effect on the claimant, as *Barclays* itself demonstrated. We are concerned not with the casual use of contractors, for instance in ad hoc transport or cleaning operations, but with the integration of the contractor in the employer's business. That was so in earlier cases such as *Cassidy* [1951] 2 K.B. 343, which confirmed the overall responsibility of a hospital for all aspects of its activities, and *Woodland* which generalised that approach in at least limited circumstances. Those cases addressed the reality of modern business practice, and the justice of making an operator liable however he outsources his actual operations. The relationship between Barclays and Dr. Bates fell within that compass. Dr. Bates was the only practitioner used by Barclays, was obliged to complete a pro forma report supplied by Barclays, and featured in the recruitment process on a regular and recurring basis.

The Supreme Court thus had an opportunity to build on the earlier jurisprudence by holding that that the independent contractor rule, formulated in very different social circumstances, cannot prevail in the particular case when the contractor is part and parcel of, and integral part of, the employer's business. That that opportunity was not taken, indeed was rejected in detailed terms that do not admit of any modification or qualification, means that in this respect the law of vicarious liability departs from the realities of modern life.

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MORE DISQUIET WITH EQUITABLE COMPENSATION

IN *Auden McKenzie (Pharma Division) Limited v Patel* [2019] EWCA Civ 2291 the Court of Appeal was presented with a novel question in a claim for equitable compensation. The facts were simple. Patel, as director of Auden, had caused Auden to pay out over £13 million for no value, against sham invoices, for the benefit of Patel and his sister. They were the sole directors and controlled all the shares, so it was assumed as fact that they could have compelled Auden to distribute those same funds to them in any event by legal means. After the wrongdoing, all the shares were sold and Auden brought these claims against Patel.

Putting "equitable" in front of "compensation" seems to invite parties to advance arguments they would not otherwise think of running. Had this been an ordinary compensation case, the defendant would surely never have dreamt of arguing that "even if I had not taken your £13 million, you would have given it away, so you have suffered no loss". This was Patel's broad assertion. It goes to the heart of equitable compensation,

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and the ends it is designed to deliver. His narrower assertion was that "even if I had not taken your £13 million, I would have obtained these funds anyway, and the company would have lost them, so the same payments would have been made to the same people and it does not serve justice to make me repay them now". Perhaps surprisingly, the Court rejected the broad assertion as not even arguable, but accepted the narrow version as difficult but arguable. On an appeal from a summary judgment, the Court was not required to go further and decide the point.

Equitable compensation has generated heated debate ever since the decisions in *Target Holdings v Redferns* [1996] A.C. 421 and *AIB Group (UK) plc. v Mark Redler & Co.* [2014] UKSC 58, [2015] A.C. 1503. Academics have not helped matters, and nor have certain judicial explanations. No one disputes that fiduciaries such as Patel may be subjected to money remedies for three broad categories of breaches: unauthorised disposal of the assets under their management; wrongful management of those assets (e.g. failures to exercise due care); and disloyalty (i.e. profit-generating breaches of the fiduciary's duty of loyalty).

Patel's breach clearly fell into the first category. This was also the relevant category in *Target* and *AIB*, and is unquestionably the most troubling category. The confusion is surprising, especially given the clear assertion in *AIB* that any analysis of remedial consequences must start with a precise understanding of the obligation which has been breached *and the detailed performance requirements demanded by it*. It then follows ineluctably that the value difference between the actual flawed performance and the hypothetical compliant performance indicates the quantum of equitable compensation, subject only to what is said below on timing.

Despite this, debates and complications abound, all seemingly rooted in three common distractions which can completely sidetrack proper analysis. Each caused the Court of Appeal to pause, but perhaps not to clarify sufficiently.

The first distraction comes from accounting terminology. An unauthorised disposition is "falsified" – a line is drawn through the disbursement in the accounts – and the defendant is ordered to make good the deficit. This is powerful imagery, and a superficial reading suggests that what was taken out should still be there (its removal has a line through it), so making good the deficit involves putting that sum back into the fund (see at [32]). But that is not what is done: see *Target*, *AIB* and also *Libertarian Investments Ltd. v Hall* [2013] HKCFA 93.

