Causation in equitable compensation: but for test without novus actus interveniens?

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***Conv. 31* Abstract**

Various Claimants v Giambrone & Law (A Firm) (Giambrone) , *as a Court of Appeal decision, holds significant referential value for subsequent courts interpreting the rule established in AIB Group (UK) Plc v Redler (AIB) . However, current literature lacks a thorough examination of Jackson LJ's reasoning in Giambrone, particularly in his interpretation and application of the causation test. This article addresses this gap by identifying a discrepancy between Jackson LJ's judgment and the causation test employed in AIB . By examining this inconsistency, the authors highlight the areas where Jackson LJ's analysis diverges from the AIB rule and its potential implications for future cases.*

Introduction

Traditionally, equity addresses a trustee's liability for misappropriation of trust property through the accounting mechanism. However, the decisions in *Target Holdings Ltd v Redferns* (*Target*) [1] and *AIB Group (UK) Plc v Redler* (*AIB*) [2] signalled the English apex court's departure from the traditional accounting mechanism. Citing with approval Lord Browne-Wilkinson's famous statement in *AIB* that "equitable compensation is designed to … make good a loss in fact suffered by the beneficiaries", [3] both Lord Toulson and Lord Reed opined that certain principles of common law damages can be introduced in the assessment of a trustee's liability for the misapplication of trust funds. [4] The *AIB* decision thereby established a general rule that equitable compensation is unavailable where a trustee's breach has not caused losses to the trust fund (the *AIB* rule). ***Conv. 32*** [5]

From the perspective of *stare decisis*, it is unquestionable that "the [r]ules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute". [6] Upon closer examination of cases following *AIB*, it appears that the lower courts have consistently disregarded the *AIB* rule by utilising certain tactics, such as intentionally excluding or improperly interpreting the rule. [7] *Various Claimants v Giambrone & Law (A Firm)* (*Giambrone*) [8] is one such case. Being a Court of Appeal decision, *Giambrone* has referential significance for subsequent courts in their interpretations and applications of the *AIB* rule. The existing literature on *Giambrone* has mainly focused on the active-passive-duty distinction made by Jackson LJ; [9] how Jackson LJ applied the *AIB* rule to the facts in *Giambrone* has not yet been subject to in-depth scrutiny. This question is of scholarly and practical significance due to a discrepancy in his Lordship's ruling. While Jackson LJ stated in *Giambrone* that his Lordship had strictly followed the *AIB* rule, his Lordship's judgment contained a discrepancy between the application of the causation test in *Giambrone* and the causation test in *AIB*. It is unclear whether such a discrepancy was caused by Jackson LJ's misunderstanding of the *AIB* rule or by his Lordship's intentional choice. This short article fills the gap in the existing literature by examining this inconsistency. It identifies the areas where Jackson LJ's analysis departs from the *AIB* rule and the insights this departure might have for future cases.

The decision in the Court of First Instance

Giambrone [10] concerned an Italian real estate development project called JoTS, where RDV and Veco acted as developers and vendors and VFI as the promoter. JoTS attracted some potential buyers from England. These buyers entered into an off-plan purchase contract with the vendors in which they paid deposits for the purchase of the apartments before they were constructed. To protect such vulnerable buyers from the risk of the developers going bankrupt, [11] the Italian legislation Decree 122 required that vendors provide sureties issued:

"by a bank, insurance company operator or financial intermediaries registered in the special list described in Article 107 of the Consolidated Law on Banking and Credit … upon the conclusion of a contract which has the purpose of the [non-immediate] transfer of ownership or other real right of enjoyment of a property to be built. ***Conv. 33*** " [12]

