SOME EFFECTS OF THE INTERMINGLING OF COMMON LAW AND EQUITY

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In 1978 in *United Scientific Holdings Ltd v Burnley Borough Council*[1] Lord Diplock remarked that the "waters of the confluent streams of law and equity have surely mingled now".[2] This statement has been criticised by some Australians with customary candour. Settling for merely exposing the fusion "fallacy" when writing an academic text, Justice Meagher has been less restrained on the Bench.[3] In a recent case his Honour said:[4]

[In *United Scientific Holdings v Burnley Borough Council*] Lord Diplock ... expressed the remarkable view that the [Judicature Act 1873] effected a "fusion" of law and equity so that equity as a distinct jurisprudence disappeared from English law. That view is so obviously erroneous as to be visible, and one may confidently anticipate that no Australian court will ever follow it in that regard.

Certainly the orthodox view is that no merger of substantive law has ever occurred in an all or nothing fashion. As Ashburner wrote in 1902[5] "the two streams of jurisdiction though they run in the same channel, run side by side and do not mingle their waters". There was judicial support for this view before Ashburner wrote, and there has been since. Introducing the legislation Lord Selborne LC said:[6]

It may be asked ... why not abolish at once all distinction between law and equity: I can best answer that by asking another question — do you want to abolish trusts? If trusts are to continue, there must be a distinction between what we call a legal and an equitable estate ... The distinction, within certain limits, between law and equity, is real and natural, and it would be a mistake to suppose that what is real and natural ought to be disregarded.

Sir George Jessel MR agreed. In *Salt v Cooper*[7] his Lordship said:

It is stated very plainly that the main object of the Act was to assimilate the transaction of Equity business and common law business by different Courts of Judicature. It has been sometimes inaccurately called "the fusion of Law and Equity"; but it was not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of Law and Equity in every cause, action or dispute which should come before that tribunal. That was the meaning of the Act. Then, as to that very small number of cases in which there is an actual conflict, it was decided that in all cases where the rules of Equity and Law were in conflict the rules of Equity should prevail. That was to be the mode of administering the combined jurisdiction, and that the meaning of the Act. To carry that out the Legislature did not create a new jurisdiction, but simply transferred the old jurisdictions of the Courts

1 [1978] AC 904.
2 Ibid, 925.
3 *G R Mailman & Associates Pty Ltd v Wormald (Aust) Pty Ltd* (1991) 24 NSWLR 80.
4 Ibid, 99.
5 Ashburner, *Principles of Equity* (1902), 23.
6 Hansard 3rd Series Vol 214, 339.
7 (1880) 16 Ch D 544, 549. Similarly, in *Britain v Rossiter* (1879) 11 QBD 123 Brett LJ stated (at 129):
"I think that the true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the Courts either of Law or of Equity; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure."
See also *Lavery v Purcell* (1889) 39 Ch D 508; *Clements v Matthews* (1883) 11 QBD 808; *Joseph v Lyons* (1884) 15 QBD 280; *Hallas v Robinson* (1885) 15 QBD 288; *Colls v Home and Colonial Stores Ltd* [1904] AC 179.

of Law and Equity to the new tribunal as to the mode in which it should administer the combined jurisdiction.

In 1915 in *Stickney v Keeble*[8] Lord Parker maintained that in post fusion times it was still necessary to ask what was the position at law and then to ask what was the position in equity.[9] More recently, in *Bank of Boston Connecticut v European Grain and Shipping Ltd*[10] Lord Brandon, in the context of a charterparty dispute, stated that "the Judicature Acts, while making important changes in procedure, did not alter, and were not intended to alter, the rights of the parties".[11]

This understanding of the nature and purpose of the legislation has been accepted elsewhere. In New Zealand Denniston J in the course of his judgment in *Riddiford v Warren* said:[12]

> ... the Judicature Act [i.e. the UK Act] dealt mainly with procedure. Its object was the fusion of law and equity and the abolition thereby of the anomalous procedure by which rights as to one subject matter were determined by different but co-ordinate authorities. It was not to create new rights in respect of the individual's interpretation or enforcement of contracts, but only to effect a combination of two sets of rules for determining and enforcing existing rights in which combination in any case where there were rival and incompatible rules that of equity was to be the survivor.

