FALSIFICATION IN TRUST LAW: A CRITIQUE OF THE 'BUT FOR' TEST

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I. INTRODUCTION

Under trust law, if a trustee misapplies trust property such as by distributing trust funds to unauthorised persons or by making unauthorised investments, the doctrine of falsification steps in to allow the beneficiaries to falsify the trust account to treat the disbursement as one using the trustee's own money instead.[1] The trustee would thus be required to replace the misapplied asset *in specie* or in money which is, under the orthodox approach, all loss caused to the trust fund even if it was not 'but for' the trustee's breach.[2] However, the English cases of *Target Holdings Ltd v Redferns*[3] ("*Target Holdings*") and *AIB Group (UK) plc v Redler*[4] ("*AIB Group*") renounced the orthodox approach and laid down a new method whereby the 'value' of the trustee's liability is only what was caused 'but for' the breach. While there has not been a definitive pronouncement by the Singapore Court of Appeal ("SGCA") on whether to follow the English direction, it is submitted that it should not be adopted because *Target Holdings* and *AIB Group* are of weak authoritative weight given that it was unnecessary for the court to have considered causation in those cases. Moreover, even if the authoritative weaknesses of the English cases can be somehow overlooked, the 'but for' test remains fundamentally incongruent with the established nature of the trustee's duties vis-a-vis the trust fund such that adopting it would engender undesirable conceptual confusion into what is otherwise a straightforward area of law.

* LLB (Candidate), National University of Singapore, Class of 2023. All errors in this article remain my own.
[1] P.J. Millett, "Equity's place in the law of commerce" (1998) 114 Law Quarterly Review 214 at 226. [Millett].
[2] *Ibid.*
[3] [1996] AC 421 [*Target Holdings*].
[4] [2015] AC 1503 [*AIB Group*].

II. TARGET HOLDINGS WAS DECIDED PER INCURIAM

As a preliminary, it should be noted that the English cases revolved around a very common form of trust used to purchase land: the *Quistclose* trust. This form of trust is, in essence, a bare trust for the lender with a contractual mandate where the trustee has to apply the trust assets only for the specific purposes stipulated for under the contract.[5] The trustee would thus commit a breach of trust if he distributed the assets in a manner not provided for in the contract.[6] In addition, the trustee is also usually an agent of the beneficiary.[7]

In *Target Holdings*, the client of Target, Crowngate, wanted to purchase a plot of land by way of a mortgage in favour of Target. In order to facilitate the transaction, Target, the mortgage lender, transferred the loan money to their solicitor, Redferns, under a *Quistclose* trust arrangement where the solicitor-trustee Redferns was to release the money to Crowngate, their associated companies and the vendor only once the requisite documentation had been provided by them. Redferns however committed a breach of trust by releasing the trust money before the documents arrived – paid too early. Two years later, Crowngate defaulted on the mortgage payments and became insolvent. Unfortunately, the property turned out severely over-valued due a decline in the property market. Target then applied for a summary judgement against Redferns for falsification to claim the difference between the mortgage redemption price and the original valuation. The court held that Redferns was not liable for the diminished value of the property as it was not caused 'but for' their breach but rather due to the decline in the property market.[8]

It is however submitted that *Target Holdings* was wrongly decided as it is underpinned by the dubious premise that there was still an active breach of trust by Redferns for 'paying early' to Crowngate at the time of the lawsuit. Lord Browne-Wilkinson, in his hypothetical example given at the start of his analysis, explained that there is a breach of trust should monies in the client account

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[5] J E Penner, *The Law of Trusts* 11th Ed (Oxford: Oxford University Press, 2019) at paras 7.28-7.32.
[6] *Ibid.*
[7] Example: The trustees in *Target Holdings* and *AIB Group*.
[8] *Target Holdings*, *supra* note 3 at 440.

be transferred by "the solicitors to the borrower one day before the mortgage is executed".[9] This is however false as such breaches may be 'self-corrected' if the conditions for proper payment are subsequently fulfilled.[10] A 'self-correction' arguably occurred in *Target Holdings* as there was no loss to the trust fund by the time of the trial because the misapplication of funds by 'paying early' was properly restored to the correct terms when the required documentation subsequently arrived.[11] This was possible because "the trustee's obligation to restore the trust property is not an obligation to restore it in the very form in which he disbursed it, but an obligation to restore it in any form authorised by the trust".[12] Lord Browne-Wilkinson thus erred in finding a breach of trust by Redferns – the breach had already been corrected earlier and so ceased to exist by the time of the trial. This leaves his lordship's 'but for' test necessarily *obiter* which greatly undermines the case's authoritative weight.

