The Performance Interest in the Law of Trusts

Lusina Ho[[1]](#footnote-2)\* and Richard C. Nolan[[2]](#footnote-3)\*\*

1. *Introduction*

The obligations of a trustee are fundamentally different from the obligations of a contracting party. This difference is most obviously reflected in the remedies for breach of the respective obligations. But it also has other important structural consequences.

The obligations of a trustee give primacy to the “performance interest” of beneficiaries of that trust: that is, the interest of those beneficiaries in actual execution of the trust rather than compensation for loss resulting from the trustee’s failure to execute the trust. The obligations of a contracting party do not attach the same importance to the performance interest: the contracting party will generally perform, but if that party does not perform, the counterparty may, in the vast majority of cases, claim the monetary equivalent to reasonably foreseeable loss that flows from breach of the contract.

This understanding of the law of contract is well-known, though some theorists have criticised it. However, the axiomatic basis of the law of trusts is much less well appreciated, particularly by those who do not specialise in the study or practice of trust law. This lack of familiarity can lead to difficulties and misunderstandings, particularly in cases where trusts are established in the context of contractual dealings. It is therefore useful to explain to a wider audience the correct obligational structure of the law of trusts.

Further, the exercise is important for at least two other reasons. First, several recent and high-profile cases have revealed an apparently awkward fit between trust and contract. Understanding each body of law correctly assists in their simple and correct reconciliation, eliminating uncertainty and confusion. As will be seen, the law of trusts and the law of contract have distinct and yet complementary domains. We do not need some novel “law of commercial trusts” or such like to accommodate the interface between trust and contract. The existing law, properly understood, more than adequately accommodates that conjunction.

Secondly, exploring both the differences and the interface between the law of trusts and law of contract sheds a suitably critical light on theoretical attempts to re-conceptualise the law of trusts. These attempts are neither necessary in order to understand the law, nor desirable in their practical effect. This exercise also sounds a note of caution about the idea of assimilating trusts under a “law of obligations”, even a “law of voluntary obligations”. While a notion of a law of obligations can be interesting from the perspective of considering who is bound, benefitted or affected by a particular juridical relationship, nevertheless the notion has the potential to confuse. For example, it does not accord sufficient attention to the power or authority that is granted to the trustee, and the crucial relevance of such power or authority in any analysis of trustees’ liabilities. Moreover, the concerns of different obligations, even different voluntary obligations such as trust and contract, can be very different, as will be shown below.

In what follows, Part Two of this article considers the basic case law establishing the axiomatic principle of the law of trusts – that a trust must be performed. Next, in Part Three, the article briefly sketches the most important mechanisms through which the law of trusts secures performance of the trust in cases where the current trustees are not voluntarily performing it. Part Four of the article briefly outlines various structural features of trusts which reflect, and are a consequence of, the basic axiom that a trust must be performed. In Part Five, the article considers remedies for breach of trust which all manifest the concern of trust law with performance rather than compensation in lieu of performance. Part Six develops one of the key points to be made in this article: that the law of trusts is significantly and fundamentally different from the law of contract in its concerns and its structure. Finally, Part Seven sets out the implications, both theoretical and practical, of these important distinctions between the law of trusts and the law of contract.

1. *Trusts and Performance: Axioms from Authority and Statements of Principle*

In 1805, Lord Eldon gave a memorable, and often cited, statement of a vital axiom in the law of trusts.

“As it is a maxim, that the execution of a trust shall be under the controul [*sic*] of the court, it must be of such a nature, that it can be under that control; so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust: a trust therefore, which, in case of maladministration could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the court can neither reform maladministration, nor direct a due administration.”[[3]](#footnote-4)

Lord Eldon’s words are most often associated with discussions of “certainty of objects” and the “beneficiary (or enforcer) principle”, of which more in Part Four. But their fundamental importance is in their acknowledgement that the court will secure the performance of a trust, or, *in extremis*, administer the trust itself, or direct the administration of the trust.[[4]](#footnote-5) As will be seen, the rules about “certainty of objects” and the “beneficiary (or enforcer) principle” are consequences of this foundational axiom, not themselves foundations of the law of trusts.

Lord Eldon’s words were cited and approved in *McPhail v Doulton* by Lord Hodson,[[5]](#footnote-6) who went on to say:

“In a sentence there is no trust over which the court cannot assume control. If the inability arises from inability to ascertain the objects of the alleged trust, it is said to be void for uncertainty.”[[6]](#footnote-7)

Lord Hodson differed in the result of *McPhail v Doulton* from the majority. But that majority, represented in the person of Lord Wilberforce, did not in any way reject the axiom articulated by Lord Eldon in *Morice*; the majority simply took the view that the accepted axiom did not entail such a strict test of certainty of objects as Lord Hodson proposed. Lord Wilberforce said:

“Assuming, as I am prepared to do for present purposes, that the test of validity is whether the trust can be executed by the court, it does not follow that execution is impossible unless there can be equal division.

…..

“Lord Eldon himself, in *Morice v. Bishop of Durham*, 10 Ves. Jr. 522, laid down clearly enough that a trust fails if the object is insufficiently described or if it cannot be carried out, but these principles may be fully applied to trust powers without requiring a complete ascertainment of all possible objects.”[[7]](#footnote-8)

That a trust must be capable of performance, and that it must be performed, were and remain accepted axioms. Their Lordships differed in what they thought was required to perform the trust at issue in *McPhail*, and therefore in the degree of certainty with which the settlor must identify the beneficiaries of the trust in order that it might be performed.

Later in the twentieth century, Lord Browne-Wilkinson made another statement of high authority that a trust must be performed. In *Target Holdings Ltd v Redferns*, he emphasised that:

“The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instruments, if any, and the general law … 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, often called ‘the trust estate’, what ought to have been there.”[[8]](#footnote-9)

The beneficiary’s right is a right to performance, if needs be remedied by substitute performance, rather than a right to performance or the payment of compensation in lieu of performance.

In the early part of the present century, Lord Walker noted in *Schmidt v Rosewood Trust Ltd* that:

“It is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust.”[[9]](#footnote-10)

This already marks out the trust as significantly different from other obligations: the court assumes no such general jurisdiction with respect to contracts.

1. *Trusts and Performance: Mechanisms for Securing Performance*

It is one thing to note axioms and statements of principle articulated by the courts. But it is another – and quite as important – to see whether, and if so, how, the courts’ rhetoric is matched by reality. Does trust law and practice seek to procure performance by trustees, or, in cases where trustees have breached their trust and failed to perform their duties, does it seek to remedy that failure by requiring performance or merely compensation of the loss resulting from non-performance? This section and the following section seek to outline the structural mechanisms that give effect to the courts’ axioms, and substance to their statements of principle. These have received remarkably little academic attention.

Obviously, the most basic – and the most common – means through which a trust is executed is the performance by the original trustees and their successors, if any, holding office under the terms of the trust. However, this does not reveal much about the law of trusts. What is much more revealing are the mechanisms for coping with situations where the anticipated performance by duly appointed trustees is problematic, or simply does not occur. These range from the court’s assistance through to the most intrusive and profound: the administration of the trust by the court itself. For the purposes of exposition, this part will address the various mechanism in order of increasing intensity of intervention.

The first means of promoting performance of a trust is the jurisdiction of the court, now governed by Part 64 of the Civil Procedure Rules, to determine any question arising in the execution of a trust. Nowhere is there a comprehensive judicial statement of this jurisdiction, but it might be useful to begin with a well-known statement given in *Public Trustee v Cooper[[10]](#footnote-11)* by Hart J., who was in turn quoting part of an unreported judgment of Robert Walker J. (later Lord Walker) from 1995.

These judgments set out four non-exhaustive categories into which most cases fall. First, the court may determine definitively whether some proposed action is permitted or required by the terms of the trust – including the trustees’ powers.[[11]](#footnote-12) Secondly, the court may give certainty to trustees by “blessing” the trustees’ proposed course of action as a proper exercise of the trustees’ powers, even where there is no real doubt as to the nature of the trustees’ powers and the trustees’ decision, but the decision is particularly momentous, such that the trustees want confirmation of their plan from the court. Thirdly, the trustees may surrender their discretion to the court, for the court to exercise it (or direct exercise of it). Fourthly, there are cases where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. The remedial consequences of the trustees acting outside their powers (the fourth category) are considered in Part Five.

Cases in the first two categories are those where the trustees are finding it difficult to execute their trust, and the court can help them in some way. The court can promote performance to a degree not possible if the matter were left solely to the parties – the trustees and the beneficiaries – without the involvement of the court.

This useful jurisdiction has statutory origins. Section 30 of the Law of Property Amendment Act 1859, read with section 9 of the Law of Property Amendment Act 1860, provided that “[a]ny Trustee, … without the institution of a Suit, to apply by petition to any Judge of the High Court of Chancery, or by summons upon a written Statement to any such Judge at Chambers, for the Opinion, Advice, or Direction of such Judge on any Question respecting the Management or Administration of the Trust Property…”. Further means by which judicial advice could be given to trustees “without the institution of a suit” was provided by the Rules of the Supreme Court 1883, Order 55, rule 3, replaced first by the Rules of the Supreme Court 1965, Order 85, rule 2, and presently by Part 64 of the Civil Procedure Rules.[[12]](#footnote-13) Following the repeal of section 30 of the Law of Property Amendment Act 1859 by the Trustee Act 1893, the mechanism under rules of court became the standard means by which trustees could seek the assistance of the court (at least in England).[[13]](#footnote-14) Until the creation of these statutory mechanisms, the only way for a trustee in difficulty to discover what to do was to transfer the whole administration of the trust to the court, in a suit for administration of the trust:[[14]](#footnote-15) hence the words “without the institution of a Suit” in the new procedure introduced by section 30 of the 1859 Act. Administration by the court is still possible, and is considered below. However, it is the last resort. It is useful first to consider some other less radical mechanisms for securing performance of the trust.