Giambrone, the law firm representing the interests of the vendors, was involved in this purchasing scheme, undertaking the duty to retain the deposits paid by the buyers and to release them to the vendors only after guarantees compliant with Decree 122 were shown by the vendors. [13] The solicitors, however, paid out the money upon receipt of defective guarantees that did not meet the requirements of Decree 122. The construction of the apartments was delayed, and the whole project was suspended due to suspected money laundering. [14] The conditions required to trigger the guarantees were never met, and the buyers were unable to recover their deposits. [15] Upon a summary judgment application by the buyers, Foskett J considered Giambrone's paying the deposits upon receipt of non-compliant guarantees to be a breach of trust and awarded the full amount of the deposits to the buyers in the name of equitable compensation. [16]

The decision in the Court of Appeal

The causation test

Giambrone appealed the case to the Court of Appeal (CA), arguing that equitable compensation should be nil because the buyers would have recovered nothing even if guarantees duly compliant with Decree 122 had been obtained before the payment of the deposits. [17] To address the issue related to equitable compensation, Jackson LJ began by reviewing three authorities: *Canson Enterprises Ltd v Boughton & Co*, [18] *Target* and *AIB*. His Lordship cited with approval some paragraphs from *AIB* in which Lord Reed drew a comparison between equitable compensation and common law damages in relation to the issue of causation: [19]

"The foreseeability of loss is generally irrelevant, but the loss must be caused by the breach of trust, in the sense that it must *flow directly* from it. Losses resulting from unreasonable behaviour on the part of the claimant will be adjudged to flow from that behaviour, and not from the breach … Of course, the aim of equitable compensation is to compensate: that is to say, provide a monetary equivalent of what has been lost as a result of a breach of duty. At that level of generality, it has the same aim as most awards of damages for tort or breach of contract. Equally, since the concept of loss necessarily involves the concept of causation, and that concept in turn inevitably involves a consideration of the *necessary connection* between the breach of duty and a postulated consequence (and therefore of such questions as whether a consequence flows 'directly' from the breach of duty, and whether loss should be attributed to the conduct of third parties, or to the conduct of the person to whom the duty is owed)."

Here, it is clear that Lord Reed denied foreseeability as a relevant consideration in the assessment of equitable compensation but admitted the relevancy of *novus* ***Conv. 34*** *actus interveniens* (NAI) by emphasising that any loss covered by equitable compensation must "flow directly" [20] from the breach of the trustee rather than any intervening events attributable to third parties. The significance of causation between the breach of trust and the losses argued under equitable compensation was also emphasised in *Target*, where Lord Browne-Wilkinson remarked that "there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz. the fact that the loss would not have occurred *but for* the breach". [21]

In assessing equitable compensation, the *Target* and *AIB* decisions, when read together, give rise to two observations regarding the issue of causation. First, what is recoverable by equitable compensation must be losses that would not have occurred but for the breach of the trustee. To determine this, a hypothetical scenario in which the breach did not occur is to be constructed with reference to each case's facts, with any loss that would still have been suffered in the hypothetical scenario not being recoverable by equitable compensation (the but-for test). Secondly, even if a loss passes the but-for test—i.e. the loss would not have occurred but for the breach—this loss must still have flowed directly from the breach without any interruption of NAI in order to be recoverable under equitable compensation (the NAI test). In summary, the establishment of causation between a trustee's breach of duty and the loss suffered by a beneficiary recoverable under equitable compensation is a two-stage process consisting of the but-for test and the NAI test. Both tests must be satisfied before a loss can be recovered under equitable compensation.

