1. INTRODUCTION

1.1 Jurisdiction

An account of profits (“AOP”) is an equitable remedy for disgorging the value of a gain obtained in breach of an equitable obligation. As it is an equitable remedy, the primary duty is assessed strictly.

A fiduciary is generally the focus of the action. Therefore, the inquiry centres on the relationship of the parties. This may involve assessing whether the relationship is fiduciary (i.e. falling outside the fixed categories) via assessing trust/confidence, dependence/reliance and loyalty.

Breath of confidence is another area of law that might trigger an account.

1.2 Order based on defendant’s gain

As mentioned, the focus is on the defendant (or another person) and whether they have made an illegitimate gain. This differs from actions in tort/contract which focus on the plaintiff’s loss. An AOP works by “stripping” or “disgorging” the defendant’s gain. This is referred to as a “restitutionary basis of relief” in Estate Realities Ltd v Wignall. It is not bound by the rules of restitution, though.

An AOP is advantageous for the plaintiff because:

- It is in equity (strict approach to the primary duty).
- The plaintiff does not need to prove loss (see Boardman v Phipps)
- Need not be any dishonesty
  - There has to be an infringement of rights, but acting bona fide is no excuse; there can be an innocent breach of their duty. Again, see Boardman.

An AOP is “advantageous” to the defendant because:

- The award is not “penal” per se. Somers J in Aquaculture said that equity and penalty are strangers. Thus, the outcome should not be unduly harsh.

1.3 Other orders in aid of enforcement

Injunction: When acting for a P whose rights are undoubtedly being infringed, but trial is a while away, you would seek an interlocutory injunction which can then be superseded by a permanent order. It would be improper to sit on your rights and get a greater AOP at the end.

Freezing order: To prevent the defendant from dissipating their assets and rendering themselves judgment-proof.

1.4 Personal order

An AOP is a personal order. This means it acts “in personam” and renders the defendant personally liable. It must be assured that the defendant actually has the assets (and not a spouse or a trust).

This means it does not survive insolvency either. You are in the position of an unsecured creditor. Ironically, by bringing proceedings, it might hasten insolvency as other creditors will become nervous and call in debts. Thus, lawyer needs to advise as to whether to bring the action in the event that cost > amount recovered.

Getting around this? Need to somehow found a claim for a proprietary remedy, such as a constructive trust.

1.5 Implications of equitable relief

- Remedy is discretionary
- It is subject to laches/acquiescence/delay
- Maxims of equity are relevant as guides
- Involves looking at the conduct of both plaintiff and defendant

1.6 Different forms of order

The remedy is flexible (as is equity generally) and can respond to moral actions. Not all defendants are the same in terms of moral reprehensibility: compare Reid (bribes) and Boardman (good faith breach). Thus, there is versatility in terms of what equitable relief is granted (ranked best to worst from plaintiff’s perspective).

- Proprietary order: The D is deemed in equity to hold property.
- Security over an asset
- Order of AOP subject to allowances (“bare personal order”)
- AOP subject to remuneration on a liberal scale
This differs from the third one as liberal remuneration is rare. *Boardman* is the exceptional case where the errant fiduciary did a good job and made an immense amount of profit.

**Estate Realities v Wignall:** Tipping J hinted he would be reluctant to allow P to cite equity to scoop large profits, so there is a chance.

Competing considerations: Need to send the message that equitable duties must be complied with (so as to deter breaches). Once you start remunerating liberally, it undermines this objective.

- Division of profits between plaintiff and defendant
  This is *far* more scarce. Might occur where there is an agreement etc.

In *Warman International v Dwyer*, the Court commented that apportioning profits in the absence of an agreement is running afoul of the cardinal principle of the no-profit rule.

Can it be said that equity is going soft due to this flexibility?

- Equity seeks to not act oppressively. Its genesis, of course, was to mitigate the rigours of the common law.
- Proportionality of response is arguably consistent with a conscience based jurisdiction.
- Courts are mindful of both parties when dispensing justice.
- Equity attempts to achieve justice inter partes. Deterrence “at-large” is not as significant.
- Equity is also very strict on liability (remorseless no-profit/conflict rules) and as such may need to be more measured/reflective when granting relief.
- The principle has modernized. For example, you can rationalize equal distributions in commercial agreements where the original agreement was a profit-sharing arrangement, such as *Chirnside v Fay*.
  - It can be consistent to leave some money in the hands of the D. But, the more the profits are directly attributable to the wrong, the less willing the courts will be to do so. That said, what if the profits were made before/after the breach (i.e. not during), the court might be more generous.

