Equitable money remedies against financial advisers who give "advice about advice"

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A financial advisor may be in breach of their fiduciary obligations arising from the giving of advice about advice. Substantive advice concerns recommendations by the financial adviser about actual investment decisions and strategies that are capable of implementation by the client. Advice about advice is early guidance by the adviser about the selection of topic areas on which the client will later receive substantive advice. This article considers the ambit and scope of equitable money remedies that might be available to a client against the financial adviser who breaches their fiduciary obligation in relation to the provision of advice about advice.

INTRODUCTION

Financial advisers may exceptionally owe fiduciary obligations to their clients in giving financial advice. In an earlier article in this journal[1] the authors' argued there exists a key distinction between substantive advice and advice which is given much earlier in the relationship, which the authors' label "advice about advice." Substantive advice concerns recommendations by the financial adviser about actual investment decisions and strategies which are capable of implementation by the client. Advice about advice on the other hand is early guidance by the adviser about the selection of topic areas on which the client will later receive substantive advice. The significance of this distinction is that in providing advice about advice, the adviser constitutes itself a fiduciary, albeit these fiduciary duties may be limited in scope. In consequence the financial adviser may well be in breach of fiduciary duty depending on the substance of the advice about advice. This article considers the equitable money remedies which may flow from a breach of the financial adviser's fiduciary obligations arising from the giving of advice about advice.

The statutory regime applying to the provision of financial product advice to retail clients assumes and may mandate a course of dealing between the financial adviser and client.[2] Early on in this course of dealing, the financial adviser assists or guides the client to determine the scope of financial product advice to be provided by the financial adviser; the financial adviser is thus providing advice about advice. The statutory obligations applying to the financial adviser are conditioned upon the provision of financial product advice to retail clients.[3] Advice about advice is not *financial product advice* and so the financial adviser's conduct in the giving of advice about advice is not caught by the regulatory regime. Meeting the requirements of Pts 7.7-7.7A and 7.9 of the *Corporations Act 2001* (Cth) is unlikely systematically to discharge the financial adviser's equitable fiduciary obligations that arise in relation to the provision of advice about advice.[4] Compliance regimes that are calibrated towards an adviser's statutory obligations, which largely concern the provision of substantive advice, may not be effective to prevent a breach of fiduciary obligations arising earlier in the parties' interaction.[5]

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[1] Degeling S and Hudson J, "Fiduciary Obligations, Financial Advisers and FOFA" (2014) 32 C&SLJ 527.

[2] See Annexure A below; Pts 7.7-7.7A, 7.9 of the *Corporations Act 2001* (Cth). See Degeling and Hudson, n 1 at 528-531.

[3] "Financial product advice" is defined in s 766B of the *Corporations Act 2001* (Cth). See also discussion in Degeling and Hudson n 1 at 528-529.

[4] Degeling and Hudson, n 1 at 530 (Table 1), 535-538.

[5] Degeling and Hudson, n 1. Legislative reforms to the obligations owed by financial advisers under Pt 7.7A of the *Corporations Act 2001* (Cth) (FOFA obligations) have been proposed (*Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014* (Cth) (FOFA Bill 2014)), some of which were implemented by *Corporations Amendment (Streamlining Future of*

Equitable money remedies may therefore be available to the client in a claim against the financial adviser. This article considers the ambit of equitable money remedies that might be available to a client against the financial adviser who breaches his or her fiduciary obligation in relation to the provision of advice about advice. Subject to the doctrine of election, the financial adviser might be liable to pay either or possibly both an account of profits and equitable compensation.

FINANCIAL ADVISER-CLIENT RELATIONSHIP

The financial adviser-client relationship is a contested status based fiduciary relationship. In *Daly v Sydney Stock Exchange Ltd*,[6] a fiduciary relationship was found to be inherent in the giving of advice.[7] Taken strictly, this approach suggests the adviser-client relationship is fiduciary in virtue of status, so long as the relationship contains those factors identified in *Daly*. These are an undertaking by the adviser[8] and reliance[9] by the client:

> The firm, which held itself out as an adviser on matters of investment, undertook to advise Dr. Daly, and Dr. Daly relied on the advice which the firm gave him. In those circumstances the firm had a duty to disclose to Dr. Daly the information in its possession which would have revealed that the transaction was likely to be a most disadvantageous one from his point of view. Normally, the relation between a stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to make to the client a full and accurate disclosure of the broker's own interest in the transaction.[10]

However, there is no clear judicial authority indicating acceptance of this position.[11] In any case, analysis of the circumstances and course of dealing may justify a conclusion that the relationship between the financial adviser and client is on the facts fiduciary.[12]

In construing the fiduciary relationship, the scope of the financial adviser's duty must be determined. The analysis uses as an example the course of dealing between the financial adviser and client contemplated by the *Corporations Act 2001* (Cth) and accompanying explanatory material and regulatory guidance (see Annexure A below).[13] The purpose of doing so is to provide context and content to the financial adviser's fiduciary obligations and the equitable remedies which might apply on breach. To this extent, the analysis and conclusions are of general application.

