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Equitable Compensation and the Brickenden "Rule" After Winsta Holding Pte Ltd and another v Sim Poh Ping and others

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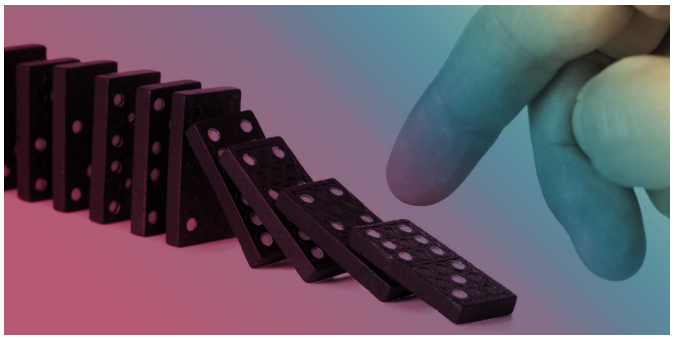

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Equitable Compensation and the *Brickenden* "Rule" After Winsta Holding Pte Ltd and another v Sim Poh Ping and others

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by Nicholas Liu Sheng

The Brickenden rule, which was thought to provide an exception to the requirement of but-for causation of loss in equitable compensation for breach of fiduciary duty, has recently been rejected by the Singapore High Court in Winsta Holding Pte Ltd and another v Sim Poh Ping and others [1] *(**Winsta Holding**). This case comment suggests that although the substantive position arrived at in Winsta Holding is a sound one, it should not entail a rejection of the Brickenden rule. Properly understood, the Brickenden "rule" is consistent with the requirement that the principal prove but-for causation.*

Introduction

In *Brickenden v London Loan Savings Co* [2] (**Brickenden**), the Privy Council in 1934 appeared to have established a rule (**the *Brickenden* rule**) that either dispensed with the need to prove causation of loss in a claim for equitable compensation for breach of fiduciary duty entirely, or at least assisted the principal in establishing causation by reversing the burden of proof. The *Brickenden* rule was a late transplant into Singapore law, having been judicially adopted only in 2013, [3] but quickly entrenched itself in a string of High Court decisions over the years that followed. [4]

This changed with *Winsta Holding*, a decision of the Honourable Justice Chua Lee Ming (**the Judge**) rendered in November 2018. The Judge rejected the *Brickenden* rule, holding that a principal bringing a claim for equitable compensation for breach of fiduciary duty must prove but-for causation of her loss without any reversal of the burden of proof. Applying that analysis to the facts before him, the Judge partly disallowed the plaintiffs' claim, on the basis that but-for causation had not been proven in respect of part of the plaintiffs' losses. The decision is on appeal.

In the author's view, the position established in *Winsta Holding* is sound, but the articulation of that outcome as requiring, or resulting from, the *rejection* of the *Brickenden* rule is not quite accurate. On a proper analysis, *Brickenden* is consistent with and indeed involves the application of ordinary principles of but-for causation, which the principal must prove.

The Decision in *Winsta Holding*

Winsta Holding concerned claims by Winsta Holding Pte Ltd and its subsidiaries (**the Winsta Subsidiaries**; collectively, **the Winsta Group**), which were in the hostel and serviced apartments business, against certain of its directors. The relevant claims for present purposes concerned the following alleged breaches of fiduciary duties:

1. Diversion of opportunities (specifically, opportunities to operate two serviced apartment projects, and to house foreign students during a certain summer camp in 2014) away from the Winsta Group toward companies associated with the defendant directors;
2. The procurement of the Winsta Group's entry into interested-party transactions (**IPTs**) involving the rental of certain units owned by the Winsta Group (which were then rented onwards to the ultimate tenants), the provision of catering services to the Winsta Group, and the provision of air-conditioning servicing and general maintenance services to the Winsta Group, all by companies associated with the defendant directors; and
3. The misuse of some of the Winsta Group's support/administrative resources for the operation of a company in which one of the defendant directors was interested.

The Winsta Group sought equitable compensation rather than an account of profits, triggering an inquiry into causation of their losses. The losses claimed included profits which the Winsta Subsidiaries had to forego because they were placed under creditors' voluntary liquidation (**the post-liquidation losses**), allegedly due to financial difficulties caused by the defendant directors' breaches.

