

# *More clues as to the nature of the remedy for breach of trust: Creggy v Barnett*

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# More Clues as to the Nature of the Remedy for Breach of Trust

*Creggy v Barnett* [2016] EWCA Civ 1004; [2017] P.N.L.R. 4

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*Creggy v Barnett* [2016] EWCA Civ 1004; [2017] P.N.L.R. 4

*Ex p. Adamson* (1878) 8 Ch. D. 807

*Target Holdings Ltd v Redferns* [1996] 1 A.C. 421

*AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] A.C. 1503

## Abstract

This note examines the nature of the remedy for the breach of trust that is the inadvertent paying away of trust property without authority, addressing the *Target Holdings* debate. The case of *Creggy v Barnett*, considering the rule that the acknowledgement of a debt and indeed a breach of trust can reset the limitation clock, sheds some light on the remedy. This note considers its origins as a restitutive measure and, in line with other developments, argues its future is compensatory.

## Introduction

What is the nature of the remedy for the breach of trust that is the inadvertent paying away of trust property without authority? Until *Target Holdings Ltd v Redferns*<sup>1</sup> it was thought to be the simple reconstitution (or restitution) of the trust absent the features of compensation such as remoteness and causation: *Re Dawson*.<sup>2</sup> Yet causation was applied to reduce quantum in *Target Holdings* and that case was affirmed in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*.<sup>3</sup>

The precise nature of the remedy is not entirely clear. Assisting matters are the judgments in *Creggy v Barnett*,<sup>4</sup> where the Court of Appeal made a number of *obiter dicta* about the remedy. This addresses the debate as to whether *Target Holdings* and *AIB* are correct and if it is legitimate to view the remedy as compensatory and, unlike account and debt, subject to causation.<sup>5</sup>

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<sup>1</sup> [1996] 1 A.C. 421.

<sup>2</sup> [1966] 2 N.S.W.R. 211.

<sup>3</sup> [2014] UKSC 58; [2015] A.C. 1503 at [53].

<sup>4</sup> [2016] EWCA Civ 1004; [2017] P.N.L.R. 4.

<sup>5</sup> See, e.g., C. Mitchell, “Stewardship of Property and Liability to Account” [2014] Conv. 215; M. Conaglen, “Explaining *Target Holdings v Redferns*” (2010) 4 J. Eq. 288; P.J. Millett, “Equity’s Place in the Law of Commerce” (1998) 114 L.Q.R. 214; P.S. Davies, “Compensatory Remedies for Breach of Trust” (2016) 2 C.J.C.C.L. 65, 76; and J. Edelman, “Money Awards of the Cost of Performance” (2010) 4 J. Eq. 122, 131.

*Creggy v Barnett* was concerned with the acknowledgement rule, which resets the limitation clock when one acknowledges a debt. The majority of the Court held that it applied to equitable compensation for that kind of breach of trust. The whole Court held it did not to breach of fiduciary duty.<sup>6</sup> However, the Court did not distinguish between situations where *Target Holdings* applies and where it does not. It further did not engage with the newer terminology of substitutive and reparative compensation. This note aims to take these matters further.

It is argued that the rule will apply to both situations. It is further argued that, on the face of it, the additional historic materials revealed by *Creggy* support the proposition that the remedy is simple reconstitution. This is in line with the familiar *dictum* uttered by James and Baggallay L.J.J. in *Ex p. Adamson*:

“The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated.”<sup>7</sup>

This has been relied on to support the proposition that causation does not apply to breach of trust because it does not to debt. It is suggested that a reason for the comparison in that *dictum* is because of the judge-made law that converted an equitable obligation to reconstitute a trust, upon acknowledgement, into a legal debt. Accordingly, the two were indeed seen as equivalent.

Ultimately, however, the direction of travel of the cases, old and new, is against this. This pushes the remedy – substitutive compensation – to one that is compensatory, albeit it is a peculiar form of compensation that excludes consequential losses.