The active-passive-duty distinction

Jackson LJ proposed an essential distinction between *Giambrone* and *Target* and *AIB*: whereas, in *Giambrone*, the solicitors' duty was to receive the guarantees provided by the developers and check their compliance, the solicitors in *Target* and *AIB* were obliged to take active steps to secure the guarantees (the active-passive-duty distinction). [22] It is common practice for judges to make factual distinctions between cases to justify deviations from principles established in those cases. [23] However, in *Giambrone*, the active-passive-duty distinction made between *Giambrone*, *Target* and *AIB* does not mean that Jackson LJ intended to exclude the application of the *AIB* rule. On the contrary, Jackson LJ held himself to have orthodoxly applied the but-for test under the *AIB* rule by drawing the following contrast: "In *Target* the plaintiff's claim failed on the "but for" test, and in the present case the claimants' claim passes the "but for" test". [24] Relying on the ***Conv. 35*** active-passive-duty distinction, his Lordship then explained how a different result from those in *Target* and *AIB* was reached: the solicitors were liable for the full monetary amount wrongly paid out in *Giambrone*, whereas the solicitors in *Target* and *AIB* were liable for only part or none of the money disbursed without authorisation, despite the exact same but-for test being applied in all three cases.

As Jackson LJ elaborated, [25] the solicitors' role in *Giambrone* was to check whether the guarantees provided by the developers were compliant with Decree 122 and to release the money only if such compliance was confirmed. In other words, the vendors were solely responsible for acquiring the compliant guarantees; the solicitors were merely guardians of the buyers' money and were not obliged to participate in obtaining the compliant guarantees. This understanding is supported by the retainer letter sent by Giambrone to the buyers cited in the judgment: "We will ensure that the Builders/developers or the Promoters will provide us with a copy of an "idejussione bancaria", which is now mandatory in certain circumstances". [26] After clarifying the nature and scope of the solicitors' duty, Jackson LJ formed the following hypothesis (*Hypothesis 1*): but for the breach, the deposits

would have been retained until the rescission of the contract and paid back to the buyers because the compliant guarantees that would trigger the release of the money never appeared. [27] Accordingly, the solicitors were liable for the full deposit amounts.

The reason Jackson LJ emphasised the passive nature of the solicitors' obligation is now clear: because of the passive nature of the solicitors' obligation in *Giambrone* in comparison to its active nature in *Target*, different assumptions were relied upon to construct the hypothetical scenarios for the but-for test. In *Giambrone*, the assumption was that the solicitors duly performed their passive duty to safeguard the money until the compliant guarantees were received. Therefore, because compliant guarantees were never received, the full deposit amounts should have been returned to the buyers. By contrast, in *Target*, the assumption was that the solicitors duly performed their active obligation to acquire the guarantees in the interest of the beneficiaries. Given that the intervening event responsible for the claimant's loss was the mortgagor's fraudulent inflation of the value of the mortgaged property, [28] the claimant would still have suffered the same loss even if the trustee had remedied their breach at a later stage of the transaction. [29] These differences in the duties of the solicitors in *Giambrone* and *Target* generated different hypotheticals, which explains why different consequences followed from the application of the same but-for test. The active-passive-duty distinction was not relied upon by Jackson LJ to justify his Lordship's deviation from the *AIB* rule; rather, it justified the different result arrived at in *Giambrone*, though the but-for test under the *AIB* rule had already been strictly adhered to in *Giambrone*.

Regarding the question of what would have happened but for the breach, *Giambrone*, the appellant, proposed an alternative hypothesis (*Hypothesis 2*) to Jackson LJ's: namely, that even if guarantees compliant with Decree 122 had been obtained before the release of the deposits, the buyers would still have lost the full ***Conv. 36*** amount of their deposits. [30] The statement itself is uncontroversial because the conditions that would trigger the intervention of the guarantors never took place in *Giambrone*, rendering the buyers' loss irrelevant to whether compliant guarantees were eventually acquired. [31] Despite its correctness, Jackson LJ did not accept this hypothesis when applying the but-for test. His Lordship did not offer any explanation why Hypothesis 2 ought not to be accepted. Nonetheless, analysis of Jackson LJ's reasoning reveals two grounds to support his Lordship's rejection of Hypothesis 2.