The least intrusive mechanisms are those outlined in the first two categories of *Public Trustee v Cooper*:[[15]](#footnote-16) seeking the directions of the court, either as to the extent of the trustees’ powers or as to the exercise of those powers. To these might be added cases where the court rules on the construction or effect of some other aspect of the terms of a trust, and so can establish what the trustees must do, or refrain from doing.[[16]](#footnote-17) The trustees must make full disclosure to the court, but this should not be too onerous a task.[[17]](#footnote-18) The great advantage to trustees of acting pursuant to a direction or ruling of the court is that they are absolutely protected from liability in so far as they act in accordance with the court’s order.[[18]](#footnote-19) As the order will almost always include liberty to apply, the trustees can make a further application to court for clarification of the order or its effects, should that be needed. By contrast, the general declaratory jurisdiction of the court is much more limited.[[19]](#footnote-20)

The inherent administrative jurisdiction of the court can also be used to help trustees to perform the trust where they have run into practical difficulties. For example, the court has power, *inter alia*, to authorise in an emergency acts of administration of the trust that are not otherwise authorised;[[20]](#footnote-21) to authorise the trustees to take court proceedings paid out of trust funds;[[21]](#footnote-22) to authorise as a matter of salvage, the expenditure of capital in keeping up the trust property, for instance by raising money on mortgage and spending it on repairs of the property to save it from ruin which would otherwise ensue;[[22]](#footnote-23) to sanction a transaction which would otherwise constitute a breach of the trustee’s fiduciary duty;[[23]](#footnote-24) to authorise a trustee to charge remuneration where none is provided by the terms of the trust or to charge remuneration in excess of that provided pursuant to the trust;[[24]](#footnote-25) to authorise the maintenance of minor beneficiaries out of income directed to be accumulated, and even out of capital in some circumstances, where this course is contrary to the strict terms of the trust instrument and the statutory power of maintenance in section 31 of the Trustee Act 1925 is excluded or is otherwise not applicable;[[25]](#footnote-26) and to approve on behalf of minor, unborn and unascertained persons compromises of genuine disputes over the destination of trust property.[[26]](#footnote-27) This is not meant to be an exhaustive list of the court’s powers. But it does illustrate their wide scope and great practical utility. However, the court has no general inherent power to alter the terms of a trust because the court thinks it beneficial to do so.[[27]](#footnote-28)

If the trustees cannot exercise their powers, and the assistance of the court cannot resolve that impasse, the trustees may surrender their discretion to the court, for the court to exercise it or direct its exercise. The court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest, or because the trustees are faced with a proposed compromise of litigation against a third party where the beneficiaries take strong and opposed views as to the merits of accepting the compromise.[[28]](#footnote-29)

Another, very rarely used, means to promote due administration of a trust is the right of beneficiaries or trustees to seek an official audit of the trust, either by a solicitor or an accountant agreed on by the applicants and the trustees, or, in default, by the Public Trustee or some person appointed by the Public Trustee.[[29]](#footnote-30) This right might well promote due performance of the trust, but it is of less practical utility than might first appear: there are no provisions to enforce action that is shown to be appropriate following the taking of these accounts. Consequently, this right has been used only rarely, and the Law Reform Committee accordingly recommended repeal of the legislation which established it.[[30]](#footnote-31)

Much more important is the power of the court, both inherent and statutory, to remove current trustees and to appoint new trustees.[[31]](#footnote-32) This power self-evidently promotes due performance of the trust. If there is some reason why the current trustees of a trust cannot perform the trust, whether or not that is the trustees’ fault, the court can supply new people who will perform the trust. In many – perhaps most – cases, the removal of trustees who are, in some sense, problematic, and their replacement with able and willing new trustees, will be the quickest and simplest method of restoring due administration of the trust. The appointment of new trustees might involve appointment of a judicial trustee,[[32]](#footnote-33) or the appointment of the Public Trustee,[[33]](#footnote-34) though in the interests of brevity nothing more will be said of these more specific options: they still involve the appointment of a new trustee to facilitate and promote the due performance of the trust in question.

Injunctions will issue against a trustee who has acted, or threatens to act, in breach of trust.[[34]](#footnote-35) Most commonly, an injunction would be an interim injunction, because the appointment of a receiver and/or the appointment of new trustees is a more effective way of securing due performance of the trust in the longer term than a court order directed towards miscreants or those who threaten to do wrong.[[35]](#footnote-36) But in appropriate circumstances, such as stopping an improper sale by trustees, a permanent injunction may issue.[[36]](#footnote-37)

The last means of procuring the administration of a trust is the most intrusive and profound: the administration of the trust by the court itself in exercise of its inherent administrative jurisdiction over trusts.[[37]](#footnote-38) The state, through its courts, will, *in extremis*, ensure that the trust is performed. In other words, performance of the trust is back-stopped by institutions that form the very bedrock of the legal order. This jurisdiction of the court in relation to trusts is ancient and well attested.[[38]](#footnote-39)

Of course, the court will not administer each and every trust: that would manifestly be beyond the ability of any organ of state unless absurd resources were put at its disposal. This jurisdiction of the court is a back-stop, a last resort. The current principles upon which the court will accede to a request that it take on the general administration of a trust were discussed in *Re Wilson*[[39]](#footnote-40) and *Re Blake*.[[40]](#footnote-41) These cases were decided, and the principles were established, after the introduction of less intrusive mechanisms to facilitate the performance of trusts (such as the ability of trustees and beneficiaries to seek the court’s directions),[[41]](#footnote-42) which should nowadays resolve the vast majority of cases in which the due administration of a trust has encountered problems. So presently the court is likely only to take on the administration of a trust in rare cases, even though it is quite common to include a claim for general administration by the court in many cases where trustees and beneficiaries seek the assistance of the court in the administration of the trust.[[42]](#footnote-43)

In summary, there are substantial structural mechanisms to promote and procure due performance of a trust: the commitment of equity to the performance of a trust, rather than compensation in lieu of performance, is a great deal more than rhetoric. It involves a graduated series of possible responses to a problem or breakdown in the administration of a trust, culminating in the involvement of the state itself, through the courts, in the administration of a trust. That is the greatest commitment a legal order can give: if the state, having offered itself as the ultimate means of performing a trust, cannot then procure performance, there is nothing more that a legal system can do. This commitment to the performance of trusts stands in stark contrast to the law’s attitude to the performance of contracts, something examined in Part Five below.

1. *Trusts and Performance: Structural Features of Trusts*

Students are told that three certainties are required for the creation of a private trust: certainty of intention, certainty of subject matter and certainty of objects.[[43]](#footnote-44) But there is little reflection on why these rules exist in their current form.

The law of trusts, like the law of contract, requires certainty of (objective) intention.[[44]](#footnote-45) This is no more than a way of saying, in doctrinal terms, that there needs to be a sufficient objective manifestation that the parties wish to create a particular form of legal relationship to which the organs of state, principally the courts, can then respond.

More importantly for present purposes, are the requirements of “certainty of subject matter”[[45]](#footnote-46) and “certainty of objects”.[[46]](#footnote-47) They find their origin and justification in the inherent jurisdiction of the court in relation to the administration of trusts and the vital importance it places on the performance of a trust. These rules show consequently distinct structural differences from their analogues in the law of contract, which attaches much less doctrinal significance to performance.

The law of trusts is much more rigorous than the law of contract in its requirements that the subject matter of the obligation in question be accurately identified or identifiable. The law of trusts needs to know *ab initio* what are the assets to be held on trust, or else it needs to be able to ascertain that immediately. If, as is axiomatic, the law of trust requires trustees to execute their trust, and if, as is again axiomatic, the court will when necessary procure performance of the trust using one or more of the means outlined above, then those responsible for performance of the trust – current trustees, new trustees, the court, as appropriate – all need full information about the assets they are to manage. They have obligations to manage, or assist in the management, of specific assets, not of assets matching some generic description. By contrast, contracts to deal with assets, such as contracts for the sale of goods, do not necessarily require that the assets be immediately identified or identifiable on formation of the contract: it is generally sufficient that the assets be identified on performance of the contract.[[47]](#footnote-48)

Similar points can be made in connection with the rules on certainty of objects. These rules are not just about ascertainment of those who have *locus standi* to enforce the trust. If the rules were just concerned with establishing that someone has standing to enforce a trust, it would be difficult to argue with the proposition that identification of a single such beneficiary should be sufficient to validate the trust, a proposition that was rejected decades ago in *Re Gulbenkian’s Settlement Trusts*.[[48]](#footnote-49) But the rules have another function. They are also designed to make sure that the trustees can perform the trust. And crucially, they are also designed to enable the court to perform the trust, or facilitate its performance, should the current trustees fail to do so.[[49]](#footnote-50) The theoretical implications are the same as those flowing from the rules about certainty of subject matter. The axiomatic proposition that a trust must be performed generates the strict requirements of the law of trusts relating to how much the settlor needs to make clear to the trustees, and to the court, about the identity of beneficiaries – the people who will enforce the trust and for whom the trustee, and perhaps the court, need to execute the trust – that is, what is required by way of certainty of objects.

The beneficiary principle also reflects trust law’s focus on performance, though less strongly. At one level, the principle is simply an aspect of the fact that a trustee is subject to obligations: someone must have the power to enforce an obligation, or else it is not an obligation but an aspiration. Equally, the identification of the principle as a *beneficiary* principle, rather than an *enforcer* principle,[[50]](#footnote-51) draws attention to the fact that, in English law, the enforcer must be someone who stands to benefit by enforcement, though that position has been changed by statute in many off-shore jurisdictions.[[51]](#footnote-52) Nevertheless, the beneficiary principle is conceptualised in the case law as identifying those in whose favour *performance* of the trust may be decreed,[[52]](#footnote-53) rather than who may claim monetary remedies for breach of trust: performance is the law’s main concern.

The performance interest is therefore at the heart of establishing a trust. As has been seen, the state, through the courts, gives very significant support to that performance interest. But the performance interest is also plainly reflected in the remedies available following a breach of trust, which form the subject matter of the next section.

1. *Trusts and Performance: Remedies for Breach of Trust*

Remedies for breach of trust also reflect the performance interest in the law of trusts. The remedial structure of the law of trusts is constructed around the performance of the trust, or the nearest monetary approximation to performance, rather than loss caused by non-performance. Just as in the context of constituting a trust, trust law’s unique remedial structure also assumes and is built on the stricter certainty requirements for trusts examined above: the courts need to know more if they are to be able and willing to order trustees to deal with particular assets and subject them to sanctions, including ultimately contempt of court. By contrast, the courts do not need to know so much about what assets are in question if all they are required to do is to estimate and award damages if performance does not occur as agreed.

