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Abstract
A fiduciary, accidentally or deliberately, may breach his duty to his beneficiary by misusing his position to derive an unauthorised profit. Paradoxically, and notwithstanding this breach, he may be entitled to receive an 'equitable allowance' for the work which he has done. The award of an allowance represents an abrupt departure from the 'prophylactic' disciplinary sanctions to which Equity normally subjects a fiduciary. Perhaps as a result of this incongruity, technical questions concerning the ease with which such an 'allowance' may be granted and the principles upon which it is awarded are much disputed.

Keywords
equitable allowance, fiduciary, breach of duty

RECONCILING 'IRRECONCILABLE PRINCIPLES' - A REVISIONIST VIEW OF THE DEFAULTING FIDUCIARY'S 'GENEROUS EQUITABLE ALLOWANCE'

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A fiduciary,[1] accidentally or deliberately,[2] may breach his duty to his beneficiary by misusing his position to derive an unauthorised profit.[3] Paradoxically, and notwithstanding this breach, he may be entitled to receive an 'equitable allowance' for the work which he has done. The award of an allowance represents an abrupt departure from the 'prophylactic' disciplinary[4] sanctions[5] to which Equity normally subjects a fiduciary.[6] Perhaps as a result of this incongruity, technical questions concerning the ease with which such an 'allowance' may be granted and the principles upon which it is awarded are much disputed. Professor Finn[7] has noted that awarding the allowance to the fiduciary for his own skill and exertions may obviate many difficulties in balancing the equitable entitlements of the parties; but, he notes, 'it does leave open the objection of the purist'. The 'purist's objection' is a very simple one and was stated recently by Lord

1 '... the fiduciary undertakes to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a practical sense': per Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97.

2 Whether the bona fides of the fiduciary makes any difference to his allowance is discussed below at the text to notes 53 to 75 and the analysis of *Estate Realties v Wignall* [1992] 3 NZLR 615.

3 A difficult issue beyond the scope of this article is how the 'profit' is to be calculated. Suppose, for example, that the 'property' which is misused by the fiduciary is some corporate opportunity. Is he entitled to receive any of the capital gain involved in its exploitation? The quotation from Mason J at text to notes 18 to 19 illustrates the difficulties which arise when an attempt to define profits is made.

4 *Bray v Ford* [1896] AC 44 at 48; *Docker v Soames* (1834) 2 My and K 656 at 664-5; 39 ER 1095 at 1098.

5 *Green and Clara Pty Ltd v Bestobell Industries Pty Ltd* [1982] WAR 1 at 20 per Kennedy J.

6 It is, however, consistent with permitting the defaulting trustee to retain a proportionate share of the profit derived from purchasing an appreciating asset with a mixed fund composed partly of trust monies, and partly of his own. This is discussed in the context of *Australian Postal Corporation v Lutaks* (1991) 21 NSWLR 584 at text below notes 79 to 86.

7 Finn, *Fiduciaries* (1977) para 269.

Goff in *Guinness v Saunders*.[8] How is the allowance to be reconciled with the fundamental principle that a trustee is not entitled to remuneration for services rendered by him to the trust except as expressly provided in the trust deed?[9] Strictly speaking, it is irreconcilable as so stated.

The collision of principles flows from the lack of a rational basis, on purely economic grounds, *against* awarding an allowance to a fiduciary in appropriate circumstances where his actions benefit both himself and his beneficiary. The application of a blanket rule denying an award to a fiduciary offends reason; accordingly, the courts, without saying so expressly, must denature the fiduciary's strict obligation by simultaneously taking away the profit he earns and then returning all or some portion of it by way of allowance to him. This return of part of the 'profit' occurs at present somewhat capriciously although various attempts to justify it in principle have been made by judges and commentators. The hesitancies over the granting of any allowance are the more odd when it is remembered that it is conventionally acceptable for a defaulting trustee to retain a proportion of the profit made from acquiring an asset with mixed funds[10] if equity's true goal was deterrence, the trustee who abused his position should be deprived of all profit there as well.

The practicalities of the fiduciary's duty have been more forthrightly recognised in other jurisdictions.[11] For example, the need to 'balance' the rational, economic and moral imperatives which define the scope of the fiduciary duty has been examined in the American literature, and in a detailed critique in England.[12] In the United States, a distinguished commentator,[13] in a slightly different context,[14] has posed the essential issue as follows:

> What is there...in traditional fiduciary law from which rational parties might wish to deviate? The traditional fiduciary ethic insists that the fiduciary acts selflessly.

8 [1990] 2 AC 663 at 701. In *Guinness* it was argued for Ward, the financier, that whether or not he was entitled in contract to a payment for completing a successful take-over, he was entitled to payment of an equitable allowance. This claim was rejected by the House of Lords and is discussed below at notes 77 and 78.

9 As Tipping J noted in *Estate Realties v Wignall* [1992] 3 NZLR 615 at 627, Lord Goff's own formulation of the issue does not sit at all well with any case of constructive trust where, ex hypothesi, there is no 'trust deed' to which reference may be made.

10 *Scott v Scott* [1964] VR 300; (1963) 109 CLR 649. The best recent discussion is by Bryson J in *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 583 at 593-4.

11 For a recent overview, see Bratton, 'Public Values and Corporate Fiduciary Law' (1992) 44 Rutgers LR 675 at 678-680.

12 Bishop and Prentice, 'Some Legal and Economic Aspects of Fiduciary Remuneration' (1983) 46 Modern LR 289. This article looks at the broad question of the efficient operation of a fiduciary's services.

13 Coffee, 'The Mandatory\Enabling Balance in Corporate Law: An Essay on the Judicial Role' (1989) 89 Col LR 1618 at 1658.

14 Professor Coffee was discussing the duties of directors as fiduciaries but his general comment is directly applicable to trustees, agents and others since the same policy considerations are relevant.

> At bottom, the anticontractarians believe not only that beneficiaries desire such a relationship, but that a public morality requires its preservation. Two visions of society here collide: the individualistic, wealth maximising view of the economist and the communitarian ethic of the moralist'.

It is not proposed to enter into any debate whether fiduciary duties could be better ordered if a more 'contractarian' approach were taken to defining them nor will there be any attempt to analyse the area from an economic perspective. Despite the validity of those arguments, the court has thus far proved unwilling even to entertain an unvarnished 'economic' approach. It lacks the relevant expertise to do so, and the relevant recent cases have not been argued on that basis. It will be suggested, however, that recognising the economic importance of bestowing some allowance upon the defaulting fiduciary would be a step in resolving current tensions about such payments.

This article is in two parts. The first explores in detail the black-letter authority which supports and quantifies the equitable allowance; the second briefly discusses whether a principled basis in equitable principle for the grant of the award can be discovered and explores the part which economic and other considerations have to play. Some of the arguments advanced may, in terms of received equity principle, appear iconoclastic but if the principles lead to conflicting results or 'irreconcilable' results they must be reconsidered and, if necessary, amended to mirror reality.