On the facts, the Judge found for the Winsta Group on the issue of breach. Turning then to the issue of causation, the Judge considered what the applicable principles were. The Judge summarised *Brickenden* as "*stand[ing] for the proposition that but-for causation is not essential for liability for breach of fiduciary duty*" and that "*in the context of equitable compensation, it is not necessary to show a causal link between the breach and the loss claimed*". [5] Against this, he highlighted the contrary holding by the House of Lords in *Target Holdings Ltd v Redferns (a firm)* [6] (***Target Holdings***) that but-for causation was necessary.

The Judge noted that *Brickenden* had been academically criticised, including by Tan Ruo Yu in "Causation in Equitable Compensation: The *Brickenden* Rule in Singapore". [7] He then considered the UK Supreme Court's decision in *AIB Group (UK) plc v Mark Redler & Co Solicitors*, [8] which confirmed the position in *Target Holdings* that but-for causation was required, though without the requirement of foreseeability. [9]

Finally, the Judge considered the Singapore cases on *Brickenden*. He observed that an attempt had been made in *QAM* and *Then Khek Koon* to reconcile *Brickenden* and *Target Holdings* "*by limiting* Brickenden *… to cases involving fiduciaries in one of the well-established categories of fiduciaries and culpable breaches of core duties of honesty and fidelity*", [10] and that the correctness of this position had been left open by the Court of Appeal on appeal from the decision in *Then Khek Koon* in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* (***Maryani Sadeli***). [11] The Judge referred as well to *Beyonics Technology Ltd and another v Goh Chan Peng and others*, [12] which (as summarised by the Judge) had explained *QAM* and *Then Khek Koon* as follows:

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> “*(a)* QAM *clarified the burden-shifting function of the* Brickenden *decision, i.e. once the principal adduces some evidence to connect the breach to the loss, the evidential burden shifts to the fiduciary to prove that but-for his breach, the loss would still have occurred; and*
>
> *(b) bearing in mind this burden-shifting function of the* Brickenden *rule,* Then Khek Koon *should not be understood as dispensing with the need for but-for causation* altogether.” [13]

This is what has been referred to as the “weak” conception of the *Brickenden* rule, in contrast to the “strong” conception of the *Brickenden* rule, which dispenses with the need for causation altogether when triggered. [14]

Having surveyed the above authorities, the Judge held that “Brickenden *should not be followed in Singapore*” and that he “*respectfully agree[d] with the decision in* AIB”. [15] The Judge held that “*whether a fiduciary belongs to a well-established category of fiduciaries or not, or whether the breach is of a core duty or is innocent*”, the same position applied, which was that “*the beneficiary should be compensated for loss suffered as a result of that breach and no more*”. [16] The Judge also saw “*no reason in principle why the evidential burden on causation should shift to the fiduciary on the mere ground that the principal proves that the breach “is in some way connected” to the loss*” [17] (making it clear that the Judge’s rejection of *Brickenden* extended to the “weak” *Brickenden* rule as well).

Applying these principles to the facts before him, the Judge concluded that the Winsta Group had proven but-for causation only in respect of some of the losses. The losses that were not claimable included the summer camp opportunity (as it could not have been taken up by the Winsta Group in any event), the IPTs involving rental of the units owned by the Winsta Group (as on the facts the Winsta Group would have obtained the same profit, or even less, had it rented directly to the ultimate tenants), and the post-liquidation profits (as the liquidation of the Winsta Subsidiaries was due to financial difficulties unrelated to the breaches of fiduciary duties).

Commentary – The Right Substantive Position in Not Quite the Right Words

The Judge’s reasoning in *Winsta Holdings* can be described as tightly focused, if not narrow; he does not appear to have considered certain controversial issues which have received significant academic attention, such as the interrelationship between equitable compensation and equitable accounting principles. [18] It is hoped that the eventual decision by the Court of Appeal will provide clarity on these matters.

The remainder of this comment will instead examine two other questions which arise directly from the Judge’s decision: First, was the Judge right in (in reasoning as well as outcome) in concluding that but-for causation should apply, without any reversal of the burden of proof? Second, is the *Brickenden* rule truly incompatible with that conclusion?

But-For Causation to Be Proved By the Principal – Already the Requirement Under Singapore Law

The Judge's decision was reached on the basis that he agreed with the reasoning in *AIB*. Without faulting that conclusion, it bears mentioning that this also follows, as a matter of binding authority, from the Court of Appeal's decision in *Ohm Pacific Sdn Bhd v Ng Hwee Cheng Doreen* [19] (***Ohm***).

