of remoteness as they apply at law. Finally, it drew connections between the features of rules of remoteness as they apply at law and the reasoning in *Ancient Order*.

III 'ALLOWANCES'

This Part analyses *Warman*. Significantly, the case is illustrative of many cases prior to *Ancient Order* in which the court limited the extent of a fiduciary's liability by granting a fiduciary an allowance. It reviews three interpretations of an allowance. Then, it compares these interpretations against the purpose of fiduciary obligations. It concludes that rules of remoteness too, are a more principled way of explaining an allowance.

A Warman International Ltd v Dwyer

1 Facts

Warman had an agreement with an Italian company, Bonfiglioli, to distribute gearboxes in Australia. Mr Dwyer, in breach of a fiduciary obligation he owed to Warman as its then General Manager, secretly negotiated with Bonfiglioli to establish a joint venture. This caused Bonfiglioli to terminate its relationship with Warman. Mr Dwyer established two companies for this purpose. He asked several

[104] Cf *Ancient Order* (n1) [15] (Kiefel CJ, Keane and Edelman JJ); *CMS Dolphin* (n98) [140] (Lawrence Collins J).
[105] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[106] *Digital Pulse* (n38) [311]–[336] (Heydon JA).
[107] *CMS Dolphin* (n98) [140] (Lawrence Collins J).

employees of Warman to join him. As a joint venture, they, in effect, succeeded to the business which Warman, itself, formerly owned.

2 Result

Mason CJ, Brennan, Deane, Dawson and Gaudron JJ held that Warman was entitled to an account of profits for the gains made in the first two years of the operation of Mr Dwyer's business.[108] However, the court granted Mr Dwyer an allowance for the 'skill, expertise, property and resources' he had contributed to the business.[109] Consequently, gains made in the third and fourth years of the business's operation were exempt from liability.[110] The High Court's reasons for doing so included that the relationship between Warman and Bonfiglioli was unlikely to have continued for much longer,[111] the goodwill Mr Dwyer enjoyed in his business was not Warman's property,[112] and the two companies were, in fact, half–owned by Bonfiglioli.[113] Further, local assembly had never formed part of Warman's business, but was part of the business that Mr Dwyer had built; albeit a less substantial part than the distributorship business.[114] However, liability remained for the first two years of Mr Dwyer's business operations because the gains Mr Dwyer received from acquiring Warman's employees would endure for two years.[115]

3 *Reasoning*

Three critical points emerge from *Warman*.

First, consistent with the first way in which the fiduciary may prove that it would be inequitable to disgorge the entire gain in *Ancient Order*;[116] the court may make an allowance for gains that the fiduciary's work and skill generated.[117] If the fiduciary cannot discharge that onus, it bears the consequences of mingling gains attributable to the breach with gains attributable to other sources.[118] Second, in cases in which a fiduciary acquires and operates a business as opposed to a specific asset, it may be 'inappropriate' and 'inequitable' to compel the fiduciary to disgorge the

---

[108] *Warman* (n1) 562 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[109] Ibid.
[110] Ibid.
[111] Ibid 567.
[112] Ibid.
[113] Ibid 562.
[114] Ibid 566–567, 568.
[115] Ibid 562.
[116] Ibid 561.
[117] Alternatively, a fiduciary may receive a proportion of gains, but as stated, the court will only apportion profits if an antecedent arrangement for profit–sharing exists, which did not exist on the facts: *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[118] Ibid 562.

entire gain on an indefinite basis.[119] Third, consistent with *Ancient Order*, the following will influence the extent of fiduciary liability: the fiduciary's level of dishonesty;[120] the desire to not unjustly enrich the plaintiff;[121] and preventing the imposition on a fiduciary of a penalty by requiring a fiduciary to disgorge more than they have gained.[122]

B Historical Interpretations of Allowances

Historically, three interpretations of this kind of allowance exist.

1 *Fairness*

The first explanation for why the court granted Mr Dwyer an allowance in *Warman* is that it would have been unfair and unjust not to do so.[123] This explanation recognises that the stringent rule requiring fiduciaries to disgorge their entire gain may be 'carried to extremes'.[124] This recognition stems from views in cases that preceded *Warman*, where the court granted an allowance because the 'hard and fast rule' that a plaintiff may demand the entire gain is 'unduly severe'.[125] For plaintiffs to take gains without paying for the skill and labour which produced it would be, therefore, inequitable.[126] To remedy this severity, the court must, it is said, consider the 'justice of the individual case' when determining whether a fiduciary is entitled to an allowance.[127]

2 *Factual Connection*

The second explanation for the allowance in *Warman* is its function of identifying which gains Mr Dwyer had made which did not bear, sufficiently, a factual

---

[119] Ibid 561.
[120] Ibid 557.
[121] Ibid 557.
[122] *Hospital Products* (n6) 108–109 (Mason J) citing *Vyse* (n41) 333 (James LJ); *Ancient Order* (n1) [94] (Gageler J).
[123] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). See also Harding (n13) 342–343; Aitken (n13) 61; Palmer, 'Rewarding the Bad Guy' (n13) 146, 162; Palmer, 'Allowances and the Search for Justification' (n13) 21, 25; Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (n97) 390.
[124] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[125] *O'Sullivan* (n7) 468 (Fox LJ).
[126] *Boardman* (n11) 104 (Upjohn LJ).
[127] *O'Sullivan* (n7) 468 (Fox LJ). This view supports the policy goals of Equity: Barnett (n55) 50; Paul Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37, 37–40; Peter Wilson, 'Unconscionability and Fairness in Australian Equitable Jurisprudence' (2004) 11 *Australian Property Law Journal* 1, 28–30; Daniel Clough, 'Trends in the Law of Unconscionability' (1999) 18 *Australian Bar Review* 34, 52–55, 61–62; Hayden Delaney and Desmond Ryan, 'Unconscionability: A Unifying Theme in Equity' (2008) 5 *Conveyancer and Property Lawyer* 401, 403.

connection to his breach to require disgorgement.[128] This view is not concerned with establishing 'but for' causation, namely, whether the gains would not have materialised 'but for' Mr Dwyer's skill and effort.[129] Rather, it is concerned with whether it is possible to describe Mr Dwyer's work and skill as a factual cause of the gains.[130] For example, the court will award an allowance when the increased gains do not bear a factual connection to the breach in that they are not the product or consequence of the plaintiff's property but the 'fiduciary's skill, efforts, property and resources'.[131] In *Murad v Al–Saraj* ('*Murad*'),[132] the English Courts of Appeal similarly viewed the exercise in *Warman* as tied to identifying a factual connection between the gain and the fiduciary's skill.[133] The court stated that implicit in *Warman* was that at some stage the gains would cease to be attributable to Warman's goodwill.[134] Instead, one would attribute the gains to the fiduciary's own efforts and resources.[135]

3 Counter–Restitution

The court in *Warman* noted that the remedy of an account of profits should not be a vehicle which unjustly enriches the plaintiff.[136] Considering this statement, a further possible interpretation of the allowance in *Warman* is that it is a rule of counter–restitution.[137] The principle behind counter–restitution (as a defence to an unjust enrichment claim) is that the result of a plaintiff's unjust enrichment claim

---

[128] *Regal Hastings* (n7) 144–145 (Russel of Killoween LJ), 153 (MacMillan LJ); *Chan* (n7) 199 (Deane J); *Murad v Al–Saraj* [2005] EWCA Civ 959 [72]–[79] (Arden LJ) ('*Murad*'). See also Michael McInnes, 'Account of Profits for Common Law Wrongs' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Law Book Company, 2nd edn, 2005) 428, 430; Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd edn, 2006) 516–519; Edelman (n14) 172.

[129] *Regal Hastings* (n7) 144–145 (Russel of Killoween LJ), 153 (MacMillan LJ); *Chan* (n7) 199 (Deane J); *Murad* (n128) [72]–[79] (Arden LJ).

