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CAUSATION AND ACCOUNT OF PROFITS FOR BREACH OF FIDUCIARY DUTY

Murad v. Al-Saraj
Tripole Trading Ltd. v. Prosperfield Ventures Ltd.

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I. INTRODUCTION

Although fiduciary rules were originally developed in the context of a trust institution, their applicability has been extended to fiduciaries generally. Ever since the classic exposition of the strictness of fiduciary rules by the House of Lords in *Regal (Hastings) Ltd. v. Gulliver*,[1] the law has recognised the vulnerability of a fiduciary relationship and the core duty of fiduciary loyalty.[2] Equity has historically responded to breaches of fiduciary duty by gain-stripping responses, notably disgorgement of profits. While this equitable jurisdiction has been consistently applied by Anglo-Commonwealth courts, the issue of how fiduciary gains are to be quantified, in particular whether the scope of relief is affected by principles of causation and remoteness, has only been brought to the fore recently.[3]

Recently, the Hong Kong Court of Final Appeal in *Tripole Trading Ltd. & Ors. v. Prosperfield Ventures Ltd. & Anor.*[4] implicitly recognised the relevance of causation in a breach of fiduciary duty and its ensuing gain. This, however, runs counter to the decision of *Murad v. Al-Saraj*,[5] in which the English Court of

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1 [1967] 2 A.C. 134 (H.L.) [*Regal (Hastings)*].

2 See further Matthew Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 119 L.Q.R. 452.

3 On the contrary, there are more lively judicial debates and academic analyses on the relationship between causation and equitable compensation. See for example *Target Holdings Ltd. v. Redferns,* [1997] 1 A.C. 412 (H.L.); *Swindle v. Harrison,* [1997] 4 All E.R. 705 (C.A.); *Ohm Pacific Sdn. Bhd. v. Ng Hwee Cheng Doreen,* [1994] 2 S.L.R. 576 (C.A.); *Low Hua Kin v. Kumagai-Zenecon Construction Pte. Ltd.,* [2000] 3 S.L.R. 529 (C.A.). See also J.D. Davies, "Keeping Fiduciary Liability within Acceptable Limits" [1998] Sing. J.L.S. 1; Steven Elliott, "Remoteness Criteria in Equity" (2002) 65 M.L.R. 588; and Charles Rickett, "Equitable Compensation: Towards a Blueprint" (2003) 25 Syd. L.R. 31.

4 [2006] H.K.E.C. 14, [2006] 1 H.K.L.R.D. 200 (C.F.A.) [*Tripole*].

5 [2005] EWCA Civ. 959, [2005] W.T.L.R. 1573 (C.A.) [*Murad*]; noted Mitchell McInnes, "Account of Profits for Breach of Fiduciary Duty" (2006) 122 Law Q. Rev. 11.

Appeal examined directly for the first time whether such a causal link was required in quantifying fiduciary gains, and rejected its relevance.

This note examines these two contrasting cases and argues that while *Murad* fails to grasp the golden opportunity to discuss the relevance of causation in quantifying fiduciary gains, *Tripole*, though recognising its relevance, dismissed the issue on a perfunctory analysis. It is suggested that orthodox authorities on fiduciary accountability and the strictness of fiduciary rules do not embrace a broad proposition that causation is irrelevant in attributing responsibility to a breach of fiduciary duty. At the same time, it is imperative to embark upon further discussions on the applicable rules of causation and remoteness in this largely unexplored area.

II. The Relevance of Causation

A. *Tripole Trading Ltd. v. Prosperfield Ventures Ltd.*[6]

Mr. James Peng held a controlling interest in a company which he founded and controlled, namely, Shenzhen Champaign Industrial Corporation ('SCIC'), through a web of companies, including the plaintiff companies, Prosperfield Ventures Limited and Panco Industrial Holdings Limited. SCIC was listed on the Shenzhen Stock Exchange in March 1990.

Shortly thereafter, the Shenzhen regulatory authorities began investigations into SCIC's affairs, which culminated in the suspension of its trading. In order to rescue SCIC, Mr. Peng invited Madam Ding, a niece of the late Deng Xiao Ping, and a Mr. Zheng (an assistant to Madam Ding) to join as directors of the plaintiff companies. However, in breach of their fiduciary duties owed as directors to the plaintiff companies, Madam Ding and Mr. Zheng, on behalf of the plaintiff companies, entered into two agreements in June 1993 with China Projects Ltd. ('CPL') and Tripole Trading Ltd. ('Tripole'). Both CPL and Tripole were controlled by the defaulting directors. The two agreements purported to divest Mr. Peng of his shareholdings in the plaintiff companies by transferring, for illusory consideration, their entire assets (including shares in SCIC) to CPL and Tripole.[7] Later in December 1993, the Shenzhen Government issued a directive to restructure SCIC and redistributed SCIC's shares in the restructured company. CPL was allotted substantial shares in the restructured company, half of which without payment of any subscription price. The plaintiffs therefore sought to recover the profits (in the form of the gratuitously-allotted shares) from CPL.

The plaintiffs succeeded at trial[8] on the basis that the June agreements had been completed and hence SCIC shares had been transferred out of the plaintiff companies to CPL. The trial judge also addressed the defaulting directors' argument that their breach of fiduciary duty was not the cause of their gain. To him, this argument was

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[6] *Tripole*, *supra* note 4. The case is discussed in detail in Section III, *infra*.

[7] *Tripole*, *ibid.* at paras. 8-10.

[8] *Prosperfield Ventures Ltd. v. Tripole Trading Ltd. & Ors.*, (27 January 2004), HCA 5370/1993 & HCCL 98/1995, [2004] H.K.E.C. 88 (C.F.I.) (Deputy High Court Judge Carlson) [*Tripole* (C.F.I.)].

really of "a last resort,"[9] and had to be rejected because the association between the defaulting directors' breach and their acquisition of SCIC's shares was apparent:

> I am satisfied that *but for* what had been done unlawfully by Madam Ding and Mr. Zheng they would not have been in a position to demonstrate to Shenzhen that their company [CPL] was the owner, through Panco [one of the plaintiff companies], of over 50% of SCIC's shares.[10]

The Court of Appeal agreed. However, before the Court of Final Appeal, it was common ground that the June agreements were not carried into effect and accordingly CPL had never obtained any shares thereunder. The Court therefore considered whether there could be "a possible alternative basis of liability"[11] on causation, namely, whether but for the breach, CPL would not have been allotted the shares by the Shenzhen authorities. The Court held on the facts that CPL would have been allotted SCIC shares in any event, and so any breach of fiduciary duty was not the cause of the gain.