In Australia, the point has forcefully been made that a fused administration could not form the basis for substantive changes to rules of law or equity. In *Felton v Mulligan*[13] Windeyer J said:

> Mine may be an ingenuous view, but to me it seems that the law that a court must apply and administer, in the exercise of whatever jurisdiction pertains to it, may be derived from different sources, but that it is still, so far as any particular case is concerned, a single though composite body of law. It is the law of the land governing the parties in their relation to the case in hand. The law of the land for us — I use the term in its colloquial modern sense, not as the mediaeval lex terrae — is made up of inherited common law principles and equitable doctrine, Imperial statutes, Commonwealth statutes and State statutes and delegated legislation of various kinds. The topic has lent itself to metaphors, although physical metaphors can be misleading when applied to concepts. In *Eric Anderson's Case* [(1965) 114 CLR 20] I spoke of an "overlapping" of state and Federal jurisdictions. In the present case counsel in the course of argument described (Federal and State jurisdictions) as "interwoven". At other times they have been said to exist "side by side". All this is reminiscent of the statement in Ashburner on Equity [2nd ed, 18] that the result of the "fusion" of law and equity by the Judicature Act is that "the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters.

Glass JA adopted the same view in *O'Rourke v Hoever.*[14] There he said:[15]

> The position is in no way altered by the concurrent administration of law and equity directed by the Supreme Court Act 1970. This is not a fusion of two systems of principle but of the Courts which administer the two systems.

But acceptance of the orthodox position does not demand any denial for the continuing evolution of common law and equitable principles. The development of the substantive principles of common law and equity did not end with the Judicature Acts. There is no reason why courts in shaping

8 [1915] AC 386.
9 Ibid, 417.
10 [1989] 1 All ER 545.
11 Ibid, 557.
12 (1901) 20 NZLR 527, 579.
13 (1971) 124 CLR 367, 392.
14 [1974] 1 NSWLR 622.
15 Ibid, 626.

principles, whether their origins lie in the common law or in equity, should not have regard to both common law and equitable concepts and doctrines, borrowing from either as may be appropriate. In this way it seems possible to integrate aspects of the two systems without resort to a "fusion" fallacy. Even so, I doubt whether the response from the other side of the Tasman will be entirely uncritical.

Somers J in *Elders Pastoral Ltd v Bank of New Zealand*[16] referred to the possibility of this kind of integration of law and equity when he said:[17]

> Neither law nor equity is now stifled by its origin and the fact that both are administered by one court has inevitably meant that each has borrowed from the other in furthering the harmonious development of the law as a whole.

The President of the New Zealand Court of Appeal, Sir Robin Cooke, has preferred to attribute modern developments in this field to the "interaction"[18] or "intermingling"[19] of law and equity. By whatever epithet the process is labelled it simply amounts to a recognition that equity and law are coalescing in the absence of the historical impediments which have kept them apart.

This notion is not new. At the turn of the century Maitland subscribed to the view that the Judicature Acts did not merge different principles and therefore did not allow students the luxury of avoiding the highways and byways of equity.[20] However, once there was jurisdictional fusion he foreshadowed the day "when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law".[21] That day may not yet have arrived but significant developments are occurring which indicate that the common law and equity are converging on some matters. Two factors, at least, have contributed to this convergence.

The first relates to a changing perception of the nature of common law and equity. There has been a marked reluctance in some quarters to integrate into the rigid system of common law the flexibility so characteristic of equity. Yet whether the common law really is rigid or equity indeed flexible, may be a matter of fashion rather than anything else.[22] Neither system is properly described as rigid or flexible for all time. Some Chancellors rigorously pursued a structure of equity which would reduce it to a system of rules.[23] And the common law has shown itself capable of encompassing large measures of flexible principle within its traditional boundaries. A cursory glance at the ambit of the duty of care in the heartland of tort, and the open-textured principles of procedural fairness and reasonableness in administrative law show few signs of rigidity. Even within

16 [1989] NZLR 180.
17 Ibid, 193.
18 *Day v Mead* [1987] 2 NZLR 443, 451.
19 *Attorney-General for UK v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 172.
20 Maitland, *Equity* (Brunyate ed 1949), 159, 164.
21 Ibid, 20, where Maitland wrote:
"The bond which kept [these equitable doctrines] under the head of Equity is the jurisdictional and procedural bond. All those matters were within the cognizance of courts of equity, and they were not within the cognizance of the courts of the common law. That bond is now broken by the Judicature Acts. Instead of it we find but a mere historical bond– 'these rules used to be dealt with by the Court of Chancery' — and the strength of that bond is being diminished year by year. The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of the common law: suffice that it is a well-established rule administered by the High Court of Justice".
22 J Beatson, *The Use and Abuse of Unjust Enrichment* (1991), 249.
23 Ibid. See, for example, the work of Lord Eldon: *Gee v Pritchard* (1818) 2 Swanst 402, 414.

contract a place has been found for the operation of principles of reasonableness and fairness.

