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THE FLOWERING OF EQUITABLE COMPENSATION IN AUSTRALIAN REMEDIAL LAW: THE UNDERRATED CASE OF BIALA PTY. LTD. v. MALLINA HOLDINGS LTD.

Gary Davis*

While much of the common law world has moved to merge legal doctrines previously divided between courts of law and equity, Australia has resisted this trend, continuing to limit the application of certain doctrines to their historical roots. Through an examination of the underrated case of Biala Pty. Ltd. v. Mallina Holdings Ltd., this Article discusses the context and repercussions of maintaining the divide between law and equity in Australian law. Biala demonstrated the potency of the remedy of equitable compensation but also demonstrated that Australia continues to be a jurisdiction where conventional doctrinal categories remain predominant.

INTRODUCTION

The Fifth Remedies Law Discussion Forum was held at Emory University Law School in May 2007. As with its predecessors in the series, it brought together a select group of remedies law scholars from around the common law world to discuss remedial law issues and developments. An enduring value of these forums, enhanced by subsequent publication, is their comparative aspect, the capacity to learn from the traditions, and approaches adopted in other jurisdictions. This Article was produced for this forum in the same spirit.

As the practice has developed, two forum themes were offered as focal points for preparation and discussion. One such theme, “the most underrated remedies decision,” provides the foundation for this Article. No formal definition of “underrated” having been furnished, the term is taken in this Article to denote a case that has had

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significant influence on an aspect of remedial law but without due acknowledgment or recognition being subsequently accorded to it.

This Article is accordingly inspired by a case from the Supreme Court of Western Australia, Biala Pty. Ltd. v. Mallina Holdings Ltd.\textsuperscript{1} Although the judgment was affirmed on appeal to the Full Court of the Supreme Court of Western Australia,\textsuperscript{2} it is that lower court judgment, delivered by Justice Ipp, that attracts our focus. The decision itself produced no particular startling law per se. The facts, however, were quite startling, and the result even more so. The case was embedded within an extensive milieu of government-business interplay and overreach, popularized by the label “W.A. Inc.” and eventually sparking a Royal Commission\textsuperscript{3} that ultimately saw a number of the major players in Australian business and politics crash, burn, and end up in jail.\textsuperscript{4} As such, it holds some fascination for students of law and governance alike.

The case marks a departure point for the potency of the remedy of equitable compensation in Australian law, and it is in that respect that our interest lies for present purposes. More broadly, subsequent developments in this aspect of Australian remedial law signify the dominance within Australian legal culture of an approach to remedies law that is rooted in history. In this respect, Australian law differs from the approaches taken elsewhere in the common law world.

I. THE FACTS OF THE CASE

Operating via his holding company, an entrepreneur and property developer named Dallas Dempster entered into an equal interest joint venture with the mineral exploration company Mallina Holdings (“Mallina”).\textsuperscript{5} The purpose of the joint venture was to seek from the Western Australian Government a so-called exclusive mandate to conduct a feasibility study into the development of a petrochemical plant in the State. The exclusive mandate concept


\textsuperscript{3} Royal Commission into Commercial Activities of Government and Other Matters, No. 4 Special, W. AUSTL. GOV’T GAZETTE, Jan. 8, 1991, at 37–39.

\textsuperscript{4} Alan Bond, for one, and the then-Premier of Western Australia (and later Australian Ambassador to Ireland and the Holy See), Brian Burke, for another.

\textsuperscript{5} Biala, 13 W.A.R. at 21.
permitted those who were willing to invest in feasibility investigations the exclusive rights to proceed with the projects if they were demonstrated to be feasible.⁶ As explained by the court, "The immediate object of the joint venture was to acquire the mandate and to obtain and prepare a bankable feasibility. Subsequently, the object was, if the venture reached that stage, to exploit the prospect to the commercial advantage of the partners."⁷

Dempster and Mallina were not at arms length. Dempster held a large number of shares in Mallina and was its chairman and managing director.⁸ Although he departed from those roles prior to the key events, it was clear that he was and remained the dominant force in the joint venture, and controlled dealings both of Mallina and his own holding company.⁹

The Minister for Minerals and Energy was approached, and he agreed to recommend to the cabinet that the Dempster/Mallina joint venture be given the mandate.¹⁰ The Minister proposed to do this by employing a procedure known as "walking in."¹¹ This meant that the proposal would not be put through all the normal public service investigatory channels, thereby escaping the fullest scrutiny.