Despite the reversal of the decisions of the trial judge and the Court of Appeal by the Court of Final Appeal, *Tripole* illustrates that at all levels, the Hong Kong courts recognised (albeit without detailed analysis) the relevance of causation between a breach of fiduciary duty and its ensuing gain;[12] proof of the causal link only failed on the facts before the Court of Final Appeal. The position is, however, less clear as we move to the English jurisdiction.

B. *Murad v. Al-Saraj*

This case involved a hotel venture between Al-Saraj and the Murad sisters. Al-Saraj approached the Murad sisters to purchase a hotel for £4.1 million, of which £1 million was to be paid by the Murad sisters, £500,000 by Al-Saraj and the balance by way of a bank loan. The parties also agreed to a 50:50 profit sharing basis should the hotel be resold in future. Although Al-Saraj represented to the Murad sisters that he would make his £500,000 contribution by cash, he failed to disclose that he was only making this contribution by offsetting certain unenforceable obligations (including secret commissions for introducing the Murad sisters to the venture) due from the vendor.

The trial judge held that Al-Saraj breached his fiduciary duty owed to the Murad sisters in relation to the joint venture by failing to disclose the set off arrangement

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[9] *Ibid.* at para. 93.

[10] *Ibid.* [emphasis added].

[11] *Tripole*, *supra* note 4 at paras. 61-66 (Riberio P.J. and Litton N.P.J.). Note that *Murad* (which was decided before the Court of Final Appeal heard *Tripole* in December 2005) was not cited to the Court of Final Appeal.

[12] See further the Hong Kong case of *Kao, Lee & Yip v. Koo Hoi Yan & Ors,* [2003] 3 H.K.L.R.D. 296 (C.F.I.) where the defendant solicitors breached their fiduciary duties owed to their former solicitor firm by setting up a new firm whilst still working for the former firm and subsequently diverted business to their new firm. Ma J. commented (at 340) that "…when dealing with an account of profits as regards business opportunities, the Court's approach must necessarily be flexible. The key is to remember at all times the critical inquiry which emphasises [the] need to focus on causation and remoteness when examining the link between breach of duty and the gain." Although this case was concerned with disgorgement for diversion of a maturing business opportunity, there seems to be no valid reason why the same analysis could not be applied to a case where a gain is made from other breaches of fiduciary duty. After all, the corporate opportunity doctrine is derived from the wider 'no-conflict' and 'no profit' fiduciary rules.

to them. The hotel was eventually sold for a profit of £2 million, and the trial judge held that Al-Saraj should disgorge all his profits. Al-Saraj appealed. The appeal turned on an important finding of the trial judge, that had the set off arrangement been disclosed, the Murad sisters would still have agreed to go ahead with the joint venture but demanded a higher profit share.[13] Having so found, Al-Saraj argued that the account of profits should have been "limited to the profits obtained by [the] breach of fiduciary duty — namely, the difference between the 50% agreed under the [profit share agreement], and that sum which the [Murad sisters] would have agreed with full knowledge."[14]

Thus, the issue of whether there had to be a causal link between the profit and the breach arose directly on the facts of *Murad*. Arden and Jonathan Parker L.JJ. rejected Al-Saraj's contention. Arden L.J. formulated the issue in terms of whether Al-Saraj should only be liable for the loss incurred by the Murad sisters as a result of the non-disclosure.[15] Their Lordships answered this question in the negative and required Al-Saraj to disgorge all his profits, subject to an allowance for his services and disbursements,[16] on the following grounds:

(1) that causation was irrelevant and this was supported by authorities which suggested that the plaintiff's position was irrelevant in quantifying a defendant's gain for breach of fiduciary duty; and
(2) that causation was irrelevant on the basis of the strict fiduciary rules of equity to achieve a policy of deterrence.

The dissenting judge, Clarke L.J., also agreed that equity's inflexible fiduciary rules would require Al-Saraj to account for all the profits. But to him the issue was whether there was any room for "flexibility." Relying, *inter alia*, on *Warman International Ltd. v. Dwyer*,[17] he held that it was open for the court to consider whether it was equitable to order the defaulting fiduciary to account only for a proportion of the profits.[18]

In order to ascertain the relevance of causation in attributing responsibility for a breach of fiduciary duty, an examination of each of Arden and Jonathan Parker L.JJ.s' above-mentioned propositions is in order.

1. *Causation Irrelevant Under Existing Law?*

Arden L.J. referred to *Regal (Hastings)*'s statement that liability to account did not depend on whether the plaintiff could have made the profit.[19] From this observation,

[13] See *Murad v. Al-Saraj,* [2004] EWHC 1235 (Ch. D.) (Etherton J.) at para. 287, quoted by Arden L.J. in *Murad*, *supra* note 5 at para. 12.

[14] See Al-Saraj's ground of appeal, as set out in *Murad*, *supra* note 5 at para. 15.

[15] See Arden L.J.'s formulation of Al-Saraj's case, *ibid.* at para. 8.

[16] *Murad*, *ibid* at para. 88.

[17] [1994-1995] 182 C.L.R. 546 (H.C.A.) [*Warman International*].

[18] *Murad*, *supra* note 5 at paras. 153-4 and 159-60. It is submitted that Clarke L.J. failed to offer a principled analysis of why equitable notions might provide a satisfactory resolution of the case. Clarke L.J.'s decision is discussed in Section III.B.2(b), *infra*.

[19] See proposition (1) of Arden L.J.: "the liability of a fiduciary to account does not depend on whether the person to whom the fiduciary duty was owed could have himself made the profit," citing *Regal (Hastings)* and *Warman International*: *Murad*, *supra* note 5 at paras. 59-61. Lord Russell's statement is reproduced in the text accompanying note 20, *infra*.

her Ladyship concluded that a causal inquiry between the breach and the gain was not called for in discussing accountability for breach of fiduciary duty according to *Regal (Hastings)*:

> …it follows in my judgment from the *Regal* case that it is no defence for a fiduciary to say that he would have made the profit even if there had been no breach of fiduciary duty.[20]

It is true that *Regal (Hastings)* did hold that liability to account did not depend on what the plaintiff's position would have been. However, it is submitted that *Regal (Hastings)* did not preclude a causal inquiry between the breach and the gain for the following reasons: (a) that Lord Russell's statement was not made in the context of a causal inquiry; (b) that, at any rate, a proper causal inquiry was not ruled out by *Regal (Hastings)*; and (c) that causation was indeed satisfied on the facts of *Regal (Hastings)*. Each of these will be discussed in turn.