The second factor seems to be a growing willingness to recognise that some common concerns of equity and law can be addressed in a coherent manner. Estoppel, fraud, illegality and subrogation provide recent examples.

ESTOPPEL

The evolution of promissory and proprietary estoppel into a unified doctrine is explicit recognition that unconscionability underpins some common law doctrines as well as equity.[24] In New Zealand, even without a case as factually dramatic as *Walton Stores v Maher,*[25] the result has been the development of a doctrine of estoppel which applies to statements of intention and which can be used as a cause of action.[26] The doctrine is not limited to pre–existing legal relationships or to transactions involving land. By permitting a remedy where reasonable reliance is placed on a promise without consideration and where a party unconscionably allows another to rely on a false expectation the law is indeed developing in a harmonious way to meet the needs of modern society.[27]

In this area, New Zealand developments have kept pace with similar change in Australia. In *Commonwealth v Verwayen*[28] the High Court of Australia confirmed many of the advances made in *Walton's Stores*,[29] and adumbrated "recognition of an over–arching unity embracing the various classes of estoppel".[30] In *Verwayen* Mason CJ criticised the existence of different estoppels with different effects applying to the same fact situation, saying:[31]

> But since the function of equitable estoppel has expanded and it has became recognised that an assumption as to future fact may ground an estoppel by conduct at common law as well as in equity, it is anomalous and potentially unjust to allow the two doctrines to inhabit the same territory yet produce different results.

It would confound principle with common sense to maintain that estoppel by conduct occupied a special field which has as its hallmark the making good of assumptions. As one commentator has noted, either equitable estoppel operates in virtually identical circumstances to common law estoppel, or it operates in those circumstances and additional circumstances as well. There is no arguable area of operation of common law estoppel into which equitable estoppel cannot travel.[32]

24 Sir Anthony Mason, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World", in *Equity, Fiduciaries and Trusts* (1993) (ed DWM Waters), 18. In *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* unreported, CA 159/92, 30 March 1993 Tipping J said at 28:
"The decisions of this Court in *Wham–O Manufacturing Co v Lincoln Industries Ltd* [1984] 1 NZLR 641 and *Gillies v Keogh* [1989] 2 NZLR 327 have emphasised the element of unconscionability which runs through all manifestations of estoppel. The broad rationale of estoppel, and this is not a test in itself, is to prevent a party from going back on his word (whether express or implied) when it would be unconscionable to do so."

25 (1988) 164 CLR 387.

26 In *Gold Star Insurance v Gaunt* (1992) 7 ANZ Ins Cas 77393, 77396 Holland J rejected "any suggestion that estoppel is available only as a shield".

27 For New Zealand developments see *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings* [1989] 1 NZLR 356; *Gawn v MacDonald* (1992) 2 NZ Conv C 191, 071.

28 (1990) 170 CLR 394.

29 (1988) 164 CLR 387.

30 Mason, op cit, n 24 at 19, and see *Foran v Wright* (1989) 168 CLR 385.

31 (1990) 170 CLR 394, 412.

FRAUD

As to fraud, a decision last year from the New Zealand Court of Appeal is instructive. In *Swann v Secureland Mortgage Investment Nominees Ltd*[33] the plaintiff was induced to sell her house for an inflated price of $500,000 on terms that she took a second mortgage for $350,000. This left scope for a first mortgage, but no amount was specified for such a mortgage. The purchaser raised $250,000 on first mortgage from the defendant company. This mortgage effectively eroded the plaintiff's security. When the purchaser defaulted the house was sold and the plaintiff challenged the defendant's right to the proceeds.

The Court held that the plaintiff had been a victim of a fraud and was entitled to have the first mortgage set aside. In the view of the President, Sir Robin Cooke, it did not matter whether the jurisdiction to set aside the mortgage was found in the relevant statutory provision "or in the jurisdiction over 'equitable' fraud or common law fraud or all or any of them."[34] His Honour was disposed to label the case one of fraud "for which the Courts will give the relief appropriate to the particular case."[35]

ILLEGALITY

Tinsley v Milligan[36] is a decision of the House of Lords which adverts to the effect of fusion of law and equity, this time in respect of illegality. The issue was whether an equitable co–owner of a house could assert her interest in a house which was put into the sole name of the other co–owner at law, when this ownership arrangement had only been arrived at in order to practise a fraud on the Department of Social Security. By a majority the House held that such an equitable co–owner could assert her right as long as she was not forced to rely on any illegality to prove her interest.