However, before the proposal for the mandate could be formally dealt with, Mallina was the subject of some adverse publicity in the media.¹² This was thought by the Premier of Western Australia to be potentially embarrassing to the government, so he suggested to the Minister that the proposal not be "walked into" cabinet after all but rather put through normal departmental investigations.¹³ This would delay the venture.

Dempster, having been informed of the hiccup, met with the Chief Executive Officer of Mallina. He falsely stated that the government would not grant the mandate if Mallina remained part of the joint venture.¹⁴ The Chief Executive and Mallina's board of

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6. Id.
7. Dempster, 13 W.A.R at 171.
9. Id. at 23.
10. Id. at 20, 29.
11. Id. at 30.
12. Id. at 27, 30.
13. Id. at 30.
directors were persuaded to exit the venture in return for $150,000, which represented a sizeable profit over its expenses to date. Mallina was aware that a replacement partner had been found by Dempster to take up Mallina's interest. That replacement partner, Connell, did come into the project, providing the $150,000 that went to Mallina. Connell also paid a further $250,000 to Dempster's holding company. Neither Connell nor Dempster disclosed this payment to Mallina.15

A new company, Petrochemical Industries Company Ltd. ("P.I.C.L.," and commonly pronounced as "pickle") was formed, with the Dempster and Connell interests each holding 50 percent.16 Connell injected substantial resources into the venture and utilised his close connections to the state government. Eventually, P.I.C.L. was awarded the exclusive mandate and produced the feasibility study.17

Some time after that, being some two years after Mallina had been convinced to give up its half-share in the joint venture for $150,000, P.I.C.L. was sold to a consortium comprising interests of Alan Bond and a Western Australian government holdings company.18 The price paid was $400 million, of which the Connell interests received $350 million and the Dempster interests received $50 million. At the trial, Justice Ipp found that P.I.C.L. had a value of only $100 million at the time.19 Justice Ipp was of the view that the reasons for the differential distribution of the $400 million to ostensibly equal partners were shrouded in mystery: "No explanation was proffered for the very strange difference in the consideration received by the two equal shareholders,"20 and "the circumstances relating to the discrepancy between the amounts received . . . are on the evidence quite inexplicable and . . . bizarre . . ."21

15. Id. at 31, 54.
16. Id.
17. Id. at 33.
18. Id.
19. Id. at 79.
20. Id. at 57.
21. Id. at 78.
II. THE WRONGFUL CONDUCT

A. Common Law

Although the case did not proceed as one in tort, it is clear that Dempster’s conduct was fraudulent. He knowingly and dishonestly made false statements that were intended to be relied upon and were relied upon by Mallina to its detriment. Under the venerable authority of *Derry v. Peek*, a liability for the tort of deceit undoubtedly arose.

B. Equity

However, the relationship of the parties went beyond one cognisable only at common law. Whether the joint venture between Dempster and Mallina was one of partnership in the strict sense, it was “plainly based upon mutual confidence and trust” and thereby could be characterised as being of an equitable and fiduciary nature. As such, it was expected that information gained, action taken, and relationships developed would be used for the mutual benefit of the joint venturers. As Justice Rowland subsequently put it in the decision on appeal, “[w]ithin that relationship, there [was] little scope for either party to seek to advance its own interests individually in relation to the ultimate objective . . .”

More specifically, Justice Ipp found that each participant “owed a duty of the utmost good faith to the other” and was obliged “to display the utmost candour and honesty.” Dempster was “bound to state everything with strict and scrupulous accuracy.” Dempster’s conduct and misrepresentations put him and his company in breach of these fiduciary obligations.

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26. *Id.*
27. *Id.*
III. THE REMEDY

A. Common Law

Considered from the common law vantage point of the tort of deceit, Mallina’s remedy would be in damages. By reason of Dempster’s fraudulent misrepresentation, Mallina exited from the joint venture, that is, gave up its interest in it, receiving $150,000. However, since Connell was willing to, and did, part with considerably more in order to obtain Mallina’s half-share, the best evidence of the value of that interest is the $400,000 paid by Connell. A straightforward calculation of the difference tells us that the measure of Mallina’s damages in tort is $250,000.