### ***Creggy v Barnett* and the Applicable Circumstances**

The wrongdoing in *Creggy v Barnett* was the transfer in 1998 by Mr Creggy of some US\$1.2m of company money. The companies, established by Mr Creggy, were used by the claimants, the Barnett brothers, for tax avoidance purposes. The claimants were the beneficial owners of the companies. Mr Creggy controlled the relevant funds and was responsible for ensuring they were applied to the claimants’ order and, in the meantime, was under a duty to preserve the funds in the companies’ bank accounts. At first instance, David Richards J held that the transfer was unauthorised. Since Mr Creggy owed fiduciary duties due to his position as a signatory, this was a breach of fiduciary duty. However, since the funds were not held on trust at the relevant time, there could be no claim over a “pre-existing beneficial interest”. Instead, the judge assessed equitable compensation for breach of fiduciary duty in the sum of US\$1.2m.<sup>8</sup>

A defence based on the reflective loss principle was rejected at first instance and was not subject to appeal. Mr Creggy’s other defence was of limitation. Mr Creggy, as constructive trustee, came within the Limitation Act 1980, s.21 via s.68(17), providing a six-year limitation period. Since the cause of action accrued in mid-1998, by 2012 the claim was out of time. The claimants’ answer was that a letter written in 2006 acknowledging the claim reset the limitation clock.<sup>9</sup>

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<sup>6</sup> On the distinction, see *Bristol and West Building Society v Mothew* [1998] Ch. 1.

<sup>7</sup> (1878) 8 Ch. D. 807 at 819.

<sup>8</sup> [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [1]–[8]. No claim for a constructive trust for breach of fiduciary duty was apparently made.

<sup>9</sup> [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [9].

Section 29(5) of the Act provides that:

“where any right of action has accrued to recover … any debt or other liquidated pecuniary claim … and the person liable or accountable for the claim acknowledges the claim … the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.”

The judge accepted the letter amounted to acknowledgement and the claim for equitable compensation fell within the definition of “any debt or other liquidated pecuniary claim”. What was required was the “amount being known or being capable of straightforward calculation on the evidence”<sup>10</sup> rather than the remedy being liquidated as a matter of principle. Since the claim was for the fixed sum paid away, it engaged the acknowledgement rule and the claim succeeded at first instance.<sup>11</sup>

Etherton M.R., Patten and Sales L.JJ. unanimously allowed the appeal on the latter issue and it was therefore unnecessary to deal with the former. The Court of Appeal adopted a definition of liquidated sum requiring it to be ascertainable as a “reasonable price” under a contract or “a sum which can be readily and precisely ascertained” “pursuant to some contractual or similar obligation”.<sup>12</sup> While a *quantum meruit* was within the section (approving *Lagos v Grunwaldt*<sup>13</sup> and *Phillips & Co v Bath Housing Co-operative Ltd*),<sup>14</sup> compensation for breach of fiduciary duty, which requires determination much like damages, could not be described as liquidated.<sup>15</sup> Similarly, damages for negligence are outside the section.<sup>16</sup> Consequently, the clock was not restarted and the claim was time-barred. Provided one accepts the test for ascertainability is not on the evidence of the instant case and is instead on the kind of remedy in principle – in order to deal with the general case – the reasoning appears inescapable.

However, the Court of Appeal went on to consider, *obiter dictum*, whether equitable compensation for the breach of trust of paying away trust money without authorisation engaged s.29(5)(a). The Court divided. Etherton M.R. held that such a claim was within the section as did Sales L.J.<sup>17</sup> Patten L.J. held that it was not.<sup>18</sup> The applicable circumstances where this matters are thus a breach of trust absent a breach of fiduciary duty, i.e. the breach must be inadvertent. It is this situation the legal analysis in this note is concerned with.

## History of the Acknowledgement Rule

The Court traced the history of the rules governing acknowledgement. The 1980 Act consolidated the Limitation Act 1939 and the substantive change was made in the 1939 Act replacing, *inter alia*, the Trustee Act 1888, s.8, which governed limitation against trustees. Particularly, it codified the judge-made rules for acknowledgement.<sup>19</sup> The judge-made rules encompassed both debts entirely at common law and the obligations of trustees to reconstitute

<sup>10</sup> [2014] EWHC 3080 (Ch); [2015] P.N.L.R. 13 at [107].

<sup>11</sup> [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [10]–[12].

<sup>12</sup> [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [30]–[31].

<sup>13</sup> [1910] 1 K.B. 41.

<sup>14</sup> [2012] EWCA Civ 1591, [2013] 1 W.L.R. 1479 at [47].

<sup>15</sup> *Creggy* [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [35], [46], [55].

<sup>16</sup> *Dwr Cymru Cyf v Carmarthenshire County Council* [2004] EWHC 2991 (TCC).

<sup>17</sup> [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [43], [48] respectively.

<sup>18</sup> [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [34].