Lord Browne–Wilkinson, delivering the leading majority speech, noted the similarities between law and equity in this area. He accepted the proposition that a plaintiff can at law enforce property rights acquired under an illegal contract provided that he does not need to rely on the illegal contract for any purpose other than providing the basis of his claim to a property right.[37] In equity one relevant principle is that where the presumption of resulting trust applies (but not the presumption of advancement) a plaintiff who has contributed part of the purchase money for property can establish an equitable interest in that property without relying in any way on the underlying illegal transaction.[38] His Lordship concluded:[39]

> In my judgment the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.

32 M Lunney, "Towards a Unified Estoppel — The Long and Winding Road" [1992] Conv 239.
33 [1992] 2 NZLR 144.
34 Ibid, 148.
35 Ibid.
36 [1993] 3 WLR 126
37 Ibid, 147.
38 Ibid, 148.
39 Ibid, 153.

SUBROGATION

As for subrogation, another recent decision of the House of Lords in *Napier and Ettrick (Lord) v Hunter*[40] is illuminating. The question at issue was whether an insurer had a proprietary right in damages paid by a third party to the assured. The House held that payment of damages in respect of an insured loss created an equitable charge in favour of the subrogated insurers as long as the damages were traceable to an identifiable fund. In their speeches their Lordships traced the development of the doctrine of subrogation both at law and in equity. Lord Goff[41] referred to the contractual analysis of the position at law in *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd.*[42] There Diplock J (as he then was) said:[43]

> The expression 'subrogation' in relation to a contract of marine insurance is thus no more than a convenient way of referring to those terms which are to be implied in the contract between the assured and the insurer to give business efficacy to an agreement whereby the assured in the case of a loss against which the policy has been made shall be fully indemnified, and never more than fully indemnified.

In his Lordship's view subrogation was concerned solely with the mutual rights and liabilities of the parties to the contract of insurance. The remedies, he said, were essentially common law remedies; in particular, if the assured has, after payment of the loss by the insurer, received a sum from a third party in reduction of the loss, the insurers can recover the amount of the reduction as money had and received. He conceded that equity came to the aid of the common law by compelling the assured to allow his name to be used in proceedings against the third party. Lord Goff pointed out that equity did more than that. The principle of subrogation was the subject of separate development in equity, where the cases demonstrate that recoveries by the assured which reduce the loss paid by the insurer are held in trust for the insurer. Lord Goff could discern no inconsistency between the equitable proprietary right recognised by courts of equity and the personal rights and obligations embodied in the contract of insurance itself. He said:[44]

> No doubt our task nowadays is to see the two strands of authority, at law and in equity, moulded into a coherent whole; but for my part I cannot see why this amalgamation should lead to the rejection of the equitable proprietary right recognised in the line of cases to which I have referred. Of course, it is proper to start with the contract of insurance, and to see how the common law courts have worked out the mutual rights and obligations of the parties in contractual terms with recourse to implied terms where appropriate. But, with all respect, I am unable to agree with Lord Diplock that subrogation is in this context concerned *solely* with the mutual rights and obligations of the parties under the contract.

Two other areas which may be ripe for a greater coalescence between law and equity are tracing and liability for misdirected funds.

TRACING

The tracing rules adopted by the common law and equity are quite different: the equitable rules generally being regarded as affording the more effective and persistent remedy. This distinction may be an historical

40 [1993] 2 WLR 42.
41 Ibid, 56–57.
42 [1962] 2 QB 330.
43 At 339–340.
44 [1993] 2 WLR 42, 59.

anachronism which should not be tolerated in post-fusion times. Writing extra-curially Sir Robin Cooke has commented that "to talk of common law tracing and equitable tracing is to perpetuate a distinction of no public benefit".[45]

Before the Judicature Acts a claimant with a legal interest in property would go to a common law court to seek a common law remedy, suing in tort (conversion or detinue) or for money had and received; and, in determining whether that remedy was available, the court would use its particular rules of tracing. Similarly, a person with an interest recognised in equity would go to a court of equity seeking an equitable remedy, such as a declaration that he or she was beneficially entitled to the property claimed or entitled to a charge over it; and, in determining that claim, the court would rely on its own tracing rules. It was not possible for a person with an equitable interest to go to a common law court for a remedy: the equitable interest would not be recognised there. Nor was it generally possible for the holder of a legal interest to seek an equitable remedy and so benefit from the more favourable equitable rules on tracing.