B. Equity

Justice Ipp considered that Mallina’s remedy should take the form of “equitable compensation.” In assessing such compensation, Justice Ipp would “leave aside questions of causation (save that compensation will only be awarded for losses caused by the breach of fiduciary duties), foreseeability and remoteness, and . . . apply the full benefit of hindsight.”

Doing so, Justice Ipp concluded that but for Dempster’s misrepresentations, Mallina would have remained in the joint venture. By exiting, it lost the chance to make the kind of profits Dempster made.

The starting point for calculating the compensation was the $50 million Dempster received. Although the purchasers paid out $400 million for P.I.C.L., the circumstances (as noted above) were considered by Justice Ipp to be so “bizarre” that his Honour thought that Dempster’s share was worth no more than what it had received. Some deductions were made for expenses that Mallina would have had to pay, and the $50 million figure was reduced to some $38 million. Connell’s advantages in terms of “wealth and his connection with the government” and Mallina’s own problems and lack of political influence meant that a Dempster/Mallina joint

28. Id. at 31
29. Id. at 78.
30. Id.
31. Id.
32. Id. at 80.
venture was less likely to have succeeded, and succeeded to the same degree, as the Dempster/Connell venture. Justice Ipp discounted for this contingency by a factor of 40 percent and awarded Mallina the sum of $22,845,000 as equitable compensation for the loss suffered by reason of Dempster’s breach of fiduciary duties.\(^{33}\)

**C. Result**

Ordinary damages at common law, whether for the tort of deceit, negligence, breach of contract, or otherwise, are given for the purpose of compensating the plaintiff for loss suffered.\(^{34}\) Equitable compensation serves the same ostensible purpose.\(^{35}\) Despite that, *Biala* appears to demonstrate how a $250,000 damages case becomes converted to an equitable compensation case of almost $23 million. As Wayne S. Martin has pointed out, “[i]n this case, therefore, the distinction between damages assessed in accordance with conventional common law principles for deceit and equitable compensation was approximately $35 million!”\(^{36}\)

**IV. IMPACT**

The decision in the *Biala* case demonstrates the potency of the remedy of equitable compensation.\(^{37}\) At a more fundamental level, it

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\(^{35}\) See generally Michael Tilbury & Gary Davis, *Equitable Compensation, in THE PRINCIPLES OF EQUITY* 797, 804–09 (Patrick Parkinson ed., 2nd ed. 2003) (explaining that finding the distinction between the two is “difficult as a matter of principle,” and that the terms are “often, confusingly, used interchangeably”).

\(^{36}\) The nominated figure allows for the sum of interest that was added to the award. See Wayne S. Martin, *Principles of Equitable Compensation, in CIVIL REMEDIES: ISSUES AND DEVELOPMENTS* 114, 137 (Robyn Carroll ed., 1996). Mr. Martin acted as counsel for the Dempster parties, and is currently Chief Justice of Western Australia.

\(^{37}\) But see Jeff Berryman, *Some Observations on the Application of Equitable Compensation in W.A.:* Dempster v. Mallina Holdings Ltd., 25 W. AUSTL. L. REV. 317, 325–26 (1995) (arguing that damages in deceit would include the consequential loss of opportunity to participate in what turned out to be a very profitable enterprise, and valued as such). Such an approach, however, seems to give insufficient scope to a distinctive feature of equitable compensation, namely that, unlike the common law, it attracts and utilises the full benefit of hindsight. See G. M. & A. M. Pearce & Co. v. Austl. Tallow Producers, [2005] V.S.C.A. 113, ¶65; Martin, *supra* note 36, at 137 (arguing that if assessment is to be performed by reference to circumstances at time of breach—which is the conventional approach of the common law—the asset was very different in nature to the ultimate one that generated the huge profits; the chance of
brings starkly home the continued significance within Australia of the common law/equity divide or of the importance of equity as a body of principle separate and distinct from the common law. The success of the remedy, a success that has now clearly been confirmed in the years following the Biala decision, leads us to consider carefully several important matters.

V. EQUITY'S HOLD ON AUSTRALIAN LAW

Equity remains of supreme significance in Australian law. To repeat the title of Andrew Burrows's article (but to ignore its critical intent), "We Do This at Common Law but That in Equity"!38 Much of the reason for this importance is found in the influence that the State of New South Wales has on the national legal psyche in matters of equity. Not only is it the most populous state with the heaviest volume of litigation, but its connections with the traditions of equity are unimpeachable.