The analysis commences with a client who approaches a financial adviser seeking advice about advice. Many potential investors are financially unsophisticated and may approach an adviser with a laundry list of financial objectives and topics for advice. For many reasons, including practicality and

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Financial Advice) Regulation 2014 (Cth), effective from 1 July 2014, but were disallowed by the Senate on 19 November 2014. The authors argue that advice about advice is an area of risk that is not regulated by the statutory regime under Pts 7.7-7.7A, 7.9 of the *Corporations Act 2001* (Cth) in its current form, and nor do the proposed amendments contained in the FOFA Bill 2014 speak to this risk.

6 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371.

7 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 377 (Gibbs CJ), 384-385 (Brennan J).

8 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 377 (Gibbs CJ), 385 (Brennan J).

9 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 377 (Gibbs CJ).

10 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 377 (Gibbs CJ). Similarly, "Whenever a stockbroker or other person who holds himself out as having expertise in advising on investments is approached for advice on investments and undertakes to give it, in giving that advice the adviser stands in a fiduciary relationship to the person whom he advises": at 385 (Brennan J).

11 *Breen v Williams* (1996) 186 CLR 71 at 108 (Gaudron and McHugh JJ); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; [2001] HCA 31 at [72] (McHugh, Gummow, Hayne and Callinan JJ).

12 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 377 (Gibbs CJ), 385 (Brennan J). See also *Aequitas Ltd v AEFC Leasing Pty Ltd* [2001] NSWSC 14 at [307] (Austin J); *Australian Securities and Investments Commission v Citigroup* (2007) 160 FCR 35; [2007] FCA 963; *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028 at [733] (Rares J); *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1; [2014] FCAFC 65 at [1066] (the Court).

13 Note to s 961B(2) of the *Corporations Act 2001* (Cth); *Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014* (Cth); Explanatory Memorandum, *Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014* (Cth) pp 11-12; ASIC, *Licensing: Financial Product Advisers – Conduct and Disclosure*, Regulatory Guide 175 (October 2013); ASIC, *Giving Information, General Advice and Scaled Advice*, Regulatory Guide 244 (December 2012).

the client's limited ability to pay for financial advice, this list must be narrowed and clarified before substantive financial advice is given. The client thus requires "advice about advice": early guidance from the financial adviser about the topic areas on which the client may later receive substantive financial advice. It is in relation to the giving of advice about advice that the financial adviser constitutes itself a fiduciary.[14] In relation to the giving of advice about advice, the adviser holds itself out as having specialised expertise, and undertakes to act in the interests of the client in providing guidance narrowing and selecting the topics on which advice may later be sought. The client relies on the financial adviser in seeking advice about advice. Irrespective of which test the authors apply to identify the existence of a fiduciary relationship, the relationship described above systemically satisfies the elements.[15]

The client consults the financial adviser with a list of potential topics for substantive advice including, for example, superannuation, life insurance and debt consolidation.[16] Alternatively, the client may simply present with a life objective of desiring a comfortable retirement. It is in this context that the scope of the financial adviser's fiduciary obligation must be constructed. A relationship will not be fiduciary for all purposes.[17] Depending upon the course of dealing between the parties, the scope of the fiduciary relationship is wrapped around the giving of advice about advice as to the selection of the topic area on which the client may receive substantive advice. By necessary implication, the scope of the relationship also encompasses advice about which topic areas to drop from the menu.

Within the scope of the fiduciary relationship, the adviser may not put themselves in a position of conflicting duties where the conflict or possibility[18] of conflict arises between their self-interest and that of the client or duties owed to multiple clients:

> the fiduciary [must] avoid, without informed consent, placing himself in a position of conflict between duty and personal interest, but he must eschew conflicting engagements. The reason is that by reason of the multiple engagements, the fiduciary may be unable to discharge adequately the one without conflicting with his obligation in the other … In such a case, it is not to the point that the fiduciary himself may not stand to profit from the transaction he brings about between the parties.[19]

The financial adviser thus cannot steer the client towards or away from particular topic areas of advice for profit or other self-interested reasons, nor do so in the fulfilment of duties owed to another.

[14] Degeling and Hudson, n 1.

[15] See, eg, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97 (Mason J), as applied in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028 at [743] (Rares J); *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 377 (Gibbs CJ), 385 (Brennan J). See also *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1; [2014] FCAFC 65 at [1066] (the Court); *Australian Securities and Investments Commission v Citigroup* (2007) 160 FCR 35; [2007] FCA 963 at [282]-[286] (Jacobson J), although on the facts the court found a fiduciary duty had been validly contractually excluded.

[16] The example of life insurance, debt consolidation and superannuation is taken from Explanatory Memorandum, *Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014* (Cth) pp 11-12.