Even after the Judicature Acts the situation in England, at any rate, is not much different. The holder of an equitable interest is still unable to sue in tort[46] or for money had and received;[47] and declarations of a beneficial interest or a charge with the advantages of the equitable rules on tracing, are limited to those with pre–existing equitable interests. In New Zealand there have been indications that some of the limits of tracing are being altered.[48] This should not be surprising, given the approach to remedies taken by the New Zealand Court of Appeal in recent years.[49]

Liability for Misdirected Funds

There is a tension between law and equity when liability for misdirected funds is in issue. When funds are misapplied claims by the victim of the misapplication are usually brought against the person who is alleged to have been responsible for the wrongful disposal of the goods, anyone who has been a party to that act and the recipient of the property. But does the recipient's and/or the accessory's liability depend on fault or dishonesty or is it strict?

There is a large measure of disagreement in the case law about the personal liability of the recipient. In one category are decisions which accord with the position at law, holding that the recipient's personal liability is strict.[50] In a second category are cases which make the recipient's liability depend on dishonesty.[51] In a third category are cases which require fault but not dishonesty.[52] Such diversity of view is undesirable, Peter Birks comments:[53]

45 (1992) 108 LQR 337 (book review).
46 *The Aliakmon* [1986] AC 785
47 *Banque Belge v Hambrouck* [1920] 1 KB 321, 333 per Atkin LJ; cf Denning J in *Nelson v Larholt* [1948] 1 KB 339.
48 *Liggett v Kensington* [1993] 1 NZLR 545.
49 See infra at 305 ff.
50 *Re Diplock* [1948] Ch 465; *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 2 All ER 532 (Danckwerts J); [1958] 3 All ER 540 (CA); *Eddis v Chichester Constable* [1969] 1 All ER 566; affirmed [1969] 2 Ch 345 (not dealing with the issue); *Butler v Broadhead* [1975] Ch 97.
51 *In re Montagu* [1987] Ch 264; *Eagle Trust v SBC Securities* [1992] 4 All ER 488.
52 For example, *Agip (Africa) Ltd v Jackson* [1990] Ch 265.
53 P Birks, "Trusts in the Recovery of Misapplied Assets: Tracing, Trusts and Restitution in Commercial Aspects of Trusts and Fiduciary Obligations" (ed. McKendrick 1992), 160–161.

The House of Lords has not yet had or has not yet taken, the opportunity to harmonise these conflicting authorities, but it is clear that, subject to defences strict liability must now prevail. There is no dispute between law and equity. The common law is for strict liability, and so are some of the equity cases. The way forward is to develop the defences while acknowledging the strict nature of the liability. This accords with the position taken by Sir Peter Millett, writing extra-judicially: "The liability of the recipient is receipt–based and should be strict. The basis of the liability should be the same whether or not he has parted with his money, but should be subject to a change of position defence".

What of the accessory, the knowing assister? Does his or her liability depend on dishonesty or carelessness? Sir Peter Millett takes the view that it should be founded on dishonesty, although it is not completely clearly worked out yet. Extra-judicially his Lordship has written:[54]

The liability of the accessory is necessarily fault–based, and should depend on dishonesty.... [T]he difficult question which is still to be explored concerns the extent of knowledge which is required.

In *Agip (Africa) Ltd v Jackson*[55] he held the defendants liable as accessories to the fraudulent misdirection because they were dishonest in the sense that they were "at best indifferent to the possibility of fraud". Delivering the leading judgment in the Court of Appeal in Polly Peck v Nadir[56] Scott LJ said:

There is a general consensus of opinion that, if liability as a constructive trustee is sought to be imposed, not on the basis that the defendant has received and dealt in same way with trust property (knowing receipt) but on the basis that the defendant has assisted in the misapplication of trust property (knowing assistance), "something amounting to dishonesty or want of probity on the part of the defendant must be shown" (see per Vinelott J in *Eagle Trust Plc v SBC Securities*).