(a) *The context in which Lord Russell's statement was made*: In *Regal (Hastings)*, the directors acted in what they in good faith considered to be the best interests of the company in personally purchasing shares of the subsidiary. The issue was whether they nevertheless had to disgorge the profits made out of the shares obtained by them. The lower courts were particularly concerned with whether the *bona fides* or absence of fraud on the part of the directors would exonerate them from liability.[21] It was in response to this specific issue about the relevance of the fiduciary's *fides* that the following oft-quoted statement of Lord Russell was made:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, *in no way depends* on fraud, or absence of *bona fides*; or *upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff* … The liability arises from the mere fact of a profit having, in the stated circumstances, been made.[22]

His Lordship was of the view that liability for breach did not depend upon the *fides* of the defaulting fiduciary. Reading Lord Russell's statement in context, his Lordship was not addressing the issue of causation as such. Arden L.J. was citing his statement out of context to conclude that the irrelevance of the plaintiff's position in the fiduciary's liability to account must necessarily mean that a causal inquiry between the breach and the gain would also be precluded.

(b) *A proper causal inquiry was not precluded by Regal (Hastings)*: It is submitted that Lord Russell, though elucidating a strict fiduciary rule, did not deny any counterfactual inquiries required of a 'but for' causation test.[23] It is the words italicised

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[20] *Murad*, *supra* note 5 at para. 67. See also *United Pan-Europe Communications NV v. Deutsche Bank AG*, [2002] 2 B.C.L.C. 461 (C.A.) where Morritt L.J., referring to *Regal (Hastings)*, stated (at para. 47): "… I can see no justification for any further requirement that the profit shall have been obtained by the fiduciary 'by virtue of his position'. Such a condition suggests an element of causation which neither principle nor the authorities require."; and Geoffrey Vos, "Linking Chains of Causation: an Examination of New Approaches to Causation in Equity and the Common Law" (2001) 60 C.L.J. 337 at 350.

[21] *Regal (Hastings)*, *supra* note 1 at 143G (quoting judgment of the trial judge); 144F (quoting judgment of Lord Greene MR of the Court of Appeal).

[22] *Regal (Hastings)*, *supra* note 1 at 144G–145A [emphasis added].

[23] According to the counterfactual approach, a cause is anything that makes a difference that would not have occurred without it. See also H.L.A. Hart & Tony Honoré, *Causation in the Law*, 2nd ed. (Oxford: Clarendon Press, 1985) at 29.

in the quotation above which may lead one to suppose that any nexus between the breach and its ensuing gain is unnecessary. However, what Lord Russell referred to was "whether the profit would or should otherwise have gone to the *plaintiff* (emphasis added)," but not whether the profit would or should otherwise have gone to the *defendant*. In quantifying the defendant's liability to account, the causal inquiry, if any, to be made is not between the defendant's breach and the plaintiff's gain (as in causation relating to a tortious duty or equitable compensation), but between the defendant's breach and *his* ensuing gain.[24]

This is also evident from the different terminology applicable to different remedies. The remedial response to breach of equitable (fiduciary) duties aims to take away the defendant's gain by way of disgorgement of profits and it applies regardless of any loss suffered by the plaintiff. This is different from a compensatory response (such as equitable compensation or common law damages) where the aim is to make good the plaintiff's loss. In other words, in the context of stripping a defendant of his fiduciary gains, causation is a defendant-sided inquiry; what happened or would have happened to the plaintiff is irrelevant to this inquiry. Lord Russell's statement in *Regal (Hastings)* at most denied an inquiry into what would have happened to the plaintiff company in the absence of the directors' breach. One cannot derive from this statement the proposition that an inquiry into the defaulting fiduciary's position would also be precluded, which Arden L.J. suggested.

(c) *Causation was satisfied in Regal (Hastings)*: Thus, a causal inquiry involves proof of a nexus between the breach and the *defendant's* gain (as opposed to the *plaintiff's* gain). It is submitted that *Regal (Hastings)* did support such a causal link in terms of defining causes as necessary conditions.[25] Lord Russell accepted that the profits could only be made from one single cause, namely, "*by reason and only by reason of the fact that they were directors of Regal and in the course of* the execution of that office."[26] This suggests a causal limitation.[27] Admittedly, the Law Lords

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[24] The same point was also alluded to in a recent Canadian decision in *Canada Inc. v. Strother* (2005), 38 B.C.L.R. (4th) 159 (C.A.). In that case, the defendant solicitor, Mr. Strother, pursued a business after advising his client, Canada Inc., that it could not continue its business in the same area because of changes in certain tax laws. Although Canada Inc. suffered no loss, the Court of Appeal held that he was accountable for all profits received by Strother directly or indirectly from the business venture. Newbury J.A. noted the necessity for a causal connection between Strother's breach and his gain. Strother was only required to disgorge profits made in consequence of his breach of duty. But the necessity for a causal connection did not mean that a plaintiff had to prove that 'but for' the breach, he would not have made the profits in question (at para. 47). In other words, a causal inquiry was required, but that inquiry was not a plaintiff-sided one.

[25] As to whether necessary conditions are an adequate test, see Section III.B.1, *infra*.

[26] *Regal (Hastings)*, *supra* note 1 at 149F [emphasis added] (Lord Russell). See also 145F (Lord Russell); 153C-D (Lord MacMillan): "by reason and in virtue of their fiduciary office as directors" and 154B-C (Lord Wright): "by reason of his fiduciary position, and by reason of the opportunity and the knowledge, or either, resulting from it." See also *Swain v. Law Society*, [1982] 1 W.L.R. 17 (C.A.) (reversed on appeal on different grounds) at 38 (Oliver L.J.) and 49 (Fox L.J.) which also emphasised the link between the profit and the fiduciary office. Oliver L.J.'s analysis was endorsed by Lord Brightman (with whom the other Law Lords concurred) in *Swain v. Law Society*, [1983] A.C. 598 (H.L.) at 619E.

[27] See further, R.P. Austin, "Fiduciary Accountability for Business Opportunities" in P.D. Finn, ed., *Equity and Commercial Relations* (Sydney: The Law Book Co. Ltd., 1987) at 149-150. Professor Austin noted that Lord Russell suggested a causal limitation ("by reason of") and a temporal limitation ("in the course of") to the fiduciary profits. But it should be noted that he focused on the causal link between the profit and the office (*i.e*. the *capacity* of the defendants as directors), rather than the causal link between the profit and the breach.

in *Regal (Hastings)* did not expressly address the issue of whether the directors' *breach* had to be a *necessary* ('but for') condition of their gain. Yet this necessity test was satisfied on the facts. By reason of and only by reason of the opportunity and the knowledge resulting from their fiduciary position,[28] the defendant directors, in breach of their fiduciary duty, subsequently realised a profit on the sale of the shares. In other words, but for the breach, the directors would not have obtained a profit. Therefore, Lord Russell's statement could equally be interpreted to mean that 'but for' causation was required (and was impliedly satisfied on the facts of *Regal (Hastings)*, rendering his discussion of this aspect unnecessary).