Merger of the administration of common law and equity did not take place in New South Wales until the period 1970–1972, close to a full century following the passing of the equivalent Judicature Acts in England.39 The legal profession and the judiciary are populated by persons steeped in equity manners and traditions. While all may not agree with the conventional view, the significance and authority of that view is known, acknowledged, respected, and generally followed. The Supreme Court of New South Wales still maintains separate common law and equity divisions, one headed by a Chief Judge at Common Law and the other by a Chief Judge in Equity. The profession continues to use the parlance of an equity bar and common law bar to distinguish barristers according to the predominant or even exclusive nature of their practices. The significance is manifested in the remark of New South Wales Chief Justice Spigelman that one cannot overlook the "significance of the

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professional consensus of legal practitioners as a dimension of the legal system distinguishable from formal sources of law . . . "

The High Court of Australia only reinforces the dichotomy. From the maintenance of a limited, "plaintiff-friendly" notion of causation when equitable compensation is claimed for breach of equitable duty, to the rejection of any role for reduction of quantum based upon comparative fault, to acceptance of the notion that a plaintiff may be able to recover more if able to assert a cause in equity than would be recoverable at common law on the same facts, it is plain, in the words of Justice Kirby of the Court: "in Australia, the substantive rules of equity have retained their identity as part of a separate and coherent body of principles . . . ."

The Biala case fits well within that tradition. Indeed, its characterisation in this Article as "underrated" stems from the view that Justice Ipp's decision, in its potency, provided the practical springboard to the resurgence of equitable compensation as a viable remedy in Australian law.

VI. MODERN FLOWERING OF EQUITABLE COMPENSATION

The use of the word "resurgence" in the preceding section is deliberate. A general compensatory remedy in equity is grounded in the old Bill of Chancery to enforce compensation for breach of fiduciary duty. Its modern birth is usually attributed to the "great speech" of Lord Haldane L.C. in the 1914 House of Lords case Nocton v. Lord Ashburton. Despite that, three nineteenth-century

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44. See Pilmer, 207 C.L.R. at 231.
Australian cases from the Supreme Court of Victoria actually awarded the plaintiffs monetary remedies designed to restore them to positions that existed prior to the breaches of fiduciary duty that occurred in each of their situations.\(^{48}\)

The significance of *Nocton* is that a court of high authority, the House of Lords, freed equitable compensation from the bounds of what Joshua Getzler has called its “core territory,”\(^{49}\) being the simple personal duty of a trustee of an express trust to account for any dissipated assets of the trust. Instead, the obligation to pay compensation could be extended to a situation where no trust estate was depleted but the beneficiary of a fiduciary duty was nevertheless left worse off as a consequence of breach of fiduciary obligation. In *Nocton*, a client had been advised by his solicitor to discharge mortgage security.\(^{50}\) The solicitor had a conflict of interest that he did not disclose, constituting fiduciary breach. The client was left without adequate security when default occurred on the related loan. The solicitor was held liable for the loss. As was explained, “[t]he proper mode of giving relief might have been to order Mr. Nocton to restore to the mortgage security what he had procured to be taken out of it, in addition to making good the amount of interest lost by what he did.”\(^{51}\)

In the almost eighty years following the *Nocton* case, one can find intermittent instances in Australia and elsewhere in the Commonwealth of equitable relief keyed to compensating for losses arising from breaches of fiduciary obligations. The best known of these cases include *McKenzie v. McDonald*,\(^{52}\) *Re Dawson (decd.)*, *Union Fidelity Trustee Co. v. Perpetual Trustee Co.*,\(^{53}\) *Hill v. Rose*,\(^{54}\) *Guerin v. The Queen*,\(^{55}\) *Canson Enterprises Ltd. v. Boughton & Co.*,\(^{56}\) and *Day v. Mead*.\(^{57}\) Martin provides a more extensive listing and


\(^{49}\) Getzler, supra note 45, at 236.

\(^{50}\) [1914] A.C. at 937.

\(^{51}\) Id. at 958.

\(^{52}\) [1927] V.L.R. 134.

\(^{53}\) [1966] 2 N.S.W.R. 211.

\(^{54}\) [1990] V.R. 129.

\(^{55}\) [1984] 2 S.C.R. 335 (Can.).

