

Preserving a Role for Falsification in Breaches of Traditional Trusts: *Target Holdings*, *AIB*, and the Appropriate Roles of Conscience and Commerce.

Jack Hollingworth*

ABSTRACT

Target Holdings and *AIB* are decisions which intended to clarify equity's remedial response to breaches of trust. They suggested a movement away from principles of falsification — rendering a trustee personally liable to the beneficiary for all assets misappropriated in breach of trust — towards a principle of equitable compensation for wrongfully caused losses. Instead of clarity, these cases spawned descriptive and normative debates, which are explored in this article. Section I explores whether the law has truly moved away from falsification, or whether falsification has merely become a form of equitable compensation as suggested by a string of High Court and Court of Appeal decisions. It suggests that the law has moved on and that these decisions lack any descriptive basis. Section II explores whether equitable compensation applies to all breaches of trust. It argues that *Target Holdings* and *AIB* can legitimately be confined to the commercial context, preserving a role for falsification in breaches of traditional trusts. Section III considers the normative dimension of whether this distinction should become law. The section suggests that it should because it responds to the competing roles of conscience and commerce within Equity, and provides a suitable remedy for facilitating the purposes of each type of trust.

*LL.M. Candidate at Jesus College, University of Cambridge. BA (Cantab) Law '23. Views and errors are my own. I would like to thank the editors for their constructive feedback on earlier drafts.

INTRODUCTION

The House of Lords' judgment in *Target Holdings*¹ and the Supreme Court's judgment in *AIB*² were intended to clarify equity's remedial response to breach of trust. Instead, they spawned intense debates in academia and the courts about their meaning, scope, and consequences.

Target Holdings and *AIB* both suggest that equity's response to a breach of trust is equitable compensation for loss wrongfully caused by the breach, assessed under the but-for test. This moves away from the historical position whereby assets wrongfully transferred in breach of trust would be falsified. The result of that approach was that the trustee was personally liable to return them to the beneficiary regardless of whether they would have been lost but for the breach of trust. This article argues that whilst *Target Holdings* could be understood under orthodox accounting and falsification principles, *AIB* cannot. This, in turn, mandates a non-falsification understanding of *Target Holdings*.

Target/AIB, by contrast, can be descriptively understood as being limited to breaches of commercial trusts, such that equitable compensation for wrongfully caused loss applies therein. Falsification, under this approach, would be the remedy for breaches of traditional trusts. Finally, it is shown that this remedial distinction is normatively desirable within a framework where equitable remedies are presumptively conscience-based, with the role of conscience being ousted in appropriate commercial circumstances.

¹ *Target Holdings Ltd v Redfems* [1996] AC 421.

² *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503.

Section I demonstrates that falsification cannot be a form of equitable compensation available for all breaches of trust. Whilst academic claims that *Target Holdings* can be re-explained according to accounting principles are correct, attempts to reconceptualise the remedy in *AIB* as falsification have been unsuccessful. Where equitable compensation is the remedy for a breach of trust, there is, therefore, no ability for claimants to have a trust fund reconstituted for losses that would have occurred but-for the breach of trust. Worryingly, a line of case law has developed that suggests that *Target/AIB* permit falsification as a form of equitable compensation in certain circumstances. This has no descriptive basis, and these cases must be regarded as being wrong.

Section II demonstrates that it is possible to draw a remedial distinction between breach of commercial and traditional trusts. Lord Browne-Wilkinson unquestionably drew such a distinction in *Target Holdings*, suggesting that equitable compensation for losses satisfying the but-for test applies only to commercial trusts, with falsification being available in the traditional trust context. Various commentators suggest that this distinction was overruled in *AIB*. However, on a closer reading of *AIB*, this is shown to be incorrect. The Supreme Court (incorrectly) denied that Lord Browne-Wilkinson drew a ‘categorical’ distinction between the remedial position for commercial and traditional trusts but did not deny that this distinction could form part of the law. Indeed, various distinctions between commercial and traditional trusts are drawn throughout both judgments. There is, therefore, a descriptive possibility for a distinction between commercial and traditional trusts to develop.

Section III addresses whether this distinction is normatively desirable and suggests that it is. Falsification reflects the conscience-based underpinnings of equitable remedies: the trustee’s conscience is bound by misapplying trust

assets, with intervening events reducing the causality of the breach to the point where the extent of the loss makes it irrelevant. Therefore, preserving falsification for breaches of family trusts is desirable. Equity has shown, however, a willingness to discard this basis in conscience in commercial cases to ensure that trusts can be used as vehicles of commerce without providing windfalls and/or excessive liabilities to commercial parties. Hence, the ousting of conscience and confinement of falsification to breaches of traditional trusts is desirable for breaches of commercial trusts.

SECTION I – FROM FALSIFICATION TO EQUITABLE COMPENSATION FOR WRONGFULLY CAUSED LOSS

Equity's remedial response to breaches of trust has evolved to emphasise equitable compensation for wrongfully caused loss, rather than direct enforcement of trust obligations via falsification. This is at the very least true in response to breaches of commercial trusts.³ This Section shows that where equitable compensation is the remedy given in response to a breach of trust, falsification cannot be regarded as a form of equitable compensation; this is despite judgments to this effect in the High Court and the Court of Appeal.

The historical position: falsification

The historical position was that the principal remedy for a breach of trust would be the primary enforcement of the trust obligations via falsification

³ This limitation is explained descriptively in Section II and normatively in Section III. See, for a judicial suggestion of this limitation: *Purrunsing v A'Court* [2016] EWHC 789 (Ch), [2016] PNLR 26.

rather than a secondary claim for equitable compensation.⁴ Trustees have a custodial duty to hold assets on trust for the beneficiary. Under orthodox accounting principles, the beneficiary has the ability to take an account of the trust (which displays the current contents of the trust fund). This ensures that the trust contains what it ought to if the trustee is complying with this duty.⁵ If there is a deficit within the trust account because of an unauthorised transfer of assets by the trustee, then the beneficiary can falsify the account, thereby rendering the trustee personally liable to return all of the assets transferred from the trust in breach of trust.⁶ As falsification amounts to direct enforcement of the trustee's primary custodial duty,⁷ questions of causation relevant to the calculation of compensation (i.e. whether the assets would have been transferred away from the trust account even if the trustee complied with their custodial duties) are irrelevant.

The historical approach to directly enforcing a trustee's custodial duty, rather than engaging in counterfactual analyses to calculate secondary compensation, is exemplified by various cases. In *Cocker v Quayle*, the trustees of a marriage settlement could advance trust money to the husband with the wife's consent *and* the husband providing a bond as security for the advancement.⁸ The trustees advanced money without taking a bond from the husband in breach of their custodial duties. Since the husband subsequently became bankrupt, the trustees argued that the husband's bond would have been worthless security for

⁴ Paul S. Davies and Graham Virgo, *Equity & Trusts: Text, Cases, and Materials* (3rd edn, Oxford University Press 2019) 1, 806-812 and 815-821.

⁵ Ruo Yu Tan, 'Substitutive performance claims for breach of trust: final nail in the coffin? *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58' (2015) 21 *Trusts & Trustees*, 565, 565 (note).

⁶ *ibid.*

⁷ Alexander Y.S. Georgiou, 'Taking trusts seriously' (2021) 137 *Law Quarterly Review* 305, 307.

⁸ *Cocker v Quayle* (1830) 39 ER 206.

the trust assets advanced to him, meaning the wife suffered no loss as a beneficiary resulting from the breach.⁹ Sir John Leach MR rejected this, ordering falsification of the trust fund: '[t]he trustees cannot be excused from a breach of trust [...] by reason of the subsequent event of the husband's bankruptcy'.¹⁰ This displayed the irrelevance of counterfactuals to the direct enforcement of custodial duties via falsification.

The stringency of direct enforcement and the irrelevance of counterfactuals within falsification are exemplified by two subsequent cases. In *Knott v Cottee*,¹¹ whilst the trustee was authorised to 'invest in Government stocks of Great Britain, or upon real security', he instead invested in 'Exchequer bills, Russian Bonds, Belgian, Dutch, and other foreign stocks and bonds', which were declared to be improper investments in breach of trust.¹² In 1846, the Exchequer bills were ordered into court and sold at a loss. In 1848, the value of the Exchequer bills had risen. As such, if they had been retained, then there would have been no loss to the trust fund. The counterfactual position, where the trustee had not used trust assets for unauthorised investments, would, therefore, have produced an identical trust fund to that produced from the theoretical account in 1848. Regardless, the trustee was required to falsify the account for 'the amount improperly invested'.¹³ Equality in the trust account produced by authorised and unauthorised means cannot, therefore, protect a trustee from liability to falsify the trust account. Indeed, in *Head v Gould*, Kekewich J suggests that it is only through the beneficiary's authorisation of a breach of trust that the trustee's liability to falsify can be avoided.¹⁴ This is consistent with direct enforcement: the

⁹ *ibid.*

¹⁰ *Cocker* (n 8) 207.

¹¹ *Knott v Cottee* (1852) 51 ER 705.

¹² *Knott* (n 11) 705-706.

¹³ *ibid.*

¹⁴ *Head v Gould* [1898] 2 Ch 250, 266.

beneficiary's authorisation of the trustee's actions means that the trustee *has* discharged their duties. There is no custodial duty to primarily enforce through falsification because the trustee did not have a duty to retain those assets. This is because they were authorised by the beneficiary to transfer them out of the trust fund. A compelling body of case law, therefore, developed whereby a trustee's custodial duty — which has been breached by unauthorised transfer(s) of trust assets — could be directly enforced through falsification, counterfactuals being irrelevant.