The first ground lies in the nature and scope of the duties of the solicitors. The solicitors in *Giambrone* were custodians only because they were only obliged to check the compliancy of the guarantees provided by the vendors; they were not obliged to proactively obtain the compliant guarantees. Therefore, any hypothesis based on the assumption of due acquisition of such guarantees was outside the ambit of the solicitors' obligation and so irrelevant to the application of the but-for test. The second ground echoes the reasoning of David Richards LJ in *Auden McKenzie (Pharma Division) Ltd v Patel* (*Auden Mackenzie*), [32] where his Lordship held that "[the courts in *Target* and *AIB* did not consider] hypothetical events, [but only] actual events which go to establish the quantum of the loss to the trust or its beneficiaries". [33] In *Auden McKenzie*, the hypothetical event arose where, if the unlawful payments had not been made, the directors (who were also the sole shareholders) would have directed the company to issue equivalent payments to them in the form of dividends. [34] Similarly, in *Giambrone*, the hypothetical event was that the vendors would have provided guarantees compliant with Decree 122. Since hypothetical rather than actual events were deemed irrelevant to the application of the but-for test, Jackson LJ's rejection of Hypothesis 2 was justifiable.

Consideration of NAI

If one only considers the but-for test when assessing equitable compensation, Jackson LJ's conclusion that the solicitors in *Giambrone* were liable for the full amount of the wrongly paid deposits makes perfect sense. However, as noted earlier, the causation test under the *AIB* rule comprises two subtests; the but-for test is only one of them. The NAI test must also be passed for a successful equitable compensation claim. In *Giambrone*, the fact that the buyers would have recovered nothing even if the compliant guarantees had been acquired is irrelevant to the but-for test. However, it is relevant to the NAI test because it bears upon the question of whether the loss of the deposits "flow[ed] directly from" [35] the solicitors' breach of duty. If the buyers would have lost their money anyway, the solicitors' breach of their custodian duty would have been neither a necessary nor sufficient condition for the loss. According to the facts in *Giambrone*, the loss of the deposits was completely attributable to the malpractice of the vendors and the involvement of the project in a suspected money laundering scheme. [36] These facts were sufficient ***Conv. 37*** to constitute NAIs because the chain of causation between the solicitors' breach of duty and the claimants' loss of deposits was clearly broken. [37] To sum up, the claimants' loss of the deposits successfully passed the but-for test, but it failed the NAI test inherent in the *AIB* rule. If both tests had been given sufficient weight by Jackson LJ in *Giambrone*, the observation that followed should have been that the solicitors in question were not liable for any of the losses suffered by the claimant.

It is noteworthy that, in his Lordship's analysis of the solicitors' liability, Jackson LJ compared equitable compensation with the contractual measure of damages, asserting that "[t]his is a case where equitable compensation and contractual damages run in tandem". [38] Jackson LJ did not provide any reasons for this assertion; accordingly, it is hard to see how his Lordship reached this observation. Existing contract scholarship has widely acknowledged that contractual damage claims are generally upheld when a party's breach has *effectively* caused the loss suffered by the other party. [39] Here, the *effective cause* requirement functions in the same way as the NAI test. In *Giambrone*, the effective cause of the buyers' loss of deposits, as explained earlier, was the malpractice of the developers and the inherent risks associated with the illegality of the development project rather than the solicitors' breach of duty. Therefore, even if *Giambrone* was judged on a purely contractual basis, the solicitors should still not have been held liable for any of the loss of deposits suffered by the buyers.

The effect of the Giambrone decision

The part of the *AIB* rule that emphasises the significance of NAI considerations in the assessment of equitable compensation was cited with approval by Jackson LJ. [40] However, in applying the *AIB* rule, Jackson LJ ignored the NAI-related factors and drew his conclusion with exclusive reference to the but-for test. It is unclear whether Jackson LJ's misinterpretation of the *AIB* rule caused this inconsistency or whether Jackson LJ deliberately chose to exclude considerations of NAI for some unexpressed reasons. In any event, in cases involving misappropriation of trust assets, Jackson LJ's reasoning places *Giambrone* in a liminal position between the traditional accounting rule and the modern principles of equitable compensation as formulated in *Target* and *AIB*.