Large technical questions on the award of the allowance remain unanswered by the cases. Among them are: what relevance does the conduct or moral culpability of the fiduciary play in the occasion for and size of the award? What harm would be done by always permitting an award? On what basis should the award be granted?[15] Is the asserted analogy between a 'balancing' award in rescission, and that for the defaulting fiduciary apposite? In particular, it is necessary to deal with the dichotomy between a *penal* and a *compensatory* award against the fiduciary which seems to lie at the heart of the problem. A large part of the difficulty arises because of the inconsistent use of terminology in the cases - little attention is paid to defining precisely the relevant 'profit', 'gain' or 'loss' acquired or suffered by the fiduciary and beneficiary respectively, and occasions generally for imposing a constructive trust. In the last wider question, the present inquiry forms but a small and important part.

An overview: cases and commentators

Although there are relevant English, Australian and New Zealand lower and

15 Such an inquiry spills over into examining when and why an account, rather than equitable compensation, should be awarded against a fiduciary. That area is beyond the scope of the present article.

intermediate appellate court decisions,[16] the matter has not been analysed in the High Court of Australia[17] or the House of Lords. In *Hospital Products Ltd v United States Surgical Corporation*[18] Mason J, the only Justice to advert to the question, said in obiter that the defaulting fiduciary might be mulcted of his gains in one of two ways. He might either be required to disgorge the particular profits which flowed from a breach, or the entire business and its profits 'due allowance being made for the time, energy, skill and financial contribution that he has expended or made'. He did not address directly how this 'due allowance' was to be calculated. Nor, with respect to his Honour, is it immediately clear that preferring one method of calculation to the other will necessarily lead to any difference in the financial result.[19] In *Phipps v Boardman*,[20] the House of Lords' main contribution on the topic, the award of an allowance, was assumed without discussion.

Surprisingly, and notwithstanding its general importance, the question has not greatly attracted the attention of commentators.[21] Kearney J, who in his judgments[22] and writing[23] has examined the question of an allowance in detail, has remarked that 'the basis for provision of just allowances is vague, permitting it to be adapted to cover not only wages and other outgoings, but

16 *DPC Estates v Consul Developments* [1974] 1 NSWLR 443; *Queensland Mines v Hudson* (1971-1976) ACLC 28 at 658; *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488; *Paul A Davies (Australia) Pty Ltd v Davies* [1983] 1 NSWLR 440; *United States Surgical Corporation v Hospital Products* [1983] 2 NSWLR at 157; *Green and Clara Pty Ltd v Bestobell Industries Pty Ltd (No 2)* [1984] WAR 1; *O'Sullivan v Management Agency and Music Ltd* [1985] 1 QB 428; *Fraser Edmiston Pty Ltd v AGT (Old) Pty Ltd* [1988] 2 Qd R 1; *Lutak v Postal Commission* (1990) 21 NSWLR 584; *In the Marriage of Wagstaff* (1990) 14 Fam LR 78; *Cook v Evatt (No 2)* [1992] 1 NZLR 676; *Estate Realties v Wignall* [1992] 3 NZLR 615.

17 Note, however, the detailed discussion by Deane J in *Chan v Zacharia* (1984) 154 CLR 178, 204-5 cited by Kearney J in Kearney, 'Accounting for a Fiduciary's Gain in Commercial Contexts' in Finn (ed), *Equity and Commercial Relationships* (1987) at 209. His Honour's discussion remains the most detailed and incisive discussion of the general issues addressed in this article.

18 (1984) 156 CLR 41 at 110.

19 This appears to the arithmetic conclusion obtained by either giving the 'particular profits' (X) or giving the 'entire business'(Y) plus (X) and then deducting the 'due allowance' (Z). Presumably, the dictum infers that the second computation does not give back by way of allowance the capital part of the business.

20 [1976] 2 AC 46.

21 For example, Professor Cope, *Constructive Trusts* (1992) at 282-4 examines the main cases but without attempting to rationalise them. Professors Ford and Lee, *Principles of Trust Law* (1990) para. 1714.3 confine themselves to the lapidary comment that the court may award the trustee an allowance. Dr Spry, *Equitable Remedies* (4th ed 1990) does not appear to mention the topic at all. Goff and Jones, *Law of Restitution* (1986) at 254-5 discuss the award of an allowance in the context of rescission which, for reasons addressed below, is misleading. They do, however, make the telling point that the award of the allowance puts the fiduciary wrongdoer in a more favourable position than the bona fide and innocent improver of another's property. Professor Jones's earlier article, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968) 84 LQR 472 did not focus on the question of allowance. Fridman and McLeod, *Restitution* (1982) is unhelpful.

22 See, for example, *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488.

23 Kearney, 'Accounting for a Fiduciary's Gains in Commercial Contexts' in Finn (ed), *Equity and Commercial Relationships* (1986) at 195-1.

for further provision in favour of a fiduciary whose efforts may be the real or substantial source of the profits of the business'.[24] His Honour regards the 'just allowance' and the making of an 'apportionment'[25] as the two methods by which the fiduciary's gain is to be ascertained. Meagher, Gummow and Lehane[26] note the possibility of an allowance 'at least if [the fiduciary] has acted honestly and, if [the fiduciary] has been unassailably honest and unusually skilful, that allowance should be 'liberal'...'. The learned authors do not, however, attempt to provide a reasoned basis for the award.

The basic rule against fiduciary profit

All the relevant authority is resolutely against permitting a fiduciary's duty to conflict with his interest by permitting him to gain from a breach of duty. A clear statement of this rule, among many examples, is the holding in *Regal Hastings v Gulliver*[27] where Viscount Sankey said:

> The general rule of equity is that no one who had duties of a fiduciary nature to perform is allowed to enter into engagements in which he has on can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his cestui que trust.

Furthermore, in applying this rule, the *mala fides* of the alleged constructive trustee is irrelevant.[28] The only relevant 'defence' to such a claim is 'a full and complete disclosure of all material facts by the fiduciary to his principal or beneficiary, and a consequent informed consent by the principal, or beneficiary, to the fiduciary's acting in his own interest with a view to obtaining a profit.[29]

Boardman v Phipps

The modern starting point for analysis of the allowance is, of course, *Boardman v Phipps*. The fiduciaries were deprived of the gain which they derived in trading profitably in company shares about which they acquired important information while engaged in executing a trust. Their actions, while innocent, were in breach of duty. Nevertheless, Wilberforce J[30] at first instance awarded them a 'generous equitable allowance' for the work which

24 Ibid at 195.
25 Ibid.
26 Equity: *Doctrines and Remedies* (1992) para 551 citing *Phipps v Boardman*; *Brown v Litton* (1711) 1 P Wms 140; 24 ER 329; *Brown v De Tastet* (1819) Jac 284; 37 ER 858; *Lord Provost v Lord Advocate* (1879) 4 AC 823, 839; see too *Wedderburn v Wedderburn* (1856) 22 Beav 117; *Cassells v Stewart* (1881) 6 AC 74.
27 [1967] 2 AC 134 at 137.
28 '... it is immaterial that there was no absence of good faith or damage to the person to whom the fiduciary obligation was owed': per Deane J in *Chan v Zacharia* (1984) 154 CLR 178 at 199.
29 Per Toy JA in *Baillie v Charman* [1993] 1 WWR 232 at 240.
30 [1964] 1 WLR 993 at 1018.