The second distraction is similar, and sourced in the "good man" theory of fiduciaries. Its principal advocate is Lord Millett, and in *Libertarian*, at [168], he reiterated his view that this first category of breach is not designed to remedy loss at all: it is not compensatory, but restitutionary or restorative (or substitutive, adopting still more modern terminology), designed to force the defendant to make good the deficit produced when the claimant falsifies the unauthorised disbursement (at [35]). This alleged differentiation between quantification approaches in the first and second categories of breach is doubted. But, that aside, again the imagery in this first category suggests giving back or restoring what was removed. But this is clearly not what Lord Millett meant, as the outcome in *Libertarian* makes plain.

The final distraction is misleadingly described as one of timing (at [41]–[43]). Two quite distinct issues are in play, both relating more to obligation than to timing. The central rule is that the quantum required to make good the deficit is assessed at the date of judgment, not the date of breach (*Re Dawson (dec'd)* [1966] 2 N.S.W.R. 211; *Target*, p. 437). This rule exists because the fiduciary's duty in respect of funds under his management is a continuing duty, so the valuation risk lies with him. The fiduciary bears the risk that reinstatement may be more onerous by the time it is actually delivered (or perhaps less onerous, but note *Libertarian* at [171]).

The second and supplementary time rule is that quantum is assessed without "stopping the clock" and with the full benefit of hindsight and common sense (*Target*, pp. 437, 439; *Libertarian*, at [168]). This is again about obligation, not timing. It is the corrector of any sloppy misconceptions arising from the accounting and "good man" distractions. If there is no "stopping the clock", then the relevant hypothetical for "making good the deficit" on a falsification or substitutive performance analysis is not simply that the fiduciary *would not have disposed of the assets* without authority, but that the fiduciary *would have done with those assets what his duty required him to do*. In *Target* and *AIB*, property would have been purchased with a particular level of security protecting the loan funds; in *Libertarian*, the funds would have been used to purchase shares, some of which would then have been resold at a substantial profit.

All these distractions drive home yet again the one utterly compelling principle underpinning the Supreme Court judgment in *AIB*: the courts in *Dawson*, *AIB*, *Target* and *Libertarian* each enforced to the letter the respective obligations owed by the defaulting fiduciaries. In each case the court considered what had actually been done wrongfully and compared that with what would have obtained if the fiduciary had dealt with those assets *precisely as his duty obliged him to do*.

Two conclusions emerge very clearly from this. First, there is no suggestion in either *Target* or *AIB* (or in *Dawson* or *Libertarian*) that those courts are qualifying or relaxing "the previously strict application of the obligation of a trustee to restore to the trust fund the value of any assets transferred" (at [38], [49]). Indeed, to the contrary. The relevant rule never was invariably "to put back the value of what had been taken out": it was "to put back the value of what should have been there". And that duty was enforced by the courts to the letter.

The second conclusion relates to the counterfactuals or hypotheticals used by the court in assessing "what should have been there". The actuality of what was done by the fiduciary with the relevant assets is contrasted with the entirely imagined hypothetical counterfactual of perfect performance (contra at [44], [45]). Moreover, the *hypothetical* is concerned only with what the *fiduciary* was *obliged* to do with the relevant assets.

This is why Patel's broad assertion must fail. It is irrelevant to the assessment of quantum. Patel's obligation required him *not* to pay out £13 million on sham invoices; it did not go further and require him to use that £13 million to deliver some prescribed end. It follows that the relevant hypothetical counterfactual is that if Patel had complied with his duty, the £13 million would still have belonged to Auden at the time it was wrongfully paid out, and would have been available to Auden to use at its discretion. It is not to the point that *Auden* might have chosen to give these funds away in any event. That counterfactual is irrelevant: if A takes £100 from B, it affords A no defence to insist that even if she had not taken the funds, B would have given them away in any event. Nor is it relevant that Patel, with his sister, controlled Auden's discretion, and so could have acted without breach to ensure Auden paid out £13 million in some legal way to Patel and his sister. That counterfactual too is irrelevant: it is no defence to a claim of wrongdoing to insist that the same ends could have been (but were not) achieved legitimately.