[130] Ibid.

[131] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[132] [2005] EWCA Civ 959.

[133] *Murad* (n128) [115] (Jonathan Parker LJ), [79] (Arden LJ).

[134] Ibid.

[135] Ibid.

[136] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[137] Allowances have been explained in terms reminiscent of a restitutionary *quantum meruit* claim, such as 'it would be inequitable for beneficiaries to step in and take the profit without paying for the skill and labour which produced it': *O'Sullivan* (n7) 472–473 (Waller LJ). Similarly, they have been explained as 'fair remuneration of a defaulting fiduciary': *Guinness* (n45) 701 (Goff LJ). For commentary on counter–restitution more broadly, see also Burrows, *The Law of Restitution* (n70) 696–697; Birks, *An Introduction to the Law of Restitution* (n70) 351–355; Elise Bant, '*Restitui in Integrum* and the Change of Position Defence: Lessons from Rescission' [2007] *Restitution Law Review* 13, 15; Peter Birks, 'Restitution Without Counter–Restitution' [1990] *Lloyd's Maritime and Commercial Law Quarterly* 330, 335; Ewan McKendrick, 'Total Failure of Consideration and Counter–Restitution: Two Issues or One?' in Peter Birks, *Laundering and Tracing* (Clarendon Press, 1995) 239; Keith Mason, John Carter and Gregory Tolhurst, *Mason and Carter's Restitution Law in Australia* (Lexis Nexis Australia, 3rd edn, 2016) 705 [1735].

should not unjustly enrich the plaintiff at the defendant's expense.[138] On this analysis, an allowance recognises that part of the impugned gain may be set–off against the entire gain to recognise the fair value of the fiduciary's work and skill.[139] If no set–off occurs, receiving the benefit of the fiduciary's contributions would unjustly enrich the plaintiff.[140] Ordinarily, a plaintiff at law is entitled to deny that the defendant's unrequested work and skill amounted to their enrichment.[141] However, this stance becomes untenable when a plaintiff elects an account of profits. As the plaintiff seeks the gains made by the fiduciary's contributions when electing the remedy, they plainly accept the fiduciary's contributions as valuable.[142]

C Exposing the Weaknesses of these Interpretations

These interpretations, when viewed against the purpose of fiduciary obligations, are either not the most appropriate explanation of, or only partially explain, an allowance.

1 Purpose of Fiduciary Obligations

The distinguishing obligation a fiduciary possesses is that of 'absolute and disinterested loyalty'.[143] The law imposes this obligation in Equity by means of two[144] overlapping 'proscriptive obligations'.[145] Each proscriptive obligation is descriptive of circumstances in which Equity will regard conduct as

---

[138] Ibid.

[139] Kit Barker, 'The Nature and Responsibility for Gain: Gain, Harm and Keeping the Lid on Pandora's Box' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 168.

[140] Alternatively, allowances have also been said to be like the requirement to 'do Equity' in cases of rescission: Bant and Paterson, 'Effecting Deterrence through Proportionate Punishment' (n10) 28. In any case, whether the question is framed in terms of unjust enrichment or the requirement to 'do Equity', the process of reasoning is the same: *Plan B Trustees Ltd v Parker* [2013] WASC 216 [89]–[91] (Edelman J); Elise Bant, 'Rescission, Restitution and Compensation' in Simone Degeling and Jason Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 382.

[141] *Guinness* (n45) 701 (Goff LJ).

[142] Ibid.

[143] *Hospital Products* (n6) 104 (Mason J) quoting *Phelan* (n6) 602 (Hand J). See also *Bristol* (n6) 18 (Millett LJ); *Grimaldi* (n5) 344–345 [174] (Finn, Stone and Perram JJ).

[144] These are a 'conflict rule' and a 'profit rule'. The 'conflict rule' appropriates to the plaintiff any benefit or gain the fiduciary obtains or receives in circumstances where a real or possible conflict of personal interest and fiduciary duty existed. The 'profit rule' requires the fiduciary to account for any benefit or gain they obtain or receive from their fiduciary position itself, or from any opportunity or knowledge resulting from it: *Chan* (n7) 199 (Deane J); *Hospital Products* (n6) 67 (Gibbs CJ); *Warman* (n1) 557 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 198 [78] (Kirby J) ('*Pilmer*').

[145] *Friend v Brooker* (2009) 239 CLR 129, 160 [84] (French CJ, Gummow, Hayne and Bell JJ) citing *Breen v Williams* (1996) 186 CLR 71, 93–94 (Dawson and Toohey JJ), 113 (Gaudron and McHugh JJ), 135–137 (Gummow J); *Pilmer* (n144) 197–198 [74] (Kirby J).

unconscionable.[146] The strictness of fiduciary loyalty (and hence complete disgorgement) is traditionally justified by the normative principle of deterrence of wrongdoing.[147] An account of profits achieves this purpose by stripping a fiduciary of that which they have gained from wrongdoing.[148] The more a fiduciary is liable to disgorge, the more fully the law achieves deterrence.[149] This is because complete disgorgement deters fiduciaries from engaging in self–serving conduct.[150] Allowing fiduciaries to evade responsibility increases the risk that they will succumb to their temptations.[151] In light of the normative justification of deterrence, one must assess the extent to which a fiduciary can limit the extent of their liability against the stringency of fiduciary obligations and the vindication that an account of profits seeks to address if a fiduciary breaches that obligation.[152] Accordingly, limiting the extent of a fiduciary's liability must align with the objective of deterring wrongdoing. With this in mind, analysis turns to assessing the compatibility of the historical interpretations against the purpose of fiduciary obligations.

2 Assessing the Interpretations Considering the Purpose of Fiduciary Obligations

Turning to the first explanation for why the court granted Mr Dwyer an allowance: fairness. Asserting that the court should temper the harshness of the rule requiring fiduciaries to disgorge the entire gain in some circumstances is an unprincipled

---

[146] *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312, 318 [26] (Gleeson CJ, Gaudron and Gummow JJ) quoting *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 799 (McLelland J).

[147] *Bray* (n38) 51 (Hershell LJ); *Digital Pulse* (n38) [161] (Mason P), [306]–[414] (Heydon JA); *Ancient Order* (n1) [9] (Kiefel CJ, Keane and Edelman JJ), [79] (Gageler J); *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[148] Ibid. For example, courts often make the award of disgorgement by invoking the maxim: *commondum ex iniuria sua nemo habere debet*: 'a man shall not be allowed to profit from his own wrong': *Attorney–General* (n21) 262 (Goff LJ).

[149] *Bray* (n38) 51 (Hershell LJ); *Digital Pulse* (n38) [161] (Mason P), [306]–[414] (Heydon JA); *Strother* [2007] 2 SCR 177 [77] (Binnie, Deschamps, Fish, Charron and Rothstein JJ).

[150] Harding (n13) 342–343; Edelman (n14) 212; Conaglen (n6) 463; Anthony Duggan, 'Gain–Based Remedies and the Place of Deterrence in the Law of Fiduciary Obligations' in Andrew Robertson and Hang Wu Tang's (eds), *The Goals of Private Law* (Hart Publishing, 2009) 365; McInnes (n128) 430; James Edelman 'Gain–Based Damages and Compensation' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2nd edn, 2006) 147–150; Sarah Worthington, *Equity* (Oxford University Press, 2nd edn, 2006) 131, 134; Anthony Duggan, 'Solicitors' Conflict of Interest and the Wider Fiduciary Question' (2007) 45 *Canadian Business Law Journal* 414, 421–422.

[151] Harding (n13) 342–343; Conaglen (n6) 463. However, it is important to remember that a court will not unjustly enrich the plaintiff or punish a fiduciary by requiring them to disgorge more than what the fiduciary has received: *Ancient Order* (n1) [94] (Gageler J).