Contractual damages identify direct and consequential *losses* flowing from a breach by comparing, in monetised terms, the claimant’s position after the breach with the counterfactual position if due performance had occurred. This is explored in Part Six. Equity, by contrast, is concerned with reparation or restoration of the trust fund – performance of the trust or a money approximation to performance – rather than compensation of loss suffered by a particular person. Such an approach ensures that trust assets are treated as always available for the proper performance of the trust, even when they were not. In fact, so strong is equity’s commitment to the performance interest that it deems unauthorised profits as having been made for the benefit of the trust fund and hence accountable to the fund at the action of the beneficiary. By the same logic, such profits are treated as having accrued to the trust fund the moment they are made. The beneficiaries need only to assert their proprietary interests in them to demand delivery *in specie.* Whereas the law of trusts regularly orders an account of profits and the proprietary remedies as a matter of course, the law of contract still treats an account of profits as exceptional.[[53]](#footnote-54)

This part will expand on these principles and examine in detail how remedies (be they restorative or gain-stripping) for breach of trust are premised upon the primacy of the performance interest.

1. *Restorative claims for breach of trust*

In the law of trusts, personal remedies for misapplied trust property or omitted acquisitions are mediated through the accounting mechanism, which aims to restore the trust fund to the state (or at least the value) it would have *if* the trustee had acted in an authorised manner and performed the trust. An account showing the actual state of the trust fund is compared with a notional account showing the (counterfactual) proper state of the trust fund had the trust been duly performed. The trustee is ordered to take action to restore the trust fund from its actual state to its proper state, whether by adding assets *in specie* to the fund or by the payment of money into the fund.[[54]](#footnote-55) The trustee is required to produce the trust accounts as part of his stewardship of trust property,[[55]](#footnote-56) whereas the beneficiary, when constructing the counterfactual account of the proper state of the trust fund, has the option, as it suits him, to falsify or surcharge the account by treating misapplied assets as having always belonged to the trust estate and treating omitted investments as having already been obtained.

Importantly, as Viscount Haldane reaffirmed in *British America Elevator Co Ltd v Bank of British North America*, a claim to recover misapplied assets is “one for replacement of trust fund, and not for damages”.[[56]](#footnote-57) The law of trusts focuses on restoring the due administration of the trust fund, rather than reversing harm done to it.[[57]](#footnote-58) The goal of trust law is the restoration of the trust fund to its duly administered state, not some other maladministered state, however likely. Thus, an errant trustee may not argue that even though he breached his trust and thereby depleted the trust fund, the fund would have been depleted to the same extent in any event by some other breach of duty.[[58]](#footnote-59)

Contract law is interested to compensate the loss suffered by the victim of a breach of contract for which the party in breach is responsible. It is therefore necessary to identify the relevant measure of loss (reliance loss; expectation loss; loss of enjoyment or amenity; the hypothetical price of permission to breach etc); then determine a monetised comparison between that person’s position after the breach and the counterfactual position in which he would have found himself (ascertained on the balance of probabilities and in the light of events since the breach) had the contract been performed; and then deal with issues of responsibility (foreseeability of loss; mitigation; possibly contributory negligence).

Trust law constructs the measure of compensation by answering essentially just two questions. First, should an asset be represented in the counterfactual account? If not, it is simply ignored and left out of the calculation of the counterfactual account. If yes, the second question is, what monetary value should represent the asset in the account? That is a question of valuation on the date set for the taking of the account. The quantum of loss is crystallised by comparing that counterfactual account with the actual account of assets for which the beneficiaries must give credit.

Furthermore, even though surcharging engages in a counter-factual inquiry and appears to resemble contractual damages[[59]](#footnote-60), the scope of the counter-factual comparator is different. When constructing the counterfactual account of how the trust fund should appear if the trust had been duly performed, the law of trusts is exclusively concerned to ascertain the value at the time of the account of the misapplied or omitted property that should be in the trust fund, in order to restore the trust fund to its proper position. Accordingly, if a trustee is under a duty to purchase a particular stock, but fails to do so, he is surcharged not merely by the monetary value of such stock at the time he should have bought it, but by so much as is necessary to acquire that stock, so that it could be acquired for the trust fund.[[60]](#footnote-61) Equally the law is not concerned with any further harm that may have been suffered by the trust estate beyond the property in question, such as consequential losses.[[61]](#footnote-62) The law is concerned with due performance or its monetary equivalent. By treating as exactly done what ought to have been done, by holding the trustee to his duty, the law of trusts shows an uncompromising commitment to the performance interest.

The process of accounting – the fundamental mechanism for enforcing trusts – was not used, however, in *Target Holdings Ltd v Redferns*[[62]](#footnote-63) and more recently in *AIB Group (UK) plc v Mark Redler & Co Solicitors*.[[63]](#footnote-64) In both cases the courts instead assessed equitable compensation for misapplied assets, a form of remedy that emerged in the second half of the nineteenth century.[[64]](#footnote-65) However, the courts calculated amount of the respective awards on the basis of the compensatory principle adopted at common law, and held that the beneficiary cannot recover loss that would have occurred in any event. Even though Lord Reed in *AIB Group* was rightly wary of a direct analogy between equitable compensation and contractual damages, his Lordship still conceptualised the former as a type of compensation. As Lord Reed put it, “the aim of equitable compensation is to compensate: that is to say, to provide a monetary equivalent of what has been *lost* as a result of a breach of duty”[[65]](#footnote-66), and further, “the concept of *loss* necessarily involves the concept of causation”.[[66]](#footnote-67)

The decisions in both cases could have been reached by applying the traditional accounting process. In *Target Holdings Ltd v Redfern*, the solicitor disbursed the client’s funds too early, before the mortgage was obtained, but, as Lord Millett convincingly explained, even though the disbursement could be falsified *at that time*, by the time the parties went to court, the solicitor had secured the mortgage as instructed. It had performed its duty to reconstitute the trust fund. It is important to understand that Lord Millett’s explanation does not turn on any ratification by the beneficiary. It is about accounting: in this case, the reconstitution of the trust fund by the trustee, something which, self-evidently, must be brought into account.

In *AIB*, the solicitor was supposed to disburse £3.3 million in two parts, to acquire a first charge over the secured property and then to advance the balance of the loan amount to the borrower. It paid £0.3 million too little to the existing mortgagee and thus did not discharge that earlier mortgage, meaning that it acquired a second charge over the property, rather than a first charge. As a result of this error, it also paid the same amount – £0.3 million – too much to the borrower. On traditional accounting, the disbursement of £3.3 million would indeed be falsified; but the accounting process should not end at this point.

The trustee’s liability is a function of his duty. So there is no reason why the trustee cannot point to his *duty* (rather than his *powers*) in order to establish the scope of his liability. It is true that, on taking an account, a defendant trustee is not allowed to speculate that he would have used his powers in a certain way and thereby mitigated the breach of trust. This rule is justified on the basis that the trustee should not be allowed to give self-serving, and likely untrue, evidence in his defence. But what was at issue in *AIB* was not the trustee’s *powers*, but its *duties*: it is open to a defendant who is liable, even a trustee who is liable, to ask the court to pay attention to the basis and extent of his liability, that is, to pay attention to the nature of his duties. The trustee is not then in any way taking advantage of his own misconduct. This argument applies to the facts of *AIB* as follows.

Once in possession of the £3.3 million, it was the trustee’s duty to acquire a first charge, and so what should show in the account is the first charge, not £3.3 million cash. It was clearly the *duty* of the trustee to acquire that mortgage, not merely its *power*: the trustee could hardly be heard to say that it might or might not choose to expend the monies on the mortgage; it had to do so. This duty was originally revocable, of course. AIB could have called off the whole transaction, at least until it took the benefit of the second charge, though it is hard to see how AIB could resile once it had voluntarily taken benefit (the second charge) from the acquisition of the property: taking such a benefit and yet denying authority for the very transactions which generated that benefit would be inconsistent. But on the (correct) assumption that AIB did not countermand acquisition of a charge, the accounting exercise would proceed as follows. A first charge is what should show in the trust accounts, not a sum of cash. On that basis, when the borrower defaulted, the trust fund *did* contain a second charge (the actual state of the fund, albeit the result of a breach of duty), when the fund *should* have contained a first charge (the counterfactual, but proper, state of the fund). In that case, the loss to the trust fund would be the difference between realisation of a first charge over the property and realisation of the second charge actually held over the property, in other words, £0.3 million (that is, the sum due to the holder of the first charge). The only way in which the second charge could be left out of the account is if AIB disclaimed any benefit from it: as a matter of accounting, not deliberate ratification, AIB cannot retain benefit from an asset and yet seek to leave it out of account.

In other words, the results in both *Target* and *AIB* are entirely consistent with orthodox principles of accounting. But the language of those cases about loss is not consistent with orthodoxy and is apt to cause confusion in the law of trusts. The recent case of *Main & Ors v Giambrone & Law (a firm)*[[67]](#footnote-68) provides an example of just such confusion and the difficulties consequently faced by the courts.

Giambrone & Law, a firm of solicitors, held various monies on trust for clients in the firm’s client account. Those monies were deposits for the purchase of real estate in Italy, to be paid away only if the developers of properties on the land in question had a valid bank guarantee, issued by a bank as required by Italian law, and intended for the protection of purchasers of the properties, amongst whom were the firm’s clients. In breach of trust, Giambrone & Law paid the client monies away in the absence of a valid bank guarantee.