Like *Brickenden*, *Ohm* concerned a fiduciary (also a solicitor) who failed to disclose to the principal (the client) his or her interest in a third party's business, and who then acted for the principal in a transaction with that third party which allegedly caused loss to the principal. In *Ohm*, the contract was for the third party (**Pacific Navigation**) to provide bridging finance for the purchase of a vessel and subsequently to operate the vessel as managing agent for the principal (**Ohm**). The defendant solicitor was a shareholder and director of Pacific Navigation. The vessel was later arrested in an *in rem* action following Ohm's failure to pay operating and other fees owing to Pacific Navigation. [20] Ohm sued the solicitor for, *inter alia*, her breach of the no-conflict rule, seeking equitable compensation (albeit framed, incorrectly, as "damages") for its lost earnings and the costs it incurred defending the action. [21]

Although *Brickenden* itself was not cited in *Ohm*, a similar rule was proposed on the basis of other authorities and was expressly rejected by the Court of Appeal, which stated that:

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> "*it is necessary for the appellants to prove a causal connection between the breach of duty and the alleged loss. No principle could be extracted from the cases that once a breach of duty was shown the burden fell on the respondent as a*
> *defaulting fiduciary to show that the loss did not result from her breach...*" [22]

The Court of Appeal affirmed the finding of the trial judge that causation had not been proven.

Ohm thus stands for the proposition that but-for causation applies to equitable compensation for breach of fiduciary duty, without any reversal of the burden of proof. *Ohm* was acknowledged in *QAM* and *Then Khek Koon*, but the High Court in those cases reasoned that *Ohm* set out a general rule which was modified in the *Brickenden* "class" of cases. [23] With respect, that is not a sustainable distinction, as the facts of *Ohm* (a self-interested breach of the no-conflict rule by a solicitor) fell squarely within the supposed carve-out for culpable breaches of core fiduciary duties by a fiduciary falling within an established class of fiduciary. *Ohm* is thus in the same "class" of cases as *Brickenden*, and is inconsistent with the proposition that such facts trigger a more principal-friendly set of causation rules. Subsequent Singapore cases applying *Brickenden* appear to have mistakenly taken the distinction drawn in *QAM* and *Then Khek Koon* at face value, overlooking the inconsistency with *Ohm*.

Consequently, the question in *Winsta Holding* was not an open one under Singapore law – *Ohm* had already reached the same conclusion. By the same token, when *Winsta Holding* reaches the Court of Appeal, the Court will not be starting from a blank slate (despite the assumption to that effect in *Maryani Sadeli*), but will instead be confronted with the question of whether to depart from its previous decision in *Ohm*.

What *Brickenden* Really Established

If one accepts that the Judge was right to hold that but-for causation is needed and must be proved by the principal, must one also conclude that the Judge was right to reject the *Brickenden* rule? In the author's view, the answer is negative.

To properly understand the *Brickenden* rule, one should begin with the *dictum* by Lord Thankerton from which the rule arose:

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> "*When a party, holding a fiduciary relationship, commits a breach of fiduciary duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the nondisclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken, is not relevant*." [24]

As Matthew Conaglen has observed, the meaning of Lord Thankerton's *dictum* is "*difficult to decipher*" because, among other things, it appears to prevent the calling of evidence which would help to avoid the "*speculation*" which the *dictum* states is to be avoided, and also seems to draw upon principles which, on an orthodox view, should be confined to fiduciary relationships involving stewardship of assets. [25]

A further difficulty arises from the reference to the fiduciary "*commit[ting] a breach of fiduciary duty* ***by non-disclosure of material facts***" (emphasis added). This could be read as meaning that non-disclosure **is** the breach. This is significant, as the court's choice of event from which causation is drawn has as great an influence on the outcome as the court's choice of the rules of causation to apply to that event.

It is respectfully suggested that Lord Thankerton chose his words with less than perfect precision. It should be recalled that under the orthodox understanding of fiduciary law, fiduciary duties are proscriptive, not prescriptive; as Lord Woolf put it in *Attorney-General v Blake*, equity "*tells the fiduciary what he must not do. It does not tell him what he ought to do*." [26] Lord Woolf's *dictum* continues to find judicial support, particularly in Australia, which has consistently applied the orthodox (strictly proscriptive) view [27] Despite some academic criticism, [28] and the controversial decision of the Court of Appeal of England and Wales in *Item Software UK Ltd v Fassihi* [29] (which went so far as to recognise a positive fiduciary duty to disclose one's prior misconduct), the academic consensus favours the orthodox view. [30]