When a breach of trust includes unauthorised disbursement of trust funds, the traditional accounting rule lays a strict liability on the wrongdoing trustee, who is "liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter". [41] As Lewison J remarked in *Ultraframe (UK) Ltd v Fielding*, "The taking of an account is the means by which a beneficiary requires a trustee to justify his stewardship of trust property. The ***Conv. 38*** trustee must show what he has done with that property". [42] Nevertheless, to mitigate the harshness of the rule that trustees are liable to recover the full amount of misapplied trust funds, [43] Lord Browne-Wilkinson in *Target*, as well as Lord Toulson and Lord Reed in *AIB*, have recognised equitable compensation as the principal personal remedy for the unauthorised disposal of trust funds. The equitable compensation remedy admits issues of causation when assessing the quantum of a trustee's liability, though foreseeability and remoteness are still excluded. Simply put, the crucial difference between the traditional accounting rules and the principles of equitable compensation formulated under *AIB* lies in whether causation questions—i.e. the but-for and NAI tests—matter.

The above analysis shows that the assessment of compensation under *Giambrone* is less strict than it is under traditional accounting mechanisms insofar as causation is completely irrelevant in the latter context. [44] On the other hand, the assessment of compensation under *Giambrone* is stricter than it is under the *AIB* rule: whereas the former only involves the but-for test, the latter involves consideration of both the but-for and NAI tests. Jackson LJ's understanding of causation in *Giambrone* is not unique. It also finds resonance in the Australian High Court decision of *McCann v Switzerland Insurance Australia Ltd*, [45] where Hayne J stated that: [46]

"regardless of whether the immediate cause of loss is the dishonesty or fraud of a third party, a fiduciary is bound to make good the loss to the trust estate which, but for the breach of fiduciary duty, would not have occurred. *That is the only relevant causal requirement. [T]here is no translation into this field of discourse of the doctrine of novus actus interveniens*."

In *Giambrone*, although Jackson LJ cited with approval Lord Reed's and Lord Toulson's statements in *AIB* regarding equitable compensation, [47] his reasoning in the assessment of the solicitors' liabilities—i.e. admitting the but-for test but excluding the NAI test (the simple but-for test)—is a marked deviation from the two-stage test under the *AIB* rule. Jackson LJ did not explain the rationale for this deviation, nor did he clarify the particular contexts under which the simple but-for test should replace the *AIB* rule's two-stage test when assessing a trustee's liability for the misapplication of trust funds. In a jurisdiction where formalist culture is predominant, [48] the ambiguities in the simple but-for test in *Giambrone* introduce ***Conv. 39*** confusions into the English legal system. In this context, the following questions arise: Does *Giambrone* reinterpret or qualify the causation test under the *AIB* rule? If so, why did such a reinterpretation take place, and how should the simple but-for test formulated

in *Giambrone* be applied? Absent clarifications of the confusions introduced by Jackson LJ, subsequent courts will struggle to answer these questions.