In many cases, just as in *Regal (Hastings)*, there is usually only one *single* cause,[29] being the breach, for the gain. It is therefore not surprising that there is little discussion of the requirement, if any, of causation in quantifying fiduciary gains. Indeed, so long as there is only one cause for the gain, nothing turns on whether causation is relevant. With the proliferation of more complex situations in which a fiduciary relationship may arise, there may be *multiple* causes for the ill-gotten gain, with the result that the issue of causation will become germane. By denying the relevance of causation in the determination of the defaulting fiduciary's breach and his gain, one may have conclusively presumed that the gain necessarily follows the breach.

2. *Formulating the Issue for Causal Inquiry*

It is now clear that a causal inquiry is not precluded under existing law. Causation in fiduciary accountability, properly understood, is concerned with a nexus, if any, between a defendant's breach and *his* ensuing gain, rather than the *plaintiff's* gain. The failure to recognise this distinction has fraught judges with difficulties in appreciating the relevance of causation. This was also the mistake made by Arden L.J. in *Murad* in applying *Regal (Hastings)* to arrive at her conclusion.

The facts of *Murad* should be considered carefully. It must be observed that a distinctive feature of this case was that because of the profit share agreement between the parties, the effect of the trial judge's finding (that had there been full disclosure the Murad sisters would have agreed to a different profit share) was that had the ill-gotten gains not gone to Al-Saraj, they would have gone to the Murad sisters instead. In other words, the defendant's gain corresponded to the plaintiffs' loss. For this reason, Arden L.J. formulated the issue in terms of whether the defendant, Al-Saraj, should only be liable for the *loss* to the Murad sisters as a result of the non-disclosure.[30] Her Ladyship then applied the principle in *Regal (Hastings)* that fiduciary accountability did not depend on whether the profit would or should otherwise have gone to the *plaintiff* or whether the *plaintiff* had suffered any detriment[31] to come to the logical

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[28] *Regal (Hastings)*, *supra* note 1 at 145C (Lord Wright) and 149F (Lord Russell).

[29] The word 'cause', in its legal sense, means a causally relevant condition to which the law chooses to attribute legal responsibility. See further Section III.B, *infra*.

[30] See Arden L.J.'s formulation of Al-Saraj's case in *Murad*, *supra* note 5 at para. 8. This means that if, for example, had there been full disclosure, the Murad sisters might have agreed to only a 30% share of profits by Al-Saraj. The difference of 20% would represent the loss incurred by the Murad sisters as a result of Al-Saraj's non-disclosure.

[31] See also the passage in *Warman International*, *supra* note 17, cited by Arden L.J. in *Murad*, *supra* note 5 at para. 61.

conclusion that to limit Al-Saraj's liability to the loss suffered by the Murad sisters was inconsistent with the authority of *Regal (Hastings)*.[32] Likewise, Jonathan Parker L.J. relied on *Parker v. McKenna*[33] to hold that Al-Saraj's contention was "directly contrary to long-standing authority in [the English] jurisdiction."[34] Yet it was only on the special facts of *Murad* that the plaintiff's gain/loss corresponded to the defendant's. In most other breach of fiduciary duty cases, there is no such correlation: the profit is usually reaped either by the defaulting fiduciary and his principal simultaneously or not at all.[35] A coincidence is only exceptional.

Had Arden L.J. been able to apprehend this distinguishing feature of *Murad*, she might have formulated the issue, not in terms of the Murad sisters' gain or loss (*i.e*. a plaintiff-sided inquiry), but in terms of whether Al-Saraj should only be liable for the gain obtained by his breach (*i.e*. a defendant-sided inquiry). This would have led to proper consideration of whether there needs to be a causal nexus between a defendant's breach and *his* ensuing gain in the context of fiduciary accountability. Her Ladyship would have then been able to look more closely at the relevant orthodox authorities.

3. *Causation Irrelevant in Ensuring Deterrence?*

The second ground relied on by Arden and Jonathan Parker L.JJ. to conclude that causation was irrelevant was equity's imposition of stringent fiduciary liability as a matter of policy to ensure deterrence.[36] This policy of deterrence operated in two main ways. First, in the words of Arden L.J.:

> *For policy reasons*, the courts decline to investigate hypothetical situations as to what would have happened if the fiduciary had performed his duty.[37]

Second, according to Jonathan Parker L.J., the deterrent nature of fiduciary rules would leave no room for flexibility so far as the fiduciary was concerned.[38] Hence, Al-Saraj was required to disgorge all his profits made from the joint venture.

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[32] *Murad*, *ibid.* at para. 80.

[33] (1874-75) L.R. 10 Ch. App. 96 (C.A.).

[34] *Murad*, *supra* note 5 at para. 100. It is submitted that properly understood, the inflexible rule laid down in *Parker v. McKenna* only precludes an inquiry as to "whether the *principal* did or did not suffer any injury" (per James L.J., *ibid.* at 124). As discussed above, this was not the causal inquiry required in the context of quantifying fiduciary gains.

[35] For example, in *Regal (Hastings)*, *supra* note 1, both the defaulting directors and the plaintiff company realised profits on the sale of the shares of the subsidiary.

[36] See *Murad*, *supra* note 5 at para. 74. Arden L.J.'s proposition (2) was that "when awarding equitable compensation, the court does not apply the common law principles of causation" (at para. 59). She justified this proposition on the prophylactic operation of fiduciary rules and seemed to suggest that the same principle applies to an award of account of profits.

[37] *Murad*, *supra* note 5 at para. 76 [emphasis added]. Arden L.J. then cited a passage of Lord Wright from *Regal (Hastings)* to support her Ladyship's view that courts would not engage in hypothetical inquiries. Lord Wright stated at 154G that "[n]or can the court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person being charged. They are matters of surmise; they are hypothetical because the inquiry is as to what would have been the position if that party had not acted as he did…." It is submitted that this passage did not support Arden L.J.'s proposition. It is clear from the context in which this passage was set out that the "matter" referred to by Lord Wright was what the *principal's* position would otherwise have been. As suggested above, this has no bearing to the proper causal inquiry.

[38] See the judgment of Jonathan Parker L.J. in *Murad*, *supra* note 5 at paras. 108, 121 and 129.