they had done and this award was upheld in both the Court of Appeal[31] and the House of Lords.[32]

Wilberforce J's judgment is instructive as an example of the way in which the courts tend to confuse the precise benefit which the fiduciary has conferred upon the estate to the detriment of the fiduciary's equitable entitlement. His Lordship held that an allowance was payable since if:

> [the fiduciary] had not assumed the role of *seeing it through* [the execution of the scheme which the *fiduciary* had devised], the beneficiaries would, had they been well advised, have employed an expert to do it for them. If the trustees had come to the court asking for liberty to employ such a person, they would in all probability have been authorised to do so, and to remunerate the person in question.[33]

This dictum, upon analysis, ignores the distinction between the *conception* of an original and ingenious plan, and the *execution* of another's scheme. While it is no doubt true that, given a suggested scheme, a hypothetical expert could have carried it through, the dictum takes no account of the notional capital value of *conceiving* such a scheme ab initio: it was this that the trustees did in *Boardman*. To pay them anything less than the full notional capital value of such a scheme was to do them a serious injustice.

In the Court of Appeal[34] Lord Denning MR held that the gist of the claim was 'unjust enrichment' but he was obviously using that term in its broadest sense since it is clear that recovery is allowed by the beneficiary from the fiduciary notwithstanding that the former has lost no profits and suffered no damage at all.[35] The allowance was discretionary and its scope depends upon the circumstances: 'If the agent has been guilty of any dishonesty or bad faith, or surreptitious dealing, he might not be allowed any remuneration or reward'.[36] Pearson LJ felt that the amount which the beneficiaries obtained was 'unreasonably large' but that the rule of equity requiring payment was rigid.[37] He noted that the making of an order contained a 'penal element'.[38] Russell LJ stressed the importance of upholding the rules of equity 'whose rigidity is necessary *if cases deserving of no sympathy are not to escape*'.[39] In the House of Lords, the debate focussed on the scope of the fiduciary relationship - it was accepted that the fiduciaries were entitled to an allowance in the event that they had to disgorge the profits.[40] The principles

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31 [1965] Ch 992.
32 [1967] 2 AC 46.
33 *Phipps v Boardman* [1964]1 WLR 993 at 1018.
34 [1965] Ch 992, 1020.
35 *Parker v McKenna* (1874) LR 10 Ch App 96, 118.
36 Ibid.
37 Ibid 1030.
38 Ibid 1031.
39 Ibid 1032.
40 [1967] 2 AC 46, 104 per Lord Cohen; 112 per Lord Hodson.

underlying the award of the allowance do not appear from any of their Lordships' judgments.

Precedents for *Boardman*

Now, the award of an allowance in *Boardman* was not unprecedented. As long ago as 1834 in *Docker v Soames*,[41] Lord Brougham had made it clear that a defaulting trustee was not to be deprived of all the benefit to the trust which flowed from his personal skill and exertion but was chargeable only for the reasonable profit which could be calculated on an account, or derived from applying a notional interest of 5% to the capital employed. It had been suggested that if a skilled trustee took a fungible piece of trust property and converted it into a valuable chattel, he would be deprived of all the additional profit so generated. Brougham LC dismissed any such suggestion since that would be 'not of profits upon stock, but of skilful labour very highly paid; and no reasonable person would ever dream of charging a trustee, whose skill thus bestowed had so enormously augmented the value of the capital as if he had only obtained from it a profit'.[42] A parallel line of authority shows that surviving partners were entitled to a generous allowance for managing the capital and business of a deceased partner against claims for all the profit derived from trading mounted by the deceased partner's heirs.[43] Subsequently, prior to *Boardman*, in *Re Jarvis*[44] Wilberforce J had upheld an award to the trustee who had successfully managed an estate and resulted in a large profit for the beneficiary. Ignoring for the moment an issue of laches, the trustee was held entitled to 'all just allowances for her own time, energy and skill, for the assets she ha[d] contributed...' and for other payments made.[45]

English, Australian and New Zealand authorities since *Boardman*

In more recent decisions, the ability of the courts to grant such an allowance has been the subject of different views. The debate has centred on:

(a) the effect of the fiduciary's mala fides on the making of an award and whether there is a penal element in refusing it; and
(b) the extent to which a fiduciary may lay claim to all the proceeds of the breach by way of allowance.

There are indications that the courts may grant an allowance which covers all the efforts of the defaulting fiduciary. In possibly permitting a large scale

41 (1834) 2 My and K 656; 39 ER 1095.
42 Ibid 667; 1099.
43 It is this line of authority which is relied on by Meagher, Gummow and Lehane: above n 26.
44 [1958] 2 All ER 336 at 340.
45 Ibid 341.

return, the courts manifest their ambivalence. As noted above, there is something odd about a system which reproves the fiduciary by holding him to the highest standard but simultaneously rewards him by a side wind. As a consequence, the work which the fiduciary carries out may be so valuable that a just allowance will result in his receiving all the gain from the transaction. On the other hand, certain of the cases indicate that the improper conduct of the fiduciary may result in his being absolutely debarred from any allowance at all. The cases, then, are in a state of flux.

A good example of this ambivalence is *Queensland Mines v Hudson*[46] where a company director made use of a highly speculative mining possibility and succeeded in its development in breach of duty to the company. Wootten J, at first instance, ritualistically invoked the high standards imposed on fiduciaries: '[the courts] simply insist that such a person does not act in a way in which he is exposed to temptation'.[47]

The decision at first instance turned on the laches of the plaintiff but in obiter Wootten J observed that 'in some cases proper remuneration for what has been done by the fiduciary may allow him to keep most or all of the benefit he has acquired'.[48] So, the defaulting director in developing highly speculative mining opportunities, had made a silk purse out of a sow's ear; accordingly, 'it [was] a case in which any realistic quantum meruit assessment would have to be closely related to the value of the achievement'.[49] In other words, despite imposing a high prophylactic standard, the net result would have been to give the fiduciary all the capital profit.

A little earlier, in the New South Wales Court of Appeal in *DPC Estates v Consul Developments* Hutley JA suggested that there be allowance to recoup Consul in full for its expenditure by paying a reasonable allowance for Consul's overhead, since the acquisition of the property acquired in breach of duty was fairly referable to the management of the property.[50]

A more detailed but less useful discussion is contained in the Court of Appeal's decision in *Hospital Products*[51] where it would have awarded a constructive trust over the assets of the defendant 'because of the gross character' of its breaches, 'including fraud' but would also have awarded 'just allowances'. This expression, so it was said, 'describes appropriately

46 (1971-1976) ACLC 28,658. The case eventually went to the Privy Council where the decision turned on the consent of the beneficiary company, something which Wootten J decided adversely to the defendant: see (1978) 18 ALR 1 at 10.

