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Account of Profits

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Reviewed by Lord Millett

Subject: Damages. **Other related subjects:** Trusts

***L.Q.R. 681** This valuable monograph joins others which deal individually with the various remedies which are available at common law and in equity, whether damages, specific performance or the so-called constructive trust. It is concerned with the most controversial remedy of all: the recovery of the profit made by the wrongdoer. As Michael Kirby writes in his foreword, there is something deeply intuitive about the feeling that a person who does a wrong to another should not be able to make or retain a profit as a consequence of that wrong. Yet the common law has generally insisted on measuring the remedy by the loss suffered by the claimant rather than by the profit made by the wrongdoer. This book deals with the cases when the court does allow a claimant to recover all or some of the profit which the wrongdoer has made whether or not he has suffered any loss and whether or not he would or could have made the profit himself.

There are two questions, each of which is hotly disputed: (i) in what circumstances may the claimant recover all or part of the wrongdoer's profit? and (ii) should his claim be classified as restitutionary or compensatory? Peter Devonshire's book deals with both questions. It illustrates the pervasive influence of English law, for while the author teaches at the University of Auckland and his book is published in New Zealand, most of the cases which he discusses are English. The book is arranged by the nature of the claim, which is certainly convenient and probably unavoidable, though it inevitably results in duplication. ***L.Q.R. 682***

The author introduces his subject by explaining that the term "account" has different meanings which reflect distinct functions: as a form of liability, as a remedy, and as a procedure to discover whether any and if so what remedy is appropriate. This is an important point which is often overlooked. The book was published before the recent decision of the Court of Final Appeal of Hong Kong in *Hall v Libertarian Investments Ltd [2013] HKCFA 93* (decided in October 2013), which was concerned with the relationship between the remedies of account and equitable compensation as responses to the misappropriation of trust property. The court explained that, while it is often said that the primary remedy for breach of trust or fiduciary duty is an order for an account, this is an abbreviated and potentially misleading statement of the true position. In the first place an account is not a remedy for wrong. Trustees and most fiduciaries are accounting parties, and their beneficiaries or principals do not have to prove that there has been a breach of trust or fiduciary duty in order to obtain an order for account. Once the trust or fiduciary relationship is established or conceded the beneficiary or principal is entitled to an account as of right. Although like all equitable remedies an order for an account is discretionary, in making the order the court does not grant a remedy for wrong but enforces performance of an obligation. In the second place an order for an account does not in itself provide the claimant with a remedy; it is merely the first step in a process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means whether personal or proprietary by which it may be made good. It was the failure to appreciate this which led the English Court of Appeal astray in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2011] EWCA Civ 347; [2012] Ch. 453*. In reviewing the English authorities Lord Neuberger M.R. wrongly assumed that an order for an account is inconsistent with a proprietary remedy, whereas it is merely the precursor to the appropriate relief whether personal or proprietary.

The leading chapter deals with the remedy for breach of trust or fiduciary duty. It contains a particularly useful section on commercial joint ventures and the vexed question whether the whole or any aspect of such a relationship can attract fiduciary obligations. The author discusses the leading cases from Australia, Canada and New Zealand. This section will be particularly useful to English lawyers, for there are relatively few English authorities on the question. The author does not, however, discuss the question which arose in *Hall v Libertarian*, viz. in what circumstances will the

court refuse to order an account to ascertain the exact amount of a deficit in the trust funds resulting from an established breach of trust, and this will no doubt have to await a second edition.

The chapter does, however, contain a long section dealing with the question whether the unauthorised receipt by a fiduciary of a bribe or secret commission may give rise to a proprietary remedy. This is a little surprising given the author's background, for the question, while currently the subject of acute controversy in England, has never been disputed in Australia and is settled law in Canada and New Zealand. This part of the chapter may perhaps be the subject of criticism, for while the author is right in saying that the modern debate begins with the decision of the Court of Appeal in *Lister & Co v Stubbs (1890) 45 Ch.D. 1 (CA)*, this disregards a long and consistent line of authority to the contrary stretching back over the previous hundred years. The author is also wrong to say that, "despite ***L.Q.R. 683*** reservations", the decision "remained good law" until a century later; for it was generally ignored by the Chancery judges in England (as well as by the High Court of Australia) who generally reached the opposite conclusion without so much as a glance at *Lister v Stubbs*. In his *Essays on Equity published in 1906* (and re-edited in 1936) Maitland had stated in terms that the rule in *Keech v Sandford (1726) Sel. Cas. Ch. 61* (where the court awarded a proprietary remedy) was not confined to leaseholds, but extended to any profit made by a fiduciary in the course of the fiduciary relationship; and this was echoed by Lord Russell in *Regal (Hastings) Ltd v Gulliver [1967] 2 A.C. 134 (HL, 1942)*, when he said that the rule in *Keech v Sandford* applied to the profit "in full force". The order made by Wilberforce J. and upheld by the Court of Appeal (*[1964] 1 W.L.R. 993*) and the House of Lords in *Phipps v Boardman [1967] 2 A.C. 46* was unequivocally proprietary.

