

BOOK REVIEWS

Peter Devonshire, *Account of Profits* (Thomson Reuters, 2013)

As Michael Kirby notes in the foreword to this book: ‘Remedies matter. Remedies count’.¹ This theme is a constant refrain in my teaching of Equity classes. The availability of an account of profits is an important matter to a plaintiff and must not be overlooked by his or her legal advisers. A text such as this, which distils the important theoretical and practical issues relating to accounts of profits, will be valuable for practitioners, academics and students alike.

This book covers a lot of territory, perhaps more than is suggested by its title. The expected content is an examination of the remedy and process of accounts of profits, in equity and in the intellectual property context. In addition, there is substantial discussion on the equitable causes of action for which the remedy is available — breach of fiduciary duty and breach of confidence. The author also ventures into a discussion of common law gain-based remedies.

Therefore, the text presents a comprehensive account of the circumstances in which an account of profits and other gain-based remedies can be obtained. Although there will be other texts where a reader can learn about account of profits and gain-based remedies, the advantage of this text is that it examines the remedies across the various causes of action. Further, in its discussion of the process of taking accounts, and the complexities involved in allowances and apportionment, this book contains much more detail than is commonly found in standard texts. For anyone with a particular interest in the account of profits remedy, this book will be a valuable addition to their library.

The book is well written and easy to read. One of its strengths is the author’s straightforward style, which renders it very accessible, without being simplistic. It is a practical book, which will make it useful for practitioners. The chapters have a sensible structure and order. Some readers will wish to read the book from cover to cover, while others may only choose to read particular chapters. The structure of the text makes it accessible to both groups of readers. The text is clearly written with an Australian audience in mind, although it is not exclusively written for the Australian market. It discusses the major relevant English and Australian cases. There is some brief comparative discussion of the Canadian and New Zealand positions, where relevant. Overall, the book is successful in its ambition to discuss the Anglo-Australian position. However, there are a couple of places where discussion of the Australian position is a bit sparse, particularly where it differs from the English law.

The structure of the text is as follows:

— Foreword by Michael Kirby

1 Michael Kirby, ‘Foreword’ in Peter Devonshire, *Account of Profits* (Thomson Reuters, 2013) vii.

- Chapter 1: Introduction
- Chapter 2: Elements of Account of Profits
- Chapter 3: Account of Profits and Breach of Fiduciary Duty
- Chapter 4: Allowances to Defaulting Fiduciaries
- Chapter 5: Breach of Confidence
- Chapter 6: Intellectual Property Infringement
- Chapter 7: Gain-Based Remedies for Common Law Wrongs

If I had read the foreword to this book before agreeing to write this review, I suspect that I might well have declined to review the book. The foreword eloquently explains why this book deserves to be widely read. The Introduction is brief and to the point. It outlines the structure of the book and the core work of each chapter.

Chapter 2 explores the historical basis of the action before outlining the ‘juristic basis’ of the remedy, its discretionary nature and the requirement for the plaintiff to make an election. In relation to discretionary factors, the chapter briefly mentions how the court has discretion to adjust the allowances which may be claimed. This is discussed in detail in ch 4. As to other discretionary factors, the author concentrates on laches as an example.

Chapter 3 situates account of profits as a remedy for breach of fiduciary duty. This chapter concisely but comprehensively discusses the Australian approach to the fiduciary principle. Obviously, there are other texts which concentrate wholly on the nature of the fiduciary relationship, and this book does not attempt to compete with them. It takes a practical case-based approach to the identification of important principles. This chapter is quite wide-ranging and discusses particular aspects of the conflicts and profits rules such as the duty/duty conflict, the self-dealing and fair-dealing rules, and the rules in *Keech v Sandford*² and *Re Hastings-Bass (deceased) v Inland Revenue Commissioners*.³ The discussion of *Keech v Sandford* is, in my view, a little too brief for Australian readers as it could have included discussion of the rule by Deane J in *Chan v Zacharia*.⁴ In relation to the *Re Hastings-Bass* rule, the book discusses the Court of Appeal decision in *Pitt v Holt*.⁵ Readers interested in this rule must now take account of the English Supreme Court decision in *Pitt v Holt*, handed down in May 2013.⁶ The author also addresses whether the strict statements in cases such as *Boardman v Phipps*⁷ still represent the law.

2 (1726) Sel Cas T King 61; 25 ER 223.

3 [1975] Ch 25 (*Re Hastings-Bass*).

4 (1984) 154 CLR 178, 186.

5 [2012] Ch 132.

6 [2013] 2 AC 108.

7 [1967] 2 AC 46.

This chapter contains specific sections on the fiduciary characterisation of joint ventures and the interaction between contract terms and fiduciary duties. Finally, the author raises the issue regarding the proscriptive/prescriptive nature of the duties owed by a fiduciary. There is some discussion of the possibility that company directors may owe positive duties, but the author concludes that the English cases are unlikely to be followed in Australia because of *Breen v Williams*.⁸ Although it is not a specialist text on fiduciary relationships, I suggest that this chapter will be a useful starting point for practitioners and students, particularly.

