

## *Equitable Compensation Workshop*

### **The Chancellor's Chameleon: Origins and Species of Equitable Compensation**

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## Equitable Compensation: Key Points

- Definition: A personal monetary award ordered by Court pursuant to its equitable jurisdiction
- Available, *inter alia*, for:
  - Breach of trust and dishonest assistance
  - Breach of fiduciary duties and equitable duty of skill and care
  - Breach of confidence
- Nature of equitable compensation is context specific
- Essential to bear in mind origins as remedy following account and distinction between substitutive/reparative compensation

## Account: Historical Perspective

- Compensation/damages historically the preserve of the common law courts
- Taking of accounts developed in chancery
  - Initially a means of enforcing stewardship liabilities of trustees
  - Now available against all who hold assets in a custodial capacity

## The Nature of an Account

- An account is an evidential process:

*“...an order for an account does not in itself provide the plaintiff with a remedy; it is merely the first step in a process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be good”*

- There is no need to establish a breach of duty to obtain a common account

*per Lord Millett NPJ in *Libertarian Investments Limited v Hall* [2014] 1 HKC 368 at [167][168]*

# EQUITABLE REMEDIES IN COMMERCIAL LITIGATION

## Equitable Compensation following an Account

- On a common account the Court will:
  - **Falsify** any unauthorised disbursement
  - **Surcharge** any receipt that has not been accounted for
  - **Substitutive** equitable compensation *may* be ordered requiring fiduciary to make good deficit
- Account on the basis of wilful default:
  - Fund **surcharged** to reflect what position would have been if the defendant had performed his duty
  - **Reparative** equitable compensation akin to payment of compensation for breach of duty *may* be ordered

## Right to Elect

*“At every stage the Plaintiff can elect whether or not to seek a further account or inquiry. The amount of any unauthorised disbursement is often established by evidence at the trial, so that the plaintiff does not need an account but can ask for an award of the appropriate amount of compensation. Or he may be content with a monetary award rather than attempt to follow or trace the money, in which case he will not ask for an inquiry as to what has become of the trust property. In short, he may elect not to call for an account or further inquiry if it is unnecessary or unlikely to be fruitful, though the court will always have the last word” Per Lord Millett NPJ in *Libertarian* at [172]*

## Equitable Compensation in the Absence of an Account

- Evidential tools available to the Court in the absence of an account:
  - Treat false statements by the fiduciary as to what has become of assets as true even when known not to be true
  - Make every assumption against a party whose conduct has deprived it of necessary evidence
  - Do *“rough and ready justice without having to justify the amount of its award with any degree of precision”*

*Per* Lord Millett NPJ in *Libertarian* at [174]  
(*see also* Ribeiro P.J. at [138]–[139] but  
n.b. differing approach to causation at  
[113], [122] and [126])

## Equitable Compensation in the Absence of an Account

- For custodial fiduciaries, substitutive/reparative distinction ought to be, but is often not, observed

*Target Holdings v Redferns* [1996] 1 AC 421;  
*AIB Group Plc v Mark Redler & Co (A Firm)* [2014] UKSC 58; cf. *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15; *Re Paycheck Services 3 Ltd* [2010] 1 WLR 2793

- For breaches of duty by non-custodial fiduciaries, reparative equitable compensation is more common
- Causation tests for reparative equitable compensation are appropriately context specific (*Then Khek Koon v Arjun Permanand Samtani* [2013] SGHC 213)