\(^{56}\) [1991] 3 S.C.R. 534 (Can.).

brief summaries of the cases that arose prior to (and to a slight extent, following) *Biala*.\(^{58}\)

However, in the fewer than fifteen years since *Biala*, there has been a blossoming of cases from the superior courts. Just looking at the Australian environment, for example, we see pursuit of the remedy and judicial acceptance of its viability in a slew of cases, spanning jurisdictions. Cases come from:

- the High Court of Australia, including: *Maguire v. Makaronis*,\(^{59}\) *McCann v. Switzerland Insurance Australia Ltd.*,\(^{60}\) *Pilmer v. Duke Group Ltd. (in liq.)*,\(^{61}\) *Youyang Pty. Ltd. v. Minter Ellison*;\(^{62}\)
- the Federal Court of Australia, including: *A.M.P. Services Ltd. v. Manning (A.M.P. II)*;\(^{63}\)
- New South Wales, including: *O'Halloran v. R. T. Thomas & Family Pty. Ltd.*;\(^{64}\) *Beach Petroleum N.L. v. Kennedy*;\(^{65}\) *Digital Pulse Pty. Ltd. v. Harris*;\(^{66}\)
- Victoria, including: *Murphy v. Lew*,\(^{67}\) *G.M. & A.M. Pearce & Co. v. Australian Tallow Producers*;\(^{68}\)
- Queensland, including: *Ferrari Investment (Townsville) Pty. Ltd. (in liq.) v. Ferrari*;\(^{69}\)
- South Australia, including: *Gemstone Corp. of Australia Ltd. v. Grasso*,\(^{70}\) *Southern Real Estate Pty. Ltd. v. Dellow*;\(^{71}\) and
- Western Australia, including: *Permanent Building Society (In liq.) v. Wheeler*.\(^{72}\)

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61. (2001) 207 C.L.R. 165, at 201–02 (McHugh, Gummow, Hayne and Callinan, JJ.), 224–28 (Kirby, J. concurring on this point).
Equitable compensation following the *Biala* decision is now established as a "vital part of [the] judicial armoury." Yet it is still "a developing area of the law;" its remedial vigor "of comparatively recent vintage." As such, it has offered scope for Australian law to rethink the relationship between legal and equitable remedial relief, and between law and equity itself. As put by Charles Rickett, the burgeoning of the remedy invites us to think "about the make-up of modern equity, and the latter's place in the civil law of obligations and property in the new century." While this invitation has been taken up elsewhere, it has largely been declined in Australia.

VII. NO CONVERGENCE WITH COMMON LAW

If the invitation were to be pursued, it would be expected that we would ask whether it is justifiable that the same conduct should give rise to different results depending only upon whether one classifies the wrongful conduct according to law, on the one hand, or equity, on the other. There is no doubt, however, that Australian law adopts a "very plaintiff-friendly" attitude to the remedy. In the context of equitable compensation, "the court is permitted to use somewhat subjective 'tools' in arriving at a valuation; tools such as common sense and general notions of justice and fairness." Justice Somers put it similarly in a New Zealand case: "assessment will reflect that which the justice of the case requires according to considerations of conscience, fairness, and hardship and other equitable features such as laches and acquiescence."

Australian law is therefore comfortable with the notion that a plaintiff may recover greater compensation in equity than might be recoverable at common law on the same facts. Emphasis is placed

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76. Rickett, *supra* note 73,, at 176.
on the distinctive "dual functions"—"compensatory and prophylactic"—of equity. The Australian High Court's Justice Kirby encapsulates the approach as follows: "[w]here fiduciary obligations exist and have been breached, equitable remedies are available both to uphold the principle of undivided loyalty which equity demands of fiduciaries and to discourage others, human nature being what it is, from falling into similar errors."

The hold of history, that is, of the historical divide between law and equity, is thus seen to be tenacious. Australian law is vigilant regarding the maintenance of equity's "doctrinal integrity." While it may well be that yesterday's equity is tomorrow's law, "[i]t is quite another thing to declare that today's law will be tomorrow's equity."

Accordingly, Australian law, although challenged with the argument that a modern and united legal system demands unity and coherence and principle, remains adamant. The challenge is most intense when the wrongful conduct of the defendant, as far as equity is concerned, is mirrored in the law.

