While employing reasonableness of consumer choice to query the defectiveness of products is alien to the relevant legislation, such a consideration can be incorporated into a firmer legal test that honours the intentions of the CPA and the Directive. Any appropriate test for defectiveness must allow recovery for harm caused by products as a strict matter. To craft a test that cleaves to this feature of product liability while incorporating information from consumer behaviour, it is helpful to enquire into the consequence of classifying an instance of harm as flowing from a defect: it distributes the economic effect of the instance of harm across all consumers of the product, rather than placing it all upon any person unfortunate enough to suffer harm. Such a spreading of consequences occurs when, in response to being held liable for harm caused by a defective product, a producer either modifies its practices to avoid the defect or raises the cost of the product (or, if the defect cannot be cured in a cost-effective manner, withdraws it from the market, either by choice or by producer bankruptcy). Identification of a "defect", therefore, should be understood as a cost-spreading measure akin to producer-sponsored insurance. It ensures that a person who loses the game of "Russian roulette" (*NBA* at [65]) when harmed by a product does not solely bear the effects of such misfortune.

Courts, therefore, should decide if a product is defective by enquiring if it is appropriate to insulate a person who happens to be harmed by a product from his or her bad luck. This approach synthesises the virtues of *NBA* (its provision of analytical structure to courts and parties) and *Wilkes* (its simplicity and lack of superfluous categories), remains faithful to the CPA and the broader purposes of contemporary product liability, and provides courts with clearer guidance in making judgments about product defects. It serves the intention of the CPA by focusing on the nature of the product rather than the conduct of the parties, yet can incorporate considerations such as a consumer's role in bringing about the harm (as was apparently at play in *Wilkes*). Most importantly, it gives courts a touchstone regarding when a product should be deemed defective, thus facilitating consistency in the law and providing an alternative to frustratingly particularised judgments.

JACOB EISLER

Address for Correspondence: Jesus College, Cambridge, CB5 8BL, UK. Email: jme42@cam.ac.uk

THE RECOVERY OF GAINS FROM A FIDUCIARY'S MISUSE OF TRUST FUNDS

SUPPOSE a trustee misapplies trust funds to purchase property for his own benefit. If the acquired property increases in value, what is the nature of the beneficiaries' claim in respect of those gains? This was recently considered

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by the Hong Kong Court of Final Appeal in *Tang v Tang* [2017] HKCFA 3. In 2003 the administrator of an estate (the defendant) purchased property (the "Property"). The purchase was partly funded by the unauthorised use of HK $11.48 m from the estate. Shortly afterwards, the defendant executed a declaration of trust over the Property in favour of his corporate vehicle, Tri-Strong Investment Ltd. The Property was subsequently transferred to this company. Seven months after acquiring the Property, the defendant paid the estate the full amount that had been withdrawn together with interest. In 2005 the estate beneficiaries discovered the defendant's misuse of estate money and commenced proceedings alleging breach of fiduciary duty. By the time the matter was heard, the Property had increased significantly in value.

The defendant argued that the sum withdrawn from the estate was a bridging loan and that he had discharged his liability to the estate by repaying this sum in full. The trial judge accepted that the transaction was a loan. However, the defendant was in breach of fiduciary duty and was ordered to account to the estate for the value of gains attributable to use of the estate funds. The trial judge refused to grant proprietary relief and this was not pursued on appeal. Instead, the plaintiff claimed a proportionate share of the defendant's profits. The Hong Kong Court of Appeal ([2015] HKCA 523; [2016] 1 H.K.L.R.D. 302) rejected the trial judge's finding that the transaction was a loan but affirmed that the defendant had breached his fiduciary duty to the trust.

The Court of Appeal characterised the defendant's gain as profit deriving from a breach of fiduciary duty. Liability was conditional on establishing a causal nexus between the breach of duty and the defendant's gain. Citing authorities such as *Target Holdings Ltd. v Redferns* [1996] 1 A.C. 421, it was noted that in granting equitable compensation the court must be satisfied that the loss would not have occurred but for the breach. By analogy, a similar rule applied where the fiduciary had made a profit (see R.A. Havelock, "Account of Profits and Mixed Funds" [2016] L.M.C.L.Q. 332, where this reasoning is persuasively challenged). On the present facts there was sufficient proximity and the defendant's appeal was dismissed.