[152] *Ancient Order* (n1) [84] (Gageler J) citing *Youyang* (n5) 502 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

response to the stringent standards expected of fiduciaries.[153] *Warman* epitomises the dangers of limiting a fiduciary's liability solely by reference to notions of fairness. Although the court mentioned that Warman's distributorship with Bonfiglioli was unlikely to have lasted more than one year,[154] the court's reasoning indicates that the contribution of Bonfiglioli's goodwill and of the local assembly business to the profit–making were also integral factors justifying the limited disgorgement.[155] However, no attempt was made at trial to value the goodwill of Bonfiglioli,[156] and as such, attempts to determine the degree to which that goodwill contributed to the gains of the new businesses would have required further analysis. The court undertook no such analysis.[157] Accordingly, despite the importance of accurately determining the true value of the gain considering the 'absolute and disinterested loyalty' plaintiffs expect of fiduciaries,[158] the facts of *Warman* indicate that this did not occur. Convenient and expedient judicial estimations of the true value of the gain are therefore not appropriate. The remedy must be commensurate with the obligation it protects.[159] When assessing the extent of fiduciary liability, the court should be as certain as possible that the gains a fiduciary is liable to disgorge are those, which are an unquestionable product of the breach.[160]

Turning to the second explanation for why the court granted Mr Dwyer an allowance: factual connection. The understanding that allowances identify which gains do not bear a factual connection to the breach to require disgorgement misapprehends the content of fiduciary obligations. Consider a situation where a fiduciary has made a gain in the form of a business whose gains grow over the next five years.[161] The fiduciary is liable, according to the profit rule, to disgorge all gains that come from their initial misuse of a fiduciary position, applying a 'but for'

---

[153] See *Murad* (n128) [79] (Arden LJ), [121] (Jonathan Parker LJ), [79] (Arden LJ), [156]–[158] (Clarke LJ). See also Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (n97) 390.
[154] *Warman* (n1) 566–567, 568 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[155] Cf Lee (n13) 502; Mitchell (n13) 329–330; Virgo (n13) 326.
[156] *Warman* (n1) 565 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[157] Ibid 558. See also *Murad* (n128) [116] (Jonathan Parker LJ). In *CMS Dolphin* (n30) CMS Dolphin did not seek an account of profits for any period beyond the year in which Simonet committed his breaches of fiduciary obligation, so the same issue did not arise: at [140] (Lawrence Collins J).
[158] *Ancient Order* (n1) [67] (Gageler J); *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Hospital Products* (n6) 104 (Mason J) quoting *Phelan* (n6) 602 (Hand J). See also *Bristol* (n6) 18 (Millett LJ); *Grimaldi* (n5) 344–345 [174] (Finn, Stone and Perram JJ).
[159] HLA Hart and T Honoré, *Causation in the Law* (Clarendon Press, 2nd ed, 1985). For further support for this point, courts have said that 'integral to the formulation of the fiduciary principle itself' that a fiduciary cannot profit from their position: *Grimaldi* (n5) 405 [513] (Finn, Stone and Perram JJ). Further, an account of profits expresses 'the policy of the law in holding fiduciaries to their duty': *Maguire* (n99) 468 (Brennan CJ, Gaudron, McHugh and Gummow JJ).
[160] *Warman* (n1) 562 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). See also Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (n97) 390.
[161] Note, this hypothetical is like the facts in *Ancient Order* (n1).

test.[162] The fact that the initial misuse of fiduciary position itself suffices as a breach of fiduciary obligation implies that one cannot divide the fiduciary's subsequent actions into categories of 'breach of fiduciary obligation' and 'no breach of fiduciary obligation,' the gains from the latter of which the fiduciary may retain.[163] Rather, the fiduciary's conduct after their initial misuse of fiduciary position is irrelevant to establishing a factual connection between the misuse of position and their subsequent gain.[164] Such is plain on a reading of *Warman* and *Ancient Order*.[165] In this sense, it is simply not possible to argue that no factual connection exists between conduct occurring post–breach and the wrong.

Turning to the third explanation for why the court granted Mr Dwyer an allowance: counter–restitution. Counter–restitution of unjust enrichment is, at best, a partial explanation of an allowance. Two reasons support this view. First, counter–restitution does not entirely capture the objects of disgorgement. As disgorgement aims to deter wrongdoing,[166] it does not focus on the extent to which gains have come at a party's expense,[167] and a plaintiff does not need to have suffered any loss.[168] In contrast, counter–restitution does not prevent wrongdoing.[169] In fact, a person does not need to commit a wrong for restitution to occur.[170] Instead, its function lies in preventing the plaintiff's unjust enrichment at a person's expense.[171] Given the focus on disgorgement is wrongdoing,

---

[162] *Chan* (n7) 199 (Deane J); *Hospital Products* (n6) 67 (Gibbs CJ); *Warman* (n1) 557 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Pilmer* (n144) 198 [78] (McHugh, Gummow, Kirby, Hayne and Callinan JJ). See also Mitchell (n13) 329–330. Note, however, that the plurality in *Ancient Order* (n1) [9] (Kiefel CJ, Keane and Edelman JJ) acknowledged the 'but for' test as sufficient to establish a factual connection did not state that it was necessary.

[163] *Regal Hastings* (n7) 144 (Russel LJ). See also Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (n94) 87; Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another' (n94) 610.

[164] *Bray* (n38) 51–52 (Herschell LJ); *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443, 453 (Roskill J); *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048 [145] (Mummery LJ).

[165] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Ancient Order* (n1) [9] (Kiefel CJ, Keane and Edelman JJ).

[166] Significantly, it has also been said that allowances can only be granted where the exercise of the equitable jurisdiction did not conflict with the policy underlying the rule: *Guinness* (n45) 770 (Goff LJ).

[167] *Ancient Order* (n1) [70] (Gageler J); *Warman* (n1) 562 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[168] *Warman* (n1) 558 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Regal Hastings* (n7) 149 (Russel LJ); *Boardman* (n11) 104 (Upjohn LJ).

[169] See *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 257 (Deane J); *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 520 [20] (Gleeson CJ, Gaudron and Hayne JJ) ('*Roxborough*'); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 378–379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). See also Birks, *An Introduction to the Law of Restitution* (n70) 335.

[170] Ibid. In this respect, counter–restitution also does not explain the distinction in the cases between an honest and dishonest fiduciary.

[171] Ibid. Some argue that the counter–restitution analysis, focused on the unjust enrichment of the plaintiff, should be viewed as the fiduciary having a 'desert' claim. On this view, a fiduciary deserves an allowance because their work has benefitted the plaintiff. This has also been referred to as 'recompense': Harding

mechanisms which limit the extent of a fiduciary's liability for conduct occurring post–breach must relate this limitation, in some respect, to the purpose of deterring wrongdoing.[172] Counter –restitution does not achieve this. Second, counter–restitution is a defence to an unjust enrichment claim by the plaintiff as against the defendant.[173] In this respect, the explanatory power of counter–restitution to the operation of an allowance will depend upon whether the plaintiff has an unjust enrichment claim as against the fiduciary in addition to a claim for breach of fiduciary obligation. An unjust enrichment claim will exist alongside a breach of fiduciary obligation claim in some cases, but not in others. In cases like *Ancient Order*, a correlation existed between Foresters gain and Lifeplan's loss.[174] So, gains the fiduciary made came at the plaintiff's expense, in the relevant sense.[175] However, other cases will exist where a fiduciary made gains that were not, in the relevant sense, at the plaintiff's expense.[176] In circumstances in which the fiduciary obtains an opportunity independently from the plaintiff, and which may not have been available to the plaintiff at the time, those gains have not come at the plaintiff's expense.[177] Of course, one must concede that rejecting counter-restitution reasoning would only apply to fiduciary breach cases, not non-breach cases.