These facts presented a straight forward case for the reconstitution of the trust fund (that is, the client account). However, Giambrone & Law relied on *Target* and *AIB* to argue that even if a valid guarantee had been obtained, the claimants would not have recovered their deposits by virtue of such a guarantee, because their loss would not have fallen within the terms of such a guarantee. Jackson L.J. distinguished *Target* and *AIB* on fine grounds. He held that Giambrone & Law owed its clients a duty to hold the deposits and release them only if the relevant bank guarantee was in place. He held that the firm did not have any active duty to procure such guarantee, unlike the active duty of the solicitors in *Target* to obtain a legal charge over land in exchange for client monies, and the active duty in *AIB* to clear prior charges off some land and obtain a first charge over the land in exchange for client monies. So if Giambrone & Law had done their duty – the relevant counterfactual for the assessment of loss – they would have retained the trust fund in the absence of a suitable bank guarantee. Accordingly, the clients had suffered loss.[[68]](#footnote-69)

With respect, this reasoning reaches the correct result, but the case is needlessly complicated because of the arguments raised by Giambrone & Law based on *Target* and *AIB*. In all trusts, the trustee’s duty is to retain the trust fund *in specie* save as directed or authorised to deal with it or to pay it away.[[69]](#footnote-70) In order to determine whether the disbursement is authorised, what matters are the terms of the trust, not every obligation to which the trustee might be subject. So in the case of an alleged misapplication of trust funds, the court must first identify the circumstances in which the trustee may lawfully pay the fund away, and then make a finding as to whether the payment actually made by the trustee was within those circumstances or not. If not, the trustee committed a breach of trust in making the payment, for which the trustee is accountable and *prima facie* liable. Of course, the final liability of the trustee will depend on what other entries, if any, appear in the account, such as credits for any reconstitution of the trust fund, and on any distinct defences such as estoppel or laches.

In short, a routine application of orthodox accounting would have revealed the proper ground for distinguishing *Giambrone* from *Target* and *AIB*. The crucial difference was not that in *Target* and *AIB*, the solicitors had active duties to procure certain things before disbursing trust funds, whereas in *Giambrone*, the solicitors only had to wait for an appropriate bank guarantee before disbursing the funds.[[70]](#footnote-71) In all three cases, the trustee disbursed trust funds without authority to do so and thereby committed a breach of trust. The key distinction is whether, following an unlawful disbursement, the trust fund was reconstituted. In *Target* and *AIB*, the trust fund was partially or fully restored. By contrast, in *Giambrone*, it was not. The entries in the notional account of what the trustee should have done, shaped by the terms of the trust, are the key to the trustee’s *prima facie* liability, not any distinction between active and passive duties. And that *prima facie* liability may be diminished or eliminated by subsequent reconstitution of the fund, or by defences.

Most recently, the Court of Appeal, in *Interactive Technology Corporation v Fernster*,[[71]](#footnote-72) considered an award of equitable compensation for a director’s breach of fiduciary duty in obtaining excessive remuneration. The Court helpfully clarified that the award of equitable compensation was not confined to compensation of loss suffered by the claimant company, but included payments made to restore the value of assets or funds removed from the company without authority by a fiduciary (the director): that is, the Court saw the award as extending not just to loss suffered by the company, but to restoration of the company’s assets: the award extended to a remedy of “substitutive performance”.[[72]](#footnote-73)

1. *Gain-based remedies for breach of trust*

Equity’s strong adherence to the performance interest is also evidenced by the ready availability of an account of profits and the constructive trust. While the law of contracts only awards account of profits exceptionally,[[73]](#footnote-74) and never awards any proprietary remedy, these gain-based remedies are awarded as a matter of course for breaches of trust, even though they lie in the discretion of the court.

If a trustee makes profits from the use of trust property, the beneficiary has the option to treat all profits as a natural increment of the trust estate. He can then assert his equitable interest over them[[74]](#footnote-75) or compel the trustee to account for them. The principle is most eloquently put by Story J. in *Oliver v Piatt*, as follows:

“[A]ll the gains made by the trustee, by a wrongful appropriation of the trust fund, shall go to the *cestui-que-trust*, and all the losses shall be borne by the trustee himself.”[[75]](#footnote-76)

The same point was recently made in *Tang v Tang[[76]](#footnote-77)* by Lord Millett, who observed that a trustee’s misappropriation of trust assets:

“put the trust fund at risk without hope of gain. Equity’s response [was] to insist that any profit [was] for the beneficiaries and any loss for the trustee.”[[77]](#footnote-78)

After almost a century of controversy, the same analysis also applies, at least as far as English law is concerned, to profits obtained from the abuse of the fiduciary position, such as secret commissions.[[78]](#footnote-79)

These expansive gain-based remedies are designed to protect the beneficiary’s performance interest, but they do so in a manner different from that of the restorative remedies considered earlier. As has been seen, those restorative remedies protect the performance interest directly, by reversing the effect of the breach or by giving the next best monetary equivalent to that. Their aim is to maintain the trust fund at the level it should have if the trustees had done their duty. Gain-based remedies protect the performance interest structurally, by making it more likely that those who have undertaken obligations – for present purposes, trustees – will, in the future duly perform their duties. Specifically, they deter the trustee from breaching his fiduciary duties, and in turn promote the performance of his primary duty to utilise the trust fund in an authorised manner. This deterrent purpose of gain-based remedies has been recognised both academically[[79]](#footnote-80) and judicially.[[80]](#footnote-81)

By denying the trustee any unauthorised personal profits from use of trust assets, or from the unauthorised use of his position, the law of trusts ensures that, whatever the intention of the trustee may be, he cannot derive personal profits from the trust property or the incidents of trusteeship. It thereby seeks to make due performance more likely. Granted, if the trustee had strictly adhered to his duty, he would not even have made the unauthorised profits. However, once the profits are made, equity has to respond to that situation. And it chooses to respond by treating the trustee as having always intended to use trust property and the trusteeship loyally in performance of the trust, so the profits are treated as having fallen within the trust estate the moment they reach the trustee’s hands.[[81]](#footnote-82)

An account of profits in trust law therefore protects the performance interest in two ways. First, by treating all profits as having been made for the beneficiary, it removes any temptation that may affect the deliberation of any future trustee in the performance of his duties. Second, as the profits are treated as belonging to the beneficiary the moment they were made, this retroactive operation ensures that the beneficiary will neither be kept out of his right during the period between breach and the actual award of the remedy, nor be defeated by a third-party transferee who is not a bona fide purchaser for value without notice.

These gain-based remedies interact with the alternative, restorative, remedy through the principle of election: the claimant (or the court, where a claimant – such as a minor beneficiary – is unable to do so himself) may elect between available restorative and gain-based remedies to ensure that he will get the best option available.[[82]](#footnote-83)

By keeping the trustee to his duty in remedial terms, even if he has in reality breached his duty, equity’s robust remedial architecture in effect provides both the option of performance, or the next best remedial equivalent, and the option of a gain-based remedy which provides a strong disincentive to disloyal conduct. Such an approach contrasts sharply with that in contract, examined in Part Six below, where a party’s right to contractual performance is, on breach in the vast majority of cases, transformed into a “second-best” right to compensation for reasonable, foreseeable losses.

An appreciation of the purpose behind the deterrence offered by gain-based remedies helps address the difficult tasks of explaining and developing principles to guide the quantification of profits due from a defaulting trustee, particularly those that guide the award of any allowance to the defaulting trustee. Thus far, disgorgement of profits has been primarily governed by the exhortation that the fiduciary must account for *all* profits obtained “by the use of” the fiduciary position.[[83]](#footnote-84) This broad and simplistic rule is tempered by vague notions of fairness and equitable discretion that may limit the extent of recovery in individual cases.[[84]](#footnote-85) Fortunately, the recent decision of the High Court of Australia in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd*[[85]](#footnote-86) shows greater judicial willingness to explain the factors underlying the exercise of discretion.

Lifeplan provided funeral products under which a customer would make payments towards a fund that would be paid on his death to a funeral director to meet the expenses of a pre-arranged funeral. Senior managers of Lifeplan approached its competitor, Foresters, whose business was of a much smaller scale, with a five-year plan to divert existing funeral products business of Lifeplan to Foresters. The managers were held liable for breach of fiduciary duty and Foresters was liable for knowingly assisting the breach. Foresters argued that it should only be required to account for profits directly resulting from its specific acts of assistance and not the overall effect of the breach in capturing the business connections of Lifeplan. It also sought to limit recovery to actual profits already accrued, and not to account for the net present value of the funeral bond contracts which were yet to be performed. Since the majority decided, either on principle[[86]](#footnote-87) or on the facts[[87]](#footnote-88), that Foresters was liable in the same way as the errant fiduciaries, the principles stated in *Lifeplan* and applied to an assistant are also applicable to an account of profits by an errant trustee (or other fiduciary). The majority held that Forresters’ extraordinary increase in profits arose from the breach, and hence it was not inequitable to require it to account for the net present value of the future benefits likely to arise from the business.[[88]](#footnote-89)

The majority adopted a two-stage analysis: establishment of causation between the wrongdoing and the profit, and quantification of the benefits to be disgorged. On causation, Kiefel C.J., Keane and Edelman JJ. held that as against a dishonest fiduciary, it sufficed to show that but for the wrongdoing, the profit would not have been made, or that the wrongdoing contributed to the profit, even though there were other contributing factors.[[89]](#footnote-90) The judges were silent as to the position of good faith fiduciaries. Furthermore, it was not open to a dishonest fiduciary to argue that but for his breach, the profit would still have been made.[[90]](#footnote-91) In contrast, Gageler J. adhered to the formulation laid down for equitable compensation, that is, common sense causation with the benefit of hindsight.[[91]](#footnote-92) His Honour and Nettle J, dissenting, rejected both the use of common law labels of factual causation, remoteness or *novus actus interveniens*.[[92]](#footnote-93) Despite their differences, the majority (including Gageler J.) had no difficulty accepting that causation was established, as the fiduciary’s plan to capture the business connections of Lifeplan could only have succeeded with Foresters’ participation.[[93]](#footnote-94)

On the issue of quantification, the majority held that the onus was on the errant fiduciary to show that it would be inequitable to require him to account for the full value of the advantage obtained.[[94]](#footnote-95) This is consistent with, and justified by, the rule governing due performance of a trust whereby the trustee must strictly account for disbursements from the trust fund, including any due to the trustee personally.[[95]](#footnote-96) Kiefel C.J., Keane and Edelman JJ. went on to hold that apart from allowance for labour and skill, the fiduciary needed to show that the profit had no “reasonable connection” with the wrongdoing. This involved considering all the circumstances, including the nature of the wrongdoer’s conduct.[[96]](#footnote-97) Again, this is consistent with, and justified by, the rules governing due performance of a trust whereby the trustee must keep trust property separate and account for it separately (unless otherwise permitted by the terms of the trust),[[97]](#footnote-98) so if he fails in that duty, he, not the trust fund, bears the burden of any uncertainty he created.[[98]](#footnote-99)

Although the issue was not raised in *Lifeplan*, there is support in case law to deny or reduce the award of equitable allowance for skills and effort if the fiduciary is dishonest.[[99]](#footnote-100) Again, this fits the same pattern of supporting the rules which govern due performance: if the trustee, through dishonesty, fails in his duty to account correctly for his activity, he must bear the burden of the error he culpably created in the trust’s accounts.[[100]](#footnote-101)

In summary, the accounting exercise is, naturally, informed by the duties of the trustee as well as his culpability. But that should be done thoroughly and consciously in the context of an account of profits made in breach of trust. The scope of the account may be deterrent, but it is not penal: the point of accounting is to secure, protect and promote due performance of the trust, rather than any broader societal goals that might be furthered by penalties or punishment. And even deterrence should be informed by the interest it seeks to uphold.