The defendant's further appeal to the Hong Kong Court of Final Appeal was also dismissed. Writing the judgment of the Court (Ma C.J., Ribeiro and Fok P.JJ., Chan and Lord Millett N.P.JJ.), Lord Millett N.P.J. considered that the Court of Appeal had misconceived the nature of the case. It was erroneous to treat this as a claim for secret profits, which typically involves the diversion of a business opportunity from the principal or the receipt of a benefit, such as a bribe, from a third party. Such conduct gives rise to a conflict of interest or a breach of the profit rule (at [14]). His Lordship stated that *Tang* can be understood on a much simpler basis. This was a straightforward case of a breach of trust by a fiduciary who had made a personal profit by using the principal's funds for his

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own purposes (at [15], [27]). Causation was not relevant. The enquiry, properly framed, is that where trust funds have been misapplied, the defrauded beneficiaries can elect whether to reject or affirm the transaction. In *Tang* the Property had increased in value. The plaintiff affirmed the transaction and claimed a proportionate share of the gain.

Several points arise. First, the rejection of the defendant's attempt to categorise the misappropriation as a loan is entirely consistent with principle. Absent the beneficiaries' informed consent, a trustee cannot unilaterally extract a personal benefit from the trust. To rule otherwise would be to ignore the strictures of the profit rule. Moreover, on the facts of *Tang*, this would stultify the trust's ability to claim profits attributable to the use of its own assets or their substitutes.

Secondly, the Court of Appeal's reasoning reflected the uncertainties surrounding pecuniary relief in equity. Since *Nocton v Ashburton* [1914] A.C. 932 much has been said about the nature of equitable compensation. The role of causation and limiting principles has attracted intense scrutiny (see for example, *AIB Group (UK) plc v Mark Redler & Co.* [2014] UKSC 58; [2015] A.C. 1503). Less attention has been directed to the nature of gain-based relief, although it is generally held that causation is irrelevant or at least profoundly marginalised with respect to an account of profits (*Gwembe Valley Development Co. Ltd. v Koshy* [2003] EWCA Civ 1048; [2004] B.C.L.C 131, at [145], *Stevens v Premium Real Estate Ltd.* [2009] NZSC 15; [2009] 2 N.Z.L.R. 384, at [32]). However, such considerations must be set aside where gains derive from misuse of trust property. The Court of Appeal's failure to draw this distinction produced the right answer to the wrong question. As noted, where trust money has been misapplied to purchase property, the beneficiaries can elect to reject or affirm the transaction (*Tang*, Court of Final Appeal at [18]). In affirming the transaction, the purchase is essentially treated as an authorised act. By definition, gains deriving from the claimant's property, or interest in property, belong to the claimant.

Thirdly, the Court of Appeal categorised the defendant's gain as an account of profits to which a "but for" test of causation applied. This is philosophically inconsistent with fiduciary doctrine. A test of causation affords a means of avoiding disgorgement even if profits are made in the course of a fiduciary relationship or derived from trust property. This undermines the function of profit-stripping in deterring breach of fiduciary duty and removing the economic incentive for betraying a position of trust (*Boardman v Phipps* [1967] 2 A.C 46, *Regal (Hastings) Ltd. v Gulliver* [1967] 2 A.C. 134n). The imperative is particularly pronounced when a trustee exposes trust property to risk (*Warman International Ltd. v Dwyer* (1995) 182 C.L.R. 544, 561). Moreover, traditionally, an account of profits is subject to allowances in the court's discretion. This seems

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anomalous in cases like *Tang*, where gains are the product of the plaintiff's capital rather than the defendant's labour.

Fourthly, this discussion is underpinned by the parallel narrative of an account of administration. Trustees are accounting parties who can be required to render an account of receipts and disbursements in respect of the administration of the trust. The accounting exercise is not a remedy but a vehicle for enforcing performance of an obligation. Causation and limiting principles are irrelevant because the principal is not alleging loss. This is merely a procedural step to establish the state of accounts. While loss to beneficiaries and a trust account deficit have obvious similarities, they are conceptually distinct. As Lord Millett N.P.J. observed in *Libertarian Investments Ltd. v Hall* (2013) 16 H.K.C.F.A.R. 681, at [168]: "Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative."