Target Holdings

The historical approach was ostensibly challenged by the House of Lords in *Target Holdings*.¹⁵ A finance company transferred £1,525,000 to solicitors to be held on trust for it. Pursuant to the finance company becoming a mortgagee on commercial property, the solicitors were instructed to transfer the money to the mortgagor when the property had been purchased *and* the finance company had a charge over it. In breach of trust,¹⁶ the solicitors transferred £1,490,000 of the trust assets before a charge had been secured over the property for the finance company. By the date of the judgment, however, the finance company had obtained a charge over the property for the mortgage.¹⁷ The solicitors had therefore transferred £1,490,000 of trust assets in breach of trust, but had not caused any loss to the trust estate when assessed at the date of judgment.

The Court of Appeal ordered the remedy which would be expected of the historical approach, albeit in the form of equitable compensation rather than

¹⁵ *Target Holdings* (n 1).

¹⁶ *Target Holdings* (n 1) 421, 430.

¹⁷ Lord Millett, '*AIB v Redler*' (2018) 32 *Trusts Law International* (note) 44, 45-46.

falsification.¹⁸ It ordered compensation of £1,490,000 — the amount wrongfully transferred — which was the loss suffered by the finance company at the date of breach. By contrast, Lord Browne-Wilkinson in the House of Lords insisted that loss to the trust fund is to be ascertained at the date of judgment, with compensation ‘assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach’.¹⁹ Equity’s response to a trustee’s breach of trust through unauthorised transfers is not, therefore, direct enforcement of the custodial duty via falsification. Instead, it entails an order to make equitable compensation for wrongfully caused loss.²⁰ As the property had been purchased and the finance company had acquired a charge over it at the date of the judgment, the solicitor’s unauthorised transfer of £1,490,000 to the mortgagor had not caused the finance company any but-for loss. The historical approach to responding to breaches of trust through falsification, therefore, appears to have been abrogated by *Target Holdings*.

It has been convincingly argued, however, that *Target Holdings* is explicable as primary enforcement of the custodial duty, when the rule of assessing losses to the trust fund at the date of judgment is considered. Lord Millett cogently observed that an account taken at the date of judgment in *Target Holdings* would display exactly what it was supposed to — a charge over the property.²¹ Assessed at the date of judgment, £1,490,000 had been transferred by the solicitors, and the trust fund had a charge within it. Since the trustee’s duties had been discharged by performance of their obligations by the date of the judgment, there were no

¹⁸ *Target Holdings Ltd v Redfern* [1994] 1 WLR 1089; *Target Holdings* (n 1) 431.

¹⁹ *Target Holdings* (n 1) 437.

²⁰ *Target Holdings* (n 1) 432.

²¹ Lord Millett (n 17) 45-46.

custodial trust obligations to directly enforce.²² The resulting liability of £0, though expressed incorrectly as ‘equitable compensation’, is therefore correct. Indeed, this idea is expressed directly by Lord Browne-Wilkinson in *Target Holdings*:

if at the time of the action claiming compensation for breach of trust those trusts have come to an end [...] there is no reason for compensating the breach of trust by way of an order for restitution [...] to import into such trust an obligation to restore the trust fund once the transaction has been completed would be entirely artificial.²³

This explanation has been challenged by some commentators, though their rebuttals are unconvincing. Edelman and Chen both argue that Lord Millett assumes that the finance company ratified the solicitors’ original dispersal of the assets in breach of trust: the dispersal of the £1,490,000 was in breach, thereby necessitating ratification to prevent falsification of this amount being required under accounting principles. This would be achieved by retrospectively authorising the dispersal.²⁴ However, this both overlooks the importance of an account being taken at the date of the judgment under *Target Holdings* and mistakes the nature of ratification. In *Knott v Cottee*, Kekewich J emphasised the possibility of a trustee avoiding liability to falsify an unauthorised transfer by having the beneficiary authorising the transfer.²⁵ However, this does not require the beneficiary to authorise *all* transfers. The only transfers which need to be authorised are those not previously authorised by the trust instrument or the

²² Georgiou (n 7) 319.

²³ *Target Holdings* (n 1) 434-436.

²⁴ James Edelman, ‘Money Awards of the Cost of Performance’ (2010) 4 *Journal of Equity* 122; Alex Chan, ‘In Defence of *AIB v Mark Redler*’ (2021) 27 *Trusts & Trustees* 725, 734.

²⁵ *Knott* (n 11).

beneficiary. In *Target Holdings*, the trustee's duty was to acquire a charge for the trust fund. At the date of judgment, an account of the trust fund displayed this charge. Authorisation from the beneficiary is, therefore, not required. This is because, at the date of the judgment, the dispersal of the trust assets corresponded to the charge being displayed when the account was taken. Therefore, Ho and Nolan are entirely correct in stating that 'Lord Millett's explanation does not turn on any ratification by the beneficiary. It is about accounting'.²⁶ The falsification explanation of *Target Holdings* does not assume ratification.

Another means of attacking the falsification explanation is through questioning the judgment-date rule established in *Target Holdings* upon which it relies. However, this does not undermine the *descriptive* possibility of explaining *Target Holdings* as falsification. The judgment-date rule seemingly runs against the strictness of a trustee's custodial duties demonstrated in historical falsification cases. For example, the trustee's liability for dispersing trust assets without obtaining a bond from the husband in *Cocker v Quayle* was not nullified by the hypothetical bond being rendered worthless by the husband's bankruptcy at the date of the judgment.²⁷ As such, Lord Millett's explanation of *Target Holdings* seemingly countenances a looser version of custodial duties, allowing for their breach to be rectified by the trustee between breach and judgment. This, in turn, is incompatible with the strict custodial duties suggested by falsification.

Although there is tension between the strictness of custodial duties assumed by historical falsification cases and that suggested by the judgment-date rule, this does not undermine arguments for falsification being preserved by *Target Holdings*.

²⁶ Lusina Ho and Richard C. Nolan, 'The performance interest in the law of trusts' (2020) 136 Law Quarterly Review 402, 414.

²⁷ *Cocker* (n 8).

Target Holdings establishes that the method of quantifying a trustee's personal liability for wrongfully dispersed trust assets is by quantifying losses caused to, or deficits within,²⁸ the trust account at the date of judgment.²⁹ Preserving falsification as a potential remedy in response to breaches of trust relies upon demonstrating that falsification, applied within this framework (however undesirable), thereby reaches the same result as that reached by the House of Lords. As Lord Millett's explanation demonstrates, an account taken at the date of judgment in *Target Holdings* would have revealed £0 in deficits, which was the result reached in the case. Falsification, applied within the method of quantification required by *Target Holdings*, reaches the same result as in the case itself. Whilst the normative desirability of the dilution of custodial duties created by the judgment-date rule can certainly be questioned, it is the descriptive compatibility of falsification with the result in *Target Holdings* that is essential in arguing that falsification may be preserved. Lord Millett's analysis is sound, and thus the falsification explanation of *Target Holdings* is convincing.

Indeed, subsequent cases accepted the falsification explanation of *Target Holdings*. In the Australian case *Yonyang*, a trustee wrongfully invested \$500,000 of trust money into a preference share issue by EC Consolidated Capital Limited ('ECCCL') without providing security for the investment.³⁰ ECCCL was subsequently wound up, with none of the \$500,000 being returned to the trust fund.³¹ The High Court distinguished *Target Holdings* on the basis that, on the date of judgment in *Yonyang*, the underlying trust duty had not been fulfilled. It followed that there were active custodial duties which could be enforced by the

²⁸ If Lord Browne-Wilkinson's view is accepted, there will be losses caused to the trust account. If Lord Millett's view is accepted, there will be deficits within the trust account.

²⁹ *Target Holdings* (n 1)

³⁰ *Yonyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15, (2003) 313 CLR 484.

³¹ *Yonyang Pty Ltd* (n 29) [26]

court.³² The court effectively did so, ordering the trustee to pay \$500,000 to the beneficiary — the amount dispersed in breach.³³ This illustrates the consistency of *Target Holdings* with orthodox accounting principles: when the account at the date of judgment contains what it would have had were the trustee's duty complied with, the trustee's duties have been discharged and there are no custodial duties to directly enforce (as in *Target Holdings*). Where the judgment-date account displays otherwise, the trustee's duties have not been discharged, and their custodial duties can be directly enforced by requiring falsification of the account (as in *Yonyang*). Somewhat surprisingly, Lord Reed in *AIB* recognised the validity of this explanation, commenting of *Yonyang* that:

the important distinction [from *Target Holdings*] that the security — which would have been good — was never provided... [means that] the decision appears to me to be consistent with the approach adopted in *Target Holdings*.³⁴

The English Court of Appeal has also applied this understanding of *Target Holdings*. In *Knight*, a trustee wrongfully transferred trust assets without obtaining an assignment of trademarks, which had also not been obtained by the date of the judgment.³⁵ The trustees had, therefore, breached their custodial duties to the beneficiary by transferring assets from the trust fund without the trust fund displaying what it was supposed to when an account was taken at the date of the judgment. Aldous LJ found that these custodial duties could effectively be directly enforced, suggesting that 'the remedy for [...] breach is reconstitution of the trust fund [...] where the underlying transaction covered by the trust had not been

³² *Yonyang Pty Ltd* (n 29) [45], [48].

³³ *Yonyang Pty Ltd* (n 29) [71].

³⁴ *AIB* (n 2) [124].

³⁵ *Knight v Haynes Duffell Kentish & Co* [2003] EWCA Civ 223; Georgiou (n 7) 319.

completed'.³⁶ Reading *Target Holdings*, *Yonyang*, and *Knight* together suggests that where an account at the date of judgment reveals a breach of the trustee's ongoing custodial duties, these duties can be directly enforced via falsification to render the trustee personally liable to reconstitute the trust fund, albeit inaccurately expressed as equitable compensation. *Target Holdings* and its progeny thus provided a strong descriptive basis for orthodox accounting principles and falsification to survive.