Given this robust conclusion, why did the Court then go on to hold that Patel had a arguable defence in his narrower assertion that justice would not be served by requiring him to refund £13 million if, absent his breach, the same sums would have been transferred to him and his sister? The Court was clearly hesitant (at [59], [64]), but found in Patel's favour on the basis that *Target* and *AIB* "demonstrate a willingness … to develop the equitable remedies … and, where required to do what is practically just, to entertain some departure from the strict obligation of … fiduciaries to restore the funds under their control" (at [60]). It is one thing to ensure practical justice in assessing the proper scope of a fiduciary's duty and the appropriate counterfactuals to assess losses or gains. But it is quite another to relax the traditionally strict duties imposed on fiduciaries in their management of assets on behalf of others, and especially to do so for reasons that are conceded to have no bearing on the assessment of liability.

The more principled approach to Patel's assertion is surely that "justice would not be served" only if it required Patel to make payments to Auden that delivered no practical benefit, because Auden would either ratify the wrongs or immediately return the compensation payment. If those were realistic scenarios, then the court would adjourn the hearing to enable the company to take the relevant decisions. Here, however, that outcome is impossible. Auden could never have ratified sham transactions designed to defraud HMRC; and although Auden might have re-delivered the compensation payment when the company was under the control of Patel and his sister, it is no longer in that position. Patel's assertion may well be arguable, but it is difficult to see how it could succeed.

It is often said that equity is difficult, demanding law, yet here it might be hoped that equitable compensation is both less difficult and more demanding than it would otherwise seem.

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"BIT-PROPERTY"

AA v Persons Unknown [2020] 4 W.L.R. 35 is the first English judgment that explicitly and at length recognises bitcoins as property. Bitcoin is a virtual or cryptocurrency launched in 2009 that enables the peer-to-peer exchange of electronic "coins". These bitcoins are data that contain the bitcoin's transactional history, but are rivalrous because each bitcoin, individually or partially, may be associated with a single "digital wallet". This association occurs via a decentralised, digital public ledger known as the Blockchain and in this respect bitcoin is different from traditional or "fiat" currency because these "coins" are transferred from user to user without mediation by a trusted third party. The Blockchain, in essence, by verifying transactions and ensuring problems of fraudulent double-spending are overcome substitutes cryptographic proof for trust. While bitcoin and other cryptocurrencies eliminate the need for mediation by financial institutions, a growing number of cryptocurrency exchange platforms have emerged, where users may "store" their digital wallets, and are like broker-dealers which enable users to trade in different cryptocurrencies and to convert cryptocurrencies into fiat currencies. Although its users treat cryptocurrencies such as bitcoin as a valuable commodity and bitcoins as a medium of exchange, it is a one of a series of disruptive technologies, which fall outside established categories at common law.

In his classic statement in *Colonial Bank v Whinney* (1885) 30 Ch.D. 261, 285, Fry L.J. divided personal property into neat boxes of *choses* in possession and *choses* in action. However, so-called "cryptoassets", such as bitcoins, can neither be possessed because they are intangible, nor, like a debt, can they be enforced against a specific individual. Instead, bitcoins might be described as "intangible assets" which are definable, possess economic value and which may be traded. However, while intangible they are not a right against which another person owes a correlating duty. Therefore, cryptoassets fall outside the dichotomy in *Whinney*. Yet, in recent years, there has been a growing recognition that since bitcoin's users treat bitcoins as having economic value and as transferrable, the law should classify bitcoins as property. This is meant also to guard against fraud. (e.g. Sir Geoffrey Vos, "Cryptoassets as Property: How Can English

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