1. *Contracts and Performance: A Contrast*

The law of contract is said, somewhat loosely, to protect the parties’ interest in performance of a contract. But what the law of contract does, and how it does it, is significantly different from what the foregoing survey has shown about the law of trusts. Contract law is different from trust law both in the remedies it provides and in their extent. And these features show that the central concern of these remedies is not protecting performance *per se*, but rather protecting parties from the reasonably foreseeable consequences of non-performance using an award of money, that is, damages.[[101]](#footnote-102) This appears plainly from a survey of current remedies for breach of contract.

The law of remedies for breach of contract was recently re-affirmed and restated in authoritative fashion by the Supreme Court in *Morris-Garner v One Step (Support) Ltd*.[[102]](#footnote-103) Lord Reed, with whom Lady Hale, Lord Wilson and Lord Carnwath agreed, began his discussion as follows.[[103]](#footnote-104)

“In *Robinson v Harman* (1848) 1 Exch 850, Parke B said:

‘The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.’

That statement has been endorsed on many occasions at the highest level, most recently in *Bunge SA v Nidera NV (formerly Nidera Handelscompagnie BV)* [2015] UKSC 43; [2015] Bus LR 987, para 14, where it was described as the ‘fundamental principle of the common law of damages’. It has also been described as the ‘ruling principle’ (*Wertheim v Chicoutimi Pulp Co* [1911] AC 301, 307), the ‘fundamental basis’ for assessing damages (*British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No 2)* [1912] AC 673, 689), and the ‘lodestar’ (*Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 AC 353, para 36).”

He continued:[[104]](#footnote-105)

“The compensatory nature of damages for breach of contract, and the nature of the loss for which they are designed to compensate, were explained by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848-849. As his Lordship stated, a contract is the source of primary legal obligations upon each party to it to procure that whatever he has promised will be done is done. Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to ‘substituted or secondary obligations’ on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law:

‘The contract, however, is just as much the source of secondary obligations as it is of primary obligations... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach...’ (p 849)

“Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. Their function is confined to enforcing either the primary obligation to perform, or the contract breaker’s secondary obligation to pay damages as a substitute for performance (subject, according to the decision in *Attorney General v Blake*, to a discretion to order an account of profits in exceptional circumstances where the other remedies are inadequate). The damages awarded cannot therefore be affected by whether the breach was deliberate or self-interested.”

Much that is vital can be unpacked from these paragraphs.

First, only in “comparatively rare cases” will a court actually compel performance of a contract through an order for specific performance (or, occasionally, by an injunction) or an award based on cost of cure.[[105]](#footnote-106) In the great majority of cases, damages in lieu of actual performance is the remedy. This contrasts sharply with the law of trusts, in which there are a good number of mechanisms habitually employed for securing actual performance of the trust.[[106]](#footnote-107) So it is certainly possible that the interest in actual performance of a contract should be strong enough that the courts will secure actual performance of the contract; but such a strong interest in performance is certainly not universal. Indeed, it is “comparatively rare”.

There is one area of the law that might, at first sight, suggest a greater willingness to procure the “performance” of a contract: cases where a court will issue an injunction to enforce a “negative obligation”, that is, a contractual obligation to desist from certain action.[[107]](#footnote-108) Here, it is not uncommon for an injunction to issue, provided the obligation is truly negative, in the sense that complete inactivity would amount to “performance” of that obligation: the key to this area of the law is that the “performance” in question is inactivity.[[108]](#footnote-109) The law of contract, supplemented by the auxiliary jurisdiction of equity, still does not require action of the person subject to the contractual negative obligation, just inaction. By contrast, the law of trusts can and does require a trustee to take all action necessary to execute the trust. The distinction between the law of contract and the law of trusts in their approach to performance still stands.

Secondly, a breach of contract will very rarely result in an account of profits made by the party in breach as a result of his breach. While *Attorney General v Blake*[[109]](#footnote-110) is a high-profile case, and the subject of much comment,[[110]](#footnote-111) it is a quite exceptional case. In the majority of cases, a party may choose to commit a self-interested “efficient breach” of contract and profit by that breach. The interests of the innocent party are then adequately protected by an award of damages. The exceptional case, such as *Blake*, is the rare case where there is an extraordinarily strong interest in performance (that there should be no “efficient betrayal” of the Crown), but the remedies through which a strong interest in actual performance of the contract are normally given effect, remedies such as specific performance or an injunction, are unavailable or practically impossible to enforce.

This body of contract law stands in stark contrast to the law of trusts, where the beneficiaries’ interest in due performance of the trust is protected by the award, as a matter of course, of an account of profits made by the trustee in breach of trust or fiduciary duty.[[111]](#footnote-112) It is true that, as a matter of doctrine, the order for an account of profits lies in the discretion of the court, and the court can mould the terms of the account to reflect the breach of duty and its circumstances; but the discretion is judicial, not arbitrary, and the account issues in the overwhelming majority of cases as a matter of course.[[112]](#footnote-113)

In the vast majority of cases, that leaves an award of compensatory damages as the remedy for a breach of contract: that is, “monetary compensation to the other party for the loss sustained by him in consequence of the breach.”[[113]](#footnote-114) Of course, calculation of those damages can be a matter of dispute, and can be done in various ways, as witness the points at issue in *Morris-Garner v One Step (Support) Ltd* itself.[[114]](#footnote-115) But that must not obscure the fact that all these bases of calculation seek to make a monetary estimate, appropriate to the context and purpose of the contract, of loss which reasonably foreseeably results from breach of the contract.[[115]](#footnote-116)

At a high level of generality, damages for breach of contract seek to compensate the innocent party from the reasonably foreseeable consequences of non-performance by the counterparty who is in breach of contract. To that extent, damages protect the performance interest in contract. But they do not necessarily aim to provide the monetary equivalent of securing due performance.[[116]](#footnote-117) While the damages awarded in a particular case may be the monetary equivalent (or best estimate) of performance, that is not their aim, which is rather compensation of sufficiently proximate loss caused by non-performance. And where a contract is breached, and the sum required to secure performance of a contractual task does not match the sum which compensates for reasonably foreseeable loss caused by the breach, the latter sum will constitute the amount of damages awarded to remedy the breach.[[117]](#footnote-118)

By contrast, as has been seen, and again at a high level of generality, the law of trusts does seek to procure actual performance – due execution – of the trust through a variety of mechanisms. And where actual performance of the trust is not feasible, or not required by the beneficiaries, the monetary remedies for breach of trust seek to protect performance, so a court can certainly order payment of the monetary equivalent of performance.

In summary, performance – “the performance interest” – in the law of contract is not accorded, and, without major change to our law of contract, cannot be accorded, the same significance or importance that it has in the law of trusts. In the most general terms, redressing harm (so far as possible to do so) remains the principal concern of remedies for breach of contract, and thus of contract law itself. In similarly general terms, securing performance is the principal concern of the law of trusts.

1. *Implications*

What emerges clearly from the foregoing survey is the vital importance of remedies in the theory, as well as the practice, of the law. What is practically possible for a court system in a particular society shapes the available remedies a court may decree. Within that realm, choice narrows the range of remedies further. And what remedies may be decreed vitally shapes the content of rights protected.

In the law of trusts, the courts have, through the range of judicial remedies that respond to threatened or real non-performance of a trust, privileged the performance interest to a degree not seen in the law of contract. So far, this article has shown how. But that still leaves the interesting question of why.

There is a basic, pragmatic reason why the law can protect the performance interest in the law of trusts much more effectively than in the law of contract. A trust can almost always be performed entirely adequately by a substitute for the original person(s) who undertook to perform it – that is, the original trustee(s). Trust obligations are inherently confined to the preservation, management and distribution of assets – the trust property – which makes it entirely feasible for a substitute trustee (or the court) to perform the trust. The maxim of trust law is that a trust shall not fail for want of a trustee:[[118]](#footnote-119) the court can instead supply a substitute trustee to perform the trust unless, very rarely, the identity of the trustee is vital to the execution of the trust.[[119]](#footnote-120) And as a matter of practice, the overwhelming majority of trusts explicitly contemplate that substitutes may act in place of the original trustees.[[120]](#footnote-121) The rhetoric that trusteeship is “personal” to a trustee must be read in that light:[[121]](#footnote-122) trusteeship is “personal” in the sense that it requires trustees to devote their own minds to the execution of their trust,[[122]](#footnote-123) and to act themselves save where authorised to engage delegates;[[123]](#footnote-124) but trustees of any stripe can still be replaced. By contrast, contracts are far more various, and often demand performance by the obligee in person, so the law simply cannot, in general, decree performance by a substitute party.

This is not to say that the law of contract can never procure performance through a substitute: one example to the contrary would be specific performance of a contract for the sale of land achieved through the court ordering that the necessary transfer documents be signed on behalf of the recalcitrant vendor or purchaser.[[124]](#footnote-125) But it is to say that such cases are outliers: in many, many cases, the court practically could not order performance of a contract by a substitute (for example, a contract of employment, or a contract that would involve continued oversight by the court).[[125]](#footnote-126)

By contrast, new trustees, or ultimately the court, can perfectly execute the vast majority of trusts. And it is interesting to note that, in that rare case indeed where the identity of the trustee was crucial, and the trust by its terms could not be performed by a substitute, the trust was held void when the person named as trustee refused to perform it:[[126]](#footnote-127) performance was vital to a trust, and where performance by a substitute was not possible, the impossibility of performance was fatal to the trust.

