Whither Remoteness?

Wellesley Partners LLP v *Withers LLP* [2015] EWCA Civ 1146

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Abstract

In *Wellesley* v *Withers*, the Court of Appeal held that where a defendant is concurrently liable in tort and contract, the contractual rules for the remoteness of loss must apply. This note welcomes and explains that decision, suggesting that two principal reasons emerge from the judgments. The first, that each party has had the chance to alert the other to unusual risks, is valid but often unconvincing. The second is both more original and more compelling: that the nature of any responsibility assumed in tort is distinct from, but wholly defined by, the valid contract. This note seeks to develop that argument. It then addresses the uncertain issue of concurrent liability in equity. It suggests that, in a case in which any fiduciary duties arise out of, and are defined by, a valid contract, it may now be appropriate to apply the contractual remoteness rules to a concurrent claim for breach of contract and equitable compensation.

Damages in concurrent liability claims

It is now axiomatic that a supplier of professional services will usually owe its client concurrent duties in contract and tort.[2] Where this is so, does a claimant have the option to 'pick and choose' between contractual and tortious remedies rules in framing its claim?[3] This is the question addressed by the Court of Appeal in *Wellesley Partners LLP* v *Withers LLP*,[4] a decision of

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[2] This was authoritatively established by the House of Lords in *Henderson* v *Merrett Syndicates Ltd (No.1)* [1995] 2 AC 145, following Oliver J in *Midland Bank* v *Hett, Stubbs & Kemp* [1979] Ch 384. This will not be so if the contract explicitly excludes any tortious duty of care. An interesting analysis of exceptions to the general rule is given by J. O'Sullivan in 'Suing in tort where no contractual claim will lie - a bird's eye view' [2007] 23 PN 165. She further explores some of the shortcomings of concurrent liability in 'The meaning of "damage" in pure financial loss cases: contract and tort collide' [2012] 28 PN 248.

[3] It is important to keep in mind that the present discussion presupposes a claimant seeking to frame its entire claim in either form; there is no suggestion that it might pick and choose different contractual and tortious rules within a single claim. Confusion results from losing sight of this fundamental point.

[4] [2015] EWCA Civ 1146; [2016] CILL 3757.

considerable conceptual importance for the developing law on concurrent liability, and practical importance for providers of professional services.

As far as limitation periods are concerned, it is clear that 'picking and choosing' is allowed. In the leading case of *Henderson* v *Merrett*, the House of Lords allowed claims in negligence by Lloyd's names who were in a contractual relationship with their syndicate managers, where the time-bar for a claim in contract had elapsed.[5]

The answer is probably the opposite in respect of contributory fault. A reduction in damages for contributory fault is available in tort under the Law Reform (Contributory Negligence) Act 1943. However, the restriction of this Act to tort claims is subject to the dicta of the Court of Appeal in *Vesta* v *Butcher*.[6] There, the court approved Hobhouse J's distinction at first instance[7] between three types of case: 1) cases involving a strict contractual duty (as was the case in *Barclays Bank Plc* v *Fairclough Building Ltd (No.1))*[8]; 2) cases involving a contractual duty of care which does not correspond to any independent tortious duty of care (as in *Raflatac* v *Eade*)[9]; 3) cases involving a contractual duty of care and an identical duty of care in tort (as in *Vesta* v *Butcher* itself).[10] Type 2), following the recognition of concurrent liability, is likely to be very rare.[11] Type 3) includes most of the cases now known to rest on concurrent liability. In a type 3) case, any reduction of damages for contributory negligence that would be applicable to a claim in tort will also apply to a claim in contract, as was held to be the case in *UCB Bank* v *Hepherd Winstanley and Pugh*.[12] The precise effect of *Vesta* v *Butcher* is uncertain, but, if applied rigorously, it has the effect of preventing a claimant from framing a claim in contract to avoid contribution for fault.[13]

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[5] In *Henderson* v *Merrett* [1995] 2 AC 145, 191, Lord Goff approved Le Dain J's statement, delivering the judgment of the Supreme Court of Canada in the solicitors' negligence case *Central Trust Co* v *Rafuse* (1986) 31 DLR (4th) 481, 522: '…where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him *in respect of any particular legal consequence*' (emphasis added). Lord Goff ([1995] 2 AC 145, 185) also explicitly grouped remoteness rules alongside limitation, contribution, and private international law issues as 'practical problems' giving rise to a recognition of concurrent liability.

[6] *Forsikringsaktieselskapet Vesta* v *Butcher* [1988] 3 WLR 565, affirmed [1989] AC 852 (HL).

