

# Book review

## Account of Profits

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By Peter Devonshire, Thomson Reuters,  
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Dr Devonshire has produced a practical and forward-looking work that deals comprehensively with the remedy of an account of profits, not just for breach of fiduciary duty and breach of confidence but also for intellectual property infringement. He finishes by dealing with gain-based remedies for common law wrongdoing. His book is attractively short so as to enhance its utility, but it is not superficial in covering in 178 pages of text what needs to be known for lawyers to become more aware of the availability of, and the requirements for, orders for an account of profits or other gain-based remedies. Indeed, as Dr Devonshire points out, it will often be advisable to commence proceedings seeking damages and an account of profits in the alternative to see which remedy it is better to elect for once the full facts come to light. Compensatory damages for loss may be fine in many circumstances but there will be other circumstances where profits have been made which, in all justice, need to be disgorged and where it may be that a proprietary constructive trust remedy lies that affords priority over a defendant's ordinary creditors.

In this latter area, as in other areas, he examines contrasting approaches in common law jurisdictions and points to the need for the UK Supreme Court to clarify the appropriate remedial response to bribes and secret commissions acquired by a defendant fiduciary. As to be expected, after a brief historical view

of the development of an account of profits and its principal applications, Dr Devonshire focuses on its core role in enforcing the proscriptive 'no profit, no conflict' fiduciary obligations. He emphasizes the strictness of a fiduciary's liability to account for unauthorized profits happening to arise from a breach of his fiduciary obligations. This deters the fiduciary from such a breach and makes it more likely that he will properly perform his prescriptive duties.

In examining the case law he usefully breaks down commercial joint venture relationships into (i) a relationship that is entirely treated as fiduciary, (ii) a relationship, some aspects of which are fiduciary but the remaining aspects are not, and (iii) a relationship that is not fiduciary at all but governed by common law obligations in contract and tort. There is, of course, a reluctance to bring fiduciary obligations into commercial transactions where one can normally accept self-seeking behaviour and where contractual terms can be used to oust fiduciary duties that might otherwise be implied. Properly informed parties can thus set out what they wish as the parameters of their relationship.

The book is particularly useful in making it clear that allowances for industry, enterprise, and skill are often more readily available to defaulting fiduciaries than one would expect: they are not always ousted on the basis that they would have the effect of encouraging fiduciaries to act where there is a conflict of interest. Dr Devonshire restrictively distinguishes the strict approach of the House of Lords in *Guinness plc v Saunders* where no allowance was awarded. That case hinged on the company law context where a

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committee of the board of directors had authorized one director to be paid £ 5.2 million for work done on the company's behalf that was part of his duties and where the whole Board needed to authorize such a payment. Other case law reveals that there is a more sympathetic contextual approach where profits are made from the defendant's independent activities and not from recourse to property subject to a trust or other fiduciary obligation. It is rare, however, for there to be an apportionment of profits between a defaulting fiduciary and his principal in the absence of an antecedent agreement for profit sharing except in the case of an intellectual property infringement.

In the case of an asset acquired with mixed funds of the fiduciary and his principal or beneficiaries Dr Devonshire points out that the two responses are (i) division of ownership of the asset between fiduciary and principal in shares proportionate to their original contributions where the asset has appreciated in value, or (ii) in the case of the asset having depreciated in value, the principal has a personal claim for his mixed money with the benefit of an equitable lien or charge over the asset in aid of his claim. He suggests that in scenario (i) consideration needs to be given to forfeiture of the defaulting fiduciary's interest in the asset, subject to reimbursement of the amount originally contributed, though I wonder whether this should be supported by an equitable charge in favour of the fiduciary for such amount. The reason for Dr Devonshire's suggestion is that to allow the fiduciary to participate in gains made by mixing funds in breach of fiduciary duty is to encourage him to speculate with fiduciary funds instead of deterring him. There is no disincentive, the fiduciary only being at risk of personal liability if the venture fails, which would anyhow be the case if he had lawfully borrowed the extra money from a bank. The liberal approach here is in stark contrast to the strict approach in cases like *Boardman v Phipps*.