47 Ibid 28,685.

48 Ibid 28,712 referring to AJ McClean, 'The Theoretical Basis of the Trustee's Duty of Loyalty' (1969) 7 Alberta LR 218 at 220.

49 Ibid.

50 [1974] 1 NSWLR 443 at 473 relying upon the doctrine in *Palmer v Monk* (1961) WN (NSW) 107; [1962] NSWR 786.

51 [1983] 2 NSWLR at 157.

the nature of the amounts' to be credited to the fiduciary, and 'supports the vagueness of the principle'![52] The Court invoked a passage from *Story on Equity*,[53] with respect to the cancellation of deeds, to deny any reward for the building up of the business. With respect, the passage cited from *Story* hardly appears apposite to the problem of the fiduciary. It is an overwrought statement couched in hyperbolic terms. Moreover, equity's intervention is denied in relation to cancellation of the deed at the suit of the guilty party simply because 'the failure of success in the scheme would manifestly be the sole cause of his praying relief'.[54] But that is not the case at all with the fiduciary who succeeds in obtaining a large increase in the capital value of the trust assets by his undiminished efforts. How then can it be 'equally applicable'? Its relevance to the encouragement and control of fiduciaries is not clear at all.

The case, however, whatever the basis of the reasoning, is clear authority that the *mala fides* of the fiduciary is a relevant consideration in depriving him of any allowance. This was not, be it noted, put on the basis of any exercise of a penal jurisdiction.

Subsequently, in *Paul A Davies*, the Court of Appeal took a far more lenient view with respect to 'innocent' fiduciaries.[55] There, Moffitt P spoke of 'contributions by way of effort and expertise in procuring the purchase', running and improving it after entering into possession, and then securing completion by mortgage finance obtained on the security of a personal covenant.[56] Undoubtedly an important fact in the generosity of this basis for the allowance was the lack of any conscious wrongdoing by the fiduciary directors. Moffitt P found it a 'hard' case since the net result was a windfall profit for the creditors of the beneficiary company which had gone into liquidation in the interim. Indeed, Hutley JA went so far as to acknowledge the possibility that on the Master's reference all the profit might be found to flow from the work[57] done by the defaulting fiduciary. Such a holding would, presumably, entitle the fiduciary to retain all the increase in value stemming from the breach of duty as 'proper remuneration for obtaining the loan'.[58] Mahoney JA felt that the fiduciary should be deprived both on the basis that the law should secure the beneficiaries' property and 'provide a sanction against the conduct of a trustee when it falls below the standard required by the law'.[59]

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52 Ibid.

53 *Story on Equity* (1920 3rd ed) para 697 at 296.

54 Ibid.

55 The case involved no issue of fraudulent gain or wrongdoing: [1983] 1 NSWLR 440 at 442 per Moffitt P.

56 [1983] 1 NSWLR at 444.

57 His Honour correctly noted the large amount of skill, work and 'know-how' involved in obtaining a very large loan: [1983] 1 NSWLR at 451.

58 Ibid at 448. Mahoney JA did not disagree with this possibility: see his judgment at 460 apparently equating a 'liberal allowance' with all the profit!

59 [1983] 1 NSWLR at 459.

Brinsden J in the Supreme Court of Western Australia, in *Green and Clara Pty Ltd v Bestobell Industries Pty Ltd (No 2)*[60] took a slightly narrower view of the possibility of an allowance. There, by use of a shelf company, controllers of a company had obtained a lucrative contract by tender for the shelf company which they should have sought for the company itself. The court held that 'this branch of the law is prophylactic, not restitutionary' and that it contained a penal element to deter others.[61] Specifically, his Honour upheld a ruling of the Registrar which provided an allowance by way of notional salary rather than taking into account the setting up of the company. There was no reward for risk taking.[62] That seems a rather harsh result but accords with the strict ruling in *Boardman*. Significantly, neither *Queensland Mines* nor the New South Wales decisions were cited to the judge. The decision is perhaps justifiable because in *Green and Clara Pty Ltd* there was no doubt that the 'opportunity' purloined could have been carried out by the existing company. In other words, there was a straight diversion of an asset which the company could have exploited, not the conception and execution of an entirely new project: compare *Hudson*, and *Davies* and *O'Sullivan v Management Agency and Music Ltd.*[63]

A decision similar to *Green and Clara* is that of Williams J in the Supreme Court of Queensland in *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd.*[64] In this case a fiduciary relationship existed between intending partners in breach of which the defendants gazzumped the plaintiff by obtaining a lease which was originally intended to form the work-site for the partnership. Williams J recognised, following *Boardman*, that a 'just allowance' must be made for the time and effort expended by the defendants in building up the business.[65] From a practical viewpoint, it was difficult to calculate the precise entitlement since most of the profit flowed from the location of the shop and no detailed records had been kept. Relevantly for present purposes, Williams J held that no liberal allowance was payable because of 'the nature of the breaches of trust involved here' so that the 'court should adopt a stricter approach to the fixing of a proper allowance'.[66]

It is submitted that the two later cases can be distinguished from those in which an allowance of all or part of the gain was contemplated. The distinction lies in what the fiduciary did in the respective cases. In *Green and Clara* and *Fraser Edmiston* the fiduciary simply took property which did not belong to him and exploited it. In *DPC*, *Hudson*, and *Davies* the fiduciary's efforts were a key part of the ultimate profit enjoyed by the estate and the fiduciary.

60 [1984] WAR 32. The decision of the full Court is reported at [1982] WAR 1 on the question of breach of duty. The later judgment deals with computation of the allowance.
61 Ibid at 38.
62 Ibid at 39.
63 [1985] 1 QB 428.
64 [1988] 2 Qd R 1.
65 Ibid at 12.
66 Ibid at 13.

The English position

Issues of *mala fides* have also exercised the court in England where the law is unclear.

First, in *O'Sullivan v Management Agency and Music Ltd*[67] a strong Court of Appeal in England upheld the grant of an allowance, notwithstanding the fiduciaries' opprobrious conduct. This case repays detailed analysis[68] because of the reasoned judgments delivered.

A young song writer had been induced to enter a contract in restraint of trade under which his career as an artiste was managed very successfully indeed. Eventually, after disputes with his managers, he took action seeking to set aside the transactions and obtain an account of the sums which had been earnt by them and the management company during the currency of the agreement. It was argued for the managers that the plaintiff was not entitled to 'all the benefits derived by them from the operation of the agreements while at the same time expropriating the whole of the defendants' reward for their labour'.[69]

The English Court of Appeal upheld the decision of the trial judge to award such an account but also required the singer to give a generous equitable allowance to the managers for their time and effort. The aim was to do

> practical justice between the parties by obliging the wrongdoer to give up his profits and advantages, while at the same time compensating him for any work that he has actually performed pursuant to the transaction.[70]

It is, however, difficult to reconcile the countervailing policies which appear to be at work. This is because, upon analysis, the 'profits and advantages' which the fiduciary has conferred upon the beneficiary usually flow directly from the work which he has performed.[71] In *O'Sullivan's* case, without the nature and skill of the fiduciary managers, the songster's incipient talents may well have remained forever unrecognised.[72]

Like the company director in Hudson, the fiduciary saw and exploited the 'human capital' of the singer. It does not help matters at all to speak as if the gains can be separated from 'work' actually 'performed pursuant to the transaction'. They are one and the same. It would be far better to recognise this fact directly and then to decide what policy should apply. It is,

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67 [1985] 1 QB 428.