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Footnotes

1 *Target Holdings Ltd v Redferns [1996] A.C. 421; [1995] 3 W.L.R. 352*.
2 *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] A.C. 1503; [2014] 3 W.L.R. 1367*.
3 *Target [1996] A.C. 421* at 439.
4 *AIB [2015] A.C. 1503* at [63], [133].
5 R. Lee, "Substitutive Compensation for Breach of Trust: An Irrelevant Fairy Tale?" (2015) 9 Journal of Equity 94, 101; *J. Glister and J. Lee, Hanbury and Martin Modern Equity, 22nd edn (London: Sweet & Maxwell, 2018), p.632*; *P.G. Turner, "Want of Causation as a Defence to Liability for Misapplication of Trust Assets" in P.S. Davies, S. Douglas and J. Goudkamp (eds), Defences in Equity (Oxford: Hart Publishing, 2018), p.155*; M. Conaglen, "Equitable Compensation for Breach of Trust: Off Target" (2016) 40(1) Melbourne University Law Review 126, 159–60.
6 *Young v Bristol Aeroplane Co Ltd [1944] K.B. 718 at 729; (1945) 78 Ll. L. Rep. 6*. See also *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2002] EWCA Civ 1407 at [157]–[161]; [2002] 3 W.L.R. 1617*; *Williams v Glasbrook Brothers (1947) 2 All E.R. 884* at 885.
7 See, e.g. *Auden McKenzie (Pharma Division) Ltd v Patel [2019] EWCA Civ 2291 at [51]–[60]; [2020] B.C.C. 316*; *Various Claimants v Giambrone & Law (A Firm) [2017] EWCA Civ 1193 at [62]–[63]; [2018] P.N.L.R. 2*; *Interactive Technology Corp Ltd v Ferster [2018] EWCA Civ 1594 at [26]–[30]; [2021] W.T.L.R. 561*; *Davies v Ford [2021] EWHC 2550 (Ch)* at [105]–[106].
8 *Giambrone [2017] EWCA Civ 1193*.
9 *G. Virgo, The Principles of Equity & Trusts, 4th edn (Oxford: Oxford University Press, 2020), p.552*; S. Williams, "Equitable Compensation, Trustees, and Disobedience in the Court of Appeal" (2021) 13 Conveyancer and Property Lawyer 27–28.
10 *Various Claimants v Giambrone & Law (A Firm) [2015] EWHC 1946 (QB)*.
11 *Giambrone [2015] EWHC 1946 (QB)* at [302].
12 *Giambrone [2015] EWHC 1946 (QB)* at [122].
13 *Giambrone [2017] EWCA Civ 1193* at [21].
14 *Giambrone [2015] EWHC 1946 (QB)* at [33], [37].
15 *Giambrone [2017] EWCA Civ 1193* at [29]–[31].
16 *Giambrone [2017] EWCA Civ 1193* at [37].
17 *Giambrone [2017] EWCA Civ 1193* at [48].
18 *Canson Enterprises Ltd v Boughton & Co (1991) 85 D.L.R. 129*.
19 *Giambrone [2017] EWCA Civ 1193* at [58] (emphasis added).
20 *Giambrone [2017] EWCA Civ 1193* at [58]. Subsequent courts have frequently emphasised the requirement of "loss flowing directly from the breach of duty" when interpreting and applying the *AIB* rule. See, e.g. *Barrowfen Properties Ltd v Patel [2022] EWHC 1601 (Ch)* at [120]; *Maitland Hudson v Solicitors Regulation Authority [2017] EWHC 1249 (Ch)* at [53]–[58], [66]; *Gray v Smith [2022] EWHC 1153 (Ch)* at [390]; *ECU Group Plc v HSBC Bank Plc [2021] EWHC 2875 (Comm)* at [523]; *TMO Renewables Ltd (In Liquidation) v Yeo [2021] EWHC 2033 (Ch)* at [566].
21 *Target [1996] A.C. 421* at 434.
22 *Giambrone [2017] EWCA Civ 1193* at [60]–[61].

23 That may be the reason why some scholars have interpreted the active-passive-duty distinction in *Giambrone [2017] EWCA Civ 1193* as a generalised principle that can be relied upon to exclude the application of the *AIB [2015] A.C. 1503* rule. See, e.g. *Virgo, The Principles of Equity & Trusts (2020), p.552*; Williams, "Equitable Compensation, Trustees, and Disobedience in the Court of Appeal" (2021) 13 Conveyancer and Property Lawyer 27–28.

24 *Giambrone [2017] EWCA Civ 1193* at [63].

25 *Giambrone [2017] EWCA Civ 1193* at [60]–[62].

26 *Giambrone [2017] EWCA Civ 1193* at [21] (emphasis added).

27 *Giambrone [2017] EWCA Civ 1193* at [62].