The chapter then moves on to discuss the remedy of account of profits for breach of fiduciary duty. The author acknowledges in the Introduction that it was necessary to be selective. He has taken as a focus the topic of bribes and the issues of remedy which arise when a fiduciary is disloyal in this fashion. For those who are unfamiliar with the debate, the discussion in this book provides a very clear description and discussion of the relevant policy and theoretical issues raised by the Privy Council decision of *Attorney-General (Hong Kong) v Reid*.⁹ The Court of Appeal decisions of *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*¹⁰ and *FHR European Ventures LLP v Mankarious*¹¹ are discussed and compared.

One of my few real criticisms of this book's coverage of Australian law relates to this section. I think that, for Australian readers, there is insufficient attention paid to the important decision of *Grimaldi v Chameleon Mining NL [No 2]*¹² in comparison to the length of time spent discussing the overseas decisions. The author acknowledges that the Australian approach to bribes will be different to that in England, but the discussion is too brief. The section on bribes leads into a general discussion as to whether the remedy serves penal or deterrence functions. The chapter concludes with a section on the complexities involved in determining causation in this area. This is a very useful section, again showing the author's willingness to tackle the harder questions involved in the account of profits.

Chapter 4 is an important chapter and considers one of the more difficult aspects of this remedy: the question of allowances or apportionment of profits for a defaulting fiduciary. The depth of discussion in this chapter is one of the strengths of this book. The chapter clearly explains how the two approaches differ. Allowances are addressed first. The discussion in this chapter explores the case law and provides a clear discussion of the ways in which allowances are tackled in the decisions. This chapter concentrates on the English authorities.

The section on allowances includes discussion of misuse of trust property and the ways in which the tracing rules permit the plaintiff to strip a defaulting trustee of gains. A minor criticism here is that the distinction between personal and

8 (1996) 186 CLR 71.

9 [1994] 1 AC 324.

10 [2012] Ch 453.

11 [2013] 3 All ER 29.

12 (2012) 200 FCR 296.

proprietary remedies is not strongly articulated, as the author is dealing with the philosophy behind profit stripping, rather than the method by which such profit stripping is carried out. The issue is treated as a contextual example of allowances. This obscures the distinction between personal and proprietary claims. This section concludes with a section on the taking of accounts as part of rescission. The chapter then moves to consider the more limited scenario in which a fiduciary may be granted an apportionment of profits. This section also discusses tracing into a mixed fund, and whether the current case law sufficiently requires a defaulting fiduciary to disgorge profits. Devonshire makes a coherent argument for a different approach.

Chapter 5 addresses the other significant equitable doctrine: breach of confidence. Like the chapter on fiduciary duty, it is necessarily concise. Nonetheless, it addresses the elements of the doctrine with sufficient detail. Any person new to this doctrine will find this a helpful chapter. Specific contexts in which this doctrine can be employed, such as privacy and employment, are explored. In relation to privacy, the impact of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*¹³ on the English doctrine of breach of confidence is discussed. The Australian position is only briefly compared. The second half of the chapter is devoted to discussion of the remedy for breach of confidence cases. Again, the author is willing to tackle the difficult questions, such as the measure of accountable profits and the period for which accounting may be required. This leads to a discussion of the springboard doctrine.

Chapter 6 deals with the remedy of account of profits in the context of intellectual property infringement. This chapter will obviously be of specific interest to those readers who are interested in this particular aspect of the remedy. It may be of less immediate interest to those whose area of study or specialty relates to the equitable doctrines. Nonetheless, it is suggested that the chapter is well worth reading, although it has particular interest to intellectual property specialists. A perusal of this chapter provides an interesting comparison with the approach taken to the remedy in the context of breach of the equitable doctrines.

Chapter 7 is less connected to the rest of the book, as it discusses gain-based remedies for common law wrongs. However, in a book such as this, its inclusion is quite justifiable. The chapter discusses interference with property rights, and account of profits for breach of contract. In the section on property rights, the chapter explores the user principle from *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd*¹⁴ and *Wrotham Park* damages in some depth.¹⁵ It separately considers whether these cases can be termed ‘restitutionary’. The controversial nature of these awards and the difficulty with their classification are acknowledged. The section on account of profits for breach of contract discusses *Attorney-General (UK) v Blake (Jonathan Cape Ltd Third Party)*¹⁶ and subsequent English case law, highlighting that *Blake* ‘has not had a significant impact on

13 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952).

14 [1952] 2 QB 246.

15 *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321.

16 [2001] 1 AC 268 (‘*Blake*’).

English case law'.¹⁷ Because *Blake* has not been 'favoured' in Australia, there is some comparative analysis with New Zealand.

This is a valuable contribution to the literature and the author is to be commended for an excellent book. Its few shortcomings are well and truly outweighed by its strengths.

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17 Peter Devonshire, *Account of Profits* (Thomson Reuters, 2013) 172.