<sup>19</sup> *Creggy* [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [14]; e.g. *Edwards v Lowndes* (1852) 1 El. & Bl. 81 at 89; 118 E.R. 367 at 370; noted in *Bullen & Leake's Precedents of Pleadings*, 2nd edn (London: Stevens, 1863), p.38 (*Creggy* at [21])).

trusts, which, upon acknowledgement, became actionable at law. They provided that the limitation clock was started or restarted upon that acknowledgement.

The Trustee Act 1888, s.8 required the courts to determine if a claim for breach of trust was time-barred by applying the rules, including the judge-made acknowledgement rules, by analogy: “*as if* the claim had been against him in an action of debt for money had and received” (emphasis added). “Debt for money had and received” was thought to be the closest analogy to the legal liability a trustee was subject to under the judge-made law for acknowledgement.<sup>20</sup> Upon acknowledgement, the trustee in effect admitted that he held the trust monies to his own use, which gave rise to legal liability for debt in *indebitatus assumpsit* (whereunder money had and received also fell), which in turn engaged section 8.

Conversely, the Limitation Act 1939, s.23(4), like the Limitation Act 1980, s.29(5), has no such phraseology, simply requiring a “debt or other liquidated pecuniary claim”. The difficulty was whether such a claim would be subject to the acknowledgement rule under the 1939 and 1980 Acts, given the removal of the route via analogy, presumably because of “belated tidying up following … the abolition of the old forms of action”.<sup>21</sup> It was on this the Court divided.

Patten L.J. thought not. The consequence of the 1939 Act, for him, was that since the analogical link had been broken, the words of the statute had to be applied plainly. Since “[t]here is nothing in this to support giving the phrase ‘debt or other liquidated pecuniary claim’ a wide enough meaning so as to encompass claims for equitable compensation”,<sup>22</sup> he held that claims for the breach of trust of paying away trust property without authorisation were not within the acknowledgement rule. Conversely, Sales L.J. and Etherton M.R. gave precedence to the principle that in consolidating Acts such as the 1939 Act, if there is any real doubt as to an ambiguous provision’s meaning, it should be presumed there was no intention to change the law.<sup>23</sup> Accordingly, such claims would be subject to the acknowledgement rule. Sales L.J. also considered that it would be anomalous to exclude them, where claims in unjust enrichment and for set contractual amounts were included.<sup>24</sup>

## **Substitutive and Reparative Compensation**

Not being in issue, the Court of Appeal did not develop this point further. But what more can be gleaned about the claim and remedy? One preliminary matter is the conceptual distinction between substitutive and reparative compensation. The Court did not use the terms reparative compensation and substitutive compensation but they were accepted in *AIB*,<sup>25</sup> which falls within the applicable circumstances, as does *Target Holdings*.

The distinction originates in these remedies’ roots in the process and action of account. Reparative compensation is the alternative to taking an account on the basis of wilful default. This requires the pleading and proof of the misconduct, and the remedy is for wider compensation akin to damages.<sup>26</sup> The remedy also applies to breach of fiduciary duty. For

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<sup>20</sup> *Creggy* [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [21], citing *Re Somerset* [1894] 1 Ch. 231 at 255.

<sup>21</sup> *Creggy* [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [28].

<sup>22</sup> *Creggy* [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [34].

<sup>23</sup> *Creggy* [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [41]–[45] and [49]–[54] respectively.

<sup>24</sup> *Creggy* [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [45].

<sup>25</sup> [2014] UKSC 58; [2015] A.C. 1503 at [53].

<sup>26</sup> *Libertarian Investments Ltd v Hall* [2013] HKCFA 93, (2013) 16 H.K.C.F.A.R. 681 at [170] (Lord Millett N.P.J.)

breach of fiduciary duty the form of account taken does not matter but similarly misconduct must be pleaded and proven.<sup>27</sup>

Contrast that with substitutive compensation, which is the alternative to taking an account in common form. Here, one does not need to plead or prove wrongdoing.<sup>28</sup> An account is taken and the unauthorised disbursement falsified. The trustee must then make good the account by returning the property or paying its money substitute. But how is that substitute quantified?

Ordinarily, for traditional trusts, quantum is the value of the property lost with no further inquiry as to limiting principles such as causation. But in a “*Target Holdings* situation”, i.e. if a bare, commercial trust is no longer on foot and has “in practical terms been completed, leaving no active obligations for the trustee to perform”,<sup>29</sup> the principle of causation does apply. It has been made clear by the Supreme Court that quantum is capped by actual losses caused by the breach.<sup>30</sup> Moreover, it is inherent that consequential losses form no part of this sum because of its basis, looking only to reconstituting the account by replacing the value lost and not to wider matters.<sup>31</sup> Contrast that with reparative compensation for wrongs such a failure to invest or use reasonable care and skill. These necessarily take in wider – consequential – losses. The conceptual difference is thus clear.