AIB

AIB sounded the death knell for accounting and falsification. Trustee solicitors held £3.3 million on trust for a mortgage lender. The case concerned property which was subject to a primary charge held by Barclays bank, which required £1.5 million to be paid off. The solicitors were instructed to pay off the charge and then transfer the remaining trust assets to the borrower, with the mortgage lender now having the primary charge. The solicitors paid off only £1.2 million of the charge before transferring the trust assets to the borrower, leaving Barclays with a primary charge with £300,000 needed to discharge it. The borrower defaulted on the loan, and the property was sold for £800,000. The solicitors argued that their liability should be limited to £300,000, as this was the only but-for loss caused to the beneficiary. Here, the only loss which the beneficiary suffered by not being the primary chargee was the £300,000 used to discharge Barclays' primary charge. By contrast, on the falsification explanation, the underlying duty of the trustee was the acquisition of a primary charge over the property with the remainder transferred to the borrower. This duty had not been discharged. Therefore, the trustee still owed custodial duties, which it had

³⁶ Samuel Williams, 'Equitable compensation, trustees, and disobedience in the Court of Appeal' (2021) 1 Conveyancer and Property Lawyer 13, 22; *Knight* (n 35) [37]-[38].

breached, and could therefore be directly enforced through falsification. This would have required reconstitution of the trust fund of the assets transferred in breach — £3.3 million. The Supreme Court accepted the solicitors' argument, holding them liable for their but-for losses of £300,000 and regarding Lord Millett's falsification rationalisation of *Target Holdings* as 'powerful' but 'a backward step'.³⁷ The Supreme Court in *AIB*, therefore, expressly moved away from accounting and falsification in favour of but-for causation and equitable compensation.

Whilst commentators have offered accounting and falsification explanations of *AIB*, these are difficult to understand. Ho and Nolan argue:

it is open to defendants who are liable, even trustees who are liable, to ask the court to pay attention to the basis and extent of their liability [...] This analysis accepts that the breach of trust consisted in the payment of £3.3 million, but argues that it was not open to AIB to disregard the benefit of the second charge in the subsequent accounting process, which would lead to finding a sum of £0.3 million due and payable by the trustee.³⁸

The court having 'regard' to the benefit of the second charge appears to rephrase causal loss in accounting terms through allowing the trustee's liability for falsification — representing what the trustee *should have done* — to be offset by what appears in the trust account following what the trustee *actually did*. It is difficult to understand why the trustee can have the causality of their breach to the loss considered if the orthodox remedial position of falsification — a means

³⁷ *AIB* (n 1) [63].

³⁸ Ho and Nolan (n 26) 414-415.

of duty enforcement detached from causal inquiries — has been preserved. Some insight may be provided by Lord Millett's rationalisation of falsification in *AIB*:

It is true that [£1.2 million] was paid without obtaining a discharge of its mortgage and was also breach of trust, but it achieved a *pro tanto* reduction in Barclay's charge and the acquisition by the bank of a corresponding equitable charge by way of subrogation, replaced in due course by a second legal charge, so that it had no further impact on the trust account.³⁹

This appears to suggest that the accounting explanation — requiring the direct enforcement of trustee's custodial duties — will account for *partial* discharge of the trustee's custodial obligations, such that there are less obligations to directly enforce through falsification.

A potential accounting-based explanation of *AIB*, therefore, proceeds as follows. The solicitors had £3.3 million in trust assets, £1.5 million to be utilised to pay off the charge, and £1.8 million to be transferred to the borrower. £1.8 million had been transferred to the borrower, discharging this aspect of their duty. £1.2 million had been used on paying off the charge — a *pro tanto* reduction of this aspect of their duty, leaving an obligation to use £300,000 of trust assets on discharging the charge unsatisfied. Whilst the entire underlying trust duty had therefore not been discharged, £3,000,000 of the £3,300,000 trust assets had been applied correctly. This represented a *pro tanto* reduction in the trust duties which the solicitors owed to the mortgage lender. A trust obligation to use £300,000 of the trust assets on discharging the primary charge which had not been fulfilled by

³⁹ Lord Millett (n 17), 49. The reference to a '*pro tanto* reduction in Barclay's charge' suggests that the trustees had partially discharged their trust obligations by utilising trust assets to pay off some, but not all, of Barclay's primary charge.

the solicitors at the date of the judgment was left as a result. The £300,000 of equitable compensation ordered could, therefore, be considered direct enforcement of the remaining trust duty via falsification, albeit incorrectly expressed as equitable compensation.

This interpretation of *Ho* and *Nolan* and Lord Millett is given some support by Yip's interpretation of *AIB* under accounting principles. On this view, the second charge may be regarded as either mitigation or 'an authorised remedial course of action' which is 'taken into consideration in the accounting procedure'.⁴⁰ This seemingly countenances the idea that actions of trustees which do not completely comply with trust obligations can nonetheless partially discharge them. There is, therefore, a possible accounting explanation of *AIB* which suggests that a trustee, whilst not discharging its trust obligations in full, has discharged them *pro tanto*. The aspects of the duty not discharged would, in turn, be directly enforceable through falsification.

The accounting and falsification explanation of *AIB* faces insuperable obstacles. First, it conflates the value of the charge with the charge itself. The trustee's duty was to obtain a primary charge over the property, which should have been displayed when an account was taken of the trust at the date of the judgment. The account should never have displayed a secondary charge. The (novel) *pro tanto* rationale discards this distinction by comparing the value of the primary charge to that of the secondary charge. It thus regards trust duties as being reducible to value, rather than as obligations which can be directly enforced. This, in turn, would be contrary to the very rationale of falsification.

⁴⁰ Man Yip, 'The commercial context in trust law' (2016) 5 *Conveyancer and Property Lawyer* 347, 363.

Second, this explanation assumes that trust obligations can be partially discharged, although it was accepted in *AIB* that the entire trust fund was transferred in breach. HHJ Cooke held at first instance that the solicitors' breach consisted only of the £300,000 transferred to the borrowers rather than being used to discharge the charge.⁴¹ This would support the *pro tanto* rationale, insofar as the trustees failed to discharge their trust duties regarding £300,000 of the trust fund which could, therefore, be directly enforced through falsification. However, Patten LJ overturned this aspect of the judgment, finding that the breach related to the entire fund since the primary charge had never been obtained, and the transfer of the remaining trust assets was only to take place when it had.⁴² Lord Reed did opine that the breach was confined to the £300,000.⁴³ However, as Charlwood notes, this was strictly *obiter* as this finding of the Court of Appeal was not appealed to the Supreme Court.⁴⁴ Patten LJ's finding is also more convincing: the trustee's second obligation — to transfer the remaining trust assets to the borrower — was contingent upon its first obligation — discharging the primary charge — being completed. Indeed, the assets transferred were to be the *remainder* of the assets used to discharge the primary charge.⁴⁵ The transfer of both the £1,200,000 and the £2,100,000 were, therefore, in breach. The trustee's breach thus related to the entire £3.3 million, resulting in non-discharged duties of this entire amount. Thus, falsification explanations of *AIB* cannot account for direct enforcement of £300,000 of trust duties, when £3,300,000 trust assets were dealt

⁴¹ *AIB Group (UK) Plc v Mark Redler & Co (a firm)* [2012] EWHC 35 (Ch), [2012] PNLR 16 [24].

⁴² *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2013] EWCA Civ 45, [2013] PNLR 19 [42]-[43], [51]; Spike Charlwood, 'AIB Group plc v Mark Redler & Co Solicitors: the last word on lenders' breach of trust against solicitors?' (2015) 3 Professional Negligence (note) 68, 70.

⁴³ *AIB* (n 2) [140].

⁴⁴ Charlwood (n 42) 71-72.

⁴⁵ See, similarly: Michael Furness QC and Judith Bryant 'Equitable compensation — clarity at last?' (2015) 21 *Trusts & Trustees* 1027, 1028.

with in breach. Direct enforcement of trust obligations through falsification must be regarded as dead post-*AIB*.

Subsequent case law accepting the transition to equitable compensation

The death of falsification following *AIB* — either as direct enforcement of custodial duties, or as masquerading falsification as equitable compensation — has been recognised by English courts. In *Shah v Shah*, Deputy Master Bowles explained that, following *AIB*, a beneficiary claiming a breach of trust is ‘to be placed in the same position as if [the trustee’s] breach had not taken place.’⁴⁶ This view recognises the centrality of but-for loss. Importantly, Lionel Persey QC observed in *Levack v Phillip Ross and Co* that ‘the appropriate remedy, if any, for breach of trust in the circumstance of this case is equitable compensation, and *not* reconstitution of the trust fund’.⁴⁷ This rejects the idea that the remedy in both *Target Holdings* and *AIB* amounted to reconstitution of the trust fund imprecisely expressed as equitable compensation. Equitable compensation and reconstitution are treated as distinct remedies. This was effectively affirmed by Lord Leggatt in *Stanford International Bank v HSBC Bank* where he said ‘in *AIB* [...] the Supreme Court expressly held that there is, or is no longer, a *separate equitable account remedy* which is not based on a principle of compensation.’⁴⁸

This recognises that there is no scope for arguing that equitable compensation incorporates direct enforcement of trust obligations based on deficiencies identified in a trust account: it only ever compensates a beneficiary for losses to the trust estate based upon causal losses. There is, therefore, no scope for arguing that the remedies in *Target Holdings* and *AIB* were falsification

⁴⁶ *Shah v Shah* [2019] EWHC 535 (Ch) [75].

⁴⁷ *Levack v Philip Ross and Co* [2019] EWHC 762 (Comm), [2019] PNLR 20 [10].

⁴⁸ *Stanford International Bank v HSBC Bank* [2022] UKSC 34, [2023] AC 761 [68].

incorrectly expressed as equitable compensation *or* that equitable compensation encompasses account-based remedies such as direct enforcement of custodial trust obligations via falsification. The descriptively incoherent account and falsification explanation of *AIB* has, therefore, been rejected by various cases.