In Singapore, the Court of Appeal has recently confirmed that the orthodox view still applies in its decisions in *Tan Yok Koon v Tan Choo Suan and another and other appeals* [31] and *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters*. [32] It follows that a breach of fiduciary duty arises when the fiduciary commits a proscribed act (eg, when she acts under a conflict or obtains a secret profit). Disclosing in advance the conflict or profit, and obtaining the principal's informed consent to it, is not a positive obligation, but rather a means of **avoiding** liability that would otherwise arise when the fiduciary proceeds to act. [33]

This can be more easily appreciated if one considers the position at the time the fiduciary has formed the intention to act, but not yet acted. At that point, the fiduciary has not crossed the Rubicon; she still has the option of refraining from acting at all. Is she, nonetheless, already under a positive duty of disclosure? If so, the implication is that a fiduciary who **intends** to act under a conflict or make a secret profit, and fails to make disclosure, has already breached her fiduciary duty **even if**

she eventually decides not to act at all. This would come close to punishing intention without more and would be a harsh conclusion even for fiduciary law. The fairer and more logical view is that there is no **duty** to disclose, but a fiduciary omits to do so at her own peril (as she thereby forgoes the opportunity to pre-empt liability).

With this in mind, a simpler reading of *Brickenden* presents itself. Rather than departing from but-for causation or offering an evidentiary aid in proving it, *Brickenden* merely identifies the relevant act from which but-for causation is to be drawn. This argument has been forcefully made by Matthew Conaglen, who characterises the *Brickenden* rule as "*identifying the relevant counterfactual against which the plaintiff's loss properly falls to be assessed*", which should be "*the counterfactual of what would have happened if the fiduciary had not acted with the relevant conflict or taken the unauthorised profit*." [34] He argues that the court should choose this, rather than the counterfactual of disclosure having been made, because it is more consistent with the prophylactic aims of fiduciary law. [35]

The author agrees with Conaglen's analysis, but respectfully suggests that his premises in fact support a more robust conclusion. Conaglen appears to assume that there is no default answer to the question, thus necessitating the application of the *Brickenden* rule to fill the gap. The more accurate picture is that Conaglen's preferred counterfactual is **already the default**, and that the court would need compelling reasons to depart from that default position.

This can be seen if one considers the common law position. Before committing a breach, a contract-breaker could try to avoid liability through various ways, such as a variation or waiver of the relevant contractual term. Similarly, a tortfeasor could seek the victim's consent to the intended tortious act. Despite this, the court determining but-for causation in contract or tort is only concerned with what would have happened if the contract-breaker had performed her obligation or if the tortfeasor had not performed the tortious act – not what would have happened had the contract-breaker/tortfeasor sought consent in advance. Simply put, the law recognises consent, but does not generally deal in **hypothetical** consent. Even the exceptional example of *Wrotham Park* damages, which are based on a hypothetical bargain between the wrongdoer and the innocent party to waive the right which was infringed or grant a licence for the act, only operates in favour of the innocent party to fill the remedial lacuna where that party would otherwise be left with no or only nominal damages, not in favour of a wrongdoer who would otherwise be liable for a larger sum. [36]

The question that remains is whether there is any reason for equity to provide an escape route to a breaching fiduciary which is not available to a contract-breaker or tortfeasor. It is difficult to conceive of such an argument. If anything, fiduciary law should be **stricter** with a breaching fiduciary, as it aims to deter breach and has a policy of favouring the interests of the principal over the fiduciary's freedom of action. [37] Hence, the only reasonable position to adopt is that the relevant causal inquiry is whether the loss would have been incurred had the fiduciary not acted, rather than whether the principal would have consented had full disclosure been made.

Conclusion

Returning to the facts of *Winsta Holding*, it is apparent that the interpretation of *Brickenden* proposed above is perfectly consistent with the Judge's reasoning. In fact, the Judge effectively did apply that interpretation of *Brickenden*. He did not ask whether the Winsta Group would have given their informed consent had the defendant directors made disclosure (which is the inquiry which *Brickenden* states is irrelevant). He instead asked whether the Winsta Group would have obtained the benefit of the opportunities had the opportunities not been diverted by the defendant directors, whether the entry into the IPTs caused loss to the Winsta Group, and whether the combined effect of the breaches had led to the

Winsta Subsidiaries having to be wound up. [38] In other words, the Judge traced causation from the acts constituting breaches of the no-conflict and no-profit rules, not from the omissions to disclose.

Hence, the actual outcome as well as the underlying reasoning in *Winsta Holding* would have been given better effect not by rejecting the *Brickenden* rule, but by recognising that the *Brickenden* "rule" is a statement of the natural outcome when one applies but-for causation to a breach of a proscriptive duty. The reason the court will not speculate as to what the principal would have done had disclosure been made is simply that that is the wrong causal question to begin with, not that a special rule is needed to bar such inquiries.