[17] *Howard v Federal Commissioner of Taxation* [2014] HCA 21 at [34] (French CJ and Keane J).

[18] *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390 at 392 (the Court); *Breen v Williams* (1996) 186 CLR 71 at 135 (Gummow J); *Birtchnell v Equity Trustees and Agency Co Ltd* (1929) 42 CLR 384 at 408 (Dixon J); *Boardman v Phipps* [1967] 2 AC 46 at 124 (Lord Upjohn); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 103 (Mason J); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; [2001] HCA 31 at [79] (McHugh, Gummow, Hayne and Callinan JJ).

[19] *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390 at 392 (the Court); an obligation "not to enter upon conflicting obligations to several parties": *Breen v Williams* (1996) 186 CLR 71 at 135 (Gummow J); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; [2001] HCA 31 at [78] (McHugh, Gummow, Hayne and Callinan JJ). See also *Maguire v Makaronis* (1997) 188 CLR 449 at 461 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1 at 47 (the Court); *Howard v Federal Commissioner of Taxation* [2014] HCA 21 at [59] (Hayne and Crennan JJ). There is a debate as to whether the prohibitions against conflict and profit are separate principles or form part of the same principle: see, eg, *Chan v Zacharia* (1984) 154 CLR 178 at 199 (Deane J); *Howard v Federal Commissioner of Taxation* [2014] HCA 21 at [57] (Hayne and Crennan JJ); *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250; [2014] UKSC 45 at [5] (the Court). For the purposes of this analysis, nothing turns on this distinction.

BREACH OF FIDUCIARY OBLIGATION

Turning to the pattern of interaction contemplated by the statutory regime, it is not difficult to construct breaches of the adviser's fiduciary obligation in relation the giving of advice about advice. For example, in relation to the prohibition against potential or actual conflict between duty and interest, the financial adviser may steer the client towards selection of superannuation and life insurance, dropping debt consolidation from the menu of topic areas of advice. The financial adviser's reasons for doing so may be self-interested: for example, the financial adviser may receive greater remuneration for providing substantive financial product advice on superannuation and life insurance,[20] or may in fact only be qualified or licenced to provide substantive advice on these topic areas.[21] Similarly, in relation to the prohibition against potential or actual conflict between duty and duty, assuming the financial adviser has multiple clients, the risk of fiduciary breach lies when the clients' interests are either insufficiently aligned or insufficiently differentiated.[22] For example, the financial adviser may steer one client towards superannuation and life insurance (for example a self-managed superannuation fund which invests in another's business), dropping debt consolidation from the menu of topic areas of advice, thereby assisting a second client who requires business capital. Arguably the adviser is in breach of the prohibition against potential, if not actual, conflict between duty and duty.

On either analysis above, the financial adviser has given advice about advice. The financial adviser has counselled the client and guided them into deciding which topic area to prioritise and which to drop from the menu. As has been shown, the financial adviser's conduct in doing so is in breach of fiduciary obligation, albeit narrowly confined to the giving advice about advice. Equity mandates that informed client consent to what would otherwise be a breach of fiduciary obligation will be a good defence,[23] but requires the fullest of disclosure by the fiduciary of the circumstances of breach.[24] In evaluating the sufficiency of disclosure, the court will take account of "the sophistication and intelligence of the persons to whom disclosure must be made".[25] The timing and content of the statutory notices provided by the adviser to the client are unlikely systematically to provide the foundations for informed client consent.[26] A financial services guide (FSG) is unlikely to provide

[20] There are exceptions to the prohibition against conflicted remuneration in Pt 7.7A, Div 4 of the *Corporations Act 2001* (Cth) and include, for example: benefits given solely in relation to general insurance or life insurance, s 963B(1), reg 7.7A.12A of the *Corporations Regulations 2001* (Cth); or non-monetary benefits less than $300 in value, s 963C(b), regs 7.7A.13, 7.8.11A; or agents or employees might receive benefits given for advice about basic banking and general insurance products, s 963D; reg 7.7A.12H. See also ASIC, *Conflicted Remuneration*, Regulatory Guide 246 (March 2013).

[21] A financial adviser may only advise on topic areas for which the adviser is suitably qualified to give advice and the advice given must be within the scope of the relevant licence. An Australian financial services license (AFSL) is required to carry on a financial services business, which includes the provision of financial product advice: s 911A(1) of the *Corporations Act 2001* (Cth). Financial product advice can be provided by an employee or an authorised representative for a holder of an AFSL (the licensee): s 911A. ASIC, *Licensing: Training of Financial Product Advisers*, Regulatory Guide 146 (July 2012), sets out the minimum standards for the training of financial advisers and which must be complied with by the advisers, which include the requirement to have completed approved courses on specialist knowledge about specific financial products advised on. The licensees must ensure that their representatives comply with these requirements in order to satisfy their own license obligations: s 912A.

[22] *Breen v Williams* (1996) 186 CLR 71 at 135 (Gummow J).