[7] [1986] 2 All ER 488.

[8] [1995] QB 214 (CA). See also *Robinson* v *PE Jones (Contractors) Ltd* [2012] QB 44. Neither of these is a professional services case.

[9] [1999] 1 Lloyd's Rep 506 (Colman J).

[10] On the facts of *Vesta* v *Butcher*, however, the broker's breach of its contractual obligations did not cause the induced party any loss, so no issue of contributory negligence arose.

[11] Though see *Robinson* v *PE Jones (Contractors) Ltd* [2012] QB 44.

[12] [1999] Lloyd's Rep PN 963 (CA). See also the Law Commission's 1993 report 'Contributory Negligence as a Defence in Contract' (Law Com no 219), 3.

[13] A. Kramer, *The Law of Contract Damages*, (Hart: Oxford, 2014), 363-6

The doctrines of limitation and contribution therefore leave the basis of concurrent liability uncertain. An argument can be made that *Henderson* v *Merrett* is simply a decision on the Limitation Act 1980, which represents a statutory exception to a general rule against 'picking and choosing.' Indeed, if the courts seek to limit the effect of *Vesta* v *Butcher*, and allow claimants to frame claims in contract to avoid contribution for fault, this result too can be explained as determined by the wording of the 1943 Act.[14] As such, these doctrines could plausibly be pigeonholed as statutory regimes of no wider significance.[15]

With respect to two other of the common law doctrines limiting recovery, the question does not so much arise. The first is the doctrine of mitigation, for which the rules applicable on a given set of facts will not differ depending on whether the claim is framed in contract or tort.[16] The same can be said of the 'scope of the duty'; in a concurrent liability claim, the contract will be determinative of the scope of the duty owed in both contract and tort. This is clear from Lord Hoffman's development of the 'scope of the duty' test in negligence in the concurrent liability case *South Australia Asset Management Corp* v *York Montague ("SAAMCO")*,[17] and his Lordship's adoption of the concept in the contract case *Transfield Shipping Inc* v *Mercator Shipping Inc* (*"The Achilleas")*.[18]

What, then, of the doctrine of remoteness? The above cases provide no obvious guide to determining whether English law should allow claimants to 'pick and choose' between remoteness rules. This question– perhaps surprisingly given the considerable case law on professional negligence– has evaded direct judicial decision since *Henderson* v *Merrett*, but fell to be decided in *Withers*.[19] In three separate concurring judgments, Floyd and Longmore LJJ and Roth J held that,

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[14] In *Lloyds TSB Bank PLC* v *Markandan & Uddin (a firm)* [2011] PNLR 6, HHJ Roger Wyand QC refused to apply the *Vesta* v *Butcher* principle to a claim for breach of trust.

[15] This submission was made by successful counsel in *Withers*, as one alternative route to distinguishing *Henderson* v *Merrett*. In the event, this argument proved unnecessary, and the suggestion of a division between statutory and common law rules on recovery is not addressed in the judgment.

[16] *Pilkington* v *Wood* [1953] Ch 770 (Harman J); *London and South of England Building Society* v *Stone* [1983] 1 WLR 1242 (CA).

[17] [1997] AC 191.

[18] [2009] 1 AC 61. Lord Hoffmann, writing extrajudicially ('Causation' [2005] 121 LQR 592, 596), has said that 'scope of duty' and remoteness were intended to remain two separate doctrines: 'The scope of the duty of care is to take reasonable care to get the valuation right. It has nothing to do with the extent of the consequences for which the valuer is liable… [But] [t]here is a close link between the nature of the duty and the extent of liability for breach of that duty.' This passage was cited by Roth J in the Court of Appeal in *Withers* [2015] EWCA Civ 1146, at [153].

[19] [2015] EWCA Civ 1146.

where a defendant is concurrently liable in contract and negligence, the contractual remoteness rules should apply regardless of how the claim is framed.[20]

Wellesley Partners LLP* v *Withers LLP

Facts

Withers concerned a claim in negligence and breach of contract by Wellesley Partners, a firm of headhunters specialising in the banking sector, against its solicitors. In May 2008, Wellesley sought to expand overseas, and received a $5m investment from a bank ("Addax") in return for a 25% share of the firm. The contract granted Addax the option to sell back half of its share, at the original price, at any time within 41 months of May 2008. Following the collapse of Lehman Brothers, in May 2009 Addax exercised its option, causing an unrecoverable cash-flow crisis in Wellesley, which prevented it from expanding abroad. Wellesley alleged– and Nugee J held at first instance[21]– that Withers was negligent in drafting the Addax investment contract, on the basis that Wellesley had instructed that Addax's option be exercisable for a period of one month commencing 42 months after the date of contracting, rather than any time within the first 41 months after contracting.

The bulk of Wellesley's damages claim– and most relevant for present purposes– was for lost profits for its inability to expand. The intervening financial crisis had had a catastrophic effect on the banking sector, and so Nugee J found that any general expansion according to Wellesley's 2008 plan would not have been profitable. However, Wellesley claimed that it had effectively secured a contract to provide recruitment services for Nomura bank in New York, through the personal contacts of its (as the parties agreed) very successful director. Nomura had taken over Lehman's business in the UK and Europe, and sought to build a business in the US, including substantial recruitment. The judge accepted that there was a substantial chance that Wellesley would have obtained the Nomura mandate had it not suffered a cash-flow crisis, and that Nomura's unusual situation meant that there was a substantial chance that that mandate would have been profitable.

[20] Ibid, at [80] (Floyd LJ); [163] (Roth J); [186] (Longmore LJ).
[21] [2014] PNLR 22.

An interesting question thus arose: so far as remoteness was concerned, was Wellesley entitled to take advantage of the more generous negligence rules, or must contractual remoteness rules apply? At first instance in *Withers*, Nugee J was attracted to the suggestion that the contractual remoteness test should apply[22] but was drawn somewhat reluctantly to the opposite conclusion, since his Lordship felt bound by *Henderson* v *Merrett* to allow Wellesley to rely on the more generous tortious test.[23] This finding was vital, in Nugee J's assessment. His Lordship held that the damages were recoverable under the negligence test,[24] but went on to express the provisional view that the losses would not have been so recoverable in contract.[25] The Court of Appeal dismissed Withers' appeal. The court held that the contractual remoteness test was appropriate, and that Wellesley's lost opportunity to profit from the Nomura mandate was recoverable under that test. Wellesley's damages were then to be assessed on a 'loss of a chance' basis, according to the principles set out in *Allied Maples* v *Simmons & Simmons*.[26]

The remoteness issue

The tests applicable to determining whether a loss suffered is too remote to be recoverable vary considerably in tort and contract. In tort (or a least, for non-intentional torts),[27] the wide test established in *The Wagon Mound* cases applies: the defendant is liable for all reasonably foreseeable consequences of its tort, however unlikely, as long as the extent of possible harm is so great that a reasonable man would guard against it.[28] 'Forseeability' in tort is determined as at the time the tort was committed. In contract, the 'two limbs' of *Hadley* v *Baxendale* apply: a loss will be recoverable if (a) it would arise naturally, according to the usual course of things, or (b) the loss was reasonably in the contemplation of the parties at the time of contracting.[29] With regard to the second limb, subsequent authorities have established that an important distinction applies between the type

[22] Ibid, at [212].
[23] Ibid, at [214].
[24] Ibid, at [215]: 'Withers… knew sufficient for it to be reasonably foreseeable that Addax's capital might be used to expand the business, and that this might, among other places, be in the US. I also find that it was reasonably foreseeable that if Addax were able to withdraw its capital at short notice, it might prevent WP from earning profits in the US.'
[25] Ibid, at [216].
[26] [1995] 1 WLR 1602 (CA).
[27] It appears that a test of 'directness' akin to that in *Re Polemis* [1921] 3 KB 560 (CA) (overturned in relation to the tort of negligence in *Overseas Tankship (UK) Ltd* v *Morts Dock & Engineering Co. Ltd ("The Wagon Mound")*) [1961] AC 388 (PC), applies to intentional torts: *Smith New Court Securities* v *Citibank* [1997] AC 254 (HL). Cf Lord Steyn's obiter suggestion of a test of 'intentionality' across all torts: *Kuwait Airways Corp* v *Iraqi Airways Co (No.6)* [2002] 2 AC 883 at [100] – [104]). See S. Elliott, 'Remoteness Criteria in Equity,' [2002] 65 MLR 588, 589.
[28] [1961] AC 388 (PC); [1967] 1 AC 617 (PC).
[29] (1854) 9 Ex 341, 354 (Alderson B).

and extent of loss: only losses of the contemplated type will be recoverable, but if suffered they will be recoverable to the full extent of loss (*Victoria Laundry (Windsor)* v *Newman Industries;*[30] *Parsons (Livestock) Ltd* v *Uttley Ingham & Co Ltd;*[31] *Jackson* v *Royal Bank of Scotland*[32]). The authorities have also established that the second limb requires that the loss must have been contemplated as a 'serious possibility' of breach (*Koufos* v *C Czarnikow Ltd ("The Heron II")*).[33] The contemplation of the parties is determined not at the date of breach, but at the time when the contract was entered into. Long before the explicit recognition of concurrent liability by the House of Lords in *Henderson* v *Merrett*, the courts had recognised the inconsistency that might arise in some cases. In *Parsons*, Scarman LJ thought that *The Heron II* left these cases 'unsolved.'[34]

The Court of Appeal in *Withers* had two options. The first approach, which might seem to follow from *Henderson* v *Merrett* itself, is to allow a claimant to 'pick and choose' between remoteness tests. This approach has at its core the idea that, in concurrent liability cases, a claimant has a full claim both for breach of contract and for negligence, as of right. This first approach also has the advantage of consistency with the doctrine of limitation, removing the need artificially to cast aside that doctrine as determined by statute. It might therefore be preferable to allow claimants to 'pick and choose' with respect to any of the doctrines limiting recovery, if to do so would afford them an advantage. It is irrelevant that it is unlikely to do so with regard to mitigation or 'scope of the duty.' Claimants must therefore be free, so this argument runs, to frame their claim in either form, with whatever advantages and disadvantages that form brings for recovery.

Prior to *Withers*, there was some support for the first approach, both in a brief statement in *Jackson and Powell on Professional Liability*,[35] and in a dictum of Underhill J in the recent case *Yapp* v *Foreign and Commonwealth Office*.[36] That case concerned very different facts to most concurrent liability cases, being an unsuccessful claim by a former employee for damages for psychiatric injury following his employer's breach of contract. Underhill LJ said that '[i]n claims for breach of the common law duty of care it is immaterial that the duty arises in contract as well as tort: they are in

[30] [1949] 2 KB 528 (CA).
[31] [1978] QB 791 (CA).
[32] [2005] 1 WLR 377.
[33] [1969] 1 AC 350.
[34] [1978] QB 791 (CA), 806-807.
[35] J. Powell, R. Stewart and R. Jackson, *Jackson and Powell on Professional Liability* (Sweet & Maxwell: London, 2011 (7th ed)), at [11–258].
[36] [2015] IRLR 112.

substance treated as covered by tortious rules.'[37] In a footnote to that passage, his Lordship implies that the result follows from the imbalance in employment relationships, in which the employee is unlikely to be in a position to stipulate more favourable terms.

The second approach is to limit claimants to the contractual test in all concurrent liability claims– that is, in situations in which the tortious claim derives from a contractual relationship. This approach is set out succinctly by Burrows:[38]

> If we think about the policy behind having different tests, this rests on there being an opportunity for a contracting party to inform the other party of unusual risks. That other party can then exclude or limit its liability or can negotiate a higher price.[39] This is not an opportunity a party suing in tort normally has because the defendant prior to the commission of the tort is usually a stranger.

McGregor on Damages is to like effect.[40]

Further support for this view, in principle, was offered by Nugee J, at first instance in *Withers*. His Lordship noted its consistency with the *SAAMCO* doctrine:[41]

> It seems unsatisfactory that where what is in issue is the scope of the duty the measure of damages in contract and tort is identical, but where what is in issue is remoteness of damage (which is another facet of the same question, namely "what damage is the defendant liable for?"), the answer should be different.

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[37] Ibid, at [119]. It is admittedly unclear whether this passage suggests a choice between the tortious and contractual rules, or that only the tortious rules can be applicable.

[38] A. Burrows, *Remedies for Torts and Breach of Contract* (OUP, 2004 (3rd ed)), 92-4. Burrows suggests that this conclusion is supported by *Brown* v *KMR Services* [1995] 4 All ER 598, in which the Court of Appeal applied a contractual remoteness test to a claim in tort and breach of contract. Roth J cited *Brown* in his concurring judgment in the Court of Appeal in *Withers*, at [159] and [165]. See also A. Burrows, 'Limitations on Compensation' in A. Burrows and E. Peel (eds), *Commercial Remedies* (OUP, 2003), 27.

[39] As Lord Reid argued in *The Heron II* [1969] 1 AC 350.

[40] H McGregor, *McGregor on Damages* (Sweet & Maxwell: London, 2009 (18th ed)), at [19–008]. This passage was cited with approval in *Withers* [2015] EWCA Civ 1146, at [65] and [183], and in obiter dicta of HHJ McKenna in *Obsession Hair & Day Spa Ltd* v *Hi-Lite Electrical Ltd* [2010] EWHC 2193, at [66] - [68]. Further support for this view is provided by E. Peel (ed), *Treitel on the Law of Contract* (Sweet & Maxwell: London, 2015 (15th ed)), at [20-112].

[41] [2014] PNLR 22 at [213].

However, Nugee J felt constrained by *Henderson* v *Merrett* to apply the more generous negligence test.

Discussion

As we have seen, the Court of Appeal adopted the second approach, holding that the contractual remoteness test was appropriate. This conclusion is to be welcomed. Two principal arguments emerge from the judgments. These are treated together in their Lordships' reasoning, but can usefully be separated. The first is the argument encountered above– that parties to a contract can set out in that contract which losses will be recoverable. This argument, though valid, begs the further question whether and to what extent the claimant in fact had the opportunity to negotiate the terms of recoverability. This question is especially relevant to cases of contractual imbalance; such concerns influenced Underhill LJ's obiter dictum in the employment case *Yapp*.[42]

The second argument is both more convincing and more original. It is set out most forcefully in the leading judgment of Floyd LJ. His Lordship stated:[43]

> Whilst the two causes of action in contract and tort are independent, it is nevertheless significant that the tortious liability normally arises because one party has assumed a responsibility towards another… In a case such as the present (although not in all cases) the responsibility is assumed under a contract. It would be anomalous, to say the least, if the party pursuing the remedy in tort in these circumstances were able to assert that the other party has assumed a responsibility for a wider range of damage than he would be taken to have assumed under the contract… It makes no sense at all for the existence of the concurrent duty in tort to upset this consensus, particularly given that the tortious duty arises out of the same assumption of responsibility as exists under the contract.'

[42] [2015] IRLR 112.

[43] [2015] EWCA Civ 1146, at [68], [80]. This approach fits the explanation given by Burrows ('Solving the Problem of Concurrent Liability,' in A. Burrows (ed), *Understanding the Law on Obligations: Essays on Contract, Tort and Restitution* (Hart, Oxford, 1998)) of an 'independence principle,' by which the negligence tests for recovery should apply only where the duty of care arose independently of any contract.

What precisely is the reasoning emerging from this passage? Though not entirely clear, it can be expressed as follows:

1. In a concurrent liability case such as *Withers*, the defendant owes two independent duties. The first arises in tort, on the basis of an 'assumption of responsibility.'[44] The second arises in contract.
2. The responsibility is assumed under a contract, but the contract is not necessarily a 'but for' cause of the tortious duty of care; it is possible that the defendant would have assumed a responsibility without a contract coming into being.
3. The content of the duty of care in tort depends on the responsibilities assumed. Those responsibilities are determined in full by the contract. The tortious duty need not arise from, but is wholly explained by, the contract.
4. The answer to the question 'what losses were reasonably foreseeable as resulting from a breach of the assumed duty at the time a negligent act was committed?' will necessarily be 'those losses within the reasonable contemplation of the parties at the time of contracting.'

This, it is submitted, provides the best justification for the court's decision. Understood in this way, *Withers* is a hugely significant case for our understanding of the foundations of concurrent liability. The doctrine does not exist simply to further claimants' interests, but is instead the necessary consequence of determining that duties of care may arise by the 'assumption of responsibility.' Such duties of care are logically elementary, in that they arise merely as a result of the parties' relationship; they are independent of, and may arise prior to, the contract subsisting between the parties. Once we have established the assumption of responsibility, we must ask a) what is the content of that responsibility?; and b) what are consequences of that responsibility? The answer to a) is that the duty-holder must perform its contractual obligations non-negligently, or with reasonable skill and care). The answer to b) is that the reasonably foreseeable consequences of any subsequent negligent act are only those provided for in the contract– that is, those within the contemplation of the parties at the time of contracting.

In the light of this analysis, two ostensibly similar, but incorrect, propositions must be distinguished. The first incorrect proposition is that: 'the reason the contractual remoteness test

[44] *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465 (HL).

should be applied is because where there is concurrent liability, any duty taken on is contractual, not tortious.' This proposition assumes that there is only one– contractual– duty in concurrent liability cases. *Henderson* v *Merrett* makes clear that this is not correct. Rather, two separate duties arise– one from an assumption of responsibility, and one from contract– with identical content. The second incorrect proposition is that: 'the contractual test should be applied because, though a tortious duty arises, it would not have been caused to arise but for the contract.' This proposition is superficially attractive, at least in a simple case such as *Withers*, in which the tortious and contractual rights arose at the same time. However, it fails to explain this result in a case in which there would in fact have been a tortious duty but for the contract, for example because the tortious duty pre-dated the contract (see 'scenario d)' below). The assumption of responsibility is elementary, since tort law would impose liability even if the contract were absent. However, where a contract for services is completed after or at the same time as the duty of care arises, the terms of the contract– including those reflecting the parties' contemplation of loss– are decisive of the rights and liabilities assumed.

Having set out the theoretical basis for concurrent liability, it is useful to test the boundaries of this logic against four practical scenarios, each of which is a variant on the facts of *Withers*:

Scenario a): Solicitor *gives negligent advice to* client *having assumed a responsibility towards* client, *but with no contract.*

This scenario involves a claim only in tort, arising from an assumption of responsibility. The negligence remoteness rules will apply, but liability will be limited by the 'scope of the duty' principle (*SAAMCO*).[45]

Scenario b): Solicitor *gives negligent advice to* client *under a contract for reasonable care and skill.*

This scenario covers the facts of *Withers*. It involves concurrent liability in tort and contract. There are two duties of care, arising 'out of the same assumption of responsibility as exists under the contract.' Following *Withers*, the contractual remoteness rules will apply however the claim is framed.

[45] [1997] AC 191.

Scenario c): Solicitor *offers negligent advice to* client *for six months, having assumed a responsibility towards* client. *After six months, a contract for reasonable care and skill is concluded between the parties.* Solicitor *continues to give* client *negligent advice.*

In this scenario, an initial duty of care arises by the assumption of responsibility. A second duty arises when the contract is completed. The contract thereafter determines the relationship between the parties, and the pre-existing duty of care is modified, and made more determinate, by the terms of this contract. Until the point of contracting the parties have not agreed their rights *inter se*, and it cannot simply be assumed that each alerted the other side to unusual risks. In this scenario, it is submitted, the negligence rules for recovery should apply to all negligent acts committed before the completion of the contract, and the contractual test to negligent acts after that point. This approach differs from that preferred by Burrows, who argues that the contractual remoteness rules should apply, 'because the claimant has had the opportunity, and should be encouraged, to inform the other party of unusual risks.'[46] On this view, all claims in scenario c) would be covered by the contractual remoteness test. In obiter dictum in *Withers*, Roth J said that he 'incline[d] to the view that where there is such a relationship "equivalent to contract" […] the contractual test should apply.'[47] This suggestion seems to go beyond scenario c) to apply to all 'assumption of responsibility' cases. With respect, it would present an unwelcome departure from the current law.

Scenario d): Solicitor *offers negligent advice to* client *having assumed a responsibility towards* client, *whilst simultaneously negotiating a contract for reasonable care and skill on terms 'subject to contract.' No contract is ever completed, but the negligent advice-giving continues.*

This scenario is the most difficult. Here a duty of care arises on the basis of an assumption of responsibility, the content of which may be modified by the parties' subsequent negotiations (which may affect the foreseeability to *solicitor* of *client's* unusual risks). The question is whether it arose 'out of the same assumption of responsibility as exists under the [incomplete or invalid] contract.' Burrows, as set out above, argues for the contractual rules. However, it is again submitted that it is crucial that no binding contract was completed, and so the parties did not in

[46] Burrows (n38, above), 94 (footnote n3).
[47] [2015] EWCA Civ 1146, at [163].

fact agree their respective rights and liabilities. Moreover, the date from which the 'reasonable contemplation' test would be applied under this approach remains uncertain. One answer may be 'the date at which negotiations were substantially complete,' but no answer is unproblematic. Consequently, it is submitted, only the negligence remoteness rules should apply.

Application of the contractual test to the facts

At first instance, Nugee J expressed the provisional conclusion that the lost opportunity would not be recoverable under the contractual test. He considered the Nomura mandate 'a very particular, and potentially very remunerative, opportunity,' which 'could not reasonably […] have been contemplated.' On this basis, it was of a different kind, not merely different extent, to the losses contemplated in the contract, following *Victoria Laundry*.[48]

The Court of Appeal unanimously disagreed with this provisional conclusion, finding Withers liable for of Wellesley's lost opportunity. This result may seem harsh; as Roth J noted: 'I think it is self-evident that when Withers entered into the contract with WP, they could not reasonably have contemplated the Lehman collapse, the consequent financial crisis or the Nomura US buildout.'[49] It is, with respect, nonetheless correct. Wellesley's opportunity to profit from expansion– at a level exacerbated both by the financial crisis and its particular contacts at Nomura– was precisely the opportunity for which investment was sought, in conjunction with which Withers were instructed. Indeed, on Floyd LJ's finding, Withers 'must be assumed to have been aware of [Wellesley's director's] star qualities.'[50]

Further, as Floyd LJ explained, Withers knew that Wellesley sought to expand overseas, and that this was the precise purpose of raising capital by the Addax investment. Further, it was relevant to his Lordship that the precise source of profit was left open at the time of contracting; it was known only that Wellesley would provide headhunting services in the investment banking sector, and 'the common contemplation must have been that they would exploit such opportunities as arose.'[51] The losses reasonably in the contemplation of the parties at the time of contracting therefore

[48] [2014] PNLR 22 at [216].
[49] [2015] EWCA Civ 1146, at [168].
[50] Ibid, at [87].
[51] Ibid, at [81].

included all losses from a failure to exploit such opportunities that resulted from a shortfall in capital following Withers' negligence.

Does *Withers* apply to concurrent liability in equity?

The above discussion was concerned with concurrent liability in tort and contract. However, in the aftermath of the Supreme Court's decision in *AIB Group (UK) Plc* v *Mark Redler & Co Solicitors*,[52] it seems appropriate also briefly to consider the position where there is a concurrent liability in equity for which the claimant claims equitable compensation. In his note on *AIB* in this journal, Davies suggests that:[53]

> Perhaps this shows that the courts are now more tolerant of breach of trust, and breach of any duty– whether in contract, tort or equity– should lead to similar outcomes. This raises fundamental questions of how the law should approach issues of concurrent liability; after *AIB*, that debate should not be limited to concurrent claims in contract and tort: equitable claims must also be considered.

The difficulty in taking up this suggestion is that the rules applicable to equitable compensation remain uncertain.

There are three principal suggestions. The first suggestion is that equitable compensation is governed by negligence remoteness rules. This view follows from obiter dicta of Millett LJ in *Bristol & West Building Society* v *Mothew*,[54] and appears to be shared by Lord Toulson in *AIB:* 'in circumstances such as those in *Target Holdings* the extent of equitable compensation should be the

[52] [2014] 3 WLR 1367, following *Target Holdings Ltd* v *Redferns* [1996] AC 421. See R. Turner, 'The new fundamental norm of recovery for losses to express trusts' (2015) 74 CLJ 188; P. Davies, 'Remedies for Breach of Trust' [2015] 78 MLR 672; L. Ho, 'Equitable compensation on the road to Damascus?' [2015] 131 LQR 213; S. Charlwood, '*AIB Group plc* v *Mark Redler & Co Solicitors*: the last word on lenders' breach of trust claims against solicitors?' [2015] 31 PN 68; C. Mitchell, 'Stewardship of property and liability to account' [2014] 3 Conv 215 (on the judgment of the Court of Appeal [2013] PNLR 19).

[53] Davies, ibid, 694.

[54] 'Equitable compensation resembles common law damages in that it is awarded by way of compensation to a plaintiff for his loss. There is no reason why the common law rules of causation, remoteness of damages and measure of damages should not be applied by analogy in such a case.' ([1998] Ch 1 (CA), 17).

same as if damages for breach of contract were sought at common law.'[55] It also has the support of several Commonwealth authorities.[56]

The second suggestion is that equitable compensation is not limited by remoteness considerations at all. This view can also claim judicial support. Lord Reid in *AIB* held that 'foreseeability of loss is generally irrelevant' to equitable compensation.[57] His Lordship cited Lord Browne-Wilkinson in *Target Holdings*, who stated that 'the common law rules of remoteness of damage and causation do not apply…'[58] As Davies explains, on this view '[t]he risk of unforeseeable consequential loss should be visited upon the wrongdoing fiduciary rather than the vulnerable beneficiary.'[59]

The third suggestion, set out by Elliott, is that 'whether remoteness criteria apply at all depends on the nature of the claim advanced, for they are only apposite where the beneficiary seeks compensation for loss incurred by reason of the defendant's misconduct.' On this view, 'reasonable foreseeability' should be required for 'claims arising from unintentional and judicious breaches of trust' but not to 'claims arising from intentional disloyalty.'[60]

The important question for present purposes is this: once the remoteness test applicable to equitable compensation has been clarified, how should it apply to concurrent liability cases? Many cases involving equitable compensation will involve a concurrent liability in tort.[61] If the remoteness rule for equitable compensation is indeed more generous than in tort, it is plainly desirable that a beneficiary must be allowed to take advantage of that rule. Fiduciaries owe a duty of undivided loyalty to a beneficiary deemed to repose in them trust and confidence, a standard far higher than a duty of care.[62] Both duties are imposed by law rather than defined by the parties, and the more onerous standard must be enforced.

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[55] [2014] 3 WLR 1367, at [72].
[56] *Canson Enterprises* v *Broughton* (1991) 85 DLR (4th) 129 (High Court of Australia); *Day* v *Mead* [1987] 2 NZLR 443 and *Bank of New Zealand* v *New Zealand Guardian Trust Ltd* [1999] 1 NZLR 664 (New Zealand Court of Appeal). See Burrows, n38 above, 601-4, which supports this approach.
[57] Ibid, at [135].
[58] [1996] AC 421, 434. Both Lord Reid and Lord Browne-Wilkinson relied upon the dissenting judgment of McLachlin J in *Canson Enterprises* v *Broughton* (1991) 85 DLR (4th) 129 to the same effect.
[59] Davies, n52 above, 691.
[60] Elliott, n27 above, 597.
[61] For example, the plaintiff in *Nocton* v *Lord Ashburton* [1914] AC 932 (HL) could, in the modern law, sue either for negligence or breach of fiduciary duty.
[62] See M. Conaglen, 'The nature and function of fiduciary loyalty' [2005] 121 LQR 452.

A more difficult question, provoked by Davies' note, is whether the law should displace the normal equitable rules– whatever they are– where the fiduciary duty or trusteeship arose out of a contract. Such was the case in *Target Holdings* and *AIB*, in which the solicitors were liable for breach of trust and breach of contract. Both cases might plausibly have been decided on the basis of forseeability or 'scope of the duty' rather than causation, since the claimants' real loss resulted from a fall in the property market, as on the facts of *SAAMCO*. In neither case were contractual remoteness rules used to limit the extent of recovery. However, the point does not appear to have been argued, and would in any event have been unnecessary.

The courts might resolve this issue by holding that, wherever there is a trust or fiduciary relationship, equity affords generous rules for the protection of the vulnerable, which should be available to a claimant in any case. Alternatively, following the reasoning of the Court of Appeal in *Withers*, the courts might find that recovery should be limited to the type of loss that was reasonably in the contemplation of the parties at the time of contracting. On this approach, though a beneficiary is still entitled to undivided loyalty– and has the benefit of the 'fair-dealing' and 'self-dealing' rules[63]— compensation for breach of those rules is confined by the contract that gave rise to that duty of loyalty. Similarly, on facts such as those in *AIB*, the possibility of the improper disbursement of trust money is provided for (whether explicitly or not) in the contract. The latter view seems more in line with the reasoning of *Withers*, and, as Davies suggests, follows from the facts of *AIB,* in which the underlying commercial transaction was determinative of the losses for which the solicitors were held liable.[64] Ultimately, however, the resolution of this issue might require a more settled understanding of the nature and purpose of equitable compensation in English law.

<u>Conclusion</u>

Wellesley v *Withers* is a case of considerable importance for private lawyers, offering a convincing explanation for the basis of concurrent liability. The Court of Appeal's finding that only the contractual remoteness rules should apply to professional negligence claims should be welcomed as a matter of theory, just as it will be welcomed by suppliers of professional services.

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[63] See M. Conaglen, 'Equitable compensation for breach of fiduciary dealing rules' [2003] 119 LQR 246.

[64] Davies, n52 above, 687, citing *Thanakharn Kasikhorn Thai Chamkat (Mahachon) v Akai Holdings Ltd*[2010] HKCFA 64; (2010) 13 HKCFAR 479 at [155] (per Lord Neuberger NPJ). Davies appears to doubt this conclusion (at 693).

This note has sought to develop the analysis set out in *Withers*, suggesting that the duty of care arising in a concurrent liability case exists independently of the contract, but that the content of the duty is determined in full by the contract, which allocates the parties' respective rights and liabilities. For that reason, the only losses that will be 'reasonably foreseeable' for the purposes of a claim in negligence will be 'those in the reasonable contemplation of the parties at the time of contracting.' However the claimant chooses to frame its claim, therefore, the contractual remoteness test must apply. This logic, it has been argued, applies only where there is a valid contract subsisting between the parties, so the contractual remoteness rules should not be applied in a case in which the parties have a pre-existing but non-contractual relationship.

In the light of the above analysis, this note has considered, in brief, the uncertain issue of concurrent liability in equity, which has become important following the Supreme Court's decision in *AIB* v *Mark Redler*. The logic of *Withers*, it has suggested, might require the application of contractual remoteness rules to a claim for equitable compensation, if the fiduciary duties arise out of, and are defined by, a contract.