Does a policy of deterrence preclude a causal injury? According to Professor Austin, the prophylactic operation of fiduciary rules may explain the traditional lack of concern with the relevance of rules of causation in quantifying fiduciary gains.[39] Although the notion of prophylaxis has been used in some cases to justify the imposition of stringent proscriptive rules and allow a more plaintiff-friendly approach to remedies in equity, it is submitted that the prophylactic approach is not inconsistent with the consideration of a causative element between the defaulting fiduciary's breach and his gain. This can be illustrated by the well-known case of *Boardman v. Phipps*.[40]

In *Boardman v. Phipps*, one of the trustees had already decided not to enter into the transaction in question. There was thus no actual conflict between the defendant solicitor's duty owed to the trust and his personal interest when the solicitor entered into the transaction himself. However, in the course of their judgments, their Lordships made a counterfactual calculation that the *trustees* might enter into the transaction and thus seek legal advice from the solicitor, whence the solicitor who had entered into the transaction himself would not be able to give independent legal advice because of this hypothetical (as opposed to real or sensible) conflict of duty and interest. The majority thought that the result of this counterfactual inquiry as to whether the trustees would have made a profit but for the solicitor's gain was irrelevant to the liability of the solicitor: even though there was only a hypothetical conflict, the solicitor still breached his fiduciary duty. The case has been cited as an illustration of equity's adoption of a prophylactic approach to fiduciaries.[41]

Thus, it can be seen from *Boardman v. Phipps* that the notion of prophylaxis operates to preclude any counterfactual inquiry in which a defaulting fiduciary may be exonerated. But this (precluded) counterfactual inquiry only relates to what the *plaintiff's* position would have been in had there been no breach; it does not operate to preclude a counterfactual inquiry in terms of the *defendant's* breach and his gain.

Indeed, this understanding is consistent with the constituent elements of legal responsibility. It is trite law that the grounds on which our law imposes responsibility can be classified according to three criteria, namely, (i) the conduct of the person; (ii) the causal connection between the conduct and the result; and (iii) fault.[42] The strictness and prophylactic operation of fiduciary rules are concerned with what *conduct* may amount to a breach of fiduciary duty. We know from *Boardman v. Phipps* that courts are not concerned to investigate the circumstances of the breach at this stage. On the other hand, even if liability for breach of fiduciary duty is strict, the word 'strict' is used in contradistinction with fault-based liability to illustrate that it

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[39] See R.P. Austin, *supra* note 27 at especially 177-180. See also James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Hart Publishing, 2002) at 83.

[40] [1967] 2 A.C. 46 (H.L.). The case was cited in *Murad*, *supra* note 5, by Arden L.J. (at para. 69), Jonathan Parker L.J. (at para. 104) and Clarke L.J. (at para. 130). See also David Hayton & Charles Mitchell, *Hayton & Marshall's Commentary and Cases on the Law of Trusts and Equitable Remedies,* 12th ed. (London: Sweet & Maxwell, 2005) at para. 9.21.

[41] For example, Professor Birks cited this case to illustrate that the strictness of a fiduciary's duty to avoid conflicts of interest "consists precisely in the hypothetical nature of the inquiry": Peter Birks, *An Introduction to the Law of Restitution*, rev. ed., (Oxford: Clarendon Press, 1989) at 333. See also Rod Edmunds & John Lowry, "The No Conflict-No Profit Rules and the Corporate Fiduciary: Challenging the Orthodoxy of Absolutism" [2000] Journal of Business Law 122 at 130.

[42] See H.L.A. Hart & Tony Honoré, *supra* note 23 at xliv.

is not necessary to prove *fault* on the part of the defaulting fiduciary, and so does not entail a dismissal of the relevance or applicability of causation rules. Alternatively, expressing strict liability in terms of causation, it means that causing gain to another by certain conduct is a sufficient condition of liability. The element of a *causal connection* between the conduct and the result still persists.[43]

4. *Summary*

The above analysis shows that the existing authorities, in particular *Regal (Hastings)*, do not preclude a causal inquiry between a defendant's breach and his gain from being made. Besides, a causal inquiry is also consistent with the strictness of fiduciary rules. *Murad* presented a timely opportunity for the court to visit this largely unexplored territory of causation. Unfortunately, the majority failed to appreciate its peculiar facts and caused confusion as to what the proper causal inquiry should have been. Not only did this lead to the Court of Appeal injudiciously applying orthodox authorities to arrive at their conclusion, it also caused the court to fail to take the occasion to either clarify the law or add judicial insights to the debate.[44]

III. Causation and Legal Responsibility

Contrary to the explicit rejection of causation in the determination of fiduciary accountability by *Murad*, the Court of Final Appeal in *Tripole* implicitly recognised the relevance of causation.

A. *Causation and Tripole*

The facts of *Tripole* have been set out above.[45] It will be recalled that in breach of their fiduciary duty, the defaulting directors, Madam Ding and Mr. Zheng, attempted to transfer the plaintiffs' shares in SCIC to a company (CPL) in which they were interested. Although the impugned agreements were not carried into effect, the Shenzhen Government subsequently restructured SCIC and allocated shares in the restructured company to CPL. While the Hong Kong Court of Final Appeal rightly recognised the relevance of causation, it rejected the existence of a causal link on the facts.

It is submitted that this conclusion was only arrived at from a perfunctory analysis of the law and facts. With regard to the facts, the Court held that it was not pleaded that the Shenzhen authorities acted on the impugned agreements to provide the causal link between the breach and the shares of the restructured company. Even if this had been pleaded, CPL might well have been able to give other plausible explanations for the allocation.[46] In short, the Court suggested that there might be other reasons for

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[43] Though strict liability may influence the description of the defendant's conduct and ease proof of a causal connection: H.L.A. Hart & Tony Honoré, *supra* note 23 at xlv.

[44] For a contrary view, see Vicki Vann, "Causation and Breach of Fiduciary Duty" [2006] Sing. J.L.S. 86 at 92-100.

[45] See Section II.A, *supra*.

[46] Such as by reference to the fact that CPL's parent company, China Weal Limited, had invested substantially in the plaintiff companies (which held shares in SCIC). For this reason, there might be "good commercial sense" for CPL to be treated favourably in the restructuring: *Tripole*, *supra* note 4 at para. 66.

the allocation other than the defaulting directors' breach. In so holding, however, the Court seemed to have ignored the finding of the trial judge that CPL only obtained the opportunity to participate in the restructuring because it produced the impugned agreements to the Shenzhen authorities and represented that it had acquired the plaintiffs' shares in SCIC.[47] This finding was not challenged by the defendants on appeal, and was expressly upheld by the Court of Appeal.[48]

More importantly, from a legal point of view, the Court of Final Appeal failed to take the opportunity to address the difficult questions of the appropriate tests of causation in quantifying fiduciary gains, as well as whether remoteness criteria have a role to play. For example, what should the test of causation be in proving the defaulting directors' ultimate control of the shares in the restructured company? Did the restructuring exercise amount to a *novus actus interveniens*?