[23] *Boardman v Phipps* [1967] 2 AC 46 at 104 (Lord Cohen), 105, 112 (Lord Hodson), 117 (Lord Guest); *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126 at 1131-1132 (the Board); *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390 at 393 (the Court); *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1; [2011] FCAFC 24 at [110] (Besanko J, with whom Finkelstein and Jacobson JJ agreed).

[24] *Maguire v Makaronis* (1996) 188 CLR 449 at 466-467 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

[25] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 88; [2007] HCA 22 at [107] (the Court).

[26] A more detailed exposition of this argument is contained in Degeling and Hudson, n 1. See Annexure A to this article.

sufficient disclosure since it will likely contain generic information.[27] A statement of advice (SOA)[28] and any product disclosure statement (PDS)[29] may contain more specific and detailed information but will be given by the adviser to the client after the narrowing of the topic areas of advice, and thus may be too late to found consent. In any case these notices are passively received by the client. Mere receipt of information is not a secure basis on which to found client consent to conduct which would otherwise constitute a breach of fiduciary duty.[30]

Irrespective which breach of fiduciary duty is relied upon, the analysis in this article assumes the following paradigm events of remedial significance: loss of investment capital and loss of opportunity to receive advice about advice. Recall that the client has narrowed the topic areas of advice. Superannuation and life insurance have been chosen as the topic areas for substantive advice and debt consolidation is not pursued. The client has thereby lost the chance to receive advice about their decision to prioritise substantive advice on debt consolidation. This path not taken lays the foundation for the loss of chance analysis discussed below. In addition, assuming the client implements the substantive advice given in the areas of superannuation and life insurance, other remedial consequences may flow. In reality, actual investment losses may provide a motivating factor for the client who wishes to seek redress against the financial adviser in relation to investment decisions and strategies implemented. Similarly, the financial adviser may have made gains which are vulnerable to return. The possibility of equitable money remedies including equitable compensation and account of profits therefore comes into view. The availability of these in combination will of course be subject to the doctrine of election.[31] The financial adviser's breach of fiduciary duty may also constitute a breach of the conditions of any Australian financial services licence (AFSL) under which any financial product advice is given. This analysis does not consider the consequences of breach of the conditions of an AFSL. Further, equitable remedies in the circumstances considered here exist outside the equivalent orders provided for by statute[32] since the statutory obligations[33] do not apply to advice about advice, and are thus not engaged.

[27] Section 941D(1) of the *Corporations Act 2001* (Cth) requires a FSG to be provided "as soon as practicable after it becomes apparent to the providing entity [financial adviser] that the financial service will be, or is likely to be provided to the client, and must in any event be given to the client before the financial service is provided". See also reg 7.7.04(4) of the *Corporations Regulations 2001* (Cth).

[28] Sections 947B-947C of the *Corporations Act 2001* (Cth) requires a SOA to contain information on matters such as any associations, relationships or remuneration and commissions that may influence the adviser in providing the advice. The SOA must be provided when the financial product advice is given: s 946A(1).

[29] A PDS is disclosure by the issuer in relation to the acquisition of a financial product, but the adviser must provide a copy of the PDS to the retail client when the adviser makes a recommendation to the client to acquire a financial product: *Corporations Act 2001* (Cth), s 1012A. The PDS will contain information about the cost of the product and information about commissions or other payments that may impact on returns to the retail client: ss 1012A-1012C.

[30] *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028 at [746] (Rares J).

[31] *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 521 (the Board); *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559, 569-570 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[32] *Corporations Act 2001* (Cth), ss 953B-953C (civil action as a result of contravention of Pt 7.7, obligations to provide SOA and FSG), the court may make orders as required to address the plaintiff's loss or damage, s 961M (civil action as a result of contravention of the best interests obligations under Pt 7.7A, Div 2), including profits from the contravention, s 961M(4). Additionally contravention of Divs 3 or 4 of Pt 7.7A may result in orders including for refund (s 1317GA(1)) and compensation for damage suffered, noting that damage includes profits (s 1317HA(1)-(2)). See also s 960B which preserves the application of general law.

[33] *Corporations Act 2001* (Cth), Pts 7.7-7.7A, 7.9.

EQUITABLE COMPENSATION

The possibility of the client's claim for equitable compensation is of great significance because it *potentially* exposes the adviser to the consequences not only of substantive advice given, but also the decision not to seek advice on a particular topic area of advice. This claim thus has two components: first, it may capture the actual value of funds expended and now lost in failed or wasted investment. Secondly, and crucially, equitable compensation also allows for a counterfactual inquiry. It asks about the choice not made and compensates for the client's lost chance to receive advice on debt consolidation.