Subsequent case law attempting to frame equitable compensation as encompassing falsification

A separate line of case law which relies upon *AIB* having not prohibited account-based remedies for breach of trust has, however, also developed. In *Brudenell-Bruce v Moore*, the claimant sought a surcharge of the trust account to obtain profits made by the trustee in breach of trust. Newey J made *obiter* remarks about the status of falsification post-*AIB*.⁴⁹ His Lordship suggested that ‘where the trusts are still subsisting’, the remedy for breach is falsification rather than equitable compensation assessed on a causal basis.⁵⁰ This explanation overlooks the fact that the obligation to obtain the primary charge was not discharged in *AIB*. Thus, on Newey J’s logic, the remedy in *AIB* should have been reconstitution of the trust fund rather than compensation.⁵¹

It has been argued by Georgiou, however, that trust obligations need not necessarily be performed to be extinguished, allowing *AIB* and *Brudenell-Bruce v Moore* to be reconciled. Georgiou suggests that whilst the obligation to obtain the charge in *Target Holdings* was extinguished through performance at the date of judgment, the obligation to obtain the primary charge in *AIB* was extinguished by virtue of impossibility.⁵² This appears to import the common law notion of

⁴⁹ *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch) [2015] WTLR 373; Georgiou (n 7) 313.

⁵⁰ *Brudenell-Bruce* (n 49) [245]-[248].

⁵¹ *AIB* (n 2).

⁵² Georgiou (n 7) 319.

frustration into Equity, which is both novel and inapplicable to *AIB*: it was not impossible for the trustees to obtain the primary charge; they merely transferred the incorrect amount of trust money to the chargee and the borrower. The inability of the trustees to discharge the primary charge by virtue of transferring the remaining assets to the borrower cannot be regarded as extinguishing the trustee's obligations by virtue of impossibility. On this logic, any incorrect disbursement of all the assets in a trust fund would extinguish the trustee's underlying obligations by virtue of it now being impossible for the trustees to properly distribute the fund. Despite evidently being inconsistent with *AIB*, *Brudenell-Bruce v Moore* suggests that non-extinguished trust duties may be directly enforced through falsification.

Subsequent cases have perpetuated the notion that trustees can be required to reconstitute a trust fund via falsification in a manner consistent with *AIB*. Gloster LJ in *Re Ahmed* states that:

[t]he cases clearly establish that compensatory relief, in addition to the restoration of trust property, is available where the claimant beneficiary can establish a loss to the estate caused by the trustee's breach of trust.⁵³

This suggests that falsification is either a form of equitable compensation, or a parallel remedy to it. This is justified by Gloster LJ by reference to Lord Toulson in *AIB*:

⁵³ *Ahmed & Ors v Ingram & Another (Re Ahmed)* [2018] EWCA Civ 519, [2018] BPIR 535 [34].

Placing the beneficiary in the same position as he would have been in but for the breach may involve restoring the value of something lost by the breach or making good financial damage caused by the breach.⁵⁴

Gloster LJ misinterprets Lord Toulson. It was not suggested that reconstitution of the trust fund, without consideration of causation, has been preserved as a remedy. Rather, His Lordship is stating that a trustee may be required to compensate a beneficiary for the full amount of assets which they transferred from the trust in breach — the same result as would have been reached under traditional falsification principles. This is due to the absence of any intervening events between the breach and the loss reducing the causality of the trustee's breach to the beneficiary's loss. Instead of preserving falsification, Lord Toulson merely points out that equitable compensation and reconstitution of the trust fund may result in the same extent of liability for a trustee in these circumstances. Falsification has not become a form of equitable compensation, nor does it stand alongside equitable compensation as equity's remedial response to a trustee's breach of trust.

Richards LJ has also perpetuated the myth of the simultaneous existence of equitable compensation and falsification. In *Ferster*, His Lordship stated that '[e]quitable compensation is apt to include a payment made to restore a claimant the value of assets or funds removed without authority', reflecting Lord Toulson's above *dictum*, but incorrectly infers that this is because equitable compensation 'is not restricted to reparation for losses'.⁵⁵ Richards LJ thus envisages equitable compensation as including reconstitution of the trust fund where the trustee's

⁵⁴ *AIB* (n 2) [64].

⁵⁵ *Interactive Technology Corporation Ltd v Ferster* [2018] EWCA Civ 1594, [2021] WTLR 561 [16].

breach has not caused loss in certain circumstances.⁵⁶ Similarly, in *Auden McKenzie v Patel*, Richards LJ supported the preservation of falsification as a remedy through relying upon the falsification rationalisation of *Target Holdings*,⁵⁷ whereby the acquisition of the charge by the date of the judgment meant that the account taken displayed within it what it was supposed to, rendering falsification nil.⁵⁸ Richards LJ thus suggests that falsification may be a form of equitable compensation through relying upon falsification explanations of *Target Holdings*.

Richards LJ's suggestions are unsupportable. The circumstances in which reconstitution, rather than but-for causal loss, will be applied are not explained in *Ferster*, and the decision resultantly reads as a refusal to apply *Target/AIB*. Richards LJ states that 'the facts [in *Ferster*] bear no relation to those in cases such as *Target* [...] and *AIB*'.⁵⁹ However, as Williams notes:

no ground of distinction is provided. One can see much similarity between the facts of *Target*, *AIB* and *Ferster*: in all three cases claims are brought for equitable compensation [...] one might reasonably expect the distinction between the three cases to be explained.⁶⁰

Regarding *Auden McKenzie*,⁶¹ the reliance upon *Target Holdings* as a case supporting falsification is unsupportable following *AIB*. Whilst the falsification explanation of *Target Holdings* has been shown to be doctrinally coherent, the Supreme Court in *AIB* denied this interpretation. In doing so it made the

⁵⁶ Williams (n 36) 29-30.

⁵⁷ Samuel Williams, 'Being Audentic about equitable compensation' (2021) 35 *Trusts Law International* (note) 120, 123.

⁵⁸ Lord Millett (n 17) 45-46.

⁵⁹ *Ferster* (n 55) [30].

⁶⁰ Williams (n 36) 30-31.

⁶¹ *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291, [2020] BCC 316.

causation-based equitable compensation explanation of *Target Holdings* law.⁶² This is demonstrated by Lord Toulson refusing to ‘re-interpret’ *Target Holdings*, thereby cementing equitable compensation for loss wrongfully caused by the trustee to be the law.⁶³ Since *AIB* mandated a causation-based interpretation of *Target Holdings*, it is not open to the court in *Auden McKenzie* to rely on a previously possible falsification-based interpretation of *Target Holdings* as the Court of Appeal did in *Knight*, prior to *AIB*. Richards LJ, therefore, relied upon an interpretation of *Target Holdings* unavailable to His Lordship.

A possible means of legitimising *Auden McKenzie* is provided by Georgiou’s suggestion that *Knight* applies post-*AIB*, providing a precedential basis for falsification other than the disapproved falsification explanation of *Target Holdings*. Georgiou argues that whilst *Knight* was cited by the Supreme Court, it was not disapproved in either Lord Toulson or Lord Reed’s judgments.⁶⁴ The Supreme Court is, therefore, taken to have implicitly approved *Knight*. The better view presented by Williams is that *Knight* was impliedly overruled by *AIB*, since Lord Toulson and Lord Reed repeatedly state that equitable compensation is unavailable without but-for causal loss. This view is inconsistent with *Knight*.⁶⁵ As such, *AIB* is best understood as mandating a non-falsification explanation of *Target Holdings*, and correspondingly overruling *Knight*. This renders Richards LJ’s reliance upon the falsification interpretation of *Target Holdings* as *per incuriam AIB*.⁶⁶ Richards LJ’s arguments can thus be discarded as relying on an interpretation of *Target Holdings* which is descriptively unavailable to him.

⁶² *AIB* (n 2).

⁶³ *AIB* (n 2) [49], [63]. See also: *Various Claimants v Giambrone & Law* [2017] EWCA Civ 1193, [2018] PNL R 2 [54]-[55].

⁶⁴ Georgiou (n 7) 313.

⁶⁵ Williams (n 36) 21-23.

⁶⁶ It ignores the causal explanation of *Target Holdings* cemented into law by *AIB*, in favour of applying a now disapproved falsification explanation of *Target Holdings*.

Unfortunately, subsequent cases have failed to correct the wrong turns taken in *Re Ahmed*, *Ferster*, and *Auden McKenzie*.⁶⁷ In *Davies v Ford*, David Holland KC, relying on *Ferster*, held that ‘substitutive equitable compensation’, *i.e.*, reconstitution of the trust fund as a form of equitable compensation, is the remedy for ‘misappropriation of existing trust property’. *AIB*, *Ferster*, and *Auden McKenzie* were cited as examples.⁶⁸ By contrast, ‘reparation claims’, *i.e.*, equitable compensation for wrongfully caused loss, are applicable where the trustee has ‘failed to obtain [property] for the benefit of the trust’.⁶⁹ This was affirmed on appeal by Sir Henderson, upholding both the distinction drawn between reparative and substitutive loss, and the judge’s award of equitable compensation on a reparative basis.⁷⁰

This decision relies upon the falsification explanation of *AIB* and its perpetuation in *Ferster* and *Auden McKenzie*, despite being shown to be doctrinally incoherent above. Additionally, the distinction between the misapplication of trust property and the failure to obtain property for the trust is unsustainable in practice. For instance, the failure to get the primary charge for the trust in *AIB* rendered the trustee’s use of £1.2 million in discharging the charge and transfer of £2.1 million to the borrower a misapplication of trust assets pursuant to an unauthorised transaction. The failure to get the charge *made* the transfers a breach of trust. The distinction drawn in *Davies v Ford* would thus justify utilising both a substitutive and a reparative basis for equitable compensation in *AIB*. It does not, however, offer any means of resolving this conflict.⁷¹ The decision can nevertheless be confined to its facts because the award of equitable compensation

⁶⁷ *Re Ahmed* (n 53); *Ferster* (n 55); *Auden McKenzie* (n 61).