68 See for example above n 23 at 195-6.

69 Per Miller QC *arguendo* at 435.

70 Per Dunn LJ at 458.

71 Distinguish here *Green and Clara* and *Edmiston*.

72 Per Fox LJ at 468: 'And business reality may be that the profits could never have been earned at all, as between fully independent persons, except on a profit-sharing basis'.

accordingly, difficult to understand precisely what Lord Justice Fox had in mind when he referred to a failure to promote the singer affecting his position and leading to a 'loss' on the singer's part - without the conscientious application of the fiduciaries' skill, any potential fully to exploit his abilities is completely speculative.[73] If a strict control is desired, then the fiduciary should be deprived of all gain *pour encourager les autres*. Since the courts award an 'allowance', even when the fiduciary is not 'innocent', they implicitly recognise that to refuse an allowance would be economically inefficient and counter-productive.

The damage suffered by the song-writer, economically, is simple. Without the possible incentive of obtaining at least part of the profit derived from the exploitation of his human capital, no one would invest the time and energy necessary to take him from postal worker to mega-star. It does not help to point to the beneficiary's weaker position vis-a-vis the fiduciary as a reason for protecting him. Although the courts do not recognise it, that is intrinsic to the possibility of exploitation which attracts the fiduciary in the first place. A worldly-wise Mr O'Sullivan, knowledgeable in the ways of business, would require no protection - nor would he write best-selling songs. It is his very ingenuousness which makes him 'valuable'.

Accordingly, it would be far better for the court to be honest with itself. It should assess, as best it can, the actual capital profit derived from the activity jointly entered by the fiduciary, and then with the assistance of expert evidence make a proper division of the gain. If it be said that this will encourage unscrupulous fiduciaries, we must ask: what dissuades them at present from seeking to take advantage of a beneficiary. It is surely not that if they are caught they will receive *only* an allowance, rather than keeping all the profit.[74] There is no empirical evidence whatever to suggest that potential loss of profit has any effect upon them. To an innovative entrepreneur, the besom of a potential fiduciary liability (when the very categories of fiduciary obligation are ill-defined)[75] is no deterrent when the heavy potential sanctions of the criminal law do not dissuade him from misusing positions of trust.[76]

It could be said that, until the later 1980's, a preponderance of authority existed in both Australia and England which permitted the grant of an allowance to the defaulting fiduciary, although the cases differed over how large this might be and the relevance of mala fides. The English position is now, however, less clear.

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73 Ibid at 468.

74 Ibid 441 per Bateson QC, arguendo: 'It is important that the principle be stringently adhered to in order to deter fiduciaries and trustees from thinking that they can act in breach of their duty and yet make profit out of such misconduct.'

75 See for example *Kelly v Cooper* [1992] 3 WLR 936 (Privy Council).

76 Consider merely the large trail of Australian corporate collapses which frequently involved ignorance and manipulation of the companies law. To date, there have been few successful prosecutions for any offences.

In *Guinness v Saunders* the House of Lords rejected, on a number of disparate grounds, a claim by a company director to retain a very large success fee[77] which he had negotiated to be paid in return for ensuring the successful completion of a complicated takeover on the company's behalf. The House did so on basic principles of company law but went on to reject any restitutionary claim, or one for an allowance of the *Phipps v Boardman* type.

Lord Goff felt that the allowance could only be awarded where it did not conflict with the policy which underlies the 'no profit' rule. '...[S]uch a conflict will only be avoided if the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees.' There is, regrettably, no case in which the trustee will not be encouraged to risk a breach of duty so soon as the 'no profit' rule is ignored. In other words, Lord Goff's acceptable category is empty of content. Moreover, it appears to ignore Equity's basic standpoint which is to deny absolutely the possibility of the trustee or fiduciary profiting at all from any dereliction. Lord Templeman, in *Guinness v Saunders* (without adverting to *O'Sullivan*) suggested that an equitable allowance is available only in 'exceptional circumstances'.[78]

Presumably *Guinness* is not intended to overrule *O'Sullivan*. If, however, *Guinness* is taken as a general indication of when an allowance may be awarded there will be few occasions for doing so.

The 'hardest' case: the thief[79] and the allowance.

In *Australian Postal Corporation v Lutak*[80] Bryson J considered the entitlement of a thief to receive a share of the profit derived from the successful exploitation of property stolen by him which had been used as partial security for a loan to acquire other property which had subsequently increased in value. This is a hard case for there it is surely difficult to argue that a thief is entitled to receive any 'allowance' for a successful investment.

His Honour noted the general rule which permits dividing the

77 It is unkind to suggest it but dicta throughout the case indicates that the size of the payment worried their Lordships and revealed a touching naivety about the amounts which could be earnt in the financial markets of the late 80's. Lord Goff (at 696) says he was 'startled by the size of the sum'.

78 *Guinness v Saunders* [1990] 2 AC 663, 694:

> '... I am unable to envisage circumstances in which a court of equity would exercise a power to award remuneration to a director when the relevant articles of association confided that power to the board of directors'.

79 There is no doubt, in Australian law at least, that a thief may owe a fiduciary relationship to his victim: *Black v S Freedman and Company* (1910) 12 CLR 105 at 110; *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 584 at 587.

80 (1991) 21 NSWLR 584.

proportionate increase in the capital value to both the trust fund and the stolen monies. His judgment is of great interest because he directly addresses two apparently conflicting rules and suggests a pragmatic rationale for drawing a distinction between them. On the one hand, there is the 'rule' that a trustee who mixes trust funds with his own is entitled to a pro rata share of any increase in the value of property bought with the increased fund. This is paradoxical in the light of a general reluctance to grant an allowance - why should a defaulting trustee not be deprived of all the profit generated rather than being able to keep a portion of it? If general deterrence were equity's primary goal, that would be a useful and salutary rule. But, to the contrary, the 'convention' is to permit the return of the trustee's share.[81] Apparently,

> there is no reason for imposing penalty or forfeiture, or for withholding an allowance for the trustee's own money in such circumstances, and this is no less if the trust is a constructive trust and arises out of criminal conduct. The entitlement of constructive trustees to just allowances is well-established, and may even extend in appropriate circumstances to an allowance for the trustee's own pains and trouble. (Of course, in this case that would not be appropriate).[82]

One may ask: why is a return on the capital contribution allowed, even if arising out of criminal conduct, while a return on labour is not? Why is there 'no reason' to impose a capital penalty? To this conundrum the cases at present vouchsafe no answer.