The test of causation to be applied for breaches of fiduciary duty has been the subject of discussion and debate, the debate in part concerning the standard of causation to be applied following a breach of duty.[34] Some modern analysis distinguishes between substitutive equitable compensation which "describes a claim for the substituted value of [an] asset dissipated without authority"[35] and reparative equitable compensation which "describes a claim for reparation for the loss suffered by breach of duty".[36] The compensation available to the client may be thought of as reparative compensation in that it compensates for true loss. There is no suggestion that the client's claims rest on a custodial or trustee relationship in the paradigm course of dealing. In the reparative measure, there is no single test of causation to be applied. In identifying the relevant test, it is necessary to "identify the purpose of the particular rule to determine the appropriate approach to issues of causation".[37] Equitable compensation is not "fettered by the usual notions that serve to diminish the quantum of damages at common law. The obligation imposed by equity upon an errant fiduciary is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract".[38] Thus common law concepts such as remoteness or foreseeability of loss do not apply.[39] Similarly, contributory negligence has been held not to apply to the assessment of equitable compensation for breach of fiduciary duty.[40]

[34] Heydon JD, "Causal Relationships Between a Fiduciary's Default and the Principal's Loss" (1994) 110 *Law Quarterly Review* 328; Gummow WMC, "Compensation for Breach of Fiduciary Duty" in Youdan TG (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) pp 57-92; Elliott S, *Compensation Claims Against Trustees* (unpublished PhD thesis, University of Oxford, 2002); Elliott S, "Remoteness Criteria in Equity" (2002) 65 *Modern Law Review* 588; Elliot S, "Personal Monetary Claims" in McGhee J (ed) *Snell's Equity* (Sweet & Maxwell, 2015) Ch 20; Smith L, "The Measurement of Compensation Claims Against Trustees and Fiduciaries" in Bant E and Harding M (eds), *Exploring Private Law* (CUP, 2010) pp 363-376; Edelman J, "Money Awards of the Costs of Performance" (2010) 4 *Journal of Equity* 122; Conaglen M, "Explaining Target Holdings and Redferns" (2010) 4 *Journal of Equity* 288; Conaglen M, "Remedial Ramifications of Conflicts Between a Fiduciary's Duties" (2010) 125 *Law Quarterly Review* 72; Allsop J, "Causation in Commercial Law" in Degeling S, Edelman J and Goudkamp J (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) pp 269-330, especially pp 299-307; Glister J, "Equitable Compensation" in Glister J and Ridge P (eds), *Fault Lines in Equity* (Hart Publishing, 2012) pp 143-168; Mitchell C, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 *Current Legal Problems* 307; Turner P, "Measuring Equitable Compensation for Breach of Fiduciary Duty" (2014) 73 *Cambridge Law Journal* 257; Heydon D, Leeming M and Turner P, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (5th ed, LexisNexis Butterworths, 2015) Ch 23.

[35] *Agricultural Land Management v Jackson (No 2)* [2014] WASC 102 at [349] (Edelman J). The cases also disclose evidence of other measures outside the fiduciary context. For example, when in lieu of proprietary relief, an expectation measure may apply: *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19 at [85] (French CJ, Keiefel, Bell and Keane JJ); *Giumelli v Giumelli* (1999) 196 CLR 101 at 125 (Gleeson CJ, McHugh, Gummow and Callinan JJ). Note that the dichotomy between reparative and substitutive is not universally accepted. See Heydon et al, n 34 at [23.610]-[23.615].

[36] *Agricultural Land Management v Jackson (No 2)* [2014] WASC 102 at [349] (Edelman J).

[37] *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 274-275 (Spigelman CJ).

[38] *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 296 ALR 418; [2013] FCAFC 16 at [56] (the Court).

[39] *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 296 ALR 418; [2013] FCAFC 16 at [56] (the Court); *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484; [2003] HCA 15.

[40] *Pilmer v Duke Group Group Ltd* (2001) 207 CLR 165; [2001] HCA 31 at [86] (McHugh, Gummow, Hayne and Callinan JJ), [165]-[173] (Kirby J). Note Conaglen, n 34 at 97 who points out that the High Court's view in that case was "based in part on the unavailability of such pleas in Australian contract claims, which has now been altered by statute, but there is no cause for thinking that the statutory changes would lead the High Court to alter its view". See also *Mulvaney Holdings Pty Ltd v Thorne* [2012] QSC 127 at [60] (McMeekin J): "While what fell from the Court in *Pilmer* was obiter, it is plain that notions of contributory negligence have no part to play in this area of discourse."