D Remoteness as a More Principled Alternative

Alternatively, understanding allowances as the operation of a rule of remoteness aligns with the goals of disgorgement. One sees its real impact in the answers it offers to the shortcomings associated with interpreting allowances as an exercise in fairness, factual connection and counter–restitution. Below outlines the reasons for this stance.

First, a rule of remoteness is a more appropriate explanation of an allowance than reference to an amorphic notion of fairness. As disgorgement responds to wrongdoing, the most principled way of ensuring that the gains a fiduciary must

---

(n13) 358; Matthew Conaglen, 'The Extent of Fiduciary Accounting and the Importance of Authorisation Mechanisms' [2011] *Commonwealth Law Journal* 548, 560. However, like counter–restitution, this is only a partial explanation of an allowance because in some cases the court has made an allowance even though the defendant's activities did not benefit the claimant in any way. In *Warman* (n1), an allowance was made in favour of a defendant whose activities not only failed to benefit Warman, but also caused Warman to suffer a substantial financial loss: at 553, 568 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[172] Ibid. Although, as established, not in the factual sense.

[173] If, by counter–restitution, one means a broader test, such as where one only looks at the fiduciary separately from the plaintiff and asks whether the fiduciary has a claim in unjust enrichment as against the plaintiff, this may provide an explanation to fiduciary cases. However, this is not the ordinary view of counter–restitution, and this does not seem to be the view in the commentary on allowances.

[174] *Ancient Order* (n1) [70] (Gageler J).

[175] The subtraction of the plaintiff's wealth enables one to say that the defendant's unjust enrichment has been 'at the expense of the plaintiff': *Roxborough* (n169) [26] (Gleeson CJ, Gaudron and Hayne JJ).

[176] *Ancient Order* (n1) [70] (Gageler J); *Warman* (n1) 562 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[177] See *Warman* (n1) 567 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

disgorge are a product of the breach is to assess the extent of their connection to the wrong.[178] This understanding ensures fiduciaries are only liable to disgorge gains that are clearly attributable to their breach, and not others. It is consistent with the objective of deterring wrongdoing. A rule of remoteness serves this purpose by ascertaining the strength of a connection between the gain and the breach.[179] On this view, the court should best understand the notion of fairness simply as recognising that it is unfair to make a fiduciary disgorge some of the gain, because the gain's connection to the wrong is too remote, or tenuous.[180] Such a view avoids convenient or expedient judicial estimations of the true value of the gain that results from the breach of fiduciary obligation, as in *Warman*.[181] It undertakes a process of reasoning, rather than merely making a conclusionary and amorphic statement. It ensures the court determines this value as accurately as possible.[182]

Second, a rule of remoteness is a better alternative than viewing allowances as the identification of a factual connection. As established, it is not possible to argue that no factual connection exists between conduct occurring post–breach and the wrong. However, it is possible to argue that conduct occurring post–breach severs a factual connection between the fiduciary's wrong and the gain. In this respect, viewing allowances as the operation of a rule of remoteness avoids the shortcomings of interpreting allowances as an exercise in factual connection and is consistent with a correct understanding of what constitutes a breach of fiduciary obligation.[183] This is because applying a rule of remoteness does not entail dividing up a fiduciary's actions post–breach into categories of 'breach of fiduciary obligation' and 'no breach of fiduciary obligation' in order to identify which gains are factually connected to actions in each category. One properly applies a rule of remoteness *after* the factual connection between the breach and the gain is established. One does not apply it to establish that connection.[184] Accordingly, it is a more principled way of explaining an allowance.

Third, rules of remoteness have greater explanatory power to allowances

---

[178] *Warman* (n1) 558 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Regal Hastings* (n7) 149 (Russel LJ); *Boardman* (n11) 104 (Upjohn LJ).
[179] Charlies Mitchell QC and Ben McFarlane, 'Hayton and Mitchell on the Law of Trusts & Equitable Remedies: Texts, Cases & Materials' (14th edn, Sweet & Maxwell 2015) [13-124]. Here, the authors noted this possible interpretation of *Warman*, namely that the Court 'effectively held that the profits made by Dwyer and his companies after the first two years were too remote a consequence of his breach of duty to justify ordering them to account for these later profits'. See also. Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (n97) 401–402.
[180] Ibid.
[181] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Ancient Order* (n1) [179] (Nettle J); *Dart* (n7) 111 (Mason CJ, Deane, Dawson and Toohey JJ). See also McInnes (n22) 14.
[182] Ibid.
[183] See Part IIB2. See also Harding (n13) 340.
[184] See its application at law, in *Wallace* (n86) [11]–[14] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

than counter–restitution.[185] As elaborated, understanding gains made because of a fiduciary's work and skill as bearing too remote a connection to the wrong to require disgorgement focuses squarely upon determining the extent to which a fiduciary has wronged.[186] It therefore aligns with the normative purpose of fiduciary obligations, because stripping a fiduciary of only that which they have gained from wrongdoing is most compatible with the purpose of deterrence of wrongdoing. If allowances are counter–restitution, allowances become divorced from wrongdoing. Therefore, allowances also become divorced from the cause of action to which they exist to serve.[187] Further, rules of remoteness will explain both cases in which gains have come at the plaintiff's expense and those where gains arose from pure opportunities unconnected to the plaintiff. On the other hand, counter–restitution will only explain cases in which gains also came at the plaintiff's expense. Remoteness is therefore a preferable explanation.

Part II argued that like in *Ancient Order*, rules of remoteness too, are a more principled way of explaining an allowance.[188] Three steps brought this argument to fruition. First, the Part analysed *Warman*, as illustrative of many cases prior to *Ancient Order* in which the court granted a fiduciary an allowance. Then, it reviewed three interpretations of an allowance. Finally, it compared these interpretations, and a rule of remoteness, against the purpose of fiduciary obligations. It settled on a rule of remoteness as the most principled explanation. Consequently, it may be said that rules of remoteness explain both cases: *Warman* and *Ancient Order*.

IV A PRINCIPLED WAY FORWARD

Considering the findings in Part I and Part II, this Part proposes a model which specifically identifies the content of a rule of remoteness that should apply to fiduciaries. It outlines what circumstances should influence when gains may be too remote. It recognises that it is now appropriate to update a model Edelman

[185] Edelman (n14) 72. See also *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643, 672 (Toulson J).
[186] Harding (n13) 342–343; Palmer, 'Rewarding the Bad Guy' (n13) 162; Palmer, 'Allowances and the Search for Justification' (n13) 25.
[187] *Ancient Order* (n1) [84] (Gageler J) citing *Youyang* (n5) 502 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ). Remoteness also recognises the relevance of a fiduciary's level of dishonesty and the extent to make gains because the more morally culpable a fiduciary, the more the fiduciary compromises deterrence and the less remote the breach is. See Part III.
[188] Although beyond the scope of this article, the approach in *Ancient Order* may exist separately to capture scenarios where a fiduciary generates gains by matters other than the breach, but not because of any actions committed by the defendant.

proposed,[189] nearly twenty years ago.[190] The updated model consists of four propositions:

(1) Rules of remoteness will operate when a breach does not involve the misuse of trust property.
(2) If a breach is deliberate and the fiduciary intended to make resulting gains, those gains will never be too remote. There will be cases in which a breach is deliberate but some or all the gains exceed those which a fiduciary intended. In such cases, those gains may be too remote.
(3) If a breach is not deliberate, it follows that a fiduciary did not intend to make the resulting gains. Resultant gains may be too remote if they are not reasonably foreseeable by a reasonable person in the fiduciary's position at the time of breach.
(4) A gain does not need to come at the plaintiff's expense. However, if there is a correlation between the gain and the plaintiff's loss this will lend credence to, but will not be determinative of, the view that the gains are not too remote.

Given the findings in Part II, allowances do not operate independently of the model. Gains may be too remote by virtue of a fiduciary's work or skill, or otherwise. The article develops the propositions and concludes by assessing the model's ramifications.