Endnotes

1.	(2018) SGHC 239.
2.	(1934) 3 DLR 465.
3.	In *Quality Assurance Management Asia Pte Ltd v Zhang Qing* (2013) 3 SLR 631. The *Brickenden* rule had, shortly before that, been considered in *obiter* in *Then Khek Khoon v Arjun Permanand Samtani* (2012) 2 SLR 451 at (60)–(67).
4.	*Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* (2014) 1 SLR 245; *Beyonics Technology Ltd and another v Goh Chan Peng and others* (2016) 4 SLR 472; *Higgins, Danial Patrick v Mulacek, Philippe Emanuel and others and another suit* (2016) 5 SLR 848; *Tongbao (Singapore) Shipping Pte Ltd and another v Woon Swee Huat and others* (2018) SGHC 165; and *Cheong Soh Chin and others v Eng Chiet Shoong and others* (2018) SGHC 131.
5.	*Winsta Holding* at (185).
6.	(1996) 1 AC 421.
7.	(2014) 26 SAcLJ 724. For an earlier (and perhaps the most prominent) academic criticism of *Brickenden*, see JD Heydon, "Causal Relationships between a Fiduciary's Default and the Principal's Loss" (1994) 110 LQR 328 (**Causal Relationships**).
8.	(2014) 3 WLR 1367.
9.	*Winsta Holding* at (188)–(189).
10.	*Winsta Holding* at (190).
11.	(2015) 1 SLR 496.
12.	(2016) 4 SLR 472.
13.	*Winsta Holding* at (192).
14.	Heydon, "Causal Relationships" at 331–332.
15.	*Winsta Holding* at (193).
16.	*Winsta Holding* at (193).
17.	*Winsta Holding* at (194).
18.	See eg, Goh Yihan and Yip Man, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884.
19.	(1994) 2 SLR(R) 633.
20.	*Ohm* at (2).
21.	*Ohm* at (24).

22.	*Ohm* at (27).
23.	*QAM* at (60)–(61); *Then Khek Koon* at (106(e)).
24.	*Brickenden* at 469.
25.	Matthew Conaglen, "*Brickenden*" in *Equitable Compensation and Disgorgement of Profit* (Simone Degeling and Jason NE Varuhas, eds) (Hart Publishing, 2017) ch 6 at pp 111–112 (***Brickenden* chapter**); Heydon, "Causal Relationships" at 332.
26.	(1998) Ch 439 at 455.
27.	See eg, *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* (2007) FCA 963 at (293); *Groeneveld Australia Pty Ltd & Ors v Wouter Nolten & Ors (No. 3)* (2010) VSC 533 (***Groeneveld***) at (52).
28.	See Pearlie M.C. Koh, "A Director's Duty of Loyalty and the Relevance of the Company's Scope of Business: *Cheng Wai Tao v Poon Ka Man Jason*" (2017) 80(5) Modern Law Review 941 at 952–953.
29.	(2004) EWCA (Civ) 1244 at (41).
30.	Graham Virgo, *The Principles of Equity and Trusts* (Oxford University Press, 3rd ed, 2018) (***The Principles of Equity and Trusts***) at pp 424–426; Matthew Conaglen, "Fiduciaries" in *Snell's Equity* (John McGhee ed) (Thomson Reuters, 33rd ed, 2018) (***Fiduciaries***) at p 147; Conaglen, *Fiduciary Loyalty* ch 7; Vicki Vann, "Causation and Breach of Fiduciary Duty" (2006) Sing J Legal Studies 86 at 88.
31.	(2017) 1 SLR 654 at (192).
32.	(2018) 2 SLR 333 at (135).
33.	*Groeneveld* at (52); Jamie Glister and James Lee, *Modern Equity* (Sweet & Maxwell, 21st ed, 2018) at 22-024; Virgo, *The Principles of Equity and Trusts* at p 425; Conaglen, "*Fiduciaries*" at p 155.
34.	Conaglen's *Brickenden* chapter at p 112.
35.	Conaglen's *Brickenden* chapter at pp 141–142.
36.	See *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* (2018) 2 SLR 655 at (171).
37.	*QAM* at (38) and (41).
38.	*Winsta Holding* at (220)–(231).

Tags: BRICKENDEN RULE, CAUSATION, EQUITABLE COMPENSATION, EQUITY, FIDUCIARIES

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