The breaching fiduciary is obligated to compensate the principal for loss where there is a causal link between the breach and the loss. Applying the dictum of Spigelman CJ in *O'Halloran v RT Thomas & Family Pty Ltd*,[41] causation in equity is first approached by determining what will best further the "policy" and purpose of the particular rule. In most if not all instances of reparative compensation, these objectives will be served through application of "but for" causation. As highlighted by Edelman J in *Agricultural Land Management v Jackson* "but for" reasoning plays an exclusionary role in demonstrating causation against the background of the so called common-sense approach to determining causation or the assignment of legal responsibility for loss.[42]

Turning first to lost investment capital, the example assumes the client implements the advised strategy but that the investment performs poorly and funds are lost. The object of reparative equitable compensation is to put the parties in the position as if the financial adviser had not breached their obligation in providing advice about advice. The "award of equitable compensation [thus] involves a comparison between no breach (that is, no conflict of interest and duty) and breach (a conflict of interest and duty)".[43] It might be argued that the financial adviser's conflicted advice to narrow the topic areas of advice lead inevitably to the client receiving substantive advice on investment strategies, the implementation of which caused financial losses. However, applying the common sense test of causation, the client's loss arguably flows from acting on the *substantive advice* contained in the SOA rather than the narrowing of the topics of advice. On this analysis, causation would not be established. The balance of evidence will decide how on particular facts this common sense test will apply. However, it seems likely that a "but for" analysis will not operate to exclude the fiduciary's breach as a cause of loss. Depending on the facts it may be difficult for the fiduciary to establish that the client's investment loss would have occurred even if the fiduciary had not breached their obligation.[44]

In relation to the loss of chance, the client will seek to link the value of choices not pursued to the breach of duty. It is clear that equitable compensation may be awarded for the value of a lost chance.[45] Being a duty bound party and putting themselves in a position of conflicted duty, the causal connection between breach and loss is easier to establish. The loss goes to the heart of breach because the effect of breach denies the client an opportunity to choose, and it is the value of this opportunity which is lost and therefore captured by the claim. For example, the client who presents to the adviser with a life objective of "a good retirement lifestyle" may be told by the adviser to seek advice on "superannuation and life insurance", forgoing any discussion of debt consolidation. Equally or in addition, a client may present with these three options already in view and for conflicted reasons, the adviser steers the client into selecting "superannuation and life insurance". In both of these examples, the client has not pursued the topic area "debt consolidation". The lost opportunity is that represented by the chance to receive advice on the discarded topic area.

There are clearly intermediate steps. By whichever route the client gets to the point of having received advice on which topic area to prioritise, the client will also then receive substantive advice contained in an SOA on how to pursue the financial objectives within the agreed topic area. The point

[41] *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 275 (Spigelman CJ).

[42] *Agricultural Land Management v Jackson (No 2)* [2014] WASC 102 at [392]-[396] (Edelman J). Although not accepting the dichotomy between reparative and substitutive compensation, it seems that the analysis in Heydon et al, n 34 at [23-170] is nonetheless consistent with a reparative approach to compensation in seeking to place the plaintiff or fiduciary's principal in a "presently correct position".

[43] *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1; [2011] FCAFC 24 at [109] (Besanko J, with Finkelstein and Jacobson JJ agreeing), cited in *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1; [2014] FCAFC 65 at [3331] (the Court)

[44] *Canson Enterprises Pty Ltd v Boughton & Co* (1991) 85 DLR (4th) 129.

[45] *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262; *Edmonds v Donovan* (2005) 12 VR 513; [2005] VSCA 27 at [83] (Phillips JA) upholding Warren J at trial who assessed equitable compensation at "the opportunity that the plaintiffs lost". This reasoning was not the subject of appeal to the High Court of Australia in *Howard v Federal Commissioner of Taxation* [2014] HCA 21 at [74]-[76] (Hayne and Crennan JJ), [28] (French CJ and Keane J); *Spotless Group Ltd v Blanco Catering Pty Ltd* [2011] FCA 979 at [125] (Mansfield J): "in assessing equitable compensation, [a] Court may make a determination on the basis of loss of opportunity"; *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 296 ALR 418; [2013] FCAFC 16 (the Court); *AMP Services Ltd v Manning* [2006] FCA 256 at [67]-[70] (Finkelstein J).

is to realise that the client is likely only set on this path to the exclusion of others by reason of the narrowing of the topic areas of advice in the first instance. For example, take a retail client who foregoes debt consolidation as a topic area, receiving instead advice to pursue the topic area superannuation and life insurance, who then receives substantive advice on superannuation products which advice is implemented. Assume that the client is on retirement in a worse financial position than if debt consolidation had been prioritised as the topic area and ultimately explored. This will obviously be a matter of evidence but using “hindsight” and “common sense”[46] causation might be established. The lost chance to receive advice on the topic debt consolidation is the relevant loss which arguably is caused by the breach.

The court will value this lost opportunity, and in doing so it is necessary for the client to demonstrate its prospects of pursuing debt consolidation and then assigning a financial value to this theoretical outcome.[47] Thus the reparative award available to the client reflects the value and the prospects of the path not taken. Reparative equitable compensation in these circumstances already implicitly takes account of the risk and performance of the market. Hence, although poor performance of investments actually made as part of the choice taken may as a practical matter be the motivating force for the client in pursuing a remedy against the adviser, the performance of these investments has no particular legal significance. The court is not concerned with performance of the adviser’s promises in relation to the topic area of advice and its attendant implementation, but rather the alternative not taken. To this extent, market performance is simply a component of valuing the lost opportunity.