Although there have been objections to the 'self-correction' theory, they can be disregarded for the purposes of *Target Holdings*. The main contention against the 'self-correction' theory is that a trustee cannot 'cure' his own breach on his own accord as the 'cure' must first be adopted by the beneficiary.[13] This argument is however unconvincing because, as pointed out by Conaglen, a trustee's trusteeship does not terminate simply because he committed a breach of trust.[14] Due to the special nature of the trustee's role in a *Quistclose* trust where he is also an agent of the beneficiary, the trustee's authority to act post breach can be analogised with that of an agent's authority to act under similar circumstances.[15] Under agency principles, an agent who has breached his mandate can still remain authorised to 'cure' his own breach as the agent retains residual authority to bind the principal until the principal takes steps to terminate the agency.[16] The principal's act of termination

[9] *Ibid* at 432.
[10] Millett, *supra* note 1 at 227.
[11] *Ibid*.
[12] *Ibid*.
[13] J. Edelman, "Money awards of the cost of performance" (2010) 4 Journal of Equity 122.
[14] M. Conaglen, "Explaining Target Holdings v Redferns" (2010) 4 Journal of Equity 288.
[15] P. Watts, "Some Aspects of the Intersection of the Law of Agency with the Law of Trusts" in P.S. Davies and J. Penner, eds, *Equity, Trusts and Commerce* (Oxford: Hart Publishing, 2019) at 29.
[16] *Ibid*.

can be implied from context or automatic upon a bad faith breach by the agent.[17] An inference of residual authority would be strong "[w]here the agent has no reason to believe that the principal would not want the transaction completed".[18] Applying the agency principles, Redferns was in fact authorised to 'cure' their breach of trust as there was no implied termination of their agency because Target wanted the mortgage to be executed by Redferns once the documents were subsequently furnished. Even if the element of fraud identified by Lord Browne-Wilkinson could have amounted to a bad faith breach of Target's instructions which extinguished Redfern's agency authority to 'self correct', it could not have changed the case's decision as the court was procedurally restricted from considering any claims of dishonest fraud in summary judgement.[19]

Assuming we accept the court's reasoning that there was a breach of trust, there is still another fatal weakness in the case's logic supporting the 'but for' test: Lord Browne-Wilkinson erroneously concluded that there was case law support for the test. This is as the learned judge relied upon surcharge cases[20] to find that there must "be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable", namely, "the fact that the loss would not have occurred but for the breach".[21] His Lordship's conflation of falsification and surcharge cases is problematic because each doctrine serves a fundamentally different purpose. A claim for a surcharge of the trust fund is for situations where the trustee has failed to do something that did not involve a misapplication of trust property. This is often when the trustee has failed to meet his duties of care such that the fund is now worth less than what it would have been if the trustee had complied with his duties.[22] Implicit in the nature of a surcharge claim is the principle of 'but for' causation as the court must determine what the trust fund's hypothetical value ought to

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[17] *Ibid.*
[18] *Ibid.*
[19] This view came from a seminar conducted by Professor James Ernest Penner which the author attended.
[20] In *Target Holdings*, Lord Browne-Wilkinson cited cases such as *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260 and *Bartlett v Barclays Bank Trust Co. Ltd (Nos. 1 and 2)* [1980] Ch 515 to support his proposition at 434.
[21] *Target Holdings*, *supra* note 3 at 434.
[22] Paul S. Davies, "Compensatory Remedies for Breach of Trust" in Richard C. Nolan, Kelvin F.K. Low & Tang Hang Wu, eds, *Trusts and Modern Wealth Management* (Cambridge: Cambridge University Press, 2018) 307 at 317 [Davies].

have been without the breach. Falsification claims, on the other hand, are for situations where there was a straightforward misapplication of trust assets which does not need consideration of the future value of the fund.[23] This is as the nature of the trustee's duty here is akin to a strict liability to maintain the value of the trust fund as it is.[24] As such, the learned judge's finding that there was a 'but for' test requirement from case law was likely made *per incuriam* because the conceptual incongruity between the two types of cases rendered the surcharge cases irrelevant to *Target Holdings*, a case on falsification.