So the courts have the key remedial means at their disposal – the various possibilities of performance of a trust by a substitute, ultimately including the courts themselves – to accord performance of the trust – the performance interest – the centrality it has in the law. The law of trusts is constructed around the availability of performance by a substitute, rather than the possibility of a substitute for performance. Performance by a substitute is simply not available to remotely the same extent in the law of contract: contract law has to focus on providing a substitute for performance where a party has breached the contract.

The foregoing survey shows that the law can, both in theory and in practice, place greater importance on the performance of a trust, as compared to the performance of a contract. However, it is another question why the law chose, and continues to choose, to do so. There is not space here to investigate fully the reasons for this choice. But it is worth raising a few possibilities.

In historical and social terms, it may well be that the institution of property, and particularly the control and enjoyment of land, was seen as particularly important and deserving of more protection than mere contract.[[127]](#footnote-128)  The trust, through which the control and enjoyment of property came to be mediated in so many cases, especially for the wealthy and the powerful, may well similarly have been accorded a special significance, expressed through the importance given to the performance interest in the law of trusts.

The different nature of the relationships involved in trusts and contract may also explain why trust law privileges the performance interest to degree not seen in the law of contract. A trustee is charged with protecting trust assets and the interests of the beneficiary, rather than promising to perform a task for some mutually agreed benefit. The core concern of trust law is safeguarding interests; the core concern of contract law is market exchange. The ability to breach a contract and pay damages may be highly significant in operation of a market. There is no such concern to accommodate an analogous ability to breach a trust and pay compensation.

All this has implications for the conceptualisation of an interest under a trust: that conceptualisation must accommodate and reflect the implications of the courts’ jurisdiction to procure performance of the trust by a substitute. An interest under a trust, while it may be conceptualised as a single interest, is a complex of juridical components. The interest will involve proprietary aspects – the right to maintain and when necessary restore the integrity of the trust fund – as well as claims on the trustee by way of obligation.[[128]](#footnote-129) But that interest also still crucially involves the holder’s – the beneficiary’s – right to invoke the jurisdiction of the court. The non-obligational aspects of the interest cannot simply be reduced to nothing more than a series of obligations owed by the trustee to the holder of the interest. Of course, this is not to say that in a modern conceptualisation of the trust, such obligations do not exist: far from it. It is simply to emphasise that they are not the whole of the interest-holder’s rights.

The ability of the court to intervene in the administration of the trust when necessary, and, crucially, the ability of the court to procure performance of the trust through the appointment of new trustees, or ultimately through execution of the trust by the court itself, cannot be conceptualised as obligations owed by the trustees. Nor are they in any sense rights of property, which beneficiaries also have as part of their interests under a trust. Nor could they be practically replicated by private bargain.

There is, therefore, a danger in thinking about trust and contract just as obligations, quite aside from any question of the proprietary rights of beneficiaries. To talk of a law of obligations might be a perfectly useful categorisation to delimit the category of people bound by the right at issue, in contradistinction to the law of property. But categorisations are always purposive: they are used to construct groups by reference to one or more particular characteristics. So a categorisation made by reference to one characteristic is unlikely to be useful when the focus of enquiry is on a different characteristic. In the present context, a categorisation drawn by reference to the persons bound by a right is less than helpful when the purposes of the enquiry are to ascertain the content and purpose of the various obligations. And as has been seen, a trustee’s obligations are quite distinct from those of a contracting party.

So, when the focus of enquiry is on the content of a trustee’s obligations, conflating the obligations of a trustee with those of a contracting party will only lead to confusion, as witness *Target*, *AIB* and other cases. Yet these cases can be perfectly well explained in orthodox ways. There is no need for a separate body of “commercial trust law”. There is no need to introduce common law concepts used in the law of contract – remoteness, *novus actus interveniens*, mitigation of loss, consequential loss and contributory negligence (so far as it applies to contracts) – into the law of trusts, so long as the exercise of accounting for a trustee’s liability is undertaken correctly in response to the terms of a trust. Once the terms of a trust are properly understood (and in a commercial context, these terms may well be moulded by its contractual context) and the remedies for breach are properly applied (most importantly, the principles of accounting) then a perfectly orthodox result can be achieved (and in a commercial context, that result will necessarily reflect how the terms of the trust were moulded by its contractual context). Trustees should be duly accountable for their trust, which is to preserve, manage and distribute a trust fund on the terms applicable to that trust; but they should not – at least as a matter of trust law – be held to other standards.

Trust law and contract law indeed share some similarities. But they also show important differences in the significance and effect they respectively attribute to the interest in having a voluntary obligation performed. Much becomes clear, and much confusion is avoided, if those differences are recognised and respected.