The possibility of an intervening act must also be accommodated. The High Court of Australia in *Maguire v Makaronis* as is well known stated that “there is no translation into this field of discourse of the doctrine of novus actus interveniens”.[48] However, this must also be reconciled with the position that the defaulting fiduciary is not required to compensate for loss which would have in any event occurred. In a claim for reparative compensation there may on some facts be an independent act the effect of which is that causation is not satisfied. In the examples above, the risk of an independent act is not specifically contemplated, and in reality the other factor with most significance in the facts may be the operation and performance of the market. As discussed, this risk will likely be excluded as a relevant cause in relation to actual investment losses, either because it is disclosed and accepted[49] or because it is not relevant to causation but comes into the court’s analysis when valuing a lost opportunity.

It is possible however to construct facts in which an independent act arguably exists. For example, after receiving advice about advice, the client returns home to his or her partner who strongly agrees with the financial adviser that the client should prioritise receiving advice on superannuation and life insurance over debt consolidation. Persuaded by his or her partner’s views, the client informs the financial adviser of his or her selection. On these facts, assuming the financial adviser has given advice about advice in breach of fiduciary duty, there is the risk of multi causality. A court will have to determine whether the client has chosen to receive substantive advice on superannuation and life insurance due to the opinions of his or her partner or the advice about advice given by the financial adviser. Equity’s causation rule requires the adviser to “restore persons who have suffered loss to the position in which they would have been if there had been no breach of the equitable obligation”.[50] In

[46] *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 at 163 (McLachlin J).

[47] *Ramsay v BigTinCan Pty Ltd* [2014] NSWCA 324 at [72] (Macfarlan JA). Note that in this case the lost chance was an opportunity to obtain funding and the court held that in valuing this chance it was necessary to consider “not only the prospects of obtaining funding, but also whether, if obtained, that funding would have been put to profitable use”. See *AMP Services Ltd v Manning* [2006] FCA 256 at [67]-[70] (Finkelstein J).

[48] *Maguire v Makaronis* (1997) 188 CLR 449 at 470 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

[49] For example, in the SOA or a PDS.

[50] *O’Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 272 (Spigelman CJ).

this situation this means that the financial adviser may not be "required to pay compensation for losses which would have been suffered even if the conflict had not occurred".[51]

Account of profits

On the course of dealing outlined above, the financial adviser advises the client to receive substantive advice on the chosen topic area, dropping the other topic areas from the menu. In return for the substantive advice, the client pays fee(s). As constructed, this fee is received in breach of fiduciary duty and the financial adviser's obligation to account for profit is therefore in view.[52] The receipt of fees might otherwise lay the foundation for an argument that the fiduciary should be entitled to an allowance for care and skill. There are clear signs of dishonesty in the financial adviser's conduct which might preclude any such allowance.[53] However, it must also at least be arguable that an adviser who has narrowed the topic area of advice for self-interested reasons has *not* exercised care and skill and thus should be denied any allowance.

The adviser may also receive commissions or other benefits from financial product issuers and other third party industry participants.[54] As contemplated above, receipt of these benefits may be the factual motivation behind the adviser's decision to counsel the client in prioritising one topic area of advice and would thus be caught by the no conflict rule. The opportunity to receive free training may be the self-interested reason for advising the client in narrowing the topic area of advice.[55] If in fact received, the value of such training will be vulnerable to disgorgement to the client via an account of profits. A court will likely value this benefit in the financial adviser's hands by the amount the financial adviser has saved in not personally paying for training received.

Consent by the client operates as a defence to breach of fiduciary duty. In the course of dealing between client and financial adviser (see Annexure A below), it must be conceded that the SOA *will set out* various statutory disclosures including information about any commissions or benefits received by the financial adviser in relation to the substantive advice given. However, the prior conflict of duty and interest which underpins the narrowing of the topic areas of advice, and thus taints the giving of advice about advice, will not likely be disclosed at a point in time which equity considers useful to act on that breach of duty.[56] Therefore, any disclosure in the SOA will not be effective to provide good client consent to the prior conflict of duty and interest in relation to the giving of advice about advice. An account of profits remains a risk for the financial adviser notwithstanding the SOA.

[51] *Agricultural Land Management v Jackson (No 2)* [2014] WASC 102 at [395] (Edelman J). See also Turner, n 34 at 260; Heydon et al, n 34 at [23-020], [23-200]-[23-235].

[52] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 560 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Howard v Federal Commissioner of Taxation* [2014] HCA 21 at [33] (French CJ and Keane J), [62] (Hayne and Crennan JJ).

[53] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561 (Mason CJ, Brennan, Deane, Dawson, Gaudron JJ); *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 296 ALR 418; [2013] FCAFC 16 at [57], [61] (the Court); *United States Surgical Company v Hospital Products Ltd* [1983] 2 NSWLR 157 at 243; *Phipps v Boardman* [1965] 1 Ch 992 (CA) at 1020 (Lord Denning MR). See Harding M, "Justifying Fiduciary Allowances" in Robertson A and Tang HW (eds), *The Goals of Private Law* (Hart Publishing, 2009) pp 341-364, 360ff.