If an account of administration discloses an unauthorised disbursement, the principal can falsify or affirm it. Thus, if (contrary to the fact) the trustee in *Tang* had acquired a wasting asset, the plaintiff could have falsified the unauthorised entry. The disbursement would then be disallowed and the trustee would be required to make good the deficit. An account can also be surcharged on the ground that the trustee has failed to account for the receipt of a trust asset or its fruits (see further M. Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" (2016) 40 M.U.L.R. 126, at 130, 143). Alternatively, an account can be challenged on the ground that the trustee failed to obtain all the assets of the estate. In this event, the plaintiff can surcharge the account on the basis of wilful default and obtain a credit for any omissions. Another option, considered above, is that an unauthorised act may be advantageous to the trust, in which case no objection need be taken and the trust may adopt the transaction. Of the various scenarios, only wilful default (irrelevant on the facts of *Tang*) involves issues of causation and proof of loss (*Agricultural Land Management Ltd. v Jackson (No 2)* [2014] WASC 102; (2014) 285 F.L.R. 121, at [339], [347]). Thus, the election to falsify or not falsify an account underlies the proprietary reasoning in *Tang*, where the basic remedial options with respect to an abuse of property rights were to affirm or disaffirm the impugned transaction. Although a similar outcome is achieved, each has a distinct focus. A proprietary interest is the foundation of a substantive claim to recover assets or their value and any derivative gains, whereas an account of administration enforces the personal liability of accounting parties in respect of unauthorised disbursements.

Tang is a further illustration that causation and limiting principles fit uneasily within the scheme of equitable wrongs. This is particularly evident in relation to the unauthorised disbursement of trust property. In this sphere

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at least, the law's primary focus is the vindication of property rights. This is manifested through a continuing beneficial interest in misapplied funds. Alternatively, when a transaction is falsified, the trustee's liability as an accounting party is strict. The consistent theme is that for well rehearsed policy reasons, the trust's performance interest must be rigorously enforced. *Tang* is a cogent reminder of this principle.

PETER DEVONSHIRE

Address for Correspondence: Faculty of Law, University of Auckland, 17 Eden Crescent, Auckland, New Zealand. Email: p.devonshire@auckland.ac.nz

ECONOMIC TORTS IN THE CONFLICT OF LAWS

IN *AMT Futures Ltd. v Marzillier* [2017] UKSC 13; [2017] 2 W.L.R. 853, the Supreme Court had to decide where a "harmful event" occurred in order to determine whether the English court had jurisdiction over the defendant, Marzillier, a German lawyer. AMT brought an action in England against Marzillier for inducing breaches of contracts made between AMT and their European clients. Although the client contracts contained an exclusive jurisdiction clause in favour of the English courts, Marzillier had encouraged the clients to bring actions against AMT in Germany. The claims were made under German law of delict alleging that AMT were accessory to the bad investment advice given by the clients' brokers. The brokers were insolvent. The German claims were brought directly against AMT and AMT settled. It had lost on the jurisdiction question in Germany because the exclusive jurisdiction clause did not bind the clients. They were consumers. Additionally, the actions were in tort and therefore did not fall within the scope of the clause. AMT brought this action in England after paying over £2m in settlement and costs in Germany. AMT argued that Marzillier had deprived AMT of the benefit of the contractual exclusive jurisdiction agreement by inducing the clients to sue in Germany. Marzillier, a defendant domiciled in Germany, could only be sued in England if the harmful event occurred here. Lord Hodge J.S.C., giving a beautifully clear judgment, held that the case could not be heard in England. England was not the place where the harm occurred, despite payment out of an account in England and the alleged breach of the exclusive English jurisdiction agreement. He held that Germany was the place where the harm occurred under what is now Article 7(2) (ex Article 5(3)) of the Brussels I Regulation Recast (Regulation EC No 1215/2012).

The place where harm or damage occurs is an important connecting factor in conflict of laws for choice of law and jurisdiction purposes both under the European regimes and under the national rules. The courts where "the harmful events occur" have special jurisdiction in Article 7(2) Brussels I

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