⁶⁸ *Davies v Ford* [2021] EWHC 2550 (Ch) [103]–[106].

⁶⁹ *Davies* [2021] (n 68) [103].

⁷⁰ *Davies v Ford* [2023] EWCA Civ 167 [125], [131].

⁷¹ *ibid.*

was assessed on the ‘reparative’ basis and, therefore, constituted compensation for wrongfully caused loss. However, the High Court and Court of Appeal’s insistence upon the existence of substitutive remedies within equitable compensation reflects a fundamental misunderstanding of *Target/AIB*.

The distinction drawn between reparative and substitutive compensation as forms of equitable compensation has, nonetheless, been perpetuated in *Mitchell v Al Jaber*.⁷² Smith J accepted the distinction between substitutive and reparative claims allegedly arising from *AIB*. He held that in cases of misapplied trust assets, the trustee cannot reduce their liability by arguing that loss would have occurred anyway had the breach not occurred.⁷³ Specifically, Smith J states that:

I reject the contention that *Target Holdings* and *AIB v Redler* require the counterfactuals advanced [...] premised upon hypothetical intervening events to be taken into account.⁷⁴

However, this is exactly what *Target Holdings* and *AIB* decided. The requirement to show that the trustee’s breach caused loss to the beneficiary inherently requires considering the counterfactual of what, hypothetically, would have happened were the trust duties complied with. As with *Re Ahmed*, *Ferster*, and *Auden McKenzie*, this reads as a refusal to apply *Target Holdings* and *AIB*. This reflects a false dichotomy between reparative and substitutive compensation purportedly established in *Davies v Ford*.⁷⁵ There is, therefore, a trend of cases decided post-*AIB* which, without any descriptive basis, suggest that there is a role

⁷² *Mitchell v Al Jaber* [2023] EWHC 364 (Ch).

⁷³ *Mitchell* (n 72) [549], [562]-[563].

⁷⁴ *Mitchell* (n 72) [562].

⁷⁵ *Davies* [2021] (n 68); *Davies* [2023] (n 70).

for falsification to play as a form of equitable compensation (substitutive compensation).

Various Claimants v Giambrone

It is important to note, however, that *Various Claimants v Giambrone* does not form part of this trend and is entirely in keeping with the *Target/AIB* approach.⁷⁶ In *Giambrone*, solicitors held money on trust for property investors to subsequently be used as a deposit for properties. They had custodial duties to hold onto this money until compliant bank loan guarantees — which the solicitors did not have a duty to obtain — were received from developers. The solicitors, in breach, released the money without the guarantees having been received.

Jackson LJ held that the solicitors were liable for equitable compensation totalling the full amount of the deposits, because the solicitors breached a ‘passive’ duty to hold on to the money.⁷⁷ The trust fund would have contained the full value of the deposits but for the breach, thereby rendering loss wrongfully caused by the breach the full value of the deposits.⁷⁸ The only trust duty of the solicitors in *Giambrone* was custodianship of the trust assets, the breach of which would be a but-for causal loss to the trust fund. This is distinct from *Target Holdings*, where the trustees had an active duty to obtain a charge. It is also different to *AIB*, where the trustees had active duties to discharge a primary charge and transfer the remaining trust assets to a developer. Whilst this remedial position mirrors falsification, this can legitimately be considered equitable compensation for loss rather than direct enforcement of custodial duties. This is because the transfer of assets away from the fund *is* the loss caused to a fund which was supposed to be

⁷⁶ *Target Holdings* (n 1); *AIB* (n 2).

⁷⁷ *Giambrone* (n 63) [59]–[60], [62]–[63].

⁷⁸ *Giambrone* (n 63) [63].

preserved. It is submitted that the breach of a passive custodial duty is one of the scenarios envisaged by Lord Toulson in *AIB*, where the value of falsification and of equitable compensation for wrongfully caused loss would be equal.⁷⁹ The ability for a beneficiary to recover the full amount of assets transferred in breach of a custodial trust obligation, whilst echoing falsification, is entirely reconcilable with a but-for causal analysis, and, hence, *Target/AIB*.

Some commentators have argued that the recognition of passive duties in *Giambrone* imposes a new causal or remedial regime into equitable compensation which is unjustified by *Target Holdings* or *AIB*. Whilst Davies suggests that *Giambrone* ‘distinguished’ *Target/AIB*, ‘it is not clear why [the duty breached being a passive custodial duty] should make a difference to the remedies awarded’.⁸⁰ Williams similarly suggests that ‘the distinction between active and custodianship duties does not justify a differing approach to constructing counterfactuals’, with *Giambrone* ‘seemingly equat[ing] to a direct refusal to apply House of Lords and Supreme Court authority’.⁸¹ However, these criticisms unjustifiably suggest that a different approach is being taken in *Giambrone*, rather than the remedy being an inevitable consequence of applying but-for causal loss to a breach of a custodial duty. Where the transfer of assets away from the fund constitutes both the breach and the loss, there is no possibility for intervening events to reduce the causality of the breach to the loss. Hence, the loss wrongfully caused will always be the value of the assets transferred away from the trust. Thus, Williams’ observation that *Giambrone* ‘effectively recognises the availability of *Transfer Value Remedies* [a remedy consisting of the value of the assets transferred from the trust in breach, *e.g.*, falsification] in cases of mere custodianship’

⁷⁹ *AIB* (n 2) [64].

⁸⁰ Paul S. Davies, ‘Equitable compensation and the SAAMCO principle’ (2018) 134 *Law Quarterly Review* 165, 167.

⁸¹ Williams (n 36) 26-27, 29.

illustrates the correctness of Jackson LJ's approach. This runs counter to the 'artificial construction of the counterfactual for quantifying counterfactual remedies' alleged.⁸²

The reconcilability of *Giambrone* with *Target Holdings* and *AIB* has been noted judicially. It was first noted, but not explained, by HHJ Halliwell in *LIV Bridging Finance*.⁸³ Subsequently, in *Various North Point*, Hodge KC endorsed the above explanation for the ostensible congruence of falsification and equitable compensation for passive duties:

[the] measure of damages is the amount of the lost deposits because, on this hypothesis, they have been released when they should have been retained.⁸⁴

Hence, despite echoing falsification, *Giambrone* is entirely understandable as equitable compensation for wrongfully caused loss and is consistent with *Target Holdings* and *AIB*.

In summary, whilst *Target Holdings* is amenable to rationalisation based on accounting principles and falsification, *AIB* dictates that equitable compensation for wrongfully caused loss is equity's remedial response to a trustee's breach of trust. There is, on a proper understanding of *AIB*, neither room for arguing that the case can be understood as falsification, nor that falsification is a form of equitable compensation. Whilst *Giambrone* upholds this rationale in a scenario where but-for causal loss and falsification produce the same remedy, a line of case

⁸²Williams (n 36) 29.

⁸³ *LIV Bridging Finance* [2020] EWHC 1590 (Ch) [2020] PNLR 24 [24]-[26].

⁸⁴ *Various North Point Pall Mall Purchasers v 174 Law Solicitors Ltd* [2022] EWHC 4 (Ch) [71].

law has developed which suggests an ongoing role for falsification within equitable compensation. These cases misinterpret *Target/AIB*. It is hoped that Lord Leggatt's recent suggestion in *Stanford International Bank* that equitable compensation does not include falsification, nor stand alongside it as an alternate remedy, will contribute to the law in this area being clarified.

SECTION II – COMMERCIAL VERSUS TRADITIONAL TRUSTS

Section I has demonstrated that when *Target Holdings* and *AIB* are properly understood, falsification or reconstitution of the trust fund cannot be considered a form of equitable compensation. Where equitable compensation applies to a breach of trust, falsification cannot apply. This, however, does not resolve the issue of *when* equitable compensation is the applicable remedy for a breach of trust. This Section argues that it is descriptively possible to argue that equitable compensation applies only to breaches of commercial trusts, with falsification still being a remedial option for traditional trusts. It demonstrates that *Target Holdings* strongly implied drawing this remedial distinction and challenges the commonplace assumption that *AIB* denies its existence. Whilst not mandating a remedial distinction between traditional and commercial trusts, *Target Holdings* and *AIB* leave it descriptively possible to argue for falsification still applying to breaches of traditional trusts.

Target Holdings and AIB

Lord Browne-Wilkinson plainly suggested in *Target Holdings* that different remedial regimes should apply in response to breaches of traditional and commercial trusts. Despite the case concerning a commercial bare trust, His

Lordship describes at length why direct enforcement of custodial trust duties is the appropriate response to breach of a traditional trust:

The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Thus, in relation to a traditional trust where the fund is held in trust for a number of beneficiaries [...] the right of each beneficiary is to have the whole fund vested in the trustees [...] Accordingly, in the case of a breach of such a trust involving the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund [...] what ought to have been there.⁸⁵

This language reflects the notion of directly enforcing custodial trust duties upon breach of a traditional trust through requiring the trustee to falsify the trust account. This stands in stark contrast to the rule of compensating wrongfully caused loss for the breach of the commercial trust in *Target Holdings* itself. That Lord Browne-Wilkinson sought to distinguish this remedial response is demonstrated by His Lordship's language when describing Equity's response to breaches of commercial trusts:

it is in any event wrong to *lift* wholesale the detailed rules developed in the context of traditional trusts and then seek to *apply* them to *trusts of quite a different kind* [...] it is important, if the trust is not to be rendered commercially useless, to distinguish between the basic principles of trust law and those *specialist rules* developed in relation to traditional trusts

⁸⁵ *Target Holdings* (n 1) [434].