A Model Explained

1 Proposition One

The first proposition is: *rules of remoteness will operate when a breach does not involve the misuse of trust property.*

Where the breach of a fiduciary obligation involves the misuse of trust property,[191] the need for deterrence is greater and there should be less scope to limit the extent of a fiduciary's liability. Historically, the classification of fiduciary relationships defined the content of fiduciary obligations. 'Inherently fiduciary'

[189] Edelman (n14) 212. Professor Birks has previously advanced the view that any gain made after the 'first non–subtractive receipt' should be too remote. By 'first non–subtractive receipt', Professor Birks meant the amount of the initial gain made by reason of the breach of fiduciary obligation – like Alpha's initial earnings from the business, but not its gains arising because of the subsequent factors: Birks, *An Introduction to the Law of Restitution* (n70) 351, 355. However, this approach has been considered 'an essentially arbitrary restriction': Burrows, *The Law of Restitution* (n70) 500–501.

[190] As discussed, the model Edelman proposed is like the model proposed in this article in some respects, and it is different in others.

[191] See *Hospital Products* (n6) 110 (Mason J); *Brady* (n103) 336 (Dixon CJ and Fullager J); *Docker* (n103) 664–665 (Brougham LJ); *Scott* (n41) 661 (McTiernan, Taylor and Owen JJ); *Wedderburn v Wedderburn* (1838) 4 My & Cr 41, 55 (Cottenham LC); *Vyse* (n41) 331 (James LJ).

relationships,[192] such as the relationship of 'trustee–beneficiary' concerned how trustees were to administer trust property.[193] Misapplying trust property which increased in value engendered a strict duty to restore it *in specie* and hence to disgorge completely the appreciation in value.[194] Features of the trustee–beneficiary relationship, which necessitated complete disgorgement, included the acknowledgement that exposing another's property to risk undermined the economic interests of the trust and therefore the *very basis of trust*.[195] Such behaviour required a remedial response, which would deter others from engaging in the same behaviour, regardless of whether a fiduciary had acted innocently or fraudulently.[196]

As fiduciary obligations now apply to a wide variety of relationships,[197] courts adopt a holistic approach to defining their content. The court now defines fiduciary relationships by reference to the nature of the obligations the relationship engenders and the circumstances, in which the party was acting,[198] not the classification of the relationship.[199] The flexibility of this approach supports a broad view of fiduciary doctrine.[200] Accordingly, it is unreasonable to apply one fixed remedial response to all fiduciary relationships.[201] Their scope should be 'moulded according to the nature of the relationship and the facts of the case'.[202] For example, commercial arrangements between equal and independent parties with a view to self–gain may now attract fiduciary obligations.[203] Whilst this seems to contradict

---

[192] Relationships that may be considered traditionally or inherently fiduciary include, but are not limited to, trustee–beneficiary: *Hospital Products* (n6) 68 (Gibbs CJ), 96 (Mason J), 141 (Dawson J) partners: *Birtchnell* (n30) 408 (Isaacs, Gavan Duffy, Rich, Starke and Dixon JJ); *Chan* (n7) 178 (Gibbs CJ, Murphy, Brennan, Deane and Dawson JJ) company directors: *Hospital Products* (n6) 68 (Gibbs CJ), 96 (Mason J), 141 (Dawson J); *Mills v Mills* (1938) 60 CLR 150, 185 (Dixon J) and solicitors and clients: *Hospital Products* (n6) 68 (Gibbs CJ), 96 (Mason J), 142 (Dawson J).

[193] Birks, *An Introduction to the Law of Restitution* (n70) 5; cf Joshua Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 577, 580.

[194] For example, it has been said that where a trustee is under a duty to restore trust assets, causation, foreseeability and remoteness are usually not material: *Re Dawson; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, 214–216 (Street J).

[195] Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (n97) 390; Lee (n10) 37.

[196] *Maguire* (n99) 468 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

[197] *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 596 (Sopinka J).

[198] Conaglen (n13) 452; Robert Flannigan, 'The [Fiduciary] Duty of Fidelity' (2008) 124 *Law Quarterly Review* 274, 275.

[199] *Henderson* (n99) 205 (Browne–Wilkinson LJ); *Bristol* (n6) 16–17 (Millett LJ); *Beach Petroleum* (1999) 48 NSWLR 1 [188] (Spigelman CJ, Sheller and Stein JJA).

[200] *United Dominions Corporation Ltd v Brian Proprietary Ltd* (1985) 157 CLR 1, 10–11 (Mason, Brennan and Deane JJ) ('*United Dominions*'). However, this is more the exception than the rule.

[201] Leonard Sealy, 'Fiduciary Relationships' (1962) *Cambridge Law Journal* 69, 72–73; Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (n97) 390; Lee (n10) 36.

[202] *Hospital Products* (n6) 102 (Mason J); *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Chan* (n7) 205 (Deane J); *Boardman* (n11) 104 (Upjohn LJ); *McKenzie v McDonald* [1927] VLR 134, 144, 145 (Dixon AJ); *Re Jarvis (deed)* [1958] 1 WLR 815, 820 (Upjohn J).

[203] *United Dominions* (n200) 10–11 (Mason, Brennan and Deane JJ).

the view that Equity protects weaker parties, some aspects of a commercial relationship may legitimately require protection.[204]

This understanding has important consequences for the extent to which a rule of remoteness will operate. Breaches of trust necessitate the remedial response operating fully because undermining the basis of trust attracts a greater need for deterrence.[205] However, other fiduciary relationships may require a diminished level of deterrence, and therefore diminished liability. In these circumstances, where a fiduciary does not place trust property at risk, a rule of remoteness may operate. For example, the case for limiting the extent of a fiduciary's liability has more force when a fiduciary makes gains from independent sources, without recourse to trust property.[206] Where a fiduciary exploits an opportunity that the trust might not itself have pursued, the fiduciary's misconduct is unconnected to the economic interests of the trust. The fiduciary has not exposed the plaintiff's property to risk.[207]

In *Warman*, the court recognised that diminished liability follows in these circumstances.[208] In limiting the extent of Mr Dwyer's liability, the court emphasised that it may grant an allowance 'so long as [the risks the fiduciary takes] are not risks to which the plaintiff's property has been exposed'.[209] Then, their Honours said that that part of the gain is not 'the product or consequence of the plaintiff's property' but 'the product of the fiduciary's skill, efforts, property and resources'.[210] As noted, the court also drew a distinction between cases in which a the fiduciary diverts a business opportunity and cases in which a fiduciary acquires a specific asset. If fiduciary liability is not subject to limitation, subsequent courts may become reluctant to recognise a fiduciary relationship in all but the most trust–like cases.[211] A strict fiduciary rule may serve only to compel the courts to avoid limiting liability through the back door.[212] This back door is restricting the scope and intensity of the fiduciary obligation such that the relevant gain falls outside the scope of the fiduciary engagement,[213] rather than engaging in meaningful analysis when assessing the extent to which a fiduciary is liable. Accordingly, a rule of remoteness will apply to fiduciary relationships only when a fiduciary does not place trust property at risk.

---

[204] *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1130 (Wilberforce LJ).
[205] Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (n97) 391.
[206] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[207] Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (n97) 401.
[208] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[209] Ibid.
[210] Ibid.
[211] Lee (n10) 39.
[212] Ibid.
[213] Ibid.

2 Proposition Two

The second proposition is: *if a breach is deliberate and the fiduciary intended to make resulting gains, those gains will never be too remote. There will be cases in which a breach is deliberate but some or all the gains exceed those which a fiduciary intended. In such cases, those gains may be too remote*.