III. AIB GROUP IS OF WEAK AUTHORITATIVE WEIGHT

Similar to *Target Holdings*, *AIB Group* involved a mortgage transaction that went wrong. Under the loan arrangement, AIB Group loaned £3.3m to a borrower which was secured by a mortgage over the borrower's property worth around £4.25m. The property was however subject to a prior mortgage from Barclays Bank worth around £1.5m. As such, AIB made the mortgage conditional upon Barclays' mortgage being redeemed on or before the loan advance by AIB so that AIB would be granted the first legal charge over the land. This was to be done using a *Quistclose* trust where AIB's solicitor-trustee, Redler, was instructed by the lender-beneficiary, AIB Group, to redeem the mortgage loan prior to or on the date of securing a first charge in favour of AIB Group so as to use the funds to discharge the Barclays mortgage. Unfortunately, the Barclays mortgage was only partially discharged as Redler's mistakenly remitted around £300,000 short to Barclays. Things remained this way for about two years until Redler confessed to the error. This triggered AIB to negotiate with Barclays to acquire a second, non first charge, mortgage over the land to secure the £3.3m loan. The borrower then defaulted on the mortgage payments and the property was sold for around £1.2m which was way below the original valuation due to a property market decline. Out of the sale proceeds, AIB only received £867,697 as £300,000 had to go to the partially discharged Barclays mortgage. AIB then sought a falsification claim against Redler for the difference between

[23] *Re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] NSWR 211 at 216.
[24] *Ibid.*

the sale amount and the original valuation of £4.25m. The UK Supreme Court rejected AIB's claim and held that Redler was only liable for the £300,000 paid to clear Barclays' prior mortgage as even if there had been no breach of trust by Redler in paying the wrong amount, the property would still have sold for only £1.2m due to the subsequent decline in the property market.[25]

It is however submitted that *AIB Group* should also have been decided on orthodox trust principles as opposed to using the 'but for' test. This is as there was arguably acquiescence of Redler's breach of trust when AIB, with full knowledge of the error, chose to obtain a second mortgage with Barclays to resolve the issue instead of pursuing an action against Redler.[26] AIB's acquiescence critically meant that, similar to *Target Holdings*, there was no longer an active breach of trust by the time of the trial. As such, it was unnecessary for the court to have applied the dubious 'but for' test in *AIB Group*. This leaves the 'but for' test once more in *obiter dicta* purgatory and thus devoid of authoritative weight.

IV. CONCEPTUAL ARGUMENTS AGAINST THE 'BUT FOR' TEST

A. Fundamental Incompatibility

Assuming that the technical weaknesses in *Target Holdings* and *AIB Group* identified earlier can be somehow surmounted, it still remains undesirable to adopt the 'but for' test because it is conceptually incompatible with the principles underlying the doctrine of falsification.

At the heart of the issue is the question of what purpose should the remedy for falsification, ie. 'equitable compensation', serve? Here, there are two competing options. The first is for falsification to serve as a 'substitutive' remedy. This is one where the obligation to provide compensation for the breach of trust is of strict liability. A trustee cannot escape liability even if the loss to the trust was still going to materialise notwithstanding his breach of trust. In this sense, the trustee's duty to maintain the trust fund is analogous to the obligation to repay a debt owed, with the 'debt' here being the trust fund's value.

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[25] *AIB Group*, *supra* note 4, see Lord Toulson's judgement.

[26] Peter Watts, "Agents' Disbursal of Funds in Breach of Instructions" (2016) Lloyd's Maritime and Commercial Law Quarterly 118 at 121.

The second option is for falsification to act as a 'reparative' remedy where the purpose is to put the beneficiary in the same position he would have been 'but for' the breach of trust. In short, falsification's objective is to achieve restitution. This was the position adopted by Lord Browne-Wilkinson in *Target Holdings*.[27] Under this doctrine, the trustee is not obliged to compensate for a breach of trust if the loss would have arisen regardless of the trustee's breach because, in such situations, the ultimate position of the beneficiaries was unaffected by the breach. [28] This departure from the orthodox position, where the remedy is 'substitutive', would however lead to a number of undesirable implications that would weaken the *raison d'etre* of falsification.