The assumed facts of *Target Holdings* illustrate how this matters. There, a finance house paid £1.5m to its solicitor as financing for a property transaction. As is usual, the monies were held on bare trust. In a merely technical breach of trust (assumed to be devoid of dishonesty),<sup>32</sup> the mortgage charge was obtained after, rather than before, paying the monies, but before any material change in circumstances. Upon the mortgagor’s insolvency, the claimant realised only £500,000 on the sale of the property, nothing like its fraudulent valuation of £2m. Simple reconstitution of the trust would have meant that £1m would have had to have been paid. However, since the trust was no longer on foot and there was no causal link to the loss, quantum was zero.

Nonetheless, the proposition that substitutive compensation admits causation and is therefore primary compensatory, not restitutionary, is controversial. The law revealed in *Creggy* can help explore this matter. Applying these terms to what the majority of the Court of Appeal said yields the following. Reparative compensation is not subject to the acknowledgement rule, but substitutive compensation for breach of trust is, although the Court did not distinguish between *Target Holdings* and non-*Target Holdings* situations.

By considering the requirements and justifications for the acknowledgement rule, one can see how they influence the content of substitutive compensation. We begin with the judgments and proceed further into legal history.

## A Liquidated Pecuniary Claim

Whether substitutive compensation is a “liquidated pecuniary claim”, as required by the Limitation Act 1980, s.29(5), is the easiest question to answer: yes, despite Patten L.J.’s view. The section is, as Etherton M.R. said, “capable of being fairly interpreted to include claims for

<sup>27</sup> *Glazier v Australian Men’s Health (No 2)* [2001] NSWSC 6 [43].

<sup>28</sup> *Libertarian Investments* [2013] HKCFA 93, (2013) 16 H.K.C.F.A.R. 681 at [167] (Lord Millett N.P.J.)

<sup>29</sup> *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] A.C. 1503 at [106].

<sup>30</sup> *AIB* [2014] UKSC 58; [2015] A.C. 1503 at [62], [93].

<sup>31</sup> S.B. Elliott, “Remoteness Criteria in Equity” (2002) 65 M.L.R. 588, 590.

<sup>32</sup> In reality the transaction was highly suspicious and redolent of fraud: [1996] 1 A.C. 421 at 440–1.

recovery of trust money [or] other trust assets wrongly misapplied".<sup>33</sup> Outside a *Target Holdings* situation, this is very clear. It is a fixed, ascertained sum, which is surely within any definition of liquidated sum. Compensation here is just a procedural alternative to account.<sup>34</sup>

The difficulty is in a *Target Holdings* situation where quantum may vary. It is suggested that this too should fall within the section. In these circumstances quantification is analogous to that in a claim for a *quantum meruit*, which has been held to be within the section. In common with a *quantum meruit*, substitutive compensation does not reach consequential losses; rather it is "a sum which can be readily and precisely ascertained" despite the complication that one may have to have recourse to market rates in calculating it. A wide construction of "liquidated" has been adopted, at least in respect of the statute. If justifiable, it should therefore apply broadly. It is justifiable on the basis that both claims comprise a self-contained single-issue enquiry excluding consequential losses. Therefore, even though the majority did not expressly say that the *Target Holdings* situation would be included in the current law of acknowledgement, there is a good argument that it indeed would be.

## In the Nature of Debt

Whether substitutive compensation is "in the nature of debt", supporting the *dictum* in *Ex p. Adamson* – and therefore causation should not apply to substitutive claims – is more difficult to say. Here is where the history of the acknowledgement rule assists.

As noted, in the days of the forms of action, both money had and received and debt fell under the same action: *indebitatus assumpsit*. Liability "in the nature of a debt" may well, it is suggested, refer to this shared compartment containing money had and received, debt and equitable liability for breach of trust transmuted to legal liability in debt – liability "in the nature of a debt or money had and received", one might say.