In the aftermath of Biala, an early example of that offered some hope for a coherent development in Australian law. This is the case of Permanent Building Society (in liq.) v. Wheeler. This is another judgment of Justice Ipp, on this occasion in appellate proceedings delivering the lead judgment of the Full Court of the Supreme Court of Western Australia. The directors of the plaintiff company ("P.B.S.") caused it to enter into what turned out to be a questionable land purchase transaction, questionable because of the personal benefits that flowed to some of the directors. This transaction produced a loss to P.B.S. Hamilton, P.B.S.'s Chief Executive

80. Pilmer, 207 C.L.R. at 227 (Kirby, J.).
81. Id. at 225 (Kirby, J.).
82. Id. at 224 (footnote omitted); see also Maguire v. Makaronis (1997) 188 C.L.R. 449, 465 (Brennan, C.J., Gaudron, McHugh & Gummow, JJ.) ("Equity intervenes ... to hold the fiduciary to, and vindicate, the high duty owed ... "), 492 (Kirby, J., concurring) ("[P]urposes of equity ... are somewhat different from those of the common law [including] ensuring the strict loyalty and good faith to beneficiaries, the dutiful enforcement of obligations [and] the deterrence of breaches by fiduciaries of their powers ...").
84. Id. at 349.
86. Id. at 192–94.
Officer and Managing Director, was not implicated in the way of personal benefits and, in fact, had claimed a conflict of interest and had abstained from voting. Nevertheless, P.B.S. alleged that Hamilton’s duty to exercise care and skill on behalf of the company had required him to oppose the purchase.

The court held that Hamilton had indeed acted in breach, not quite in the way alleged, but in failing to give proper consideration to the merits of the purchase. Viewed as a breach of duty of care at common law, liability to pay damages to compensate for the resultant loss would be limited, inter alia, by the principle of causation. The court concluded that even if Hamilton had fulfilled his duty, in all probability he would not have opposed the purchase because, on the available evidence, the transaction looked sound.

However, Hamilton’s duty as a director also arose in equity, with its concern for the relationship between a company and its directors. Although Hamilton occupied a fiduciary position in relation to P.B.S., this particular duty was not one properly described as a “true” fiduciary duty. Rather, it was a duty to exercise reasonable care and skill, a “mere” equitable obligation: “there is every reason . . . in such circumstances, to apply the maxim that ‘equity follows the law.’” The court held that, but for the breach, P.B.S. would still have suffered the loss that it did, and equitable compensation was not awarded.

Although the Wheeler case produced consistent outcomes at law and in equity, ultimately it has not heralded a development in Australian law that, at the intersection of law and equity, principles should proceed in unison, without regard for historical binds. Australian case law is replete with references to the more stringent attitude of equity. The matter is approached with the full benefit of hindsight. The court will not speculate against the interest of the

87. Id. at 235.
88. Id.
89. Id. at 241.
90. Id. at 241–43.
91. See id. at 243.
92. Id. at 247–48.
93. Id. at 248–49.
The plaintiff need only lead a minimum amount of evidence to discharge the burden of causation.96

One may suggest that this discrepancy exists because Australian courts have, with Wheeler as a rare exception, primarily been faced with equitable compensation arising in the context of breaches of trust or of true fiduciary duties. Here, it may be said that one is striving to avoid "the courts being seen to wink at wrongdoing."97 But the general sentiment is much broader than that. It is established in Australia that "the measure of compensation in respect of losses sustained by reason of breach of duty by a trustee or other fiduciary is determined by equitable principles and that these do not necessarily reflect the rules for assessment of damages in tort or contract."98

More directly on point is the tenor of the joint remarks of the five-judge High Court of Australia bench that heard the case of Youyang Pty. Ltd. v. Minter Ellison.99 There was the suggestion derived from New Zealand law (and elsewhere100) that there just might be a place in the coherent development of law generally for reasoning by analogy where an equitable obligation mirrors a common law obligation, namely:

[W]here the wrong amounts in substance to carelessness or breach of contract, the policy considerations underpinning the stricter approach are absent. Hence, whatever the classification of the relationship, the law approaches the questions of causation and remoteness on a different and generally less onerous basis; namely whether there is a sufficient causal nexus and also foreseeability or reasonable contemplation of loss or damage of the kind in suit.101

There was this unanimous, virtually derisive, riposte:

[T]here must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.  