At the most fundamental level, the 'but for' approach misunderstands the nature of falsification – falsification stems from a primary obligation rather than a secondary obligation of the trustee. Under the 'but for' approach, the trustee is under a primary obligation to execute the trust terms and a secondary obligation to pay equitable compensation if he does not.[29] The reality is however that the trustee is under a single primary obligation to account for his stewardship of the beneficiary's property[30] because he has to "hold and deal with the trust property in accordance with the trust terms, and to produce it when called upon to do so".[31] Liability to pay equitable compensation in a falsification claim is thus a primary obligation as it is the means by which the trustee is forced to restore the trust fund to what the trustee should have kept it at.[32]

Moreover, involving principles of 'but for' causation in falsification also goes against its nature as a remedy for any discrepancies found during an 'account' of the trust fund. In trust law, an account is "the first step in a process which enables [the beneficiary] to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good".[33] Once discrepancies are identified, the beneficiaries can opt to falsify the account by treating those disbursements of trust property as never having been disbursed and thus obliging the trustee to restore the trust fund to this

[27] *Target Holdings*, *supra* note 3 at 436.
[28] *Ibid*.
[29] Millett, *supra* note 1 at 225.
[30] *Ibid*.
[31] *Sim Poh Ping v Winsta Holdings* [2020] SGCA 35 at para 113 [*Sim Poh Ping v Winsta Holdings*].
[32] Millett, *supra* note 1 at 225.
[33] *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368 at para 168.

new falsified account. It is implicit in this process that falsification is only a substitutive, and not reparative, remedy. As an 'account' of anything is naturally only referable to the point in time at which it was taken, the trustee's liability to restore the account must necessarily be limited to the discrepancy at the time it was taken and not after or before.[34] Therefore, introducing any concept of causation would be to go against this nature of an 'account' by considering events beyond it. It is thus submitted that the correct purpose of falsification is "to 'restore' the claimant to the position he was in *before* the defendant committed the wrong" instead of "put[ting] the parties into the position they would have been in had no wrong occurred"[35] – the orthodox interpretation where the "award of "equitable compensation" for misapplication should be based on replacement and not compensation".[36]

Although the SGCA in *Sim Poh Ping v Winsta Holdings*[37] ("*Winsta Holdings*") stated that orthodox falsification does have an element of causation, the 'causation' they were referring to is more accurately described as a 'conceptual link' rather than a 'causal link'. A link is 'causal' when the act results in an outcome that is extrinsic to the act itself while a link is 'conceptual' when the outcome is intrinsic.[38] An example is the act of cooling down a room. The act of cooling down the room is tautological with the temperature going down so there is a 'conceptual' link between the two. On the other hand, the act of opening the window is not tautological with the cooling down of the room as it might be hotter outside hence the linkage between the two is 'casual'. Applying this to the SGCA's description of the 'causal link' as "the subject matter of the trust would not have departed from the custody of the trustee to whom it was entrusted *but for* the trustee's breach of his custodial stewardship duty", [39] it would appear that what they were really referring to is a conceptual link because a trustee's breach of his custodial stewardship duty is tautological with the departure of trust assets.

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[34] Millett, *supra* note 1 at 225.
[35] Davies, *supra* note 22 at 323.
[36] Lucina Ho, "An Account of Accounts" (2016) 28 Singapore Academy of Law Journal 849 at para 65.
[37] *Sim Poh Ping v Winsta Holdings*, *supra* note 31 at para 114.
[38] Von Wright, *Norm and Action* (New York: The Humanities Press, 1963) at 40-41
[39] *Sim Poh Ping v Winsta Holdings*, *supra* note 31 at para 114.

Aside from the fundamental conceptual problems in the 'but for' test, Lord Browne-Wilkinson's approach also suffers from a tremendous flaw: it allows the wrongdoing trustee to gain a windfall from external events. This is best demonstrated by the following hypothetical example:[40]

> Tom is a trustee of some gemstones in a vault. He however commits a breach of trust by removing a gemstone from the trust collection in the vault and gives it away to an unwitting friend of his. Subsequently, out of pure coincidence, the remaining gems were stolen by a burglar.

Should Lord Browne-Wilkinson's approach be followed then Tom would not be liable for the gemstone he stole simply because he was lucky that a burglar came along to break the causal link between his theft and the loss to the trust fund. Using luck to determine liability for wrongdoing is unprincipled and unjust to the beneficiary hence it is better to stick to the orthodox approach instead.

Although the orthodox approach can instead lead to a windfall to the beneficiary, as noted by Lord Browne-Wilkinson, it can be justified on the principle that all uncertainty should be resolved against a wrongdoer. This is as the trustee voluntarily assumed control over the beneficiary's property to act for the beneficiary's interests which renders the beneficiary a 'vulnerable' party that needs protection by stricter rules against the trustee.[41] While it may be argued that an exception should be carved out for *Quistclose* trusts as the relationship is possibly more equal due to it being a bare trust where the trustee is to act to the order of the beneficiary, the power differential still tilts decisively towards the trustee. This is as the trustee can exploit the beneficiary's detached position from the fine details of the trust's execution to effectively conceal wrongdoing until it is too late for the beneficiary like what happened in *Target Holdings*.