The law in this area is developing rapidly. As Birks has commented it is growing away from its false dependence on trusts and, at the same time, it is being emancipated from the grip of the common law forms of action. Perhaps it is here that the law of restitution, based on unjust enrichment, has a part to play in the large task of unifying law and equity.[57]

EQUITABLE COMPENSATION

It is, however, in the rediscovered action for equitable compensation for breach of fiduciary duty that much evidence of the cross–fertilisation of law and equity is taking place. Although this action was preserved by *Nocton v Ashburton*[58] in 1914 its rules have escaped precise analysis. In part this has been due to an emphasis on equity's remedial ability to strip profits from wrong–doing trustees. In part it has been due to the rise of negligence and the extended notion of the duty of care. Recently, awards of equitable compensation have become much more common. They have been claimed, particularly, by clients of solicitors who feel aggrieved by some aspect of their solicitors' conduct.[59] Case law in this area has been helpful in outlining how law and equity may be reconciled in some respects.

54 "Tracing the Proceeds of Fraud" (1991) 107 LQR 71, 85.
55 [1990] Ch 265, 293–295; cf *Powell v Thompson* [1991] 1 NZLR 597, 615 per Thomas J.
56 [1992] 4 All ER 769, 777 citing Vinelott J in Eagle Trust Plc v SBC Securities [1992] 4 All ER 488.
57 Birks, fn 53, 165.
58 [1914] AC 932.
59 *Day v Mead* [1987] 2 NZLR 443; *Mouat v Clark Boyce* [1992] 2 NZLR 559(CA); [1993] 3 WLR 1021 (PC).

I mention particularly the issues of concurrent duties, causation and remoteness, apportionment and remedial flexibility.

Concurrent duties

Frequently a fiduciary breach amounts to a common law wrong. Lawyers who fail to disclose interests or who give bad advice provide examples. *Mouat v Clark Boyce*[60] is a case in point. There the plaintiff was an elderly widow whose son wanted her to grant a mortgage over her home as security for a loan to be made to him. Her son's usual solicitors declined to act in the matter, and he took her to see a partner in the defendant firm with whom he had had some dealings previously. That solicitor told her she should have independent advice, but she said she did not want it and trusted her son. The solicitor then acted in the matter for both her and her son. He did not seek information on the financial state of either of them and did not discuss the matter with the widow in the absence of her son. Eventually the son defaulted on his obligations and became bankrupt. His mother was called upon to pay the money secured by the mortgage. She sued the firm of solicitors alleging negligence in tort and contract, and breach of fiduciary duty in equity. In the Court of Appeal the solicitor was held to be in breach of his obligations, although the plaintiff was held partly to blame for her own loss. Although Holland J's judgment was restored by the Privy Council,[61] the Court of Appeal's views remain instructive. Referring to concurrent duties Sir Robin Cooke said:[62]

> ... it would seem excessively legalistic to insist on concurrent duties. What is important is the substance of the duty falling on the particular defendant in the particular circumstances, to ascertain which it may be necessary to consider various possible sources — tort, contract, equity, statute. Once the substance has been identified, questions of breach and remedy remain.

This statement seems to suggest that the context of a case is all important. Where the same facts give rise to a common law and a fiduciary breach the remedy should reflect the nature of the breach in the context of the case as a whole. The advantages developed by equity through its presumptions, reversal of onus of proof and its ability to prevail over the common law's limitations on recovery should be afforded to a plaintiff if the particular breach demands them. Thus they should not be denied a plaintiff who has suffered through a breach directly related to the fiduciary's status as such. It should be otherwise where the breach has little to do with the defendant's status as a fiduciary. In this way courts are able to ensure that a plaintiff's remedy for a fiduciary breach is not disproportionate to that which the common law would provide; *unless* there is something in the manner of the fiduciary breach which justifies the difference.

Although these doctrinal advances are being worked out in the context of the allocation of loss, it may be that the recovery of profits will not escape the effects of this aspect of the intermingling of law and equity.

Causation and remoteness

Common law and equity have traditionally had different approaches to causation and remoteness. Common lawyers speak of the existence of a duty or contractual obligation and a breach which causes loss and is not too

60 See fn 59.
61 See fn 59.
62 [1992] 2 NZLR 559, 565.

"remote". Historically, equity has been content to leave the matter on the basis that the proper inquiry is whether the loss would have happened had there been no breach, not whether the loss was caused by or flowed from the breach. In conducting that inquiry equity has not been fettered by the requirements of foresight and remoteness. Once a loss is proved equity's response has been to demand restitution for breach of trust.