[54] *Corporations Act 2001* (Cth), Pt 7.7A, Div 4 prohibits the receipt of conflicted remuneration and other benefits by financial advisers. However, there are exceptions including those listed above at n 20.

[55] Benefits which have a genuine education or training purpose are exempted from the ban on conflicted remuneration: *Corporations Act 2001* (Cth), s 963C(c); *Corporations Regulations 2001* (Cth), reg 7.7A.14.

[56] See n 23.

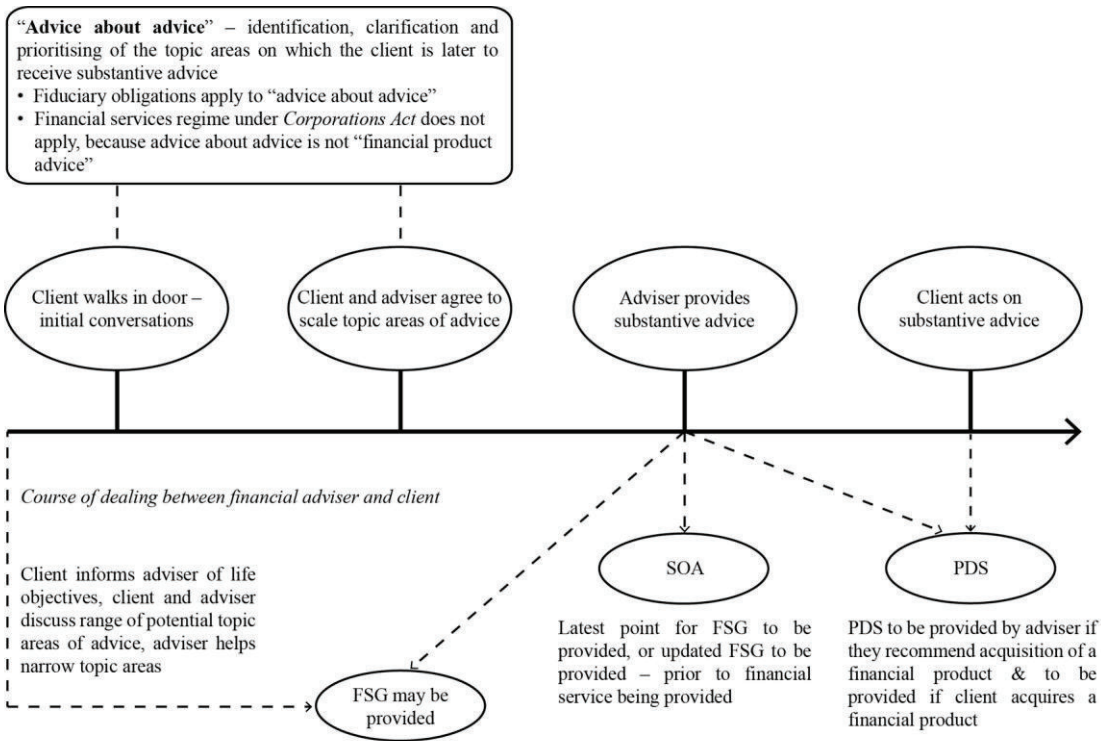
DISCRETION

Equitable remedies, including equitable compensation and account of profits, are awarded within equity's discretion. It falls outside the scope of this discussion to catalogue the circumstances on which relief might be denied, other than to notice that the conduct of the plaintiff/client will also be examined in the justice equation. Factors such as the client's delay in seeking relief may mitigate against an award,[57] or impact the court's decision whether or not to award interest or award interest on a compound basis.[58]

CONCLUSION

Advice about advice is intended to have an impact on client decision making and shapes the client's choice as to the topic area on which to receive substantive advice. Despite compliance with statutory notices and disclosures, equitable money remedies continue to apply. There remains a risk that equity will allocate to the financial adviser client losses via the mechanism of equitable compensation. Whilst not underwriting for the performance of the market, equity will hold financial advisers to a standard of conduct commensurate with their undertaking in the adviser-client relationship and the client's reliance on this in decision making. Similarly, financial advisers may be obligated to disgorge for profits obtained in breach of duty. Irrespective of the statutory exceptions to conflicted remuneration, benefits obtained by financial advisers may nonetheless be caught by equitable obligation.

Annexure A: Paradigm course of dealing



[57] See, eg, *Aequitas Ltd v AEFC Leasing Pty Ltd* [2001] NSWSC 14 at [457]-[468] (Austin J).

[58] See, eg, *Aequitas Ltd v AEFC Leasing Pty Ltd* [2001] NSWSC 14 at [457]-[468] (Austin J).