But the author is to be applauded on two counts. First he recognises that the reason that the fiduciary holds the profit in trust for his principal is that in the eyes of equity he lacks capacity to hold it for his own benefit. Secondly, he identifies the maxim that "equity regards as done that which ought to be done", which many critics have wrongly dismissed as irrelevant, as the key principle which Lord Templeman rightly invoked in *Attorney General for Hong Kong v Reid [1994] 1 A.C. 324* to uphold the grant of a proprietary remedy. The maxim is only another way of saying that a court of equity will enforce performance of an equitable obligation and, since in such a case the obligation will inevitably be performed long after the proper time, treat it as if it had been duly performed when it should have been. This is why in a purchaser's action for specific performance of an open contract for the sale of land the court treats the property as belonging in equity to the purchaser and carrying the rents and profits of the land since the contractual date of completion. As Lindley L.J. himself said in *Lister v Stubbs*, the fiduciary is bound to pay the bribe or profit to his principal the moment he receives it. That is a personal obligation (for equity always acts in personam), but equity will enforce it and in doing so will treat the bribe or profit as if it had been paid to the principal when it should have been and so belonging to the principal from the moment the fiduciary received it.

In the next chapter the author deals with two important but very different subjects: (i) whether in taking the account a defaulting fiduciary may be granted an allowance in recognition of the time and effort which he has expended in order to make the profit; and (ii) the allocation of interests in mixed funds. While it is clear that only a fiduciary who has acted honestly and in good faith may be awarded an allowance, it is far from clear whether there are any and if so what other conditions which must be satisfied. The author is rightly critical of Lord Goff's somewhat desperate attempt to reconcile *Guinness plc v Saunders [1990] 2 A.C. 663* with *Phipps v Boardman*, though in the reviewer's mind they are not inconsistent, for there are two major differences between them. First, the defendant's conduct in *Guinness v Saunders* can hardly be described as honest: and secondly in *Phipps v Boardman* the court awarded a proprietary remedy. It is well settled that where a trustee has spent money on improving the trust property a beneficiary who insists on the restoration of the property by the trustee must acknowledge his contribution to its value. ***L.Q.R. 684***

In the next chapters the author deals with breach of confidence and intellectual property infringement, and in the last chapter he deals with common law wrongs. These cover interference with property rights, restitutionary awards based on a proportion of the defendant's gain, and finally breach of contract. As is well known, the taxonomy of gain based relief in these cases is controversial.

The leading case on gain based damages for interference with property rights is in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 W.L.R. 798*, where Brightman J. awarded damages for breach of a restrictive covenant based on the amount which the plaintiff could reasonably have demanded from the defendant for releasing it. The characterisation of the award has attracted much debate. Some, like the reviewer, believe that the award is compensatory; others, like Steyn L.J., observe that this is artificial where, as is often the case, the plaintiff would never have agreed to release his right, and insist that the remedy is restitutionary.

In *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45* the Privy Council ruled that the fact that in practice one or both parties would have refused to enter into any agreement was immaterial. This is surely right. The difficulty arises because of the identification of the plaintiff's loss with the loss of his bargaining position. But his loss is more than that. The primary remedy for interference with a property right is injunction (and if necessary mandatory injunction). The court's refusal to grant injunctive relief effectively deprives the claimant of the right itself, for it can never thereafter be enforced. He is entitled to be compensated for the loss of the right, and the amount he could reasonably demand for its release is simply taken to be the best measure of its value.

The author finally gives us a valuable analysis of *Attorney-General v Blake [2001] 1 A.C. 268* and the cases which followed it. The facts of the case are well known. Blake was a member of the British Secret Intelligence Service who divulged state secrets to the Soviet Union, was convicted of treason, and after escaping from prison made his way to Moscow. Many years later he entered into a contract with an English publishing house to publish his memoirs. Publication would involve a breach of his lifelong contractual obligation not to disclose information acquired in the course of his employment. Under the terms of the publishing contract, Blake had already been paid advance royalties which were irrecoverable in practice, but he was also entitled to further royalties of £90,000, which had not yet been paid to him, and the Crown claimed payment of this sum.

At first instance Scott J. found for the Crown on the ground that Blake was in breach of his fiduciary duty and was liable to account for his profit. The Court of Appeal (*[1998] Ch 439*) rejected this analysis, for the fiduciary relationship had not survived the termination of Blake's employment. Nor could his conduct be said to be in breach of his duty of confidence, as has been suggested, for the information in the book had long ceased to be confidential. The claim had to be based on breach of contract or the Official Secrets Act. The problem was that the Crown did not want the book published at all, would never have released Blake from his obligation not to disclose the information which it contained, and would suffer no financial loss if the information were disclosed. The Court of Appeal (although not so described the judgment was in fact a judgment of the court) nevertheless dismissed the appeal, holding that the Crown had a special and ***L.Q.R. 685*** non-financial interest in the performance of Blake's contractual obligation and that the court should give effect to it by awarding damages based on the profit which Blake had made by his breach.

The House of Lords dismissed Blake's appeal, though Lord Nicholls preferred to characterise the remedy as an account of profits rather than gain-based damages. The English Court of Appeal has since held that the remedy of an account of profits should be regarded as compensatory even where there was no identifiable financial loss. The debate is likely to continue for some time. But however it is characterised it is clear that the remedy is available only in exceptional circumstances. It has been accepted in England and New Zealand that the claimant must have a legitimate interest in the performance of the contract and in preventing the defendant from profiting by its breach; though whether this is the only requirement is unclear. Australia remains unpersuaded that the remedy should be available at all.

The book will be of great value to practitioners, bringing together as it does the relevant cases in the leading common law jurisdictions and deploying both sides of the argument when dealing with the many questions which remain to be resolved in relation to an important if underused remedy.

Lord Millett

House of Lords

L.Q.R. 2014, 130(Oct), 681-685