*which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind.*⁸⁶

Lord Browne-Wilkinson thus suggested in *Target Holdings* that falsification of the trust fund is the remedy for breaches of traditional trusts, whilst equitable compensation for wrongfully caused loss is the remedy for breaches of commercial trusts.⁸⁷

The Supreme Court in *AIB* denied that this distinction was part of the law. Crucially, however, it did so by denying that Lord Browne-Wilkinson drew this distinction in *Target Holdings*, rather than rejecting the distinction outright. This means that it is descriptively possible to argue for the remedial distinction between traditional and commercial trusts post-*AIB*. Lord Toulson stated:

Commercial trusts may differ widely in their purpose and content, but they have in common that the trustee's duties are likely to be closely defined and may be of limited duration. Lord Browne-Wilkinson did not suggest that the principles of equity differ according to the nature of the trust, but rather that the scope and purpose of the trust may vary, and this may have a bearing on the appropriate relief in the event of a breach.⁸⁸

⁸⁶ *Target Holdings* (n 1) [435].

⁸⁷ See also: *Auden McKenzie* (n 61) [34]; Georgiou (n 7) 309-310.

⁸⁸ *AIB* (n 2) [70].

Similarly, Lord Reed argued:

as Lord-Browne Wilkinson pointed out, commercial trusts, usually arising out of contractual relationships rather than the transfer of property by way of gift, differ in a number of respects from the more traditional trust. That is not to say that there is a categorical distinction between trusts in commercial and non-commercial relationships.⁸⁹

That Lord Browne-Wilkinson was drawing a categorical distinction between the remedial position for breaches of traditional and commercial trusts is illustrated by His Lordship's focus upon direct enforcement of the trustee's custodial duties in relation to the former, and in the use of the but-for test for its commercial utility in relation to the latter. Lord Millett has capitalised upon this to suggest that 'the Supreme Court rejected the unworkable distinction which Lord Browne-Wilkinson drew in *Target Holdings* between "traditional" or "family" trusts on the one hand and "commercial" trusts on the other',⁹⁰ with Turner concurring that *AIB* 'reject[ed] a doctrinal division between "commercial" and "traditional" trusts when awarding equitable compensation for breach of trust.'⁹¹ However, Their Lordships were clearly denying that this distinction was *already* part of the law by virtue of Lord Browne-Wilkinson's judgment in *Target Holdings*, rather than denying that such a distinction could be drawn. Indeed, they relied upon the general distinction between traditional and commercial trusts throughout their judgments. Lord Toulson noted that:

⁸⁹ *AIB* (n 2) [102].

⁹⁰ Lord Millett (n 17) 46.

⁹¹ Peter G Turner, 'The new fundamental norm of recovery for losses to express trusts' (2015) 74 Cambridge Law Journal 188, 190.

it is a fact that a commercial trust differs from a typical traditional trust in that it arises out of a contract rather than the transfer of property by way of gift [...] The contract defines the parameters of the trust [...] In their application, the terms of the contract may be highly relevant to the question of fact whether there has been a loss applying a 'but for' test, that is, by reference to what the solicitors were instructed to do.⁹²

AIB, therefore, tolerates a distinction between traditional and commercial trusts, with the distinction that a commercial trust arises from a pre-existing contract. Whilst imperfect, the use of pre-existing contracts to designate a trust as commercial is workable and desirable. An absence of a contract in establishing a trust indicates a reduced need to establish expectations, rights, and liabilities in a formal document. This reflects the origins of the trust within family and friendship and the mutual trust existing in traditional family trusts.⁹³ By contrast, establishing these expectations in a contract reflects the arm's-length dealings typical of commercial relationships. Moreover, the likelihood of a contract existing within a commercial relationship is increased by the requirement of the parties to a contract having an 'intent to create legal relations' with each other.⁹⁴ This requirement is governed by rebuttable presumptions specifically framed in the commercial and the traditional/domestic context. In the domestic context, there is a presumption against the existence of an intent to create legal relations. There is, therefore, also a presumption against a contract arising between familial

⁹² *AIB* (n 2) [70]. Lord Reed makes similar comments at [102].

⁹³ See: Yip (n 40); John H. Langbein, 'The Contractarian Basis of the law of Trusts' (1995) 105 Yale Law Journal 625.

⁹⁴ For the requirement for the parties to a contract to have intended to create legal relations with each other, and for the fact that this intention is judged objectively, see: *Maple Leaf Marco Volatility Master Fund v Rouvroy* [2009] EWCA Civ 1334, [2010] All ER (Comm) 788.

or social partners.⁹⁵ Where there is an express commercial agreement between parties, there is a presumption of an intent to create legal relations, and hence a contract arising.⁹⁶ Thus, where a trust arises from a contract, the existence of the contract is broadly indicative of a commercial relationship between the parties to the contract and trust. Establishing this as a bright-line rule in accordance with *AIB* would provide certainty to the settlor, beneficiary, and especially trustee regarding the remedial position for breach of trust. It is, therefore, possible to remedially distinguish between traditional and commercial trusts.

On a proper reading, therefore, *AIB* does not mandate a remedial distinction between commercial and traditional trusts, but also does not prevent this distinction from becoming law as it did with the notion of falsification being a form of equitable compensation. Indeed, the method of identifying commercial trusts provided by Lord Toulson — those which arise from a contract rather than a gratuitous transfer of property — is workable and certain. There is, following *AIB*, a descriptively valid possibility for a remedial distinction to develop.

Applying the traditional/commercial trusts distinction

The remedial distinction between traditional and commercial trusts has received a limited amount of judicial attention following *AIB*. In *Purrunsing v A'Court*, HHJ Pelling KC held:

⁹⁵ *Balfour v Balfour* [1919] 2 KB 571; *Jones v Padavatton* [1969] 2 All ER 616, [1969] 1 WLR 328; *Hadley v Kemp* [1998] EMLR 589.

⁹⁶ *Esso Petroleum Co Ltd v Commissioners of Customs and Excise* [1976] 1 WLR 1; *Edwards v Skyways* [1964] 1 WLR 349, [1964] 1 All ER 494; *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2001] CLC 999.

[*AIB*] is immaterial to the issue I am now considering because that authority is concerned with the measure of equitable compensation for breach of trust that applies where there has been a breach of a bare trust arising in the context of a commercial contract [...] it is accepted that there is not a contract between the claimant and trustee.⁹⁷

Yip and Lee note that this finding was merely *obiter* because the case was not about equitable compensation for breach of trust specifically; rather, it was about the court's discretionary ability to relieve the trustee from liability under section 61 of the Trustees Act 1925.⁹⁸ Nonetheless, this *dictum* is important as a judicial recognition of the descriptive potential for a remedial distinction between commercial and traditional trusts to develop following *AIB*. It also affirms that a 'commercial' trust is one arising out of a contract rather than by gratuitous transfer of property, as recognised in *AIB*.⁹⁹ The *dictum* was also, in some sense, relevant, since HHJ Pelling KC's determination that *AIB* applied in the context of commercial bare trusts meant that *Target/AIB* did not apply to the facts of *Purrunsing*. The descriptive potential for *Target/AIB* to be limited to breaches of commercial trusts, which leaves falsification as the response to breaches of traditional trusts, has hence been recognised in an English court.

Comparatively, it is also interesting to note that *Yonyang* was a decision regarding a family trust.¹⁰⁰ Therefore, following *AIB*, the reconstitution of the

⁹⁷ *Purrunsing* (n 3) [42].

⁹⁸ Man Yip and James Lee, 'The commercialisation of equity' (2017) 37 *Legal Studies* 647, 655-656, Footnote 59.

⁹⁹ *AIB* (n 2) [70], [102].

¹⁰⁰ *Yonyang* (n 30) [1]. See also: High Court of Australia, Public Information Officer, *Yonyang Ptd Ltd as Trustee of the Bill Hayward Discretionary Trust v Minter Ellison Morris Fletcher (later Minter Ellison)* (3 April 2003) <<https://www.hcourt.gov.au/assets/publications/judgment-summaries/2003/hca15-2003-04-3.pdf>> accessed 23 September 2023.

trust fund in *Youyang* cannot support the direct enforcement of trust obligations which have not been extinguished within England and Wales. It can, however, support the existence of falsification for breaches of traditional trusts. Davies and Virgo argue that the High Court of Australia in *Youyang* regarded the divide between commercial and family trusts as unnecessary, reflecting a broader uncertainty as to ‘why the equitable principles should differ to any significant degree’ between traditional and commercial trusts.¹⁰¹ This overlooks that the traditional/commercial trust distinction was unnecessary in *Youyang* because the High Court preserved the distinction between complete and incomplete trusts, and hence the traditional trust in that case could be falsified on that basis. The trust in question being an unextinguished trust, the trustee’s custodial obligations could be directly enforced by virtue of not being discharged rather than through an independent doctrine of breaches of traditional trusts being falsifiable. Following *AIB*, the logic of direct enforcement from *Youyang* cannot be upheld in England and Wales; however, as *Purrunsing* illustrates, falsification as the remedial response for breaches of traditional trusts can explain the result in *Youyang* in a manner descriptively valid in England and Wales. Thus, within English doctrine, *Youyang* is explicable as the direct enforcement of trust obligations via falsification as the remedial response to breaches of traditional trusts.

In summary, the Supreme Court in *AIB* denied that a remedial distinction between traditional and commercial trusts forms part of the law by virtue of Lord Browne-Wilkinson’s judgment in *Target Holdings*. It is in no way denied, however, that this distinction could form part of the law in England and Wales. Following *AIB*, it is hence descriptively possible to argue that equitable compensation for wrongfully caused loss is the remedy for breaches of commercial trusts;

¹⁰¹ Davies and Virgo (n 4) 822.

falsification of the trust fund, by contrast, is the remedy for breaches of traditional trusts. This possibility has been recognised in *Purrunsing* and can be utilised to explain the result in the Australian case of *Youyang* according to English doctrine.