B. *Approach to Causation*

In law, causation serves an important function, namely, attributing legal responsibility to causally relevant conditions.[49] A causal inquiry is first concerned with identifying the causally relevant conditions to which a *causal* explanation may be made. However, not all causally relevant conditions may ground legal responsibility (otherwise legal responsibility may extend indefinitely), and the law has to face the question of which condition is to be regarded as the cause and hence attribute *legal* responsibility to it.[50] What follows is a brief discussion of each of the two aspects in causation and suggestions on how express reference to these aspects could have helped the judges in conducting a fuller causal inquiry in fiduciary cases such as *Tripole* and *Murad*.

1. *Identifying Causally Relevant Conditions*

(a) *Causally relevant conditions as necessary ('but for') conditions*: Courts have generally accepted a necessity ('but for') test as appropriate for identifying causally relevant conditions in many areas of law. Under this test, causally relevant conditions are those that are in some sense necessary for the occurrence of an event. Thus, A is a necessary condition for B if and only if, under the circumstances, in the absence of A, B would not have occurred.

It appears that the Court of Final Appeal also denied a 'but for' causal link in *Tripole*. The defaulting directors' breach of fiduciary duty (by attempting to misappropriate assets under the impugned agreements) was not a necessary condition of

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[47] *Tripole* (C.F.I.), *supra* note 8 at para. 93, quoted in text accompanying *supra* note 10.

[48] *Panco Industrial Holdings Ltd. & Anor. v. Ding Peng & Ors.*(3 December 2004), CACV 35/2004 and 43/2004; [2004] H.K.E.C. 1470 (C.A.) at para. 35. Note also that the appeal was only in respect of the remedies to be awarded to the plaintiffs.

[49] Causally relevant conditions are also known as "causes-in-fact."

[50] Anthony Honoré, "Causation in the Law," in Edward N. Zalta ed., *The Stanford Encyclopedia of Philosophy (Winter 2005 Edition)*, online: Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/archives/win2005/entries/causation-law/>. The law would require a condition to possess certain features before it will attribute responsibility to that condition. For example, in the law of tort, defendants are only liable for damage caused by proximate causes.

the gain because, in its absence, the Court suggested that the government might still have allocated the shares to CPL due to other plausible reasons (such as the fact that CPL's parent company had invested substantially in the plaintiff companies so that CPL was subsequently treated favourably in the restructuring). Besides, to a certain extent, because the impugned agreements were not carried into effect, it might be said that the breach did not change the course of events, and hence the 'but for' test could not be satisfied.

(b) *Causally relevant conditions as 'NESS' conditions*: Professor Wright defines a 'cause' as a *N*ecessary *E*lement in a *S*et of conditions *S*ufficient ('NESS') to produce an outcome.[51] A defendant's conduct is a cause of an outcome if and only if, the defendant's action is a necessary element of a set of actual antecedent conditions that is sufficient for the occurrence of the outcome; but if the defendant's conduct is taken away from the set of conditions, it would not be sufficient for the outcome. This establishes the non-redundancy or necessity of the defendant's conduct to the set of conditions required for the outcome in a 'NESS' test.[52]

It appears that the 'NESS' test could not have been satisfied on the facts of *Tripole* either. Even if the defaulting directors' breach of fiduciary duty were taken away, the Court suggested that there might have been other plausible reasons for the allocation of shares to CPL, and as such there existed other conditions which would still have been sufficient to cause the gain. The breach was thus not a non-redundant or necessary part of *this* complex sufficient condition. Therefore, to the extent that the 'NESS' test represents only a more complex variation of the 'but for' test requiring proof of necessity of the alleged causally relevant condition, it should be rejected in the more complicated factual scenarios on similar grounds. It is submitted, however, that causation may be established in *Tripole* under a more sophisticated definition of the type of condition required for causation.

(c) *Causally relevant conditions as probabilistic conditions*: A distinctive feature of *Tripole* is that there were multiple events which combined together to produce the gain. This suggests that a *quantitative* approach to causation, which allows the extent of contribution by a particular event to be weighed, may be preferable. Here, A may be said to be a cause of B, if, given the occurrence of A, the probability of the occurrence of B is higher than the probability of B if A had not occurred, *ceteris paribus*.[53] Put differently, an event (A) must be a 'substantial factor' or a 'contributing event' in order to be a causally relevant condition. In *Tripole*, the defaulting directors' breach of fiduciary duty may be said to be a causally relevant condition of the government allocation of the shares (hence the gain), because the breach *enabled* them to be able to demonstrate to the Shenzhen authorities that

[51] The 'NESS' notion was first formulated by Professors Hart and Honoré (see H.L.A. Hart & Tony Honoré, *supra* note 23 at 113) but was popularised by Professor Wright. See Richard Wright, "Causation in Tort Law" (1985) 73 California Law Review 1735 at 1774; [Wright, "Causation in Tort Law"] "Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying the Concepts" (1998) 73 Iowa Law Review 1001 [Wright, "Causation, Responsibility, Risk"].

[52] For example, if a person dies of a gunshot wound after drinking a cup of tea poisoned by another defendant but before the poison takes effect, according to Professor Wright, the poisoning is not a 'NESS' of that person's death because the poisoning is not a *necessary* element of the set of actual antecedent conditions sufficient for that person's death: Wright, "Causation in Tort Law", *ibid.* at 1795.

[53] See for example, Menno Hulswit, *From Cause to Causation: a Peircean Perspective* (Dordrecht: Kluwer Academic Publishers, 2002) at 58-60; and Honoré, "Causation in the Law", *supra* note 50 at section 3.1.

they were the owners of the SCIC shares. This contributing or facilitating effect of the breach, though not itself a necessary condition of the gain as discussed above, might have increased the defaulting directors' probability of participating in the restructuring exercise; had the breach not occurred, their chances of participation might not have improved.[54] The Court would then be able to weigh the significance of this factor against other events.[55] As to how significant an event has to be in order to qualify as a probabilistic cause, or how much legal responsibility is to be attributed to such causes, such questions must be further resolved by the law, though the following points may be noted.