(a) Extent of Deliberate Breach

In establishing a fiduciary's liability, it is immaterial that a fiduciary deliberately breached their fiduciary obligation.[214] Despite this, the extent to which a fiduciary deliberately breaches their fiduciary obligation should affect the extent of their liability to disgorge gains.[215] In this respect, a wrong should attract a greater need for deterrence and therefore a greater level of disgorgement if it occurred by virtue of a fiduciary dishonestly breaching their fiduciary obligations.[216] A dishonest fiduciary should be liable to disgorge a very wide pool of gains. There will be no scope for a rule of remoteness to operate.

The court denies relief to a fiduciary who acts dishonestly because 'it would be … inappropriate for courts to step in and rescue fiduciaries from 'the just results of [their] own gross misconduct'.[217] Such behaviour may 'condone the conduct' that the plaintiff suffered.[218] Setting an example for fiduciaries who dishonestly breach their obligations such that the existence of dishonesty attracts a more stringent requirement for disgorgement is more likely to deter breaches in the future.[219] It is therefore more likely to uphold the obligation of loyalty expected of all fiduciaries.[220]

Permitting 'good' fiduciaries to retain gains and withholding gains from 'bad' fiduciaries risks giving the remedy a punitive air.[221] However, on a proper

---

[214] *Warman* (n1) 558 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Ancient Order* (n1) [9] (Kiefel CJ, Keane and Edelman JJ); *Regal Hastings* (n7) 144–145 (Russel LJ).
[215] *Ancient Order* (n1) [70] (Gageler J).
[216] Where the breach was undertaken by 'deliberate or dishonest conduct' influences the obligation to disgorge gains: *Ancient Order* (n1) [15] (Kiefel CJ, Keane and Edelman JJ). The 'severity of the breach' also influences the obligation to disgorge gains: *Ancient Order* (n1) [101] (Gageler J).
[217] *Ancient Order* (n1) [16] (Kiefel CJ, Keane and Edelman JJ) citing Restatement Third, Restitution and Unjust Enrichment, §51 citing *Falk* (n36) 244; See also *Lym International Pty Ltd v Chen* [2009] NSWSC 167 [14] (Hamilton J).
[218] Ernest Weinrib, 'Restitutionary Damages as Corrective Justice' (2000) 1 *Theoretical Inquiries in Law* 1, 29; Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1, 33.
[219] *Murad* (n128) [84] (Arden LJ). See also *John v Mirror Group Newspapers Ltd* [1997] QB 586, 618–619 (Hirst LJ).
[220] Ibid.
[221] Jeremy Birch, 'Exemplary Damages for Breach of Fiduciary Duty' (2005) 33 *Australian Business Law Review* 429, 438; *Digital Pulse* (n38) 311 [51] (Spigelman CJ), 380–381 [329]–[330], 384 [335] (Heydon JA); Charles Rickett, 'Equitable Compensation: Towards a Blueprint?' (2003) 25 *Sydney Law Review* 31, 59.

analysis, this is not the case. The court never requires a deliberate wrongdoer to disgorge more than they have received by reason of their wrong.[222] Disgorgement of gains will therefore remain limited to those gains which were acquired by reason of the wrong and should not extend further to become a penalty.[223] The fact a fiduciary dishonestly committed a wrong merely has the consequence that it is more likely that the gains materialised by virtue of the wrong, on account of the fact that there is evidence of their dishonest nature.[224] For these reasons, gains made from a deliberate breach should never be too remote. A dishonest fiduciary should be liable to disgorge a wide pool of gains.

(b) Extent of Intention to Gain

Like deliberate breaches, if a fiduciary desires or intends to achieve particular gains, this should influence the extent of a fiduciary's liability.[225] In this respect, a wrong should attract a greater need for deterrence and therefore a greater level of disgorgement if it occurred by virtue of a fiduciary intending to make a particular gain. If a fiduciary intends to generate gains, those gains may not be too remote.

As noted in Part I, this is a new test. However, it finds support on a close reading of *Ancient Order*. For the plurality, a critical factor that influenced the extent to which Foresters' gains bore a reasonable connection to its breach was whether Foresters intended to continue reaping the benefit of the business connections they acquired beyond the five–year plan they had made.[226] The basis upon which the plurality reached this conclusion seemed to be simply that there was no evidence Foresters would cease carrying on its business beyond that period.[227] Therefore, the only reasonable inference was that Foresters would continue, intentionally, to take advantage of the business connections it appropriated from Lifeplan. For example, the plurality referred to the fact that Foresters adduced no evidence to the effect that the connections expired after the effluxion of five–years or were likely to endure only for a short period after five years, rather than over the lifetime of their business.[228] For Gageler J, Foresters'

---

[222] As already discussed, the focus of the remedy is on what *gains* accrued to the fiduciary from their wrong: *Attorney–General* (n21) 262 (Goff LJ).
[223] *Hospital Products* (n6) 108–109 (Mason J) citing *Vyse* (n41) 333 (James LJ); *Ancient Order* (n1) [94] (Gageler J).
[224] There are conflicting views surrounding whether an allowance should be completely withheld from intentional wrongdoers. On one view, when gains were the result of the fiduciary's work and skill, it would be *unjust* to deny that effort – even where the fiduciary had acted intentionally: *O'Sullivan* (n7) 458–459 (Dunn LJ), 468–469 (Fox LJ), 472–473 (Waller LJ). On another view, it would be *impossible* for a dishonest fiduciary to discharge the burden of proving that it would be inequitable to refuse an allowance: James Edelman, 'A "Fusion Fallacy" Fallacy?' (2003) 119 *Law Quarterly Review* 375, 376–377.
[225] *Ancient Order* (n1) [70] (Gageler J).
[226] Ibid [16] (Kiefel, Keane and Edelman JJ).
[227] Ibid [21] (Kiefel, Keane and Edelman JJ).
[228] Ibid [21] (Kiefel, Keane and Edelman JJ).

intention was also relevant in determining whether to limit the extent of Foresters liability to disgorge gains beyond the five–year plan.[229] His Honour acknowledged that Foresters did not 'intend [to cease marketing funeral products] after the implementation of the five–year business concept plan.[230] Further, this analysis of *Ancient Order* raises the issue of how intent to make a particular gain might be proved. It is unlikely to be something on which there is direct evidence. Therefore, the court will often have to infer intent from the fiduciary's conduct and the circumstances.

This application in *Ancient Order* reflects the rule of remoteness as it applies in the tort of deceit.[231] In the tort of deceit, where the court establishes a factual connection between the plaintiff's loss and the defendant's wrong,[232] the loss may be too remote if the defendant did not intend to inflict the loss.[233] The similarities between the rule of remoteness in the tort of deceit and the application in *Ancient Order* provide support for limiting the extent of a fiduciary's liability by reference to the notion that any intended gain is not too remote.[234] The mischief that the tort of deceit serves to correct is similar to that for fiduciaries. The tort protects an innocent party who has entered into a bad bargain based on false information provided by the wrongdoer.[235] Similarly, fiduciary obligations protect innocent parties from having relied on the loyalty inherent in a fiduciary relationship to their detriment.[236] Further, loss will not be too remote for the tort where such an intention exists, on the basis that the existence of an intention disposes of any question of remoteness of damage.[237] The tort foregoes a rule of remoteness on the basis that intentional or morally culpable conduct is immoral, and there is little (or no) social utility in allowing deceitful conduct to occur.[238] As this article demonstrates,