His Honour also examined whether and in what circumstances an 'allowance' was properly payable. He felt that the onus should be on the fiduciary to demonstrate what was a 'just allowance.'[83] More importantly, in a passage worth quoting in full, he observed that:

> [T]he determination of what is a just allowance and whether it should include any share of profits or gains could not really be made on the basis of general rules, but could only be made by examining closely the facts of a particular case and the merits and claims of the trustee, and determine what would be just allowances in relation to those facts. Where the unauthorised investment has been a successful one and has produced a profit as well as enough to give back all moneys laid out in the investment, there would often be a just claim for an allowance out of the profit. Interest, compensation for time and energy expanded or a share of profits could, in my view, only be allowed after close examination of the facts of a particular case. Cases vary widely, the claim of Tom Phipps in *Boardman v Phipps* to a liberal allowance being a very strong one while, at another extreme, a claim by persons such as the Lutaks who applied stolen money to the purchase of a property with the apparent intention of owning it themselves and were later brought to account when their dishonest conduct was revealed is a very poor one. People who use stolen trust money, and are in effect laundering it and concealing what has happened to the money, and who are found out and have a constructive

81 The main discussion is that of Hudson J in *Scott v Scott* [1964] VR 300 in a judgment not challenged on appeal to the High Court *Scott v Scott* (1963) 109 CLR 649.

82 Ibid at 591.

83 Ibid at 596.

> trust imposed on them cannot expect much consideration. Where investments although unauthorised have proved successful it must often seem right to the parties involved and also to the courts to divide the profits or gains in the same proportion as the contributions.[84]

His Honour then addressed the practical problem which arises where the mixed fund has been used to acquire an investment which is not easily 'severable', say, a business, a house property or other land.[85] He thought that here the practical difficulty of dividing the spoils might militate against applying the usual rule of apportionment. If it is impractical to sever the portions, or the trustee would not have made the same 'profit' without the additional funds from the trust, then it may no longer be 'just'[86] to apply the convention.

Thus it does not seem that the trustees failed in limine from any *ex turpi* or unclean hands difficulty but rather simply because it was not possible practically to sever the share of the profit attributed to their work, and because without the use of the stolen funds they would not have made the investment at all. Provided that the compensatory role of the return of funds is kept in mind, there is no reason in principle why the thief should not have some allowance for his work, always assuming that it is practically possible to divide the profits.

Recent New Zealand authority

Tipping J in *Estate Realties v Wignall*[87] has further analysed the award of the allowance and in doing so considered all relevant authority. The plaintiff had sold various shares and options in a publicly listed company to the defendant sharebrokers who acted in breach of fiduciary duty when doing so.[88] The scheme carried on by the brokers involved a very high degree of skill and daring on their part. The brokers devoted much of their time to furthering it and sold out eventually for a large profit. In the interim they had also received bonus shares, dividends, directors' fees and other payments. The plaintiff sought to recover all the profit so derived.

After a detailed examination of the authorities, Tipping J noted the problems in applying Lord Goff's general approach to a case of constructive trust where, ex hypothesi, there was no trust deed which might authorise payment. He also commented upon, without rationalising, the difficulty in awarding a discretionary allowance even though there may have been some misconduct by the fiduciary. 'It is a matter of discretion, the object being to do justice while not whittling down the salutary rule that a fiduciary...is

84 Ibid at 596 (emphasis supplied).
85 Ibid at 597.
86 Ibid at 597.
87 [1992] 2 NZLR 615.
88 This aspect is discussed in an earlier judgment reported at [1991] 3 NZLR 482.

liable to account'.[89] Left dangling in this dictum is the issue: for what, precisely, is the fiduciary obliged to account? It is hard to see how any allowance[90] at all can be made without 'whittling down' the salutary rule against a fiduciary's profit.

Moreover, his Honour characterised the grant of a remedy as compensatory, not penal.[91] It is here, with respect, that his analysis breaks down because he confronts, but is unable to overcome, the irreconcilable principles spoken of by Lord Goff. Put quite bluntly, if the net profit derived from the business flows from the fiduciary's actions, there is no rational basis for not allowing him a fair allowance apart from the desire to penalise him. The skill expended by the innocent or wicked fiduciary is the same, as is the result, to wit, a profit for the estate. If the venture founders, no question of accounting for profit can arise. The only ground, then, for attempting to differentiate between the two is to penalise the wicked fiduciary. It is not possible in doing so to regard the award purely as a matter of compensation.

On the facts, there was no doubt that but for the exercise of great skill and energy by the defaulting fiduciaries, no profit would have been gained and the plaintiff may have faced insolvency. So, though their conduct in acquiring the shares invited censure, his Honour concluded that: '

> it would be quite wrong and inequitable ... if they were required to account for the gross profit without any deduction and also wrong if they were not allowed some reasonable recompense for their efforts, their skill and the risks which they undertook. It is truly a case where he who seeks equity ... must do equity, ie recognise that the profits to which it is prima facie entitled are something in the nature of a windfall.[92]

His Honour's final assessment betrays the inconsistency into which an attempt to both compensate and penalise must lead. He said:

> There is no absolute bar or rule against allowing costs, expenses and other deductions or allowances in favour of a fraudulent or morally blameworthy fiduciary. The exercise is essentially to define fairly the profit made or the gains derived from the transaction impugned. *The nature of the breach of duty and the circumstances in which it occurred are relevant, as are the circumstances in which the gains or profits were derived* and the amount of personal input from the fiduciary which was necessary to enable the gains or profits to be achieved. *The jurisdiction is not penal. The fiduciary must not be robbed but, if guilty of*

89 [1992] 2 NZLR at 627.

90 Note, too, his Honour's later suggestion (at 628 citing *O'Connor v Hart* [1983] NZLR 280) that the right to an account of the profits might be lost by some other equitable consideration such as laches. This, it is argued, provides a 'countervailing equity'. How it is possible for the defaulting fiduciary to enjoy an such equity at all is difficult to envisage and beyond the scope of the present article.

91 Ibid at 629 citing *Vyse v Foster* (1872) LR 8 Ch 309 at 333.

92 Ibid at 630.

improper conduct. cannot claim as of right to be rewarded let alone liberally rewarded for discretionary elements such as skill, labour, expertise and personal exertion.'[93] (emphasis supplied)

Since the actual profit, as an accounting exercise, gives an absolute monetary figure, it merely confuses the whole issue to speak, as his Honour does, as if the fiduciary's conduct is at all relevant to assessing it. If it is not relevant to the financial assessment, it can only be relevant as a matter of penalty; accordingly, the jurisdiction is penal which attempts to deprive the defaulting fiduciary of some of his gain.

At work, then, are two conflicting policies. First, as a 'prophylactic' and disciplinary measure, no encouragement should be given to the fiduciary to act in conflict with his duty to the beneficiaries; '...the policy of the law in this field ... for the purpose of general discipline requires the fiduciary to account to the beneficiary for gain rather than compensating it for damage caused by the breach.'[94] It is irrelevant that the profit or benefit derived by the fiduciary is a profit which would not otherwise have been obtained, or that the beneficiary otherwise suffered no loss or damage.[95] On the other hand, Equity normally requires that he who seeks equity shall do equity - accordingly, as a general principle it should not permit the beneficiary to set aside and retain the benefit of the transaction without also providing some recompense for the work which has produced it.