On the one hand, it meant liability exactly as a debt as much as money had and received is liability exactly as a debt – not at all, given it had to go through a fictitious implied promise to pay to get there. On the other, before modern times (specifically *Lipkin Gorman v Karpnale Ltd* where the defence of change of position was accepted),<sup>35</sup> money had and received was also for a fixed sum. Attempts to import legal principles of quantification to *indebitatus assumpsit* were rejected; claims for unascertained sums (e.g. contractual damages, *quantum meruit* and *quantum valebant*), utilising legal principles such as causation, fell under the general *assumpsit* action.<sup>36</sup>

The judges in *Ex p. Adamson*, James and Baggallay L.JJ., called in 1843 and 1831 respectively,<sup>37</sup> would have been well aware of the need to state the nature of the action on the writ because they would have been practising when it was necessary; while separate forms and procedures were abolished by the Uniformity of Process Act 1832, it was still necessary to state the nature of the action until the Common Law Procedure Act 1852 came into force, whereafter one could simply plead the facts that disclosed the cause of action. So, on the face of it, James and Baggallay L.JJ. were saying that such claims were for a fixed sum, not subject

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<sup>33</sup> *Creggy* [2016] EWCA Civ 1004; [2017] P.N.L.R. 4 at [53].

<sup>34</sup> *Libertarian Investments* [2013] HKCFA 93, (2013) 16 H.K.C.F.A.R. 681 at [168].

<sup>35</sup> [1991] 2 A.C. 548.

<sup>36</sup> A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon 1987) pp.496–7.

<sup>37</sup> *Oxford Dictionary of National Biography* (Oxford: OUP 2004).

to legal principles in quantification, because they had in mind the range of claims in *indebitatus assumpsit*.

Nonetheless, it is submitted that the restriction is entirely historic and has been rightly superseded. Money had and received is now restitution for unjust enrichment and, being subject to the defence – a legal principle – of change of position, is no longer for an ascertained sum, narrowly construed. It seems strange to look at related rules as they were at a certain point of time and derive a fixed principle from them, particularly given how the forms of action were manipulated to accommodate more and more claims in the distant past and how the claims deriving from them have been changed even more recently (viz. change of position). If other actions can move on, so can breach of trust. We should place more weight on the second sentence of the *dictum* where James and Baggallay L.JJ. spoke of the “value of the thing”. This points to the absence of consequential losses in the remedy.

We should also look to other common factors in the class of actions falling within the old form of action, but with this in mind. Absence of consequential losses is, it is submitted, the apposite factor in what was *indebitatus assumpsit*. The present law of acknowledgement applies to the claims it does because of that common factor, albeit to a wider class than that in the 1888 Act. It can be justified because of the limited scope of enquiry in calculating quantum. It can be seen as fair to reset the limitation clock on acknowledgement of such sums, where it would be much harder on a defendant to do so upon the acknowledgement of a liability that might be swelled by consequential losses she is unaware of. Similarly, substitutive compensation should exclude consequential losses because the claimant does not need to plead or prove fault to obtain it. If the claimant wants to go harder on the defendant and claim consequential losses, she should have to plead and prove additional fault.

## Conclusion

While the criticisms of *Target Holdings* and *AIB* that rely on *Ex p. Adamson* to argue that substitutive claims are for ascertained, fixed sums and are therefore not subject to causation gain a small fillip, it is submitted that this is besides the point. Reliance on *Ex p. Adamson* looks to a particular point in time and ignores the changes to the class of claims the *dictum* alluded to both before and after that point of time. Consequently one should dismiss such arguments. Legal principles have been admitted, for good reason, to substitutive compensation just as they were to restitution for unjust enrichment.

One might wish to call substitutive compensation a “liquidated pecuniary claim”, but the phrase has been rendered ambiguous by its wide construction as applied to limitation. It is therefore better to characterise it as compensation for the value of property paid away without authorisation that excludes consequential losses, distinct from reparative compensation and distinct from simple restitution of the property’s value. This is because that is the logical progression from its historic origins and it is the right remedy for the circumstances.

One might also note that while the reason for allowing acknowledgement to reset the limitation clock only for certain actions depends on the rule’s history, it might not justify it as a matter of first principles. One justification has been given, but again, that is a snapshot in time. The law moves on. Indeed, the next statutory tidying up exercise may well be to change the law of limitation so that acknowledgement applies to all claims, as the Law Commission

suggests.<sup>38</sup> The forms of action guide us and inform our understanding of the law, but should not rule us from their graves (with apologies to Maitland).<sup>39</sup>

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<sup>38</sup> *Limitation of Actions* (Law Com. No. 270, 2001), para.3.146–3.155. There was some dissent along the lines suggested above.

<sup>39</sup> See F.W. Maitland, *Equity, also the Forms of Action at Common Law: Two Courses of Lectures* (A.H. Chaytor and W.J. Whittaker eds, Cambridge: CUP, 1910) 372.