VIII. EQUITABLE COMPENSATION AND EXEMPLARY (OR PUNITIVE) DAMAGES

A similar resolute anchoring to the historical touchstone of equity's distinctiveness from the common law can be seen in the case of *Harris v. Digital Pulse Pty. Ltd.* The defendants Harris and Eden were employees of the plaintiff Digital Pulse, a small information technology company. Harris was an experienced marketer, and Eden an experienced web designer. Their employment contracts contained non-competition clauses. More significantly for present purposes, the defendants were in responsible-enough positions in Digital Pulse as to be subject to the usual fiduciary duties. Contrary to both the common law contractual and equitable fiduciary obligations to which they were subject, they set up their own business and diverted projects from Digital Pulse to themselves. In relation to the breach of fiduciary duties, Justice Palmer at trial awarded equitable compensation in relation to Digital Pulse’s losses or, at Digital Pulse’s election, an account of profits.

Justice Palmer then turned his attention to Digital Pulse’s claim for exemplary damages. He catalogued seven factors about the defendants’ conduct:

- First, their conduct was calculated to make a profit and also to cause harm to an employer that was particularly vulnerable.

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102. *Youyang*, 212 C.L.R. at 500.
104. *Id.* at 313.
105. *Id.*
107. *Id.* at 449.
• Second, their conduct was consciously dishonest.
• Third, the diversion of business to their own company did not just happen, it was carefully planned.
• Fourth, the defendants were clearly delighted at the success of their ability to divert business from Digital Pulse to themselves.
• Fifth, it was almost certain that there were other diversions of business that were still concealed.
• Sixth, the breaches of fiduciary obligation were aided and furthered by other wrongdoing on the part of the defendant amounting to the misappropriation of confidential information.
• Seventh, much of the defendants’ conduct in their own interests took place on Digital Pulse’s time from Digital Pulse’s premises using Digital Pulse’s facilities. ¹⁰⁸

To use the time-honored Anglo-Australian terminology, Justice Palmer was satisfied that all of this, taken together, demonstrated on the part of the defendants, “conscious wrongdoing in contumelious disregard of another’s rights,”¹⁰⁹ deserving of condemnation and punishment. Justice Palmer ordered Harris and Eden each to pay $10,000 in exemplary damages.¹¹⁰

This decision to award exemplary damages was overturned by the majority of the New South Wales Court of Appeal (“N.S.W.C.A.”).¹¹¹ However, the N.S.W.C.A. did not differ from Justice Palmer on the merits of the plaintiff’s claim for exemplary damages in the sense of analysis of the defendants’ conduct. Nor did the Court query the quantum or the internal legal principles that courts apply in deciding whether to award exemplary damages. To the contrary, Justice Heydon quite directly stated that Justice Palmer’s reasoning was “entirely correct provided . . . he was correct in his view . . . which is at the heart of the controversy between the parties to [the] appeal.”¹¹²

¹⁰⁸.  *Id.* at 437–39.
¹¹².  *Id.* at 346.
So what was the “heart of the controversy?” For the N.S.W.C.A., the court was faced with a foundational jurisdictional, or judicial power,\(^{113}\) matter. The obligation breached had been a fiduciary obligation, cognisable not at common law but only in equity. Exemplary damages are a remedy from the common law side of the divide. Before fusion of the administration of law and equity, a court of equity had no power to award exemplary damages.\(^{114}\) Could there now, however, be anything in the nature of cross-over of remedies? Justice Palmer had examined the authorities and reached the view that it was open to him to award exemplary damages for breach of a fiduciary obligation.\(^{115}\) The majority of the Court of Appeal, over the dissent of its President, slapped him down.\(^{116}\)

Justice Heydon (then the junior justice on the panel but delivering his last judgment there prior to his elevation to the High Court of Australia) was forthright. There was “no power in the law of New South Wales to award exemplary damages for equitable wrongs.”\(^{117}\) There was no precedent for such a power in the case law nor in statute. Fusion of the administration of law and equity did not involve fusion of their principles. It was improper to analogue from the common law or to allow the common law to influence equity’s development. It was not an objective of equitable relief to punish: “equity and penalty are strangers.”\(^{118}\)

Although allowing himself some “wiggle room” for the future\(^{119}\) and being content in point of law to limit himself to the decision that a court exercising the jurisdiction of equity has no power to make a “punitive monetary award” (as he called it) with respect to a fiduciary relationship created by contract between the parties,\(^{120}\) Chief Justice Spigelman stated that he generally agreed with Justice Heydon’s reasons and accepted his analysis of the authorities.\(^{121}\)