SECTION III – JUSTIFYING A DISTINCTION BETWEEN COMMERCIAL AND FAMILY TRUSTS

The normative desirability of drawing a remedial distinction between traditional and commercial trusts has been explored by commentators far less than *Target/AIB*'s descriptive dimension. This Section explores whether it is justifiable for equity to respond to breaches of traditional trusts with falsification and breaches of commercial trusts with equitable compensation for wrongfully caused loss. It is argued that this distinction can be justified, as it reflects the distinct roles of conscience and commerce throughout equity. Whilst remedies in equity are traditionally based on remedying the conscience/unconscionable behaviour of the trustee having breached their trust duties, equity has, in various doctrines, shown a willingness to oust the remedial role of conscience in favour of making trusts effective vehicles of commerce. Falsification as a conscience-based remedial response to a breach of a family trust and equitable compensation as a commerce-based remedial response to a breach of a commercial trust may thus co-exist in a legitimate and normatively desirable manner.

The roles of conscience and commerce in equitable remedies

Conscience and commerce occupy distinct remedial roles in equity. Where conscience is operative, equity remedies the unconscionable behaviour of the trustee to the full extent to which their conscience was bound. Equitable

remedies are presumptively conscience-based,¹⁰² reflecting the development of equitable principles, duties, and remedies ‘in the context of family and friendship’.¹⁰³ Where this would be inconvenient commercially, the role of conscience can be ousted in favour of a lesser liability. One aspect of this relationship is represented by Wright’s observation of ‘the strong English aversion to equity in commerce’ regarding the intrusion of equitable remedies into commercial fields.¹⁰⁴ He provides Lindley LJ’s refusal to accept that those holding bills of lading had constructive notice in *Manchester Trust v Furness*, as it would ‘be doing infinite mischief and paralysing the trade of this country’, as a salient example.¹⁰⁵ The distinctive operation of commerce and conscience can hence prevent equity functioning within the commercial field.

Another aspect of this relationship is the overturning or confinement of conscience-based remedies for commercial convenience. A strong example of this is the treatment of both knowing receipt and *bona fide* purchasers for value without notice (‘BFP’) in the context of banking. To be a knowing recipient, one must beneficially — rather than ministerially — receive trust assets.¹⁰⁶ The role of the doctrine in the context of banks is thus ousted by the holding that banks, when ‘paying or collecting money for a customer’, receive ministerially.¹⁰⁷ This is doctrinally incorrect: modern banks utilise their customers’ assets to profit from investments. The larger the pool of assets, the more profit the bank can make.

¹⁰² See: Sinéad Agnew, ‘The Meaning and Significance of Conscience in Private Law’ (2018) 77 Cambridge Law Journal 479.

¹⁰³ Yip (n 40) 347; Langbein (n 93).

¹⁰⁴ David Wright, ‘Another wrong step: equitable compensation following a breach of trust’ (2015) 21 Trusts & Trustees 825, 830.

¹⁰⁵ Wright (n 104) 830-831; *Manchester Trust v Furness* [1895] 2 QB 539, 545.

¹⁰⁶ *Agip Africa Ltd v Jackson* [1992] 4 All ER 385, [1990] Ch 265, 290.

¹⁰⁷ *Agip Africa* (n 105) 292.

Therefore, it is wrong to say that a bank's conscience cannot be bound by receiving trust assets into one of its accounts.

Equally, however, the bank is prevented from obtaining the trust assets themselves by virtue of being a BFP of those assets. In *Papadimitriou*, the Privy Council held that a bank will have constructive notice of a third party's proprietary right in assets which the bank receives where if it had inquired into the existence of such rights, the 'probable' existence of the right would have been revealed.¹⁰⁸ This, therefore, prevents a bank from being a BFP, despite not having any knowledge as to the existence of rights in the assets transferred to it so as to bind its conscience. Both knowing receipt and the BFP doctrine are thus effectively ousted in the banking context.

Although this position is doctrinally irreconcilable with the conscience-based nature of equity, it is commercially justifiable. A bank, when dealing with trust assets, is effectively prevented from gaining any windfalls as a BFP. It is simultaneously protected from losses via liability as a knowing recipient of trust assets. This is simultaneously desirable to both trustees and banks. Trustees can place trust assets into a bank account to partition the trust assets from their own without fear of the fund suffering any loss by virtue of the bank being a BFP. Banks, which will be willing to accept trust assets being placed into bank accounts due to their immunisation from liability for knowing receipt, will hence be able to profit from trust assets by using them within its investment banking practice. These commercially justifiable results require the role of conscience in calculating any potential remedy being ousted: the bank's conscience being bound by receiving trust assets in breach of trust will not translate into liability for knowing

¹⁰⁸ *Crédit Agricole Corporation and Investment Bank v Papadimitriou* [2015] UKPC 13, [2015] 1 WLR 4265, [19]-[20] (Lord Clarke), [33] (Lord Sumption)

receipt, nor will the bank providing value for assets in good faith without notice of a pre-existing equitable interest render it a BFP. The ousting of conscience in calculating remedies in the banking context therefore provides commercially desirable results for trustees, beneficiaries, and banks.

Thus, remedies for breach of equitable duties are presumptively based upon remedying the unconscionable behaviour of a trustee to the extent that the trustee's conscience is bound. However, where a trust is useful as a commercial vehicle, but conscience-driven remedies would lead to undesirable liabilities and undeserved windfalls on either side of a commercial transaction, equity displays a willingness to oust the conscience-based nature of its remedial regime.

Applying this distinction to breaches of trust: doctrine and practice

The application of this framework to the remedial distinction between traditional and commercial trusts, made possible following *AIB*, reveals that it would be doctrinally justified. Additionally, in a practical sense, falsification for breach would serve the purposes of a traditional trust, whilst equitable compensation for wrongfully caused loss would serve the purpose of a commercial trust.

Traditional trusts

Doctrinally, falsification reflects the extent to which the trustee's conscience is bound by misappropriating trust assets. When a trustee disperses assets in an unauthorised manner, their conscience is bound to the full extent of this disbursement. The extent to which this disbursement caused loss is irrelevant. Anything intervening which reduces the causality of this loss — *e.g.*, losses which would have occurred even if the assets were correctly administered — does not

alleviate the conscience of the trustee. For example, in *Cocker v Quayle*, the husband's hypothetical bond being rendered worthless by his bankruptcy does not relieve the conscience of the trustees in releasing trust fund assets to him without this bond in breach of trust.¹⁰⁹ Falsification of the trust fund therefore directly mirrors the extent to which the trustee's conscience is bound.

The framing of falsification as a conscience-driven enforcement of a trustee's custodial duties faces some objection. Chan has objected to this logic on the basis that it turns the trustee into a '*de facto* insurer' of the trust fund, which is an obligation not assumed by trustees:

the accounting rules are unduly harsh, for its true effect is to turn the trustee into an insurer of the trust fund. But the position of an insurer is not the position held by the trustee, since it is precisely the office of a *trustee* that he voluntarily assumed, no more and no less.¹¹⁰

The problem with this critique is that the custodial obligations imposed upon a trustee are largely analogous to insurance for the trust fund. Where a trustee's duty is to preserve assets within a trust fund, the trustee's obligation is to prevent any losses to it. Direct enforcement of these custodial duties through falsification reconstitutes the trust fund to the level at which it was 'insured' (the amount of the trust assets over which the trustee had custodial duties).¹¹¹ This reflects the historical origin of the trust as a means of *preserving* land for beneficiaries:¹¹² a

¹⁰⁹ *Cocker v Quayle* (n 8).

¹¹⁰ Chan (n 24) 733.

¹¹¹ See: Matthew Congalen, 'Equitable Compensation for Breach of Trust: Off Target' (2016) 40 Melbourne University Law Review 126, 139, 141.

¹¹² Matthew E. Carn, 'Distinguishing traditional from commercial trusts: a dangerous precedent or necessary complication?' (2015) 21 Trusts & Trustees 868, 879.

trustee's custodial obligations ensure the preservation of the trust fund outside of transfers which the trustee is authorised to make.

Further, the suggestion that a trustee *is* an insurer is misleading. An insurer protects against risks created by third parties or by events outside of human control; they mitigate risks for which they are not responsible.¹¹³ A trustee falsifying a trust account, albeit potentially compensating for losses they did not cause, is nonetheless returning assets to the trust fund which *they* wrongfully misappropriated. Chan's language suggests that the trustee is being made responsible for some externality causing loss to the trust fund, like an insurer, when in reality the trustee's breach of their own custodial obligations are being directly enforced by the beneficiary. When making an unauthorised transfer of trust assets, the trustee's conscience is hence bound by their breach of custodial duties, rather than the trustee acting as an insurer of external losses to the trust fund. The presumptive role of conscience in defining the remedy for breaches of trust is thus upheld and should define the remedy for breaches of trust unless ousted by commercial considerations.

Practically, falsification is an effective means of remedying breaches of traditional trusts. Traditional trusts — those arising from a gratuitous transfer of property rather than a contract — generally arise in two contexts. First, traditional trusts are used as a fund of assets for one or more beneficiaries throughout their

¹¹³ Chan (n 24) 733 suggests that a trustee would be rendered a '*de facto* insurer' when made responsible for losses to the trust fund for which their breach of trust was not the cause, *i.e.*, losses caused by other individuals or by non-human events. Chan himself also distinguishes between trust obligations and insurance through noting that trust assets themselves can be insured, tracing this back to *Smith v Lascelles* (1788) 2 TR 187 where the court accepted that an agent had an obligation to obtain insurance for the trust assets, and that trust assets can be utilised to pay insurance premiums for this insurance, dating back to *Clack v Holland* (1854) 19 Beav 262.

life.¹¹⁴ Second, a traditional trust can be utilised as a form of ‘intergenerational wealth management’ to be used as an asset fund between family generations (a so-called ‘dynasty trust’).¹¹⁵ In both forms, the preservation of the trust, rather than direct disbursement to the beneficiary, is of central importance. Reconstitution of the trust fund via falsification, justified by the trustee’s conscience being burdened by their transfer of the assets in breach and hence placing the preservation of the fund at risk, upholds the existence of the trust fund throughout the beneficiary’s life and familial generations by ensuring that there are assets within the trust. Georgiou encapsulates the importance of preservation well:

in the case of so-called ‘traditional’ trusts, the trust may be for the benefit of future parties or the rights held on trust may be to property which is of some sentimental value –in both such cases, the beneficiary has an interest beyond their financial position.¹¹⁶

The connection between preservation and reconstitution is, surprisingly, emphasised by Lord Toulson in *AIB*:

¹¹⁴ *Target Holdings* (n 1) 434.