1.7 High Court Rules, Part 16, Accounts and inquiries

2. **BALANCING PLAINTIFF’S AND DEFENDANT’S INTERESTS**

2.1 Strict attitude towards breaches of equitable obligations

As mentioned above, equity takes a very hard-line approach to the breach of equitable obligations.

**Keech v Sandford**

Classic example of strict/absolute duties of loyalty. Trustee was acting entirely for the benefit of the child, but released the property in his name (as child has inherited it and was too young to have it in his name). Was held to have breached his fiduciary duty despite complete lack of bad faith. The personal benefits were imputed to the beneficial party.

**Regal (Hastings) Ltd v Gulliver**

“The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud or absence of bona fides. … The liability arises from the mere fact of a profit having … been made. The profiteer, however honest and well-intentioned cannot escape the risk of being called upon to account”.

**Estate Realities Ltd v Wignall**

Two men acquired shares and options in a company, in breach of their fiduciary duty to Estate Realities. They failed to make full and frank disclosure of this. Moreover, they misled an employee of Estate Realities into believing they were selling the shares to a genuine client who wished to remain anonymous.

The Court quoted both *Regal (Hastings)* and *Boardman*, confirming the strict approach and the only escape from liability being informed consent of the beneficiary.

The Court confirmed that AOP has a gains-based focus. The only defence to an AOP is that the profit was made with the knowledge and assent of the beneficiary. If it is too rigid, then equity becomes like the common law, which is contrary to equity’s nature.
2.2 Contrasting views
The courts can relax the standards in the appropriate case. The genesis of this relaxation was *Boardman*, where Lord Upjohn noted there has to be a “real sensible possibility of conflict”. Thus in *Boardman*, there was the potential for the trust to renounce their interest and remove the possibility of conflict.

This was applied in *Queensland Mines v Hudson* and *Murad v Al-Saraj* where both courts agreed the legacy of the strict principle may require some relaxation.

*Chirnside v Fay*
Elias CJ’s reluctance to grant a share of profits/remuneration was evident. She took a more purist view. Elias CJ believed it would be inappropriate because it was agreed he would receive a certain amount and giving more would permit the errant fiduciary to profit from the wrong.

The majority noted that the lenience should emerge where the errant fiduciary is a constructive trustee (i.e. wouldn’t know they have to declare your financial interest). Whereas, when you are a willing fiduciary, the strictness is appropriate.

2.3 Commercial relationships contemplating self-interest and personal gain
Sharing of profits is permissible where there is an agreement contemplating it. Thus, it is not inconsistent with what the plaintiff’s expectations. However, the gain should not be directly attributable to the breach.

If the overall relationship is not fiduciary, but a certain aspect of the relationship is, then it is probably inconsistent to talk about a partial duty with an unqualified duty to account. When the duty is non-fiduciary in all, then disgorging the profits lacks proportionality.

*Amaltal v Maruha*
Two commercial parties agreed to exploit a fishing quota. The overall relationship was not fiduciary, but the SC held it was fiduciary in the respect of tax arrangements. The Japanese party were unfamiliar with NZ tax and their need to pay more tax was concealed.

The other modifying influence is a contract which modifies the fiduciary duty. Mason J in *Hospital Products Ltd v USSC* said that, even where there is a fiduciary relationship, you need to consider the contract as it will generally govern the relationship between the parties. This might diminish the duty.

2.4 No unjust enrichment to plaintiff
The remedy is about maintaining an appropriate balance between the breach and the response.

*Estate Realities*
An account of profits is restitutionary, not penal. Equity is not penal and it does not promote unjust enrichment. In this case, the fiduciary paid a marker price, so the seller lost nothing. But, as a result of their effort, skill and risk taking, they made a large profit. Although their conduct was deserving of censure, it would inequitable not to give some recompense for their effort and skill.