As fiduciary obligations have moved outwards from the trust paradigm, the immediate question is how these principles apply to breach of duty by non–trustee fiduciaries, where the controversy does not concern replacement of trust property. The breach of duty in these cases typically arises through a failure to give proper advice. Is the fiduciary in such circumstances liable for all ensuing losses?

The Supreme Court of Canada thought not in *Canson Enterprises Ltd v Boughton and Co.*[63] In that case the Court had to determine the extent of liability of a solicitor who, in handling a real estate transaction, failed to disclose to the purchasers a secret profit made by a third party. Was the solicitor to be responsible only for the losses directly flowing from the breach of duty itself, or was he also liable for loss caused by an intervening act unrelated to the breach? In *Canson* the plaintiffs sued the defendant firm of solicitors for failure to disclose a secret profit made by an intermediate vendor on a piece of land the plaintiffs had bought for development. The action arose because after conveyance of the property to the plaintiffs a warehouse built on it suffered considerable damage as a result of the negligence of soil engineers and pile drivers. Only part of the loss proved recoverable from these contractors so the plaintiffs looked to the solicitors for the balance, and for the secret profit.

The whole Court agreed that the solicitors should not be liable for loss that did not flow from breach of their fiduciary duty. There was disagreement, however, about how consequential losses should be governed in equity. The majority thought that a remoteness rule in equity should be developed "as if it were a common law matter or as justifying the use of its mode of analysis".[64] The minority rejected a simple analogy in the tort. Justice McLachlin preferring to "start from trust, using the tort analogy to the extent that shared concerns make it helpful."[65]

On examination it may be that neither tort nor trust law alone provides a clear way forward for the resolution of the remoteness problems posed by fiduciary breaches. No single remoteness rule may be apt, as the divergences of opinion in the Supreme Court seem to indicate.

One reason for this may be the exponential growth of the fiduciary principle. The courts have consistently set their face against any exclusive categorisation of such relationships: some being almost per se fiduciary, while others only generate fiduciary obligations through the actions and undertakings of the parties. As a result there is a rich diversity of fiduciary obligations. They may stem from status (which would seem to suggest a trust analogy); from agreement (which would tend to suggest a contract analogy), or by imposition (which would seem to suggest a tort analogy).[66]

63 (1992) 85 DLR (4th) 129.
64 Ibid, 148.
65 Ibid, 156.
66 J D Davies, "Compensation in Equity for Losses", (paper delivered at the Second International Symposium on Trusts, Equity and Fiduciary Relationships, University of Victoria, British Columbia, January 1993) 28.

Just as variable are the types of breach. Non disclosure of material facts, giving inaccurate advice and making a secret profit can all amount to fiduciary breaches. But does it inexorably follow that they should all be treated alike in respect of a remoteness rule?

The policy governing remoteness needs to reflect the particular obligations and breaches which have occurred. In other words it should be possible to look beyond the mere categorisation of the wrong as a breach of fiduciary duty to see its particular type of breach, then the extent of recovery will be related to that breach. The policy that will inform individual decisions will be one of determining the severity of remedy that is needed to prevent further breaches of particular obligations.

Apportionment of liability for loss

In *Day v Mead*[67] the New Zealand Court of Appeal developed the concept of equitable compensation for breach of fiduciary duty by importing into it the notion that, where appropriate, the plaintiff should accept some responsibility for his or her own loss. Mead was Day's solicitor. He advised Day to invest in a certain company in which he (Mead) was a director and shareholder. He omitted to tell Day, however, about certain management and financial difficulties the company was experiencing. This, together with his failure to refer the client to another solicitor, was held to be a breach of fiduciary duty. When Day's money was lost he was entitled to compensation, but not for his entire loss. The compensation was reduced as Day was partly the author of his own loss, Sir Robin Cooke saying:[68]

> [T]here appears to be no solid reason for denying jurisdiction to follow that obviously just course, especially now that law and equity have mingled or are interacting.

This has been criticised. Some commentators have taken the view that this development heralds substantive fusion which should be resisted.[69] As to this, it may be remarked that although the Court of Appeal referred to the Judicature Acts its conclusion was not necessarily dependent on them.