First, for *A* to qualify as a significant factor contributing to *B*, *A*'s contribution to *B* must be material or substantial, *i.e*. beyond *de minimis*. This was recognised by Lord Reid in *Bonnington Castings Ltd. v. Wardlaw*.[56] Second, it may also be instructive to look at the tort jurisprudence in the United States in developing the meaning of 'substantial' or 'significant'. A probabilistic approach to causation mirrors section 431 of the *Restatement (Second) of Torts (1965)*, which requires a defendant's negligent conduct to be a substantial factor in bringing about the harm.[57]

It is submitted that probabilistic causation would be a more refined approach than the present perfunctory dismissal of the contribution of the defaulting directors' breach to the gain *in toto*. In order to show that the breach was responsible for the ensuing gain, it is only necessary to show that the breach increased the probability of the gain, as opposed to it being a necessary condition.[58] A probabilistic approach to causation is also more useful in cases of multiple events and may help secure a fairer distribution of responsibility amongst these events. Further, by dispensing with the need to prove causation in terms of necessary and/or sufficient conditions

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[54] While the trial judge opined that the occurrence of the breach was necessary for the government allocation of shares, the Court of Final Appeal was simply rejecting this view. Nevertheless, the Court of Final Appeal did not discuss whether the probability of government allocation of shares given the occurrence of the breach was greater than the probability of allocation without the breach, and if so, whether this increased probability could amount to a 'cause' of the gain. If the law may attribute responsibility to causally relevant conditions identified under this probabilistic approach, causation could be established.

[55] Such as the possibility that CPL was treated favourably in the restructuring because its parent company had invested substantially in the plaintiff companies: see *supra* note 46. A probabilistic approach to causation allows various events to be weighed against one another.

[56] [1956] A.C. 613 (H.L.) at 621: "A contribution which comes within the exception *de minimis non curat lex* is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the *de minimis* principle but yet too small to be material."

[57] Section 431 of the *Restatement (Second) of Torts* (Philadelphia: American Law Institute, 1965) reads as follows:

> *§ 431 What Constitutes Legal Cause*
> The actor's negligent conduct is a legal cause of harm to another if:
> (a) his conduct is a substantial factor in bringing about the harm, and
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in harm.

[58] Indeed, the event, in order to qualify as a causally relevant condition of the gain, does not have to be *the* probabilistic cause; it is sufficient if it is *a* probabilistic cause. This is consistent with a policy of deterrence: if the defaulting fiduciary has realised any gain from his breach, he should not be able to defeat the principal's claim to relief by showing that there were other more weighty causes which contributed to the gain. This is also consistent with the present fiduciary law which does not allow an examination of the relative importance of a contributory cause.

of the consequences, probabilistic causation is arguably a broader approach in identifying causally relevant conditions, which is consistent with the stricter standards of equitable (fiduciary) duties and hence apposite in establishing causation in breach of fiduciary duty in equity.[59]

2. *Attributing Legal Responsibility*

The next question that the law has to address is whether it should impose any limit on the extent of legal responsibility to be attributed to causally relevant conditions. According to Professor Honoré, there are both causal and non-causal grounds of limitation on legal responsibility.[60]

(a) *Causal limiting notions*: The most notable examples of limiting notions which are *causal* include later interventions which break the chain of causation, or events which are too remotely connected with the outcome. These can be regarded as causal limiting notions because their presence may sever the *causal* tie between the breach and the gain. For example, in *Tripole*, the Court of Final Appeal held that it was through the restructuring of SCIC and its consequent redistribution of shares, not the impugned agreements (which were not carried into effect), that CPL became a holder of shares in SCIC.[61] From a causal point of view, these facts provide a good example for discussing whether this allocation of shares by the Shenzhen authorities amounted to a *novus actus interveniens* in the course of events.

In order to preclude attribution of responsibility to a *novus actus interveniens*, the later intervention must possess the characteristics of being abnormal or unexpected in the context. That being so, it must not exist at the time of the alleged cause.[62] In *Tripole*, however, before the defaulting directors purported to enter into the impugned agreements in June 1993, SCIC had already been de-listed (in July 1992) with its management taken over by a restructuring committee in March 1993. Thus, the defaulting directors already had knowledge that the Shenzhen Government would carry out a restructuring exercise very soon. They were probably aware that if they were able to prove that they somehow had some interests in SCIC, they would very likely be allotted shares in SCIC after its restructuring. Indeed, as previously mentioned, the lower courts also acknowledged the linkage between CPL's production of the impugned agreements to the Shenzhen authorities and its participation in the restructuring and redistribution of shares.[63] Besides, it is worth noting that all 50.7% of the SCIC shares held by the plaintiffs were either redistributed to CPL or

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[59] In contrast, the 'but for' or 'NESS' tests may be more appropriate in establishing causation for breach of duty of care at common law: see H.L.A. Hart & Tony Honoré, *supra* note 23 at 109-114; and Wright, "Causation, Responsibility, Risk", *supra* note 51. Both discussed causation in the context of liability in tort. Nonetheless, courts are prepared to adopt a more flexible approach against negligent defendants where appropriate: *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] U.K.H.L. 22, [2003] 1 A.C. 32 (H.L.). See further John Fleming, "Probabilistic Causation in Tort Law" (1989) 68 Can. Bar. Rev. 661.

[60] Honoré, *supra* note 50 at section 3.3.

[61] See Section III.A, *supra*.

[62] *Cf.* a state of affairs (*e.g.* the victim's thin skull) which exists at the time of the alleged cause and thus cannot preclude attribution of an outcome to which it (that state of affairs) contributes to the alleged cause however extraordinary the state of affairs is: see Honoré, "Causation in the Law," *supra* note 50 at section 3.3.

[63] See text accompanying *supra* notes 47-8.

one other government corporation (with the percentage of shares held by the public remaining unchanged). It is submitted that these facts suggested that the possibility of a restructuring already existed at the time of breach and as such, the government action did not amount to a *novus actus interveniens* which could break the causal connection between the defaulting directors' breach and their gain.