Possible policy considerations

The cases elide a number of different policy arguments in justifying the allowance. As we have already seen, many of them are mutually inconsistent with larger equitable goals. Many of the cases confuse compensatory and penal objectives. Related to the notion of compensation is the notion of 'doing equity' by requiring restitution. A further notion, not yet fully developed, is to provide 'counter restitution' to the fiduciary who disgorges a gain. On the broader front, the allowance has been treated as part of the concept of seeking equity and doing equity. Given the problem in reconciling policy arguments for and against the allowance, it may be preferable at present simply to treat it as *sui generis*, an approach inherent in Professor Finn's view on balancing[96] the parties' entitlements, although he does not say so directly.

Restitutio in integrum at common law and in equity: A misleading analogy

In analysing the issue of an 'equitable allowance' most commentators note

93 Ibid at 631.
94 *Paul A Davies* at 444 per Moffitt P.
95 For a good statement of the position, see above n 5 at 4 - 5.
96 Above n 7.

the undoubted ability of the court of equity to require compensation to be paid as a condition of rescinding a captious transaction. This analysis informs the modern approach which equity takes to the payment or remuneration given to the defaulting fiduciary and, as Kearney J has pointed out,[97] was the basis for the reasoning of the Court of Appeal in *O'Sullivan*. In fact, however, it is an incorrect way in which to proceed. It necessarily looks to balance the position of the parties, whereas the basic rule against unauthorised fiduciary profit aims to prevent it at source.

At both common law and in equity an innocent party who seeks to set aside a transaction induced either by the misrepresentation, or overreaching, of the other party to it has been able to do so subject to certain conditions.[98] The common law's ability, however, to ensure justice between the parties in the event that restitutio was ordered was limited by its comparative remedial poverty. The courts of common law, lacking the facility to adjust easily the accounts between the parties, normally required the innocent representee to make restitutio before permitting him to claim the return of the consideration transferred. In the absence of such a restoration, the victim was reduced to suing in deceit to recover the actual damage which he sustained. A number of cases illustrate this principle.[99]

The courts of equity took a broader view. They were able to adjust the balance between the parties by requiring restitution on terms which took into account the added value which the guilty party may have added to the subject of the transaction before the complaint of sharp dealing was made. Now relying upon this second head may inevitably lead to the 'irreconcilable' principles to which Lord Goff adverted. The reason is simple. The primary aim of the 'prophylactic' rule is to dissuade the trustee from misusing trust property. The ability of equity to grant a repayment in the event that restitution is ordered with respect to property which was never beneficially owned by the payor. The aim of the first rule is to deter any punishment; the penalty imposed is the deprivation of all the assets built up by the breach of the duty. As a Canadian commentator has recently observed, 'The fiduciary standard is not just compensatory. It has been designedly crafted by the courts not just to penalise but to lead a fiduciary from all temptation'.[100]

The aim of the second rule is not penal but compensatory; it seeks to ensure that only compensation is paid when the transaction is unwound so that neither party profits from it.[101]

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97 Above n 23 at 196.

98 For a full discussion of this topic, see Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (3rd ed 1992) paras 2409-16.

99 *Armstrong v Jackson* [1917] 2 KB 822, 829-0; *Spence v Crawford* [1939] 3 All ER 271, 279, 280; *Alati v Kruger* (1955) 94 CLR 216 at 223-5.

100 Howard, 'Fiduciary Relations in Corporate Law' (1991) 19 Canadian Business LJ 1 at 16.

101 *Brown v Smit* (1924) 34 CLR 160 at 164; *Lagunas v Lagunas Nitrate* [1899] 2 Ch at 456-7 per Rigby LJ.

Looked at from the perspective of policy, it is obvious that the two rules cannot work together since they have directly contrary aims. Until this point is recognised, continued reliance upon the 'rescission' cases will only confuse the issue.

The position is quite clear: if the rule against fiduciary profit is applied rigorously, the defaulting fiduciary is entitled to no allowance. To what extent does the knowledge that the 'prophylactic' rule applies encourage the fiduciary to default? If the matter is considered purely from the point of policy then there is no reason to impose a disincentive on the defaulting fiduciary, nor to punish one who acts 'fraudulently' in an equitable sense while relieving the innocent beneficiary. There is no evidence whatsoever to demonstrate that a defaulting fiduciary will not engage in behaviour for fear that it will be unremunerated; to the contrary, many cases demonstrate that a fiduciary will frequently engage in conduct in breach of duty regardless of the possible sanction. If that is the case, there is no sound policy reason for refusing to confer a generous equitable allowance in either case. Moreover, a failure to do so will result in opportunities not being fully exploited.

Because of the sacrosanct antiquity of the equitable principles involved, no case[102] has discussed the question from an economic view. If, however, we are interested in maximising the use of and return upon resources, a strong policy argument can be made in support of granting an allowance to ensure the most productive use of fiduciary property which, without the 'incentive' of an allowance, might remain fallow. This general approach has been more fully developed in the United States and Canada where there is now a growing debate about the way in which judicial rules for the control of fiduciaries (principally company directors) should be applied in the light of modern law and economics. To analyse the matter in economic terms has not yet appealed in Anglo-Australian jurisprudence but a failure to do so will mean that the real issues in giving the fiduciary an allowance will remain concealed.

Prevention of a 'loss'?

Is, however, the prophylactic rule designed not only to prevent the gain by the defaulting trustee but also loss occurring to the trust by unsuccessful transactions? It is suggested that this is not a relevant consideration in the modern business context since it is always possible to claim personally against the defaulting fiduciary. Certainly, the older law of trusts suggests that it is much safer to be guilty of an omission to act, rather than to do so and make a positive mistake. But those rules date from a time when a sound investment would inevitably yield a modest return. In modern investment, that is not the case, particularly if the rate of inflation is high and the real capital value of the corpus is steadily reducing.