Other commentators make the point that a person to whom fiduciary obligations are owed should be able to rely on the fiduciary: "[t]he relationship is not at arm's length and the beneficiary is entitled to place trust and confidence in the fiduciary".[70] This argument may take too narrow a view of how unremitting the equitable duty of undivided loyalty is in practice, and give too little weight to the allocation of risks in a particular context.[71]

Day v Mead is an example of the Court's willingness to address common concerns of law and equity in a coherent manner. The fundamental issue is whether the part author of his or her own loss should recover in full. The common law originally said "no", but then modified its response, albeit by statute, to permit apportionment. The question is whether equity recognises a similar principle and reaches similar results through acquiescence and the application of the maxim that "he who seeks equity must do

67 [1987] 2 NZLR 443.
68 Ibid, 451.
69 See, generally, P Michalik, "The Availability of Compensatory and Exemplary Damages in Equity: A Note on the Aquaculture Decision" (1991) 21 VUWLR 391.
70 Handley J, "Reduction of Damages Awards" in P D Finn (ed), *Essays on Damages* (1992), 127.
71 J Beatson, *The Use and Abuse of Unjust Enrichment* (1992), 256.

equity". To insist that a concept such as contributory negligence must not invade equity's realm lest it subvert the fiduciary's duty of loyalty seems too draconian. Once equity rejects an unyielding insistence on restitutionary compensation permitting apportionment seems eminently sensible.

This development seems destined to extend beyond fiduciary breaches. In *Bowkett v Action Finance Ltd*[72] Tipping J has recently expressed the view that in a case of an unconscionable bargain equity ought to be able to apportion responsibility "if appropriate", by the imposition of conditions on the relief granted. "It need not in equity be an all or nothing affair.[73]"

Remedial flexibility

Few contend that Lord Diplock's remarks in the *United Scientific Holdings* case were intended to convey a view that relief by way of damages, awarded according to common law principles, is available in every case where there is a breach or violation of a purely equitable obligation. Nor that specific performance and injunction are more freely available through a mingling of common law and equity. To do so would be to engage in a "fusion" fallacy. Has the New Zealand Court of Appeal recently done this? The authors of the Australian text *Equity: Doctrines and Remedies* seem to think so.[74]

The series of cases which has so dismayed those authors has as its most recent member *Aquaculture Corporation v New Zealand Green Mussel Co Ltd.*[75] In that case the plaintiff claimed that the improper revelation of confidential information had injured its commercial prospects. The Court did not let the uncertain historical jurisprudence of the action for breach of confidence prevent its finding a suitable remedy. Sir Robin Cooke said:[76]

> For all purposes now material equity and common law are mingled or merged. The practicality of the matter is that in the circumstances of the dealings between the partners the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute.

But surely remedial flexibility is desirable. It eschews the historical distinctions of the law/equity divide, and thus the hierarchical approach to remedies. It admits the possibility of awarding the common law remedy of compensatory damages for breach of an equitable duty. Perhaps not as of right, but only when through the law's evolution it is appropriate. Thus an aspect of the dissenting judgment of Deane J in Hospital Products[77] may anticipate future developments. There he suggested that a constructive trust and liability to account as a trustee might be imposed where the defendant has engaged in a calculated breach of contract with a view to appropriating some benefit or advantage belonging to the plaintiff, for example, product goodwill. And such flexibility may also encompass the award of restitutionary damages for wilful breach of contract, as in the American case of *Y J D Restaurant Supply Co Inc v Dib*[78] where the plaintiff was awarded the defendant's profits after the defendant wilfully and deliberately broke the restraint of trade clause in his contract with the defendant.

72 [1992] 1 NZLR 449.
73 Ibid, 461.
74 Meagher, Gummow and Lehore, *Equity: Doctrines and Remedies* (1992 3rd ed), 66–67.
75 [1990] 3 NZLR 299.
76 Ibid, 301.
77 Hospital Products Ltd v U S Surgical Corp (1984) 156 CLR 41.
78 (1979) 413 NYS (2d) 835. See, also, Mason, op cit, n 24 at 25.

Of course, many matters still need to be worked out. Given that remedial flexibility suggests choice, are the plaintiff's wishes relevant? And how far are considerations such as the effect on the parties (punitively and economically), the effect on third parties and the enforceability of the remedies imposed to govern the courts' determinations? Further, a unified approach to remedies seems to demand a standard time period for all civil obligations.

CONCLUSION

It may be said that equity and law are indeed mingling. Although the details are not yet all clear, in substance and approach changes are occurring which should have long term effects. The only things not surviving the convergence of the waters are historical barriers which are inevitably becoming flotsam in the faster moving stream.