[40] The author thanks Professor James Ernest Penner for inspiring this hypothetical scenario.
[41] Davies, *supra* note 22 at 319.

B. Inherent Vagueness

Furthermore, even if we suppose that the need for fairness to the trustee trumps the need to protect the beneficiary, it would still be undesirable to adopt the 'but for' test because it is painfully vague as to what sort of trust it should apply to.

In *Target Holdings*, it was held that the orthodox approach should only apply to 'traditional' trusts while the 'but for' approach applies to 'commercial' trusts.[42] This was due to the perceived difference between trusts created for commercial purposes and those that are not. In traditional trusts where there is no commercial element, the trust assets are normally held in trust for a number of beneficiaries who have different and normally successive equitable interests to the trust assets (e.g. A for life with the remainder to B). The purpose of the trustee is thus to have the whole fund vested in him so as to be available to satisfy the equitable interest of each beneficiary when it falls due.[43] The trustee's strict obligation to restore the trust fund thus "reflects the fact that no one beneficiary is entitled to the trust property and the need to compensate all beneficiaries for the breach".[44] However, this rationale does not apply to commercial trusts because, under the *Quistclose* structure regularly used in commercial transactions, there is only one beneficiary: the client.[45] Moreover, as observed by the court in *AIB Group*, the trustee's duties in *Quistclose* trusts are much more closely defined and last for a much shorter duration than traditional trusts so the trustee is more akin to an agent than a true trustee.[46] Due to these special characteristics of commercial trusts, there is no need to view the trustee of a commercial trust as the "guarantor of the integrity of the fund" for all beneficiaries which requires the imposition of onerous duties on.[47]

However, how do we determine when a trust is commercial in more complex situations? This is not an easy question to answer because the 'commerciality' of a trust is not binary but rather lies on a spectrum. 'Commerciality' would misleadingly appear binary if one looks only at cases like *Target*

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[42] *Target Holdings*, *supra* note 3 at 434.
[43] *Ibid* at 435-36.
[44] *Ibid*.
[45] *Ibid*.
[46] *AIB Group*, *supra* note 4 at para 71.
[47] Richard Nolan, "A Targeted Degree of Liability" (1996) LMCLQ 161 at 162.

Holdings and *AIB Group* where the trusts were for purely commercial purposes but such an illusion would be quickly destroyed once a trust consisting of commercial and non-commercial purposes is analysed. An example is whether the following would be considered a 'commercial' trust: a family settlement granting a power to invest on a mortgage to the trustee but the trustee negligently parted with the trust money without obtaining the executed mortgage and title deeds in exchange.[48] In such situations, the 'commerciality' of the trust must be assessed on a scale to see if it tips more towards a 'commercial' trust than a 'traditional' one. Perhaps this could be done based on how many beneficiaries the trust has or how close the trustee was to an agent, like in *Target Holdings* and *AIB Group*. However, this would require a subjective assessment on the part of the judge as to where the appropriate tipping point should be which would then have the undesirable effect of greatly increasing the risk of unprincipled and arbitrary judgements. When coupled with the fact that the remedy for each is wildly different, the undesirability of the 'but for' test is obvious. It is thus submitted that the local courts should not introduce such uncertainty into an otherwise straightforward area of law.

V. A POSSIBLE MIDDLE GROUND?

Some argue that a modified 'but for' test would be more palatable for the court to adopt but it is submitted that the best option is still to stick to the orthodox position. The primary issue with any modified approach is in determining what sort of situation would justify the reparative remedy as opposed to the orthodox substitutive remedy. Unfortunately, the two main approaches to this problem are somewhat deficient in one way or another.