---

[229] Ibid [117] (Gageler J).
[230] Ibid.
[231] The plurality in *Ancient Order* may have had in mind the profit equivalent of a compensatory remoteness rule in the tort of deceit: Bant and Paterson, 'Effecting Deterrence through Proportionate Punishment' (n10) 28; Bant (n10) 9–10.
[232] All loss factually connected to the wrong will be considered direct loss. This includes both the initial difference in value between what the plaintiff was induced to pay for an asset and the real value of that asset at the time of purchase, as well as all consequential loss: *Henville v Walker* (2001) 206 CLR 459 [27] (Gleeson CJ), [65] (Gaudron J); *Gould* (n9) 250–251 (Dawson J); *Magill v Magill* (2006) 226 CLR 551 [114] (Gummow, Kirby and Crennan JJ) ('*Magill*'); *Doyle* (n9) 167 (Denning LJ); *Pitcher Partners Consulting Pty Ltd v Neville's Bus Service Pty Ltd* (2019) 371 ALR 480 [99]–[108] (Allsop CJ, Yates and O'Bryan JJ); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1,12 (Mason CJ, Wilson and Dawson JJ).
[233] *Quinn v Leatham* [1901] AC 495, 537 (Lindley LJ) ('*Quinn*').
[234] *Ancient Order* (n1) [16] (Kiefel CJ, Keane and Edelman JJ).
[235] *Magill* (n232) [114] (Gummow, Kirby and Crennan JJ).
[236] *Hospital Products* (n6) 104 (Mason J) quoting *Phelan* (n6) 602 (Hand J). See also *Bristol* (n6) 18 (Millett LJ); *Grimaldi* (n5) 344–345 [174] (Finn, Stone and Perram JJ).
[237] For example, after a factual connection is established, it is immaterial that a plaintiff's loss may have increased by some entirely extraneous unanticipated event, such as a sudden downturn in the property market: *Quinn* (n233) 536–537 (Lindley LJ).
[238] *Doyle* (n9) 167 (Lord Denning MR), 168–69 (Winn LJ), 171 (Sachs LJ).

deterrence is a strong reason for preventing fiduciaries from retaining part of the gain because of the intentional nature of the wrongdoing.[239] The two rationales connect from a policy perspective.

Finally, the question of intended gain is related to the analysis of deliberate breaches. This is because if a breach is deliberate, the resulting gains will likely be intended. The outcome of *Ancient Order* is consistent with this view. Foresters deliberately breached their obligation. The court found that Foresters also intended to make ongoing gains. However, there may be some cases where a breach is deliberate, but a fiduciary did not intend to generate all of the gains. In these cases, gains may be too remote where there is evidence that a fiduciary no longer intends to continue making gains or did not intend to make some of the gains.

3 Proposition Three

The third proposition is: *if a breach is not deliberate, it follows that a fiduciary did not intend to make the resulting gains. Resultant gains will be too remote if they are not reasonably foreseeable by a reasonable person in the fiduciary's position at the time of breach*.

If a fiduciary did not deliberately breach their obligation, this should influence the extent of their liability.[240] A wrong should attract a lesser need for deterrence and therefore a diminished requirement to disgorge gains if it occurred by a fiduciary who did not deliberately breach their fiduciary obligations.[241] Accordingly, a non–deliberate wrongdoer should be liable to disgorge a smaller pool of gains. The question of whether a fiduciary intended to make the resulting gain will not arise here because if one does not deliberately breach their obligation, one cannot have intended anything that followed from the breach. Instead, the issue is whether those gains are reasonably foreseeable. This is an objective question, rather than a subjective question about the fiduciary's actual intent.

In *Murad*,[242] the English Courts of Appeal went some way, in obiter dicta, to articulating the view that the extent of a fiduciary's liability should diminish in cases of non–deliberate breach. Lady Arden stated that where a fiduciary has acted in good faith and without any deception, and believed they were acting in the

---

[239] The tort of deceit model does not necessarily provide a deterrent function, as the plaintiff is under a duty to minimise loss. However, the model in this article merely draws parallels with the tort of deceit, it does not apply features of it that are incompatible with Equity. See *Doyle* (n9) 168 (Winn LJ); Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 162; cf *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 279–280 (Steyn LJ).
[240] *Ancient Order* (n1) [70] (Gageler J).
[241] Edelman (n14) 108.
[242] [2005] EWCA Civ 959.

plaintiff's best interests,[243] a fiduciary may limit the extent of their liability as a matter of policy (and without losing the deterrent effect of the rule).[244] Her Ladyship elaborated that it may be possible in future cases to determine whether a plaintiff would not have wanted to exploit a gain themselves, or would have wanted the fiduciary to have acted other than in the way that the fiduciary in fact did act.[245] In such cases, it was said, the court can provide a plaintiff protection by requiring the fiduciary themselves prove that they should not disgorge the entire gain.[246]

The dictum is consistent with Australian law. In *Harris v Digital Pulse Pty Ltd*,[247] Heydon JA held a fiduciary may discharge the burden of proving an allowance if the fiduciary could show 'an absence of grave misconduct' on their part.[248] Not only do innocent breaches attract a diminished requirement for deterrence, fiduciaries who breach their obligations innocently are more 'deserving' of allowances; although, as established, 'desert' only operates if the gain benefitted the plaintiff.[249] Accordingly, the existence of innocence on the part of a fiduciary to breach their fiduciary obligation should affect the extent of a fiduciary's liability to disgorge gains.[250] Innocent fiduciaries should be liable to disgorge a smaller pool of gains.

For these reasons, in situations where breach is not deliberate, it is appropriate to draw parallels with the rule of remoteness that applies in negligence. This is a lenient test (at least more lenient than the approach in deceit). In negligence, if a reasonable person in the defendant's position, would have foreseen that their conduct would involve the risk that a loss would occur, those losses are recoverable.[251] A risk that loss would occur is foreseeable if it was 'not far–fetched or fanciful'.[252] A risk of loss, which was remote, in the sense that it was extremely unlikely to occur, may nevertheless constitute a foreseeable risk.[253] However, in assessing whether a risk of loss is foreseeable, it is sufficient if the defendant foresaw the kind of loss as a possible consequence of conduct, not the particular

---

[243] *Murad* (n128) [79] (Arden LJ), [121] (Jonathan Parker LJ), [79] (Arden LJ), and [156]–[158] (Clarke LJ).
[244] Ibid.
[245] Ibid.
[246] Ibid.
[247] *Digital Pulse* (n38) 384 [311]–[336] (Heydon JA).
[248] Ibid. See also *Chirnside v Fay* [2006] NZSC 68, 158 [142] (Blanchard and Tipping JJ).
[249] *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567 [30] (Walker LJ). See also Harding (n13) 342–343; Michael Bryan, '*Boardman v Phipps (1967)*' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 581, 609.
[250] *Ancient Order* (n1) [70] (Gageler J).
[251] *Chapman v Hearse* (1961) 106 CLR 112, 119 (Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ); *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 389 (Barwick CJ), 391 (McTiernan J), 395–296 (Windeyer J), 413 (Walsh J) ('*Mount Isa*'); *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 (Mason J) ('*Wyong*'). See also *Civil Liability Act 2002* (WA) s5B.
[252] *Wyong* (n251) 47 (Mason J).
[253] Ibid.

loss. Accordingly, it is not necessary that a loss of any severity, or the mechanism of any such loss, be foreseeable.[254] Courts describe the general law test of foreseeability as 'undemanding'.[255] Whether a risk is reasonably foreseeable is determined objectively.[256]

Applying this to fiduciaries: if gains continue after the breach, a fiduciary who has committed a non–deliberate breach is only liable to disgorge those gains which a reasonable person could have reasonably foreseen at the time of breach. An innocent fiduciary is not unlike a defendant who, by careless conduct, attracts liability for negligence. Innocent or careless conduct should necessarily attract a lesser extent of liability than that of an intentional wrongdoer, who should be less able to limit the extent of their liability.[257] This contrasts to proposition one,[258] as all losses are recoverable for deliberate breaches where gains were intended (whether foreseeable or not) on the basis that a deliberate wrongdoer should not be able to escape liability because a 'reasonable person' would not have foreseen the loss in question. This is because an intentional wrongdoer is not a reasonable person.[259] Accordingly, the court adequately achieves deterrence by disgorging the expected or foreseeable gains flowing from a non–deliberate act; stripping away unexpected or unforeseeable gains is unnecessary. However, many gains, perhaps most, will be reasonably foreseeable, so even innocent fiduciaries will often be liable for most of their gains.