Apart from a *novus actus interveniens*, is the remoteness criterion also relevant in attributing legal responsibility to fiduciary gains? It is suggested that remoteness is relevant and should be utilised to rationalise certain decisions and awards in equity. For example, in order to ascertain the proper measure of a fiduciary's gain, judges sometimes exercise their judicial discretion to make an award of an 'equitable allowance' to qualify absolute disgorgement of fiduciary profits. Examples include *Boardman v. Phipps* where the House of Lords disgorged the solicitor's gains subject to an allowance on a liberal scale for the work and skill he had put in;[64] and *Warman International Ltd. v. Dwyer* where the High Court of Australia held that the defendants who set up a competing business in breach of their fiduciary duty were only liable to account for the profits made by the new competing business during the first two years of its operation, rather than for an indefinite period of time, after taking into account their input such as skill, efforts, property and resources into the business.[65]

Nevertheless, the English courts have so far not explained why notions of equity should *in principle* be relevant in fiduciary accountability. Broad equitable notions of justice and fairness are only rudimentary mechanisms of attributing legal responsibility. It is submitted that these outcomes might be explained in terms of another causal limiting notion for attributing legal responsibility, namely, the remoteness criterion. In many cases where both the breach and the work and skill of the defaulting fiduciary were causally relevant conditions of the gain, the latter might be too remotely connected to the gain such that the extent of legal responsibility is mitigated by crediting an allowance to the fiduciary to cut back the amount of profits he would otherwise have to disgorge.[66] Indeed, it has been suggested that the time-limited order made in *Warman International* was to "reflect the dilution of a causal link."[67] Where an event is too remotely connected to the gain, the causal link is severed and the law would not attribute responsibility thereon.

(b) *Non-causal limiting notions*: On the other hand, issues of legal policy, such as allocation of risks, the purpose of the legal rules, or the equities between the

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[64] *Boardman v. Phipps*, *supra* note 40 at 104 (Lord Cohen) and 112 (Lord Hodson). The same view was expressed by the lower courts: "[I]t would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it": *Boardman v. Phipps*, [1964] 1 W.L.R. 993 (Ch. D.) at 1018 (Wilberforce J.); "The claim for repayment cannot, however, be allowed to extend further than the justice of the case demands.": *Boardman v. Phipps*, [1965] Ch. 992 (C.A.) at 1020 (Lord Denning M.R.).

[65] "Whether it is appropriate to allow an errant fiduciary a proportion of profits or to make an allowance in respect of skill, expertise and other expenses is a matter of judgment which will depend on the facts of the given case.": *Warman International*, *supra* note 17 at 562 (per Mason C.J., Brennan, Deane, Dawson and Gaudron JJ.).

[66] Whether there should be a different test of remoteness in the context of fiduciary accountability or in equity generally is beyond the scope of this note.

[67] *Canada Inc. v. Strother*, *supra* note 24 at para. 60 (per Newbury J.A.).

parties,[68] are *non-causal* limiting notions to be decided in accordance with the purpose of the relevant legal rules. In attributing legal responsibility, all relevant policy considerations are to be delicately balanced.

For example, the nature of the breach may affect the equities between the parties. It has been suggested that a distinction may be drawn between honest and dishonest breaches of fiduciary duty in awarding equitable compensation.[69] In a similar vein, in quantifying fiduciary gains, a stronger policy of deterrence is justifiable to hold a dishonest fiduciary accountable for all gains however remote, whereas the policy of deterrence may operate less rigorously in cases of honest breaches. Indeed, it has been suggested that a fiduciary will, "at least if he has acted honestly," be awarded an equitable allowance to cut back the extent of his disgorgement, whereas the degree of liberality of that award will be reduced if he has acted with an "element of dishonesty."[70] Recognising a two-stage causal inquiry will allow an open examination of these policy considerations at the second stage (attributing legal responsibility) of the inquiry.

In *Murad*, Clarke L.J. seemed to suggest that notions of equity could be used to justify his (dissenting) view that Al-Saraj should only be required to disgorge a proportion of the profits.[71] It is submitted that, having identified that Al-Saraj's non-disclosure and the Murad sisters' consent as causally relevant conditions of Al-Saraj's gain, we could apply the above causal and non-causal limiting notions to determine how legal responsibility was to be attributed in the *Murad* case. Under this inquiry, factors like whether there were any intervening acts, whether some of the causally relevant conditions were too remote, the equities of the parties *etc.* should all be considered. Therefore, the better approach is that notions of equity and fairness are to be considered in a causal inquiry for the purposes of attributing legal responsibility, rather than employed in an exercise of pure discretion as what Clarke L.J. in *Murad* appeared to have suggested.

IV. Conclusion

Although causation is not the conventional explanation for some of the older cases on fiduciary accountability, the strictness and prophylactic operation of fiduciary rules, properly understood, does not preclude a test of causation in attributing responsibility

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[68] H.L.A. Hart & Tony Honoré, *supra* note 23 at xlviii-lv.

[69] Lusina Ho, "Attributing Losses to a Breach of Fiduciary Duty" (1998) 12 Trust Law International 66 at 72-3 and Elliot, *supra* note 3 at 594. It has been argued that a dishonest breach of fiduciary duty is comparable to the tort of deceit where all losses flowing naturally and directly from the breach are recoverable: *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.*, [1997] A.C. 254 (H.L.). *Cf. Swindle v. Harrison*, *supra* note 3 at 733 (Mummery L.J.) and *Collins v. Brebner*, [2000] Lloyd's Rep. P.N. 587 (C.A.).

[70] See R.P. Meagher, J.D. Heydon & M.J. Leeming, eds., *Meagher, Gummow & Lehane's Equity Doctrines and Remedies*, 4th ed. (Sydney: Butterworths LexisNexis Australia, 2002) at para. 5-255 and the cases cited therein.

[71] For example, his Lordship stated that "I see no reason, why, at the end of that process it should not be open to a court of equity to hold that it would only be *equitable* to order the fiduciary to account for a proportion of the profits.": *Murad, supra* note 5,at para. 153 [emphasis added]; "In the end the question for the judge should be whether the court is persuaded by Mr. Al-Saraj that it would be *inequitable* to order an account of all the profits having regard to all the circumstances of the case.": *Murad*, *supra* note 5 at para. 159 [emphasis added].

to a breach of fiduciary duty. It should not be conclusively presumed that causation would be satisfied in the more complicated factual scenarios.

As judicial reassessment of the relevance and role of principles of causation in this area of law is still at an embryonic stage, a lot of issues have to be resolved. Unfortunately, the English Court of Appeal in *Murad* wrongly formulated the issue for causal inquiry, and so missed an opportunity to properly address the relevance of causation. On the contrary, although the Hong Kong Court of Final Appeal appreciated the relevance of causation in *Tripole*, it did not engage in further debate on the appropriate approach to causation and remoteness.

It is hoped that once the relevance of causation in quantifying fiduciary gains is accepted, discussion on other issues can ensue. These include how equity is to identify causally relevant conditions (whether by analogy to the common law 'but for' test or by adopting some other more refined tests); how equity is to attribute legal responsibility (whether a concept of *novus actus interveniens* exists or whether reference need only be made to equitable notions). In the final analysis, recognising the relevance of causation will not empty fiduciary rules of any prophylactic content, but may help decide how remedies are to be awarded on a principled basis.