¹¹⁵ See, for example: J.P.Morgan, ‘Your Children, their trusts. How to bridge generational gaps’ (*J.P.Morgan*, 27 April 2022)

<<https://privatebank.jpmorgan.com/gl/en/insights/planning/children-and-trusts-bridging-the-generational-gap>> accessed 5 September 2023; Will Kenton, ‘Dynasty Trust: Definition, Purposes, How It Works, and Tax Rules’ (*Investopedia*, 21 October 2022)

<<https://www.investopedia.com/terms/d/dynasty-trust.asp>> accessed 5 September 2023; Richard Potts, ‘Intergenerational Wealth Management’ (*Irwin Mitchell*)

<<https://www.irwinmitchell.com/wealth-management/intergenerational-wealth-management>> accessed 5 September 2023; Alan Boswell Group, ‘What is intergenerational wealth planning and why is it so important?’ (*Alan Boswell Group*, 19 December 2022) <<https://www.alanboswell.com/news/intergenerational-wealth-management/>> accessed 5 September 2023.

¹¹⁶ Georgiou (n 7) 320.

A traditional trust will typically govern the ownership-management of property for a group of potential beneficiaries over a lengthy number of years. If the trustee makes an unauthorised disposal of the trust property, the obvious remedy is to require him to restore the assets or their monetary value.¹¹⁷

Further, where this rationale is thought to operate harshly, mitigating measures are available. Section 61 of the Trustee Act 1925 permits the court to relieve a trustee from personal liability, either ‘wholly or partly’, where the trustee ‘has acted honestly and reasonably’ and relieving them of liability would be ‘fair’.¹¹⁸ This potential was recognised by Lord Browne-Wilkinson in *Target Holdings*,¹¹⁹ Lord Toulson in *AIB*,¹²⁰ and by the High Court of Australia in *Youyang*.¹²¹ Specifically, the court in *Youyang* suggested that s 61 would be used to make the personal liability of the trustee proportionate to the extent to which their conscience was bound. It was noted that ‘[t]he facts discourage any such attempt’ to use the Australian equivalent of s 61 in *Youyang* due to the blatant misapplication of trust funds by the trustee.¹²² Aside from s 61, Congalen notes that a trustee in breach can ‘seek the beneficiary’s consent to waive the breach, or judicial advice regarding a proposal to repair the breach’ to reduce their personal liability.¹²³ Potential injustices which might result from the doctrinally and practically sound use of falsification for breaches of traditional trusts can thus be remedied by various mechanisms.

¹¹⁷ *AIB* (n 2) [67].

¹¹⁸ Trustee Act 1925, s 61.

¹¹⁹ *Target Holdings* (n 1) 432.

¹²⁰ *AIB* (n 2) [50].

¹²¹ *Youyang* (n 30) [33].

¹²² *ibid.*

¹²³ Congalen (n 111) 166.

Commercial trusts

Regarding the possibility of a remedial regime based upon practical considerations rather than conscience-based considerations applying to commercial trusts, the willingness of equity to oust doctrine in favour of commerce has been demonstrated above. Whether equity should do so is a practical matter.

The practical use of commercial trusts justifies a remedial response which does not permit windfalls or liabilities exceeding loss wrongfully caused: liability for but-for losses. Commercial bare trusts are utilised as conveyancing devices for assets, ‘used in many commercial transactions, for example across the spectrum of wholesale financial markets, where they serve a useful bridging role between the parties involved’.¹²⁴ The use of the trust is, rather than being gratuitous as with a traditional trust, something which will have been bargained for within a bilateral commercial relationship.¹²⁵ For example, a trust may be used to deliver money consideration to a counterparty. Here, ‘the trust is treated merely as a facilitative vehicle of commercial activity’, as opposed to the ‘crucial regulatory function’ of the traditional trust used to ensure the long-term preservation of the assets within the trust fund.¹²⁶ Providing more than this money consideration to the counterparty, by requiring the trustee to reconstitute the fund for losses not wrongfully caused by them, would upset this bilateral relationship and bargaining by giving the counterparty more than they bargained for. Indeed, Georgiou cogently observes that, in a commercial context, ‘it ought

¹²⁴ *AIB* (n 2) [70]. See also: *Target Holdings* (n 1) 435, where Lord Browne-Wilkinson states that ‘[i]n the modern world the trust has become a valuable device in commercial and financial dealings’.

¹²⁵ Yip (n 40) 364.

¹²⁶ Yip (n 40) 348.

to be a matter of commercial ambivalence' to the counterparty whether they receive the money through the trustee's compliance with their trust obligations, or through equitable compensation; the beneficiary has no interest in the actual performance of the trust obligations, and hence should not be compensated for losses which would have been incurred were the trust duties performed properly.¹²⁷

Turner has objected to the notion that windfalls to the beneficiary are always unjustified in the commercial context:

[Limiting the remedy for breaches of commercial trusts to compensation for loss wrongfully caused] would preclude the reconstitution of a trust even where reconstitution is necessary before the trust can be performed, and performance of the trust is necessary to complete a larger executory transaction.¹²⁸

Turner suggests that, where losses to the trust fund would have occurred but for the breach, reconstitution of the trust fund is justified where the performance of the trust is needed as part of a larger commercial executory transaction. However, this overlooks the fact that, in this scenario, external circumstances would have prevented the executory transaction being completed even if the trust obligations were complied with. Turner therefore suggests that where circumstances outside of the administration of the trust mean that the trust would have inadequate funds for the completion of the executory transaction, equity should provide commercial parties with a windfall to ensure that the transaction can be completed. The inability for the executory transaction to be completed in

¹²⁷ Georgiou (n 7) 320.

¹²⁸ Turner (n 91) 191.

that circumstance is merely a result of poor commercial planning by the beneficiary. It makes no commercial sense for the trustee to be made to internalise this loss by reconstituting the trust fund. The obligation to justify the application of but-for causation to assessing equitable compensation for all breaches of commercial trusts is thus satisfied.¹²⁹

In summary, whilst remedies in equity are presumptively based upon remedying the conscience of the trustee bound by their breach of trust, equity has displayed a willingness to oust this presumption where commercial considerations dictate a lesser liability. Applied in the context of remedies for breach of trust, falsification of misapplied traditional trust assets reflects the binding of the trustee's conscience. Intervening events reducing the causality of the breach to the loss do not relieve the trustee's conscience, explaining the lack of a causal inquiry for calculating the trustee's liability. Reconstitution of the trust fund also ensures the preservation of the trust throughout the beneficiary's life or throughout familial generations. By contrast, falsification of misapplied commercial trust assets would provide undesirable windfalls and liabilities to the beneficiary and trustee, respectively, and undermine the bilateral bargaining between parties which resulted in the commercial trust being utilised to deliver consideration to the counterparty. There is, therefore, a strong normative justification, both doctrinally and practically, for realising the descriptive possibility in English law for falsification to be utilised in response to breaches of traditional trusts and equitable compensation for wrongfully caused loss to be utilised for breaches of commercial trusts.

¹²⁹ *AIB* (n 2) [95].

CONCLUSION

The descriptive and normative positions of *Target Holdings* and *AIB* are complicated but resolvable. Whilst *Target Holdings* was amenable to a falsification-based explanation, *AIB* clarified that this interpretation is not valid within England and Wales, and that falsification cannot be considered a form of equitable compensation. A contrary line of case law has suggested that reconstitution of the trust fund, for losses not wrongfully caused by the trustee, can be a form of equitable compensation, invalidly relying directly upon the falsification explanation of *Target Holdings*. However, these cases must be wrong following *AIB*. Falsification is not available as a form of equitable compensation following *AIB*; only but-for losses of the breach are available where equitable compensation is the remedy for a breach of trust.

It is nonetheless possible to argue for a remedial distinction between breaches of traditional and commercial trusts. Whilst not insisting upon this distinction as in *Target Holdings*, the Supreme Court in *AIB* did not deny that such a distinction could exist. It is thus possible to confine *Target* and *AIB*, and the remedy of equitable compensation for wrongfully caused loss, to breaches of commercial trusts. This allows for the preservation of the reconstitution of the trust fund via falsification as the remedy for breaches of traditional trusts. A *dictum* in *Purrunsing* indeed supports this remedial distinction.

Normatively, this remedial distinction is desirable and should be formalised into law in England and Wales. The default position in equity is that remedies are conscience-based, reversing the unconscionable behaviour of the trustee in breaching their trust duties. Equity has shown a willingness to oust conscience where commercially desirable. This framework supports the remedial

distinction mooted in *Purrunsing*. Falsification of misapplied traditional trust assets reflects the trustee's conscience being bound by misapplying the trust assets, with their conscience not being relieved by intervening events reducing the causality of the breach to the loss. This approach would, however, facilitate undesirable windfalls and liabilities in the commercial context, justifying the restriction of liability for breaches of commercial trusts to wrongfully caused loss.

Thus, rather than preserving a role for falsification through unsupportable arguments of falsification being a form of equitable compensation currently being pursued in the High Court and Court of Appeal, falsification should be preserved as the remedy for breaches of traditional trusts — a descriptively and normatively sound position.