4 Proposition Four

The final proposition is: *a gain does not need to come at the plaintiff's expense. However, if there is a correlation between the gain and the plaintiff's loss this will lend credence to, but will not be determinative of, the view that the gains are not too remote*.

There might be occasions where analysing the extent to which the gain correlates with the plaintiff's loss is of assistance in ascertaining what the fiduciary

---

[254] *Mount Isa* (n251) 390 (Barwick CJ); *Sydney Water Corporation v Turano* (2009) 239 CLR 51 [46] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
[255] See *M R & R C Smith Pty Ltd v Wyatt [No 2]* [2012] WASCA 110 [42] (Pullin JA; Newnes JA agreeing); *Taylor v Fisher* [2018] WASCA 126 [34] (Martin CJ); *Lightfoot v Rockingham Wild Encounters Pty Ltd* [2018] WASCA 205 [54] (Buss P, Murphy and Beech JJA); *Best Bar Pty Ltd v Warn* [2019] WASCA 15 [40] (Quinlan CJ, Murphy and Mitchell JJA).
[256] *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 [70] (Gummow J).
[257] As to intentional conduct, see proposition one.
[258] It is not 'consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequential however unforeseeable and however grave, so long as they can said to be 'direct'': *Re Polemic v Furness, Withy & Co Ltd* [1961] AC 388, 422 (Viscount Simons LJ).
[259] *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 [13] (Gleeson CJ).

has gained.[260] *Ancient Order* provides further credence to the possibility of such occasions. On the facts, the upward trajectory of the inflow of funds to Foresters decimated Lifeplan's own business.[261] However, market conditions did not cause this temporal correlation.[262] In fact, Foresters' gain was Lifeplan's loss.[263] Such a fact was stark in the visual depiction of the parties' annual inflows, as annexed to the plurality's reasons. The congruence between the loss and the gain lent credence to the plaintiff's claim that the breach was the cause of the gain and that the fiduciary was liable to disgorge the gains – because it suffered a correlative loss, which was only attributable to the breach.[264]

However, the model in this article does not take this correlation point too far. In *Warman*, this analysis provided little assistance because Mr Dwyer's gain was much greater than the plaintiff's loss, and thus some of the gain was too remote because it arose from Mr Dwyer's own business practices.[265] Accordingly, it will only lend credence to the view, in cases of this kind, that gains are not too remote. It will not be determinative. Further, in *Ancient Order*, it was an important integer that the market conditions were not what was responsible for the commensurate gain by Foresters and equivalent loss by Lifeplan.[266] That will not always be so. Coincidence does not mean cause. There may be many factors, which play a role, often not amenable to precise measurement. To pay too much credence to the congruence is to assume that all other factors remain constant. The court should not make this assumption; as these issues are matters for expert evidence.

B Ramifications

Consideration of the ramifications of this model is necessarily very brief and limited. However, three ramifications may be noted.

First, in cases in which the gain is in the form of a business opportunity, the potential for negative externalities for third parties such as shareholders and employees, emanating from the strict application of fiduciary loyalty, may be high. The model has relevance in this context. Further, it follows from what the court decided in *Ancient Order* itself, [267] that the court should treat knowing participants in the same way as fiduciaries.[268] Like Foresters in *Ancient Order*, an individual

---

[260] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Ancient Order* (n1) [94] (Gageler J); *Regal Hastings* (n7) 135 (Russel LJ).
[261] *Ancient Order* (n1) [115] (Gageler J).
[262] Ibid.
[263] Ibid.
[264] Ibid.
[265] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[266] *Ancient Order* (n1) [115] (Gageler J).
[267] Ibid [4] (Kiefel CJ, Keane and Edelman JJ).
[268] Ibid.

who knowingly participates in a breach of fiduciary obligation is liable to disgorge any gain received because of that participation.[269] In this respect, those who knowingly participate in a breach are equally subject to the model.[270] However, the fact that they merely knowingly participated and did not directly breach a fiduciary obligation is likely to influence the veracity of the applicable rule of remoteness in a given case.[271]

Second, recognising that rules of remoteness assist in explaining how a fiduciary may limit the extent of their liability may facilitate further application in Equity, by analogy, of principles at law that limit the liability of a wrongdoer.[272] For example, the model may have application to cases of breach of confidence in which a plaintiff seeks an account of profits.[273] The model may have particular relevance in this context because gains made in breach of confidence may have widespread and far–reaching consequences.[274]

Third, the model applies to anticipated or unrealised future gains, as *Ancient Order* confirms.[275] However, this raises a question of how far disgorgement of unrealised gains extends.[276] It cannot extend to future profits indefinitely, as that is 'inequitable' and 'inappropriate'.[277] One idea is that it should only extend so far into the future as is necessary to value the business by discounting expected future cash flows to ascertain their net present value. This was the approach in *Ancient Order*, although it would not apply universally. Whilst this risks unjustly enriching a plaintiff if the anticipated future gains do not materialise,[278] there is no reason why the same contingencies may not work the other way in that, if the future gains turned out to be higher than anticipated at the time of judgment, then the remedy may prove inadequate.

---

[269] *Consul* (n7) 397 (Gibbs CJ).
[270] *Ancient Order* (n1) [4] (Kiefel CJ, Keane and Edelman JJ). Further, the principles stated by Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244 have commonly been assumed to extend to 'persons dealing with at least some other types of fiduciary': *Farah Constructions Pty Ltd v Say–Dee Pty Ltd* (2007) 230 CLR 89 [113] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also Jamie Glister, 'Diverting Fiduciary Gains to Companies' (2017) 40(1) *University of New South Wales Law Journal* 4, 6; Stephen Gageler, 'Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2018) 50, 51.
[271] O'Hara (n10) 616.
[272] Andrew Burrows, 'Remedial Coherence and Punitive Damages in Equity' in Simone Degeling and James Edelman, *Equity in Commercial Law* (Lawbook Co, 2005) 382.
[273] See *Attorney–General* (n21) 280–282 (Goff LJ); *Bluescope* (n21) [191] (Emmett J).
[274] See the facts in *Bluescope* (n21) [191] (Emmett J).
[275] *Ancient Order* (n1) [23]–[24] (Kiefel CJ, Keane and Edelman JJ).
[276] It would be incorrect to require disgorgement of realised profits but not to allow unrealised profits that will be realised upon performance of the relevant contract where there is no reason to expect that performance will not occur.
[277] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[278] *Ancient Order* (n1) [94] (Gageler J).

V CONCLUSION

As Professor Birks once said '[o]ne large-scale danger to the rationality of our law lies in the exaggeration of the historical mission of equity to do justice, as though it had some special licence to ignore the requirements of legal certainty'.[279]

The question posed in the Introduction to this article was: at what point should Alpha no longer be liable to disgorge the gains it has made in breach of fiduciary obligation, despite a factual connection existing between those gains and their breach? In answer to this question, the article has submitted that rules of remoteness, which limits the extent of a defendant's liability to compensate for loss at law, can explain, and are the most principled way of explaining, at what point Alpha will no longer be liable to disgorge those gains. It recognised that rules of remoteness explain *Ancient Order* and the allowance in *Warman*. It proposed a model to ascertain what circumstances should influence when those gains may be too remote. The model stated four propositions.

Although it is difficult, if not impossible, to achieve mathematical exactness in attributing gains to defaulting fiduciaries,[280] analytical tools such as rules of remoteness are vital if the law is to be progressed on a rational basis. The model advanced in this article contributes to that project.

---

[279] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 22.

[280] *Warman* (n1) 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). See also William Gummow, 'Equity: Too Successful? (2003) 77 *Australian Law Journal* 30.