1. \* Professor of Law, University of Hong Kong. [↑](#footnote-ref-2)
2. \*\* Professor of Law, University of York. We are grateful, with the normal caveats, to Professor Matthew Conaglen, Professor David Fox, Professor Simon Halliday, Mr Liam Kilvington, Professor Jenny Steele, Professor Hans Tjio, Dr Peter Turner and Professor Peter Watts QC for helpful comments on earlier drafts of the article. Research for this article was funded by the Hong Kong RGC General Research Fund 2017-2018 (project number: 17611917). [↑](#footnote-ref-3)
3. *Morice v Bishop of Durham* (1805) 10 Ves. 522, 539-40, 32 E.R. 947, 954. [↑](#footnote-ref-4)
4. See R.C. Nolan, “ ‘The execution of a trust shall be under the control of the court’: A Maxim in Modern Times” (2016) 2 (2) C.J.C.C.L. 469 and “Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures” in P. Davies and J. Penner (eds) *Equity, Trusts and Commerce* (Oxford: Hart Publishing, 2017) ch. 7. [↑](#footnote-ref-5)
5. *McPhail v Doulton* [1971] A.C. 424, 439-40, 443. [↑](#footnote-ref-6)
6. [1971] A.C. 424, 440. [↑](#footnote-ref-7)
7. [1971] A.C. 424, 450-51, 452. [↑](#footnote-ref-8)
8. *Target Holdings Ltd v Redferns* [1996] A.C. 421, 434. [↑](#footnote-ref-9)
9. [2003] UKPC 26, [2003] 2 A.C. 709 at [36]. [↑](#footnote-ref-10)
10. [2001] W.T.L.R. 901, esp. 922-24. [↑](#footnote-ref-11)
11. For a relatively recent example, see *Re Erskine 1948 Trust, Gregg v Pigott* [2012] EWHC 732 (Ch), [2012] 2 All E.R. 532. [↑](#footnote-ref-12)
12. For a useful historical and comparative analysis of the relevant law in England and Australia, see *Macedonian Orthodox Community Church St Petka Inc v His Eminence Bishop Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42; (2008) 237 C.L.R. 66, esp. [33]-[49]. [↑](#footnote-ref-13)
13. See D. Hayton, P. Matthews and C. Mitchell (eds), *Underhill and Hayton Law of Trusts and Trustees*, 19th edn (London: LexisNexis, 2016) (“*Underhill and Hayton*”), Article 85. [↑](#footnote-ref-14)
14. *Ibid*, Article 86.2. [↑](#footnote-ref-15)
15. [2001] W.T.L.R. 901, 922-24. [↑](#footnote-ref-16)
16. See, for example, *Citibank NA v MBIA Assurance SA* [2006] EWHC 3215 (Ch), [2007] EWCA Civ 11, an application for directions. An example of an alternative means of proceeding, namely an application for a declaration rather than directions, is *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 plc* [2015] EWHC 1560 (Ch); [2015] EWCA Civ 1257; [2016] UKSC 29, [2016] 2 B.C.L.C. 163. [↑](#footnote-ref-17)
17. See L. Tucker, N. Le Poidevin and J. Brightwell (eds), *Lewin on Trusts*, 19th edn (London: Sweet & Maxwell, 2014) (“*Lewin on Trusts*”), §27-084 and, eg, *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All E.R. 198 (PC); *Angus v Emmott* [2010] EWHC 154 (Ch), [2010] W.T.L.R. 531. [↑](#footnote-ref-18)
18. See *Lewin on Trusts* (*ibid*), §27-080 and, eg, *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All E.R. 198 (P.C.) as explained in *Public Trustee v Cooper*, [2001] W.T.L.R. 901; *Richard v Mackay* [1987] 3 WLUK 42; [2008] W.T.L.R. 1667; *X v A* [2005] EWHC 2706 (Ch), [2006] 1 W.L.R. 741. [↑](#footnote-ref-19)
19. See, recently, *Gas & Electricity Markets Authority v Spark Energy Supply Ltd* [2018] EWHC 2522 (Ch). [↑](#footnote-ref-20)
20. See, eg, *Re New* [1901] 2 Ch. 534, *Re Tollemache* [1903] 1 Ch. 955, *Chapman v Chapman* [1954] A.C. 429, and, more generally, *Underhill and Hayton* (*op cit* n 11), §§43.20–43.25, and *Lewin on Trusts* (*op cit* n 15), §45-050. [↑](#footnote-ref-21)
21. *Re Beddoe* [1893] 1 Ch. 547; *Evans v Evans* [1986] 1 W.L.R. 101; *Alsop Wilkinson v Neary* [1996] 1 W.L.R. 120. [↑](#footnote-ref-22)
22. *Re Jackson* (1882) 21 Ch.D. 768. [↑](#footnote-ref-23)
23. See, eg, *Campbell v Walker* (1800) 5 Ves. 678, 31 E.R. 801; *Farmer v Dean* (1863) 32 Beav. 327, 55 E.R. 128; *Holder v Holder* [1968] 1 Ch. 353 and, more generally, J. McGhee (ed), *Snell’s Equity*, 33rd edn (London: Sweet & Maxwell, 2015) (“*Snell’s Equity*”), §17-017. Note also M. Conaglen, “The Extent of Fiduciary Accounting and the Importance of Authorisation Mechanisms” [2011] C.L.J. 548, 564-73. [↑](#footnote-ref-24)
24. *Re Duke of Norfolk’s Settlement* [1982] Ch. 61. [↑](#footnote-ref-25)
25. See, eg, *Re De Teissier’s Settled Estates* [1893] 1 Ch. 153 and see more generally *Snell’s Equity* (*op cit* n 21), §28-053. [↑](#footnote-ref-26)
26. *Re Lord Hylton’s Settlement* [1954] 1 W.L.R. 1055, *Chapman v Chapman* [1954] A.C. 429. [↑](#footnote-ref-27)
27. *Chapman v Chapman* [1954] A.C. 429. In response to the *Chapman* case, statutory jurisdiction to approve alterations of beneficial interests on behalf of certain categories of people was conferred on the court by the Variation of Trusts Act 1958: see *Underhill and Hayton* (*op cit* n 11), §43.25. [↑](#footnote-ref-28)
28. See *Lewin on Trusts* (*op cit* n 15), §§27-082–27-084 and, eg, *Re Earl of Strafford* [1980] Ch. 28; *Re William Makin & Sons Ltd* [1992] P.L.R. 177; *Thrells Ltd v Lomas* [1993] 1 W.L.R. 456; *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 W.L.R. 32; *Public Trustee v Cooper* [2001] W.T.L.R. 901, 922-23. [↑](#footnote-ref-29)
29. Public Trustee Act 1906, s.13. See, generally, *Underhill and Hayton* (*op cit* n 11), Article 84. [↑](#footnote-ref-30)
30. Law Reform Committee, *The Powers and Duties of Trustees* (1982), Cmnd 8733, §4.48. [↑](#footnote-ref-31)
31. The principal statutory jurisdiction is now s 41 of the Trustee Act 1925. The inherent jurisdiction is illustrated by, *eg*, *Re Chetwynd’s Settlement* [1902] 1 Ch. 692; *Re Harrison’s Settlement Trusts* [1965] 3 All E.R. 795 and *Clarke v Heathfield (No 2)* [1985] I.C.R. 606. See, generally, *Underhill and Hayton* (*op cit* n 11), Articles 70 and 71. [↑](#footnote-ref-32)
32. Judicial Trustees Act 1896. See, generally, *Underhill and Hayton* (*op cit* n 11), Article 74. [↑](#footnote-ref-33)
33. Public Trustee Act 1906. See, generally, *Underhill and Hayton* (*op cit* n 11), Articles 74 and 75. [↑](#footnote-ref-34)
34. See, generally, *Underhill and Hayton* (*op cit* n 11), Article 91. [↑](#footnote-ref-35)
35. *Underhill and Hayton* (*op cit* n 11), §91.7. [↑](#footnote-ref-36)
36. *Ibid*, §91.10. [↑](#footnote-ref-37)
37. The jurisdiction was inherent to the Court of Chancery, and it survives as part of the inherent jurisdiction of that court’s successors in England and elsewhere. In England and Wales, the procedure is now governed by Civil Procedure Rules, Part 64 and Practice Direction A. See, generally, *Underhill and Hayton* (*op cit* n 11), Article 86. [↑](#footnote-ref-38)
38. See, eg, *Morice v Bishop of Durham* (1805) 10 Ves. 522, 539-40, 32 E.R. 947, 954, *per* Lord Eldon LC, cited as the text to note 1 above. [↑](#footnote-ref-39)
39. (1885) 28 Ch.D. 457. [↑](#footnote-ref-40)
40. (1885) 29 Ch.D. 913. [↑](#footnote-ref-41)
41. *Re Wilson* (1885) 28 Ch.D. 457; *Re Blake* (1885) 29 Ch.D. 913. [↑](#footnote-ref-42)
42. *Underhill and Hayton* (*op cit* n 11), § 86.2. [↑](#footnote-ref-43)
43. *Knight v Knight* (1840) 3 Beav. 148, 49 E.R. 58. [↑](#footnote-ref-44)
44. See, eg, *Knight v Knight* (1840) 3 Beav. 148, 49 E.R. 58; *White v Briggs* (1848) 2 Ph 583, 41 E.R. 1068; *Staden v Jones* [2008] EWCA Civ 936. The intention is objectively ascertained: *Byrnes v Kendle* [2011] HCA 26, (2011) 243 C.L.R. 253 (trusts); and note *Staden v Jones* (above), applying *Investors Compensation Scheme v West Bromwich BS* [1998] 1 W.L.R. 896 (contracts), and also note *Marley v Rawlings* [2014] UKSC 2, [2014] 1 All E.R. 807 (unilateral non-contractual documents). [↑](#footnote-ref-45)
45. See, for example, *Sprange v Barnard* (1789) 2 Bro. C.C. 585, 29 E.R. 320 and *Knight v Knight* (1840) 3 Beav. 148, 49 E.R. 58. The continuing importance of the principal is evidenced in *Pearson v Lehman Brothers Finance SA* [2011] EWCA Civ 1544. See, generally, *Underhill and Hayton* (*op cit* n 11), §§ 8.11-8.33. [↑](#footnote-ref-46)
46. See, eg, *Re Gulbenkian’s Settlement Trusts* [1970] A.C. 508, *McPhail v Doulton* [1971] A.C. 424. See, generally, *Underhill and Hayton* (*op cit* n 11), §§ 8.34-8.70. [↑](#footnote-ref-47)
47. See, eg, *Re London Wine Co (Shippers) Ltd* [1986] P.C.C. 121. See generally G. Jones and W. Goodhart, *Specific Performance*, 2nd edn (London: Butterworths, 1996), at pp. 9-11. Note also J.D. Heydon, M.J. Leeming and P.G. Turner (eds), Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies*, 5th edn (Sydney: LexisNexis, 2015) (“*Meagher, Gummow & Lehane*”), §[20-025]. [↑](#footnote-ref-48)
48. [1970] A.C. 508. [↑](#footnote-ref-49)
49. See the text to note 35 above. [↑](#footnote-ref-50)
50. For a consideration of this distinction, see D. Hayton, “Developing the Obligation Characteristic of the Trust” (2001) 117 L.Q.R. 96. [↑](#footnote-ref-51)
51. See, eg, Trusts (Special Provisions) Act 1989 (Bahamas), ss. 12A-12D; Trustee Act 1961 (British Virgin Islands), ss. 84, 84A; Trusts Act (Cap 202) (Belize), s. 15; Trusts Law (2017 Revision) (Cayman), Pt VIII; International Trusts Act 1984 (Cook Islands), ss. 6, 12(2)-(4). Labuan Trusts Act 1996 (Laws of Malaysia, Act 554), s. 11A. [↑](#footnote-ref-52)
52. See Part 2 above, particularly the classic formulation of Lord Eldon, cited as the text to note 1 above. [↑](#footnote-ref-53)
53. See below, text to nn 107-08 above. [↑](#footnote-ref-54)
54. See, generally, M. Conaglen, “Equitable Compensation for Breach of Trust: Off Target” (2016) 40(1) M.U.L.R. 126; L. Ho, “An Account of Accounts” (2016) 28 S.Ac.L.J. 849. [↑](#footnote-ref-55)
55. *Ibid*, and see also *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1513] *per* Lewison J; C. Mitchell, “Stewardship of Property and Liability to Account” [2014] Conv. 215, 223–224. [↑](#footnote-ref-56)
56. [1919] A.C. 658 (P.C.) at 666. [↑](#footnote-ref-57)
57. R.C. Nolan, “Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures” (*op cit* n2), at p. 175; J. Penner, “The Beneficiary’s Performance Interest in a Trust”, in R.C. Nolan, K.F.K. Low & H.W. Tang (eds) *Trusts and Modern Wealth Management* (Cambridge: CUP, 2017) ch. 9. [↑](#footnote-ref-58)