Having dealt with breaches of fiduciary duty, Dr Devonshire moves on to breach of confidence, covering information of a confidential nature disclosed or obtained in very wide-ranging circumstances eg by government or public bodies, by employees, by

surreptitious journalists, by businessmen in negotiations, by persons making idea pitches, by persons in personal or professional relationships. He examines what amounts to such confidential information, what circumstances impart an obligation of confidence, what amounts to unauthorized use of the information and when third parties can be liable, though, perhaps, a little more could have been written as to when a person is to be treated as having knowledge that information is confidential.

Equity has a broad jurisdiction to restrain an abuse of confidence and impose sanctions, while a common law duty of confidence may be an express or implied term of a contract. In the UK Article 8 of the European Convention on Human Rights provides protection for a person's privacy and respect in a 'private and family life', while Article 10 allows some counterbalancing freedom of expression, but these considerations have been used within breach of confidence principles: a stand-alone tort of invasion of privacy has not been developed as in New Zealand. In the Antipodes whether privacy is breached depends upon whether a person of ordinary sensibilities would find the publicity highly offensive, but this does not appear relevant to whether Article 8 is applicable though it may affect questions of proportionality when balancing Articles 8 and 10.

Where there is a contractual breach of confidence an account of profits is restricted in England to very rare exceptional cases (see later) where contractual damages would be inadequate, just as equity does not intervene if adequate common law damages are available. In Australia and New Zealand, however, the courts can find there to be an equitable duty of confidence where there is a comparable contractual duty, so that the injured party can pursue relief in equity and elect for an account of profits instead of damages. This position could develop in England.

Dr Devonshire then deals with the increasingly significant topic of accounting for profits in intellectual property infringement proceedings, sensibly not attempting to examine the wide range of intellectual property rights contained in statutes and international treaties. Instead, he focuses upon the

identification, calculation, and apportionment of unlawful profits where the equitable origin of accounting continues to have an impact. Causation, however, is fully investigated: a claimant is only entitled to that portion of the infringer's profits which is causally attributable to the infringement or appropriation of the claimant's intellectual property. The claimant has to elect between an account of profits or damages except that in cases of innocent infringement of copyright the claimant is not entitled to damages but can claim an account of profits. The Canadian courts are ready to determine profits by comparing the profits actually made from the infringement of intellectual property rights with the profits that would have been made using the most likely alternative non-infringing process. The English courts dislike this differential profit method, preferring to answer the question 'what profits were in fact made by the defendant by the wrongful activity?'

The final chapter deals with remedies for common law wrongs which to a greater or lesser extent can be regarded as gain-based. A person who hires out goods or rents out accommodation for a period to another, who then refuses to deliver up possession at the expiration of the period, is entitled to the fees for user of the property from the expiration date till recovery of possession, ignoring the possibility of the goods or accommodation, if they had been in the claimant's possession, not being hired or rented from time to time, and it being immaterial whether the defendant derived any actual benefit after the expiration date as before it.

*Wrotham Park* hypothetical release damages are examined. In this case the defendant in breach of the claimant's restrictive covenant built more houses

on land than he was entitled to, though this did not diminish the value of the claimant's neighbouring land. The claimant was awarded damages corresponding to the amount he would reasonably have received on negotiating a release of his rights under the restrictive covenant. This case where there was no compensable loss can be rationalized as partial disgorgement of the defendant's gains, though if the claimant had sustained a loss the hypothetical release damages could be regarded as truly compensatory.

The final topic is account of profits for breach of contract following upon *Attorney General v Blake* where in very exceptional circumstances the House of Lords ordered such an account to strip the traitor, Blake, of the royalties on the book he wrote on his activities as a spy for Russia, despite his lifelong contractual undertaking not to disclose information gained in the course of his employment as a Crown employee bound by the Official Secrets Act. *Blake* has been restrictively interpreted in England by the Court of Appeal and in Australia, but has found favour in New Zealand and in some receptive dicta in Canada. It will be up to how judges see the justice of future cases whether the *Blake* extension of the common law will be developed or whether the auxiliary jurisdiction of equity may be brought into play on the basis that common law damages are inadequate.

As will have been seen, this book is a clear, stimulating read for students, academics, practitioners and judges and a most useful practical guide to where the law has reached and where it might go. Dr Devonshire is much to be congratulated on his enthusiastic efforts that have borne such good fruits in this work.