BOOK REVIEWS

Account of Profits

Peter Devonshire

TIM CONDER*

I INTRODUCTION

How many times is a case won on liability but lost on remedy because a legal adviser has given no or inadequate thought to where a finding of liability may lead? Unfortunately, all too often.[1]

Sir Peter Blanchard's observation illuminates a problem that pervades the modern approach to the law. It is this problem that Associate Professor Peter Devonshire's new book *Account of Profits* aims to address.

Devonshire provides a thorough description and analysis of one of equity's most nuanced and underused remedies. In doing so, he sets out in detail the theoretical and historical background to an account of profits and provides a practical approach that will be useful to both practitioners and students. In particular, the final chapter "Gain-Based Remedies for Common Law Wrongs" will be of great use to lawyers and judges in navigating this area of law.

II OVERVIEW OF THE REMEDY

Devonshire begins by detailing the historical origins of account of profits. The remedy originated as an action at common law. However, the use of the common law remedy declined over time because of the difficulty of quantifying profit and the availability of other remedies in debt and *indebitatus assumpsit*.[2] By contrast, as the Chancery's influence grew, so did its use of account of profits,[3] with the remedy ultimately becoming known as an equitable one.[4]

In chapter two Devonshire describes the nature of the remedy as a personal action aimed at stripping the defendant of illicit gains.[5] The remedy is founded on the breach of a substantive obligation, which may take one of many forms.[6] This section also deals with issues such as the burden and onus

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1 Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) at v.

2 Peter Devonshire *Account of Profits* (Brookers, Wellington, 2013) at 4–5.

3 At 5.

4 At 7.

5 At 8.

6 At 9.

of proof, which Devonshire relates back to the strictness of fiduciary duty.[7]

This is a highly practical section. Devonshire's analysis is sensitive to the discretionary and conscience-based nature of the remedy. He identifies the considerations that practitioners will need to be aware of in pursuing a claim, and suggests that the election of a remedy should be delayed until counsel are in the best position to make an informed decision.[8]

III ACCOUNT OF PROFITS AND FIDUCIARIES

Following his general exposition, Devonshire turns to the specific application of the remedy in the fiduciary context, detailing the nature and source of fiduciary obligations,[9] and the various breaches that can occur.[10] This analysis provides a useful background for later discussion of the application of the remedy.

There is also an engaging discussion of the principles of causation as they apply to account of profits,[11] where, again, the strict approach taken by courts is linked to the central