58. *Cocker v Quayle* (1830) 1 Russ. & M. 535, 39 E.R. 206; *Magnus v Queensland National Bank* (1888) 37 Ch.D. 466 (C.A.). [↑](#footnote-ref-59)
59. *Libertarian Investments Ltd v Hall* [2013] HKCFA 93, (2013) 16 H.K.C.F.A.R. 681 at [170], *per* Millett N.P.J., surcharging is “akin to the payment of damages”. [↑](#footnote-ref-60)
60. *Byrchall v Bradford* (1822) 6 Mad. 235, 56 E.R. 108; *Pride v Fooks* (1839–1840) 2 Beav. 430, 48 E.R. 1248. [↑](#footnote-ref-61)
61. J. Glister, “Breach of Trust and Consequential Loss” (2014) 8 J. Eq. 235. [↑](#footnote-ref-62)
62. [1996] A.C. 421. [↑](#footnote-ref-63)
63. [2014] UKSC 58, [2015] A.C. 1503. [↑](#footnote-ref-64)
64. For an overview of this development, see M. Conaglen, “Equitable Compensation for Breach of Trust: Off Target” (*op cit* n 52), 146-150. [↑](#footnote-ref-65)
65. *Ibid* at [136] (emphasis added). [↑](#footnote-ref-66)
66. *Ibid* (emphasis added). By the same token, the confusing language of causation in a strict sense should also be abandoned. [↑](#footnote-ref-67)
67. [2017] EWCA Civ 1193. [↑](#footnote-ref-68)
68. [2017] EWCA Civ 1193 at [61]-[62]. [↑](#footnote-ref-69)
69. See, eg, *Pickering v Pickering* (1839) 4 My. & Cr. 289, 298–9; 41 E.R. 113, 116; and, more generally, *Underhill and Hayton* (*op cit* n 11), Article 58. In the case of a solicitor’s client account, note also Rule 22 of the Solicitors' Accounts Rules 1998. [↑](#footnote-ref-70)
70. For criticism of the distinction, see P. Davies, “Equitable Compensation and the SAAMCO Principle” (2018) 134 L.Q.R. 165, 167-68. [↑](#footnote-ref-71)
71. [2018] EWCA Civ 1594. [↑](#footnote-ref-72)
72. *Ibid* at [12], [16]. [↑](#footnote-ref-73)
73. See text to notes 107-08 below. [↑](#footnote-ref-74)
74. L. Smith, “Deterrence, Prophylaxis and Punishment in Fiduciary Obligations” (2013) 7 J. Eq. 87, 101-102; *Robinson v Robinson* (1851) 1 De G.M. & G. 247, 257, 42 E.R. 547, 551; and, more recently, *Tang Ying Loi v Tang Ying Yip* [2017] HKCFA 3, (2017) 20 H.K.C.F.A.R. 53. [↑](#footnote-ref-75)
75. (1845) 43 U.S. 333, 401. [↑](#footnote-ref-76)
76. [2017] HKCFA 3, (2017) 20 H.K.C.F.A.R. 53. [↑](#footnote-ref-77)
77. *Ibid* at [27]. [↑](#footnote-ref-78)
78. *F.H.R. European Ventures LLP v Cedar Capital Partners LLC*[2014] UKSC 45, [2015] 1 A.C. 250. [↑](#footnote-ref-79)
79. For breach of fiduciary duty, see M. Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (London: Hart Publishing, 2010); M. Conaglen, “The Extent of Fiduciary Accounting and the Importance of Authorisation Mechanisms” (*op cit* n 21), 557-560. For breach of contract, see D. Fox, “Restitutionary Damages to Deter Breach of Contract” [2001] C.L.J. 33, 33-35; J. Edelman, *Gain-Based Damages – Contract, Tort, Equity and Intellectual Property* (Oxford: Hart Publishing, 2002), 5-23;J. Edelman, “Profit and Gains from Breach of Contract” [2001] L.M.C.L.Q. 9, 11; S. Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford: Oxford University Press, 2012), at p. 157; K. Barnett, *Accounting for Profit for Breach of Contract* (Oxford: Hart Publishing, 2012), at pp. 26-32. [↑](#footnote-ref-80)
80. *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 C.L.R. 373, 397; *Warman International Ltd v Dwyer* (1995) 182 C.L.R. 544, 557-558; and, more recently, *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43 at [9], [78], [178] (“*Lifeplan*”). For a contrary view, see L. Smith, note 72 above. [↑](#footnote-ref-81)
81. Lord Millett, “Bribes and Secret Commissions” [1993] R.L.R 7, 20, albeit Lord Millett considers this assumption as based on estoppel rather than legal fiction. [↑](#footnote-ref-82)
82. See, eg, *Thornton v Stokill* (1855) 1 Jur. N.S. 751, though apparently *contra* *Re Lake* [1903] 1 K.B. 439; *Tang Man Sit v Capacious Investments Ltd* [1996] A.C. 514; *Warman International Ltd v Dwyer* (1995) 182 C.L.R. 544. [↑](#footnote-ref-83)
83. M Conaglen, note 21 above. [↑](#footnote-ref-84)
84. *Warman International Ltd v Dwyer* (1995) 182 C.L.R. 544, 567; *Chan v Zacharia* (1984) 154 C.L.R. 178, 204-5. [↑](#footnote-ref-85)
85. [2018] HCA 43. [↑](#footnote-ref-86)
86. *Lifeplan* at [70]-[71], [74], [85]-[94] *per* Gageler J. [↑](#footnote-ref-87)
87. *Lifeplan* at [5] *per* Kiefel C.J., Keane and Edelman JJ. [↑](#footnote-ref-88)
88. *Lifeplan* at [23]–[24] *per* Kiefel C.J., Keane and Edelman JJ., [75], [110] *per* Gageler J. [↑](#footnote-ref-89)
89. *Lifeplan* at [9] *per* Kiefel C.J., Keane and Edelman JJ., and at [88] *per* Gageler J. [↑](#footnote-ref-90)
90. *Lifeplan* at [9]. [↑](#footnote-ref-91)
91. *Canson Enterprise* *Canson Enterprises Ltd v Boughton & Co* [1991] 3 S.C.R. 534, 556, adopted in *Target Holdings Ltd v Redferns* [1996] A.C. 421, 438-439. [↑](#footnote-ref-92)
92. *Lifeplan* at [89] *per* Gageler J., and at [179] *per* Nettle J. [↑](#footnote-ref-93)
93. Nettle J. did not distinguish between causation and quantification. [↑](#footnote-ref-94)
94. *Lifeplan* at [13] *per* Kiefel C.J., Keane and Edelman JJ., and at [91] *per* Gageler J. [↑](#footnote-ref-95)
95. *Underhill and Hayton* (*op cit* n 11), §56.23, and the cases cited there. [↑](#footnote-ref-96)
96. *Lifeplan* at [15]-[16] *per* Kiefel C.J., Keane and Edelman JJ. [↑](#footnote-ref-97)
97. See, eg, *South Australia Insurance Co v Randall* (1869) L.R. 3 P.C. 101; *Re Nevill* (1871) L.R. 6 Ch. App. 397; *Re Gross* (1871) 6 Ch. App. 632; *Re Tilley’s WT* [1967] Ch. 1179; *Re Bond Worth Ltd* [1980] Ch. 228; *Paragon Finance plc v Thakerar & Co* [1999] 1 All E.R. 400, 416; *Foskett v McKeown* [2001] 1 A.C. 102; *Re Lehman Brothers International (Europe)* [2010] EWHC 2914 (Ch) and [2011] EWCA Civ 1544, [2012] 2 B.C.L.C. 151; *Re Lehman Brothers International (Europe)* [2012] UKSC 6, [2012] 3 All E.R. 1. [↑](#footnote-ref-98)
98. *Lupton v White* (1808) 15 Ves. Jun. 432, 33 E.R. 817, illustrating a rule as to the burden of proof. See also *Gray v Haig* (1855) 20 Beav. 219, 52 E.R. 587; *Cook v Addison* (1869) L.R. 7 Eq. 466, 470 *per* Sir John Stuart V-C; *Re Oatway* [1903] 2 Ch. 356, 359, *per* Joyce J; *Re Tilley’s WT* [1967] Ch. 1179, 1183, *per* Ungoed-Thomas J. [↑](#footnote-ref-99)
99. *Phipps v Boardman*, [1964] 1 W.L.R. 993 (Ch.D.), 1018, *per* Wilberforce J. and [1965] Ch. 992 (CA) at 1020, aff’d *sub nom Boardman v Phipps* [1967] 2 A.C. 46; *Hospital Products International Pty Ltd v United States Surgical Corporation* (1984) 156 C.L.R. 41. Cf. *Warman International Ltd v Dwyer* (1995) 182 C.L.R. 544; *O’Sullivan v Management Agency Ltd* [1985] Q.B. 428. [↑](#footnote-ref-100)
100. See the cases cited in note 96 above. [↑](#footnote-ref-101)
101. D. Friedmann, “The Performance Interest in Contract Damages” (1995) 111 L.Q.R 628, 629; B. Coote, “Contract Damages, *Ruxley* and the Performance Interest” [1997] C.L.J. 537, 541-44; C. Webb, “Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation” (2006) 26 O.J.L.S. 41, 45; S. Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (*op cit* n 77), p. 30. [↑](#footnote-ref-102)
102. [2018] UKSC 20, [2018] 2 W.L.R. 1353. [↑](#footnote-ref-103)
103. *Ibid* at [32]. [↑](#footnote-ref-104)
104. [2018] UKSC 20at [34]-[35]. [↑](#footnote-ref-105)
105. As to specific performance, see, eg, *Wilson v Northampton & Banbury Junction Railway Co* (1874) LR. 9 Ch. App 279, 297, *per* Lord Selborne. The cases are best discussed in *Equity: Doctrines & Remedies* (*op cit* n 45), §§[20-030]-[20-0050]. As regards the claim for cost of cure, see *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344, discussed in B Coote, “Contract Damages, *Ruxley*, and the Performance Interest” (*op cit* n 99). [↑](#footnote-ref-106)
106. See above, Part 3. [↑](#footnote-ref-107)
107. See *Meagher, Gummow & Lehane* (*op cit* n 45), §§[21-195]-[21-235]. [↑](#footnote-ref-108)
108. *Ibid* §[21-200]. [↑](#footnote-ref-109)
109. [2000] UKHL 45, [2001] 1 A.C. 268. [↑](#footnote-ref-110)
110. See, eg, *Chitty on Contacts*, 33rd edn (London: Sweet & Maxwell, 2016), §§[26-062]-[26-065] and the works cited there. [↑](#footnote-ref-111)
111. See Part 5(ii) above. [↑](#footnote-ref-112)
112. See, most fully on these points, *Warman v Dwyer* (1995) 182 C.L.R. 544. [↑](#footnote-ref-113)
113. *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 849, *per* Lord Diplock. [↑](#footnote-ref-114)
114. [2018] UKSC 20, [2018] 2 W.L.R. 1353. [↑](#footnote-ref-115)
115. *Ibid*. [↑](#footnote-ref-116)
116. *Ruxley Electronics & Constructions Ltd v Forsyth* [1996] A.C. 344. [↑](#footnote-ref-117)
117. *Ibid.* [↑](#footnote-ref-118)
118. See, eg, *Reeve v A-G* (1843) 3 Hare 191, 67 E.R. 351; *Re Lawton* [1936] 3 All E.R. 378 at 380 *per* Bennett J; *Underhill and Hayton* (*op cit* n 11), §34.6. [↑](#footnote-ref-119)
119. See, eg, *Re Lysaght* [1966] Ch. 191. [↑](#footnote-ref-120)
120. See, e.g., the definitions of “trustee”, and the provisions for the appointment and retirement of trustees, in the precedent settlements of Lord Millett (ed), *The Encyclopaedia of Forms and Precedents*, 5th edn (London: LexisNexis, 2005), vol 40(1). [↑](#footnote-ref-121)
121. See, eg, *Lewin on Trusts* (*op cit* n 15), §§[29-093]-[29-120]. [↑](#footnote-ref-122)
122. See, eg, *Wilson v Turner* (1883) 22 Ch.D. 521 and *Turner v Turner* [1984] Ch. 100. [↑](#footnote-ref-123)
123. *Lewin on Trusts* (*op cit* n 15), §§[29-093]-[29-120]. Indeed, the express terms of settlements are very commonly more permissive still of delegation: see *The Encyclopaedia of Forms and Precedents*, (*op cit* n 118). [↑](#footnote-ref-124)
124. Senior Courts Act 1981, s 39. [↑](#footnote-ref-125)
125. *Co-operative Insurance Ltd v Argyll Stores Ltd* [1997] UKHL 17, [1998] A.C. 1. [↑](#footnote-ref-126)
126. *Re Lysaght* [1966] Ch. 191. The failed trust was charitable in nature, and so on failure the assets were applied *cy-près* by the court. [↑](#footnote-ref-127)
127. For this argument in the context of restitution for wrongs, see I.M. Jackman, “Restitution for Wrongs” [1989] C.L.J. 302. [↑](#footnote-ref-128)
128. R.C. Nolan, “Equitable Property” (2006) 122 L.Q.R. 232. [↑](#footnote-ref-129)