102 See, Bishop and Prentice, 'Some Legal and Economic Aspects of Fiduciary Remuneration' (1983) 46 MLR 289.

The restitutionary perspective - The impact of 'counter restitution'

Professor Birks seems to regard the award of an allowance as a type of 'counterrestitution' in which the fiduciary makes restitution of the gain acquired while being entitled to receive something in return.[103] He notes the difficulty with limiting the amount of restitution required by reference either to remoteness[104] and 'attribution and quantification'[105] by which the fiduciary claims that the gains made were partly attributable to his own skill and labour.[106] He concedes that 'it is not easy to say how far the courts will go in exercising these powers to effect substantial if approximate counter-restitution'.[107] As noted above, in *Phipps* Lord Denning put the beneficiary's right of recovery on a 'restitutionary' footing. It is hard, however, to fit such a claim into the conventional topology of restitution. Professor Birks examines the issue as one requiring restitution for a wrong, in this case, the breach of fiduciary duty. Here, he argues, restitution is given for the 'first non subtractive receipt'. This term denotes 'a receipt in respect of which the only nexus between it and the plaintiff is that it was obtained by a wrong committed against him.[108] That, with respect, does not really answer our problem of allowances at all since it is entirely circular. What, precisely, is the relevant 'wrong' suffered by the beneficiary which is remedied by his being entitled at once to receive a profit disgorged by the fiduciary and then hand possibly all of it back to the fiduciary as an 'allowance'? There is none.[109]

Difficulties with restitution as a ground for the allowance are further demonstrated by the difficulty of defining the precise 'property' of which the fiduciary has been deprived. Enough has been said above on this already.[110] In *O'Sullivan's* case, for example, what interest had the song writer been deprived of which needed to be restored to him? If he had not been 'discovered' and 'exploited': none. Without the fiduciaries' intervention, nothing would have been done. (Possibly, through good luck, a similar opportunity may have arisen under which a selfless fiduciary would have come forward to do all the work in return for a salary - that possibility is so unlikely as to be disregarded when attempting to formulate a general policy').

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103 This terminology is creeping in in England; see, for example *Securities and Investments Board v Pantell SA (No 2)* [1993] 1 All ER 134 at 148 where Steyn LJ discusses the topic in the context of a statutory rescission scheme for share misrepresentees.

104 Ibid at 352 '... no case has squarely faced the need to formulate a test.'

105 Ibid.

106 Birks, *An Introduction to the Law of Restitution* (1988) at 415-3.

107 Ibid at 422 talking in the context of allowance upon rescission.

108 Ibid at 352. See, too, Professor Birks's earlier article, 'Restitution and Wrongs' (1982) 35 Current Legal Problems 53 at 64-5.

109 For an interesting overview of notions of subtractive enrichment see Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (1991) 11 Oxford JLS 481.

110 Above notes 72 to 76.

A restitutionary approach operates best only in those cases like *Green* and *Fraser Edmiston* in which a conscious diversion of property has taken place. In the paradigm cases, such as *Hudson* and *O'Sullivan*, there is nothing prior to the fiduciary's intervention which 'belonged' to the beneficiary. What role, then, can restitution play - no benefit has been intercepted which would inevitably have reached the beneficiary's hands. The 'profit' derived can only be defined in terms of the very breach of duty which produced it.

Furthermore, as Young J has recently noted, to make an award of counter-restitution 'offends against the general principle that a person cannot be ordered to pay even a reasonable price for a benefit conferred voluntarily by a stranger unless he or she has adopted the benefit or it was of incontrovertible benefit'.[111]

The notion of 'salvage'

In *Re Berkeley Applegate (Investment Consultants) Ltd (in liq); Harris v Conway*[112] Mr Edward Nugee QC, sitting as a Deputy Chancery Judge, considered the possible bases upon which a liquidator was entitled to non-contractual remuneration for benefit which he conferred by his actions upon the company's position. He found it in the rule that he who seeks equity must do equity exemplified in the '...general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised ...'.[113]

His Lordship gave several examples of this unified entitlement. These include permitting a trustee an allowance in the absence of express power in the deed,[114] the *Boardman* allowance, the award to a tenant for life who completes a principal mansion,[115] the general doctrine requiring submission to conditions as a precondition of equitable relief,[116] and the 'salvage' doctrine under which the Court may ensure that trustees are allowed remuneration for unexpected expenditure connected with the management of the estate.[117]

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111 *Cadorange Pty Ltd (in liq) v Tanga Holdings Pty Ltd* (1990) 20 NSWLR 26 at 35. The case concerned the ability of the court to grant an equitable lien to secure compensation for unrequested improvement to land under a contract of sale which eventually proved unenforceable. The effect of conferring the lien upon the improver was to advance its postion over all the other unsecured creditors.

112 [1989] 1 Ch 32.

113 [1989] 1 Ch at 50.

114 In *re Duke of Norfolk's Settlement Trusts* [1982] Ch 61.

115 *Hibbert v Cooke* (1824) 1 S and S 552. Note that Hutley JA in *Consul Developments* relied upon the same principle, exemplified in *Palmer v Monk* above n 70.

116 *Scott v Nesbitt* (1808) 14 Ves Jun 438.

117 *Chapman v Chapman* [1954] AC 429.

In order to exercise the discretion, the court needs to find that the work done would have to have been done by someone on behalf of the estate, and that it has been of substantial benefit to it. The main problem with taking such an approach from a prophylactic point of view is in resolving what 'equity' on the part of the defaulting fiduciary can possibly entitle him to an allowance. If deterrence is the aim, he has no relevant 'equity' at all.

However, that a unifying element which permits remuneration for unauthorised action can be found in disparate cases supports the general argument advanced above. The aim of the allowance is to compensate, not penalise.

Conclusion

The principle which denies any gain to the fiduciary is 'irreconcilable' with the notion of allowing the fiduciary any allowance for doing so. The Court of Equity at present pursues an uneasy middle path. On the one hand, it is reluctant to 'penalise' the fiduciary by depriving him of all profit earned. But this cannot be based on any consent or benefit conferred upon the beneficiary since by definition it has no choice in whether the profit is made or not. Moreover, a fully informed consent to the proposed transaction would entitle the fiduciary to retain all the benefit. On the other hand, the court will usually only permit the fiduciary access to a profit calculated upon some notional professional basis. To do so is to deny the fiduciary access to any of the capital gain which he has generated by his efforts.

It seems that rather than trying to fit the allowance into an existing equitable category (eg on the basis of 'doing equity'), it would be better to treat the allowance as sui generis. The weight of antipodean authority at least is strongly in favour of awarding the defaulting fiduciary an allowance where his work has redounded to the substantial benefit of the beneficiary. This makes good economic sense. Constant invocation of the need to deter the fiduciary does not advance the matter; no evidence demonstrates that the threat of being deprived of profit has any effect whatever. Furthermore, such a rule cannot stand in logic with the 'conventional' approach which permits the fiduciary to retain a share of the capital profit when he mixes his funds with those of his beneficiary and then successfully invests them.

To deprive the fiduciary of all profit is a mistake. It exemplifies, perhaps, equity's long concern with preventing a loss rather than encouraging the best use of resources by actively seeking a profit. The days of the gratuitous trustee are long gone as are the days of assured capital growth by investing in Consols. When a modern fiduciary intermeddles in the beneficiary's property, he frequently produces a large capital gain which would otherwise have gone unearnt - *Boardman, Hudson, Davies, O'Sullivan*, and *Estate Realties* all exemplify such a result. Why then should the fiduciary receive only a notional 'professional' fee for his work?

It may be necessary to devise new methods to restrain fiduciary temptation. The current halfway house neither deters the fiduciary nor properly rewards him. The court of equity should stop invoking any penal objective and work out how best to control fiduciaries to the maximum benefit of both the fiduciary and the estate. The continuing growth of fiduciary obligations, and the uncertain area encompassed by commercial opportunities, means that the question of simultaneously controlling and rewarding fiduciaries will be of central and increasing importance for the foreseeable future.