28 *Target [1996] A.C. 421* at 426, 428.

29 *Target [1996] A.C. 421* at 436.

30 *Giambrone [2017] EWCA Civ 1193* at [48].

31 *Giambrone [2017] EWCA Civ 1193* at [47].

32 *Auden McKenzie [2019] EWCA Civ 2291*.

33 *Auden McKenzie [2019] EWCA Civ 2291* at [44].

34 *Auden McKenzie [2019] EWCA Civ 2291* at [9].

35 *AIB [2015] A.C. 1503* at [135].

36 *Giambrone [2017] EWCA Civ 1193* at [29].

37 *Giambrone [2017] EWCA Civ 1193* at [29].

38 *Giambrone [2017] EWCA Civ 1193* at [63].

39 *Shell International Petroleum Co Ltd v Gibbs [1982] Q.B. 946 at 995; [1982] 2 W.L.R. 745*; *Scottish Power UK Plc v Talisman North Sea Ltd [2016] EWHC 3569 (Comm)* at [12]. See also *A. Burrows, "Limitations on Compensation" in A. Burrows and E. Peel (eds), Commercial Remedies: Current Issues and Problems (Oxford: Oxford University Press, 2003), p.27*; *M. Chen-Wishart, Contract Law 6th edn (Oxford: Oxford University Press, 2018), pp.526–27*; H.R. Gray and D. Thompson, "The Measure and Remoteness of Damages" (1953) 16(4) Modern Law Review 518, 519.

40 *Auden McKenzie [2019] EWCA Civ 2291* at [59].

41 *Permanent Building Society (in liquidation) v Wheeler (1994) 14 ACSR 109* at 163.

42 *Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch) at [1513]; [2006] F.S.R. 17*. See also *Jervis v Harris [1996] Ch. 195 at 203; [1996] 2 W.L.R. 220*; *Lehman Brothers International (Europe) (In Administration), Re [2009] EWHC 2141 (Ch)* at [53]; S. Elliott, "Compensation Claims Against Trustees" PhD Thesis, Faculty of Law, Oxford University, 2013, 169; *Turner, "Want of Causation as a Defence to Liability for Misapplication of Trust Assets" in Davies, Douglas and Goudkamp, Defences in Equity (2018), pp.156–57*.

43 According to Man and Lee, an implicit "commercialist pragmatism" appears to be the explanation for the decisions in *Target* and *AIB*: "The English abolition of the accounting rules—in particular, the falsification of account—is silently reforming the core obligation of trusteeship. More generally, as we argue here, it is symptomatic of a primacy of commercialist pragmatism in the Supreme Court's reasoning. Quite clearly, the Supreme Court's objective in *AIB* was to simplify the remedial rules for breach of trust". See Y. Man and J. Lee, "The Commercialisation of Equity" (2017) 37(4) Legal Studies 647, 657.

44 Conaglen, "Equitable Compensation for Breach of Trust: Off Target" (2016) 40(1) Melbourne University Law Review 126, 139. See also *Jervis v Harris [1996] Ch. 195* at 203; *Lehman Brothers International (Europe) (In Administration), Re [2009] EWHC 2141 (Ch)* at [53]; Elliott, "Compensation Claims Against Trustees" PhD Thesis, Faculty of Law, Oxford University, 2013, 169; *Turner, "Want of Causation as a Defence to Liability for Misapplication of Trust Assets" in Davies, Douglas and Goudkamp, Defences in Equity (2018), pp.156–57*.

45 *McCann v Switzerland Insurance Australia Ltd (2000) 20 3 C.L.R. 579*.

46 *McCann (2000) 20 3 C.L.R. 579* at [135] (emphasis added).

47 *Giambrone [2017] EWCA Civ 1193* at [52]–[58].

48 *J.H. Baker, An Introduction to English Legal History, 5th edn (Oxford: Oxford University Press, 2019), p.60*.