The Court noted that he who seeks equity, Estate Realities, must do equity and recognise that the profits to which it is prima facie entitled are something of a windfall. Had the defendants not played their blighted hand with considerable skill there might well have been no profit at all and they all may have been bankrupt.

*Warman International v Dwyer*
The stringent rule requiring a fiduciary to account for profits can be carried to extremes and that in cases outside the realm of specific assets (i.e. gambling with the beneficiary’s asset/liquidates trust assets and uses them) the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff.

*LAC Minerals v International Corona Resources Ltd*
The Court confirmed that the AOP jurisdiction will try to prevent windfalls for the plaintiff but sometimes it will be unavoidable and, in that case, the courts should naturally favour the innocent plaintiff.

This case concerned a joint venture between (a) the man with the money and (b) the man with the idea/expertise. The plaintiff identified property where mining would be profitable and made the defendant aware of geotechnical reports that covered the adjoining land.
Their deal did not proceed. But, of course, the defendant had become privy to valuable and sensitive information about the adjacent property. It came up for sale and the defendant outbid the plaintiff. The plaintiff alleged the information was cloaked with confidentiality and successfully argued the defendant had breached the fiduciary duty.

By this point, the mine was almost entirely in operation. But its profitability was uncertain. It could be hugely profitable or it could be a flop. Obviously it is undesirable to grant a massive windfall. So, the Court granted the mine to the plaintiff on unusual facts. They awarded the plaintiff half of future profits. After all, how would leaving the mine with the defendant be fair to the plaintiff? It was the case, therefore, that the only option was a windfall to the plaintiff (or at least a potential windfall).

2.5 Delay and other bars to relief
Delay, acquiescence and laches may act as a complete bar to relief.

Re Jarvis
Two sisters were executors of father’s estate, the assets of which include a shop. The plaintiff had stood by and observed the sister running the business, incurring debts and liabilities, paying the mother £10 a month and paying debts from her own money. Throughout all this time, the plaintiff was fully aware of her rights but took no step to assert them or to make any claim until the issue of the writ. She had not been sufficiently prompt in asking for the remedy, so her action failed.

3. ASSESSING DEFENDANT’S RIGHTS AND INTERESTS

3.1 Allowances
Allowances encompasses three things: expenses, remuneration for industry/enterprise/skill, and division of profits.

Expenses:
Technically, these are not an “allowance” because an AOP really attaches to net profits. These are almost invariable granted as such. They can be rationalized because equity is not penal. If the plaintiff is essentially adopting the defendant’s activities, had it been properly authorized, then the plaintiff would have paid overheads and other expenses.

Remuneration for Industry, Enterprise and Skill:
This is more contentious and the onus will be on the defendant to justify it.

Estate Realties
Quoted Lord Denning: “The claim for repayment cannot, however, extend further than the justice of the case demands. If the defendant has done valuable work in making the profit, then the court in its discretion may allow him a recompense. It depends on the circumstances. If the agent has been guilty of any dishonesty or bad fait, or surreptitious dealing, he might not be allowed any remuneration or reward.”

Thus, whilst disentitling conduct may render the allowance unavailable, it is still difficult to reach this threshold. It probably takes extreme facts for disentitling conduct to preclude remuneration for industry, enterprise and skill.

Chirnside v Fay
The SC confirmed there is a presumption of disgorgement (i.e. onus on defendant to justify). There is room, however, for the Court to exercise its discretion to allow the errant fiduciary some measure of allowance or recompense for effort, skill and enterprise in making those profits if it would be unjust not to do so. The threshold for disentitling conduct is a high one.

The focus is on the overall equities. Moral turpitude is not a bar to relief if the overall balance requires an allowance. NZ’s acceptance of this principle was enshrined in Estate Realties, where the Court noted that the nature of breach and duty are relevant, as are the circumstances in which the profits were made and the amount of personal input that was required to enable the gain.

The Court, relying on Warman, noted the difference between appropriating a business opportunity, and an asset. It is more likely to be disentitling when the fiduciary helps themselves an asset (whether money or otherwise). But where they take an opportunity/information and there is no semblance of gambling with the plaintiff’s property.