\(^{113}\) Id. at 321 (Mason, P).
\(^{114}\) Digital Pulse, 166 F.L.R. at 446, 449.
\(^{115}\) Id. at 448.
\(^{116}\) Harris, 56 N.S.W.L.R. at 312.
\(^{117}\) Id. at 422.
\(^{119}\) Harris, 56 N.S.W.L.R. at 304 (“Remedial flexibility is a characteristic of equity jurisprudence.”).
\(^{120}\) Id. at 303.
\(^{121}\) Id.
Further, and significantly, the Chief Justice expressed the strong view that it is correct to "acknowledge and respect the collective wisdom of our predecessors who, with respect to disputes of a kind that have occurred many times, have never felt the need to be able to award a monetary sum for the purpose of punishment, deterrence, denunciation or vindication."\textsuperscript{122}

The fundamental position of the Chief Justice is found in this passage:

The integrity of equity as a body of law is not well served by adopting a common law remedy developed over time in a different remedial context on a different conceptual foundation. The fact that exemplary damages are awarded in tort is, in my opinion, not a basis for asking "Why not?" in equity.\textsuperscript{123}

The fact that there are powerfully put alternative positions\textsuperscript{124} is, for present purposes, not to the point. There is an immutable foundation to Justice Heydon's approach (and the Chief Justice's as well, if perhaps marginally less so). It is the same foundation that we saw above: "we do this at common law but that in equity."\textsuperscript{125}

\textbf{CONCLUSION}

It has been several pages since we dealt with the remedies case that is supposedly at the center of this Article, namely \textit{Biala Pty. Ltd. v. Mallina Holdings Ltd.}\textsuperscript{126} That, one surmises, is the inevitable fate of an "underrated" case. One hopes, however, that the point of raising this case has not been lost. One shies well away from claiming a direct cause and effect relationship; indeed, the case would hardly be "underrated" if there were one. Yet it is a fair supposition that the facts and result in \textit{Biala} drew sharp attention to the capacity of equity, via its somewhat dormant general compensatory remedy, to achieve tangible financial results for

\textsuperscript{122} Id. at 307.
\textsuperscript{123} Id. at 306.
\textsuperscript{124} See, e.g., Michael Tilbury, \textit{Fallacy or Furphy?: Fusion in a Judicature World}, 26 U. New S. Wales L.J. 357, 376 (2003) (arguing that the question is not about fusion or non-fusion approaches as such, but rather about the principled development and application of doctrine through analogical reasoning); \textit{Harris}, 56 N.S.W.L.R. 298, 416 (Mason, P., dissenting).
\textsuperscript{125} Burrows, \textit{supra} note 38.
\textsuperscript{126} (1993) 13 W.A.R. 11.
plaintiffs that otherwise might have been thought to be beyond them. Coupled with the "energetic development of the reach of equitable duties," that is, an extension of equity into the ordinary commercial sphere, the remedy blasted off.

For Australian remedies academics, this is thoroughly evident through a comparison of editions of the primary casebook in the subject. The first edition of Michael Tilbury, Michael Noone, and Bruce Kercher's *Remedies: Commentary and Materials*, published in 1988, contains an excerpt from just one case (plus seven short supplementary notes) in the fewer than five pages devoted to the section "Compensation in Equity." In contrast, the current edition covers over thirty-seven pages (an increase of over 800 percent) and extracts seven cases, supplemented by twenty notes and questions, and additional textual commentary.

During the course of this journey, Australian law has had to face the challenge of breaking away from historical chains or at least justify itself by appeal to reason and principle, rather than history. This Australian law has failed to do. Australia is a jurisdiction where, like it or not, for better or for worse, conventional doctrinal categories matter and matter a great deal. For example, it is a jurisdiction where, prior to recent legislative amendment, contributing fault on the part of a plaintiff could result in damages being apportioned and reduced for breach of a duty of care in tort but not if the plaintiff was able to ground the claim for breach of a corresponding duty of care arising in contract.

In the law of remedies, and elsewhere, legal developments (apart from those generated by statute) will be made within the bounds of conventional doctrine and legal reasoning. Perhaps that is not such a bad thing in the context of a participatory democracy like Australia where voting in federal and state elections is compulsory (and failure to comply subject to criminal sanction), but the sort of great societal

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changes wrought by decisions such as the second *Brown v. Board of Education* case\textsuperscript{133} are unlikely ever to emerge from within such a legal and judicial environment.

\textsuperscript{133} 349 U.S. 294 (1955).