



Compensation Confusion

It is important not to confuse equitable compensation with equitable damages for breach of fiduciary duty

In the July issue of this publication, PM McDermott discussed *Kishimoto Sangyo Co Ltd v Oba* [1996] 2 HKC 260 (see page 3). In this case, an employer sued its former senior manager for breach of fiduciary duty in diverting a maturing business opportunity.

Mr McDermott wrote, 'Whilst it was clear that the manager was in breach of fiduciary duty to his employer, the Court of Appeal considered that an award of nominal damages was appropriate because the breaches did not result in any impairment of the Plaintiff employer's chance of obtaining contracts for a particular project.'

In *Kishimoto*, Godfrey and Ching JJA thought that compensation for breach of fiduciary duty was based on the inherent jurisdiction of equity, whereas Litton V-P treated it as 'equitable damages' based upon s 17 of the now *High Court Ordinance* (Cap 4), which was derived from *Lord Cairns' Act* 1858. For Mr McDermott, nothing turned on the issue of whether the basis of liability was inherent or statutory.

This article argues that *Kishimoto* is not a decision awarding nominal damages for breach of fiduciary duty; that the proper compensatory award for breach of fiduciary duties is equitable compensation, which is based on the inherent jurisdiction of equity; and that it matters a great deal that the courts do not confuse equitable compensation with equitable damages.

It must be pointed out, first, that the nominal damages awarded in *Kishimoto* were for breach of the duty of fidelity implied in the employment contract, not breach of fiduciary duty. In fact, the Court held that there was no breach of fiduciary duty, on the ground that there was no maturing business opportunity, and that the Defendant was entitled to exploit his own

knowledge and skill without attracting the disapproval of equity.

This having been clarified, one might ponder upon the Judges' disagreement on the nature of the compensatory award for breach of fiduciary duty. Godfrey and Ching JJA were right. Equitable damages under *Lord Cairns' Act* were intended to save litigants, who were refused equitable relief for a legal right by a court of equity, the trouble of starting afresh at a common law court to recover damages. The statutory jurisdiction did not make damages available for exclusively equitable rights.

It is true that equitable damages have nonetheless been awarded for breach of exclusively equitable duties of confidence. This is possible only upon a beneficent but controversial interpretation of the relevant statutory provision (*AG v Guardian Newspapers (No 2)* [1990] AC 109 at 286, per Lord Goff), and upon the mistaken assumption that compensation for exclusively equitable rights would otherwise be unavailable.

The heresy is unnecessary. The inherent equitable jurisdiction to award compensation as recognised in *Nocton v Lord Ashburton*, [1914] AC 932, was recently revived. Equitable compensation is now available for breach of fiduciary duty (see eg *Warman International Ltd v Dwyer* (1995) 182 CLR 544). None of the Judges invoked *Lord Cairns' Act* for breach of fiduciary duty. Litton V-P was the only exception.

Moreover, the practical advantages of pursuing equitable compensation are abundant. The court has no power to award equitable damages if it has no jurisdiction to grant an injunction or specific performance. While in breach of confidence cases there is likely to be sufficient risk of repetition to give the court jurisdiction, it is not so where, for example, a fiduciary breached the fair-dealing rule or a conveyancing solicitor

engaged in a conflict of duties between two clients. Equitable compensation is not subject to such a jurisdictional limitation.

More significantly, the measure of recovery for equitable compensation is much more extensive. Equitable damages are assessed in the same manner as common law damages: *Johnson v Agnew* [1980] AC 367. Equitable compensation is not so limited. Loss is assessed at the date of trial, not the date of breach. The rule on remoteness of damage is irrelevant. So are doctrines such as contributory negligence and mitigation. They go to causation. In fact, even the test of causation may be easier for the plaintiff to satisfy.

It is precisely on this point that the difference between the two bases of compensation could have turned in *Kishimoto*. Litton V-P stated that no less than common law damages, equitable damages required evaluation of the fundamental issues of causation and remoteness. He held that causation was not satisfied because a principal reason why the employer lost its contracts was its lack of expertise, not the alleged breach. Thus, Litton V-P assumed that the breach should be the principal cause of the loss.

However, the test of causation for equitable compensation is not so stringent. It is strongly arguable that the plaintiff only needs to show that the breach is material to the loss, even though he or she could not show that the loss would not have occurred but for the breach: *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465. Putting the defendant's case at the highest, causation is treated as not proven if the court finds that but for the breach, the loss would still have occurred: *Swindle v Harrison* (25 March 1997, English Court of Appeal). These advantages of equitable compensation are due to its progenitor, compensation for breach of trust, where fiduciaries in breach have traditionally been treated severely to hold them to strict standards. Litigants are well advised to tap into this powerful and fast-growing jurisdiction.

Lusina Ho
University of Hong Kong