A. 'Active' versus 'Passive' Duty

The first approach is the one taken by the English Court of Appeal in *Main v Giambrone & Law (a firm)*[49] ("*Giambrone*") where the applicable remedy is determined based on whether the breach of trust by the trustee was that of an 'active' or 'passive' duty. The learned judge in *Giambrone* held

[48] Millett, *supra* note 1 at 225.
[49] [2017] EWCA Civ 1193 [*Giambrone*].

that this principle stemmed from the facts of *Target Holdings* and *AIB Group*.[50] This finding is however somewhat unsatisfactory as the learned judge failed to elaborate on why the solicitors were under an 'active' duty when the facts appear to support a contrary finding instead: the solicitors had no duty to do anything other than to hold on to the trust assets if the requisite event for applying trust funds away did not arise.[51] Another issue is that whether a duty is 'active' or 'passive' should not factor into what remedy is awarded.[52] Conceptually, the basis for any remedy in falsification is the duty to "act as custodians of the deposit monies indefinitely" until mandated by the trust instrument to apply the funds away[53] which is necessarily always a passive duty. Hence, any potential 'active' duty would be additional to the always present passive duty to preserve the trust fund.[54] This leaves the basis for excluding falsification for 'active' duties unprincipled.[55]

B. A 'Completed' Trust

The second approach is to determine the appropriate remedy based on whether the trust has been 'completed'. This would involve an analysis of the scope and purpose of the trust to see if the purpose has been achieved.[56] If the objectively construed "purpose of the trust is fulfilled and the relevant transaction undergirding the trust is 'completed'" then a substitutive remedy would be unavailable.[57] This stems from the idea that the principles of trust law ceases to apply once "there is neither a trust to be reconstituted nor any duties to be performed by trustees".[58]

However, the 'completion' approach would not actually give a different result from the orthodox approach. Under the former, a trust is 'completed' when "the conditions of distribution of trust

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[50] *Ibid* at para 61.
[51] Ding Hang Seah, "Custodial Stewardship Duties of a Trustee: The Search for a Principled Approach" (2019-2020) 37 Sing L Rev 119 at 125-26 [Seah].
[52] *Ibid*.
[53] *Giambrone* at para 62.
[54] Seah, *supra* note 51 at 125-26.
[55] *Ibid*.
[56] *Youyang Pty Ltd v Minter* (2003) 196 ALR 482 at paras 48-49.
[57] Seah, *supra* note 51 at 126.
[58] *Ibid* at 127.

property are met".[59] Based on this definition, it can be said that there are two possible scenarios which may comprise 'completion': (1) when the trustee performed his duties impeccably all the way and (2) when the trustee inappropriately disbursed trust property but subsequent intervening events made it such that the conditions for the disbursement were met by the time of the trial. The completion approach appears to have only considered the first scenario as giving rise to a completed trust. But is it really so? The second can also be said to be a 'completed' trust as the conditions of the distribution have been met, albeit subsequently. More fundamentally, a trust is also either completed or is not at the time of the trial so it does not matter whether it was incomplete earlier. Therefore, should the trustee's non-compliance be subsequently corrected by intervening events then the trust would become completed at the point of trial. This then means that there would be no breach of trust for the substitutive remedy to operate on by the time of the trial.[60] The completion approach would thus only award a substitutive remedy for the scenario where the trustee's breach was never 'cured' (ie. a non-*Target Holdings* situation) – a scenario that is already well tackled by orthodox principles. The completion approach is hence not strictly necessary when analysed from the earlier self-correction theory. As such, if we have to choose between the two approaches, the self-correction method would be the better option since it does not have the added hassle that the completion approach has of needing to ascertain the trust's purpose.

VI. CONCLUSION

All in all, the 'but for' test in English law should not be adopted in Singapore because the cases of *Target Holdings* and *AIB Group* were not only wrong on the facts but also on conceptual grounds. While it is fortunate that the SGCA in *Winsta Holdings* appears cognizant of the fact that falsification should not be a reparative remedy but rather a substitutive one,[61] it remains to be seen

[59] *Ibid*.

[60] See the 'self-correction' theory in Part 2 of this article.

[61] *Sim Poh Ping v Winsta Holdings*, *supra* note 31 at para 125: "[In the] situation involving custodial breaches, the monetary award is ***substitutive*** – it seeks to restore the trust fund or the fund of the principal either *in specie* or by a monetary sum in lieu. The usage of the term "equitable compensation", with its reparative origins, in cases of custodial breaches may have well led academics and courts to view the monetary awards ordered for custodial breaches similarly – and in our view, wrongly – in a reparative light."

whether they would conclusively reject *Target Holdings*' reparative approach.[62] It is thus hoped that the SGCA would firmly reject this problematic test as soon as possible as otherwise the conceptual confusion in the doctrine of falsification would continue to stir up a storm of controversy in what is otherwise supposed to be a very calm area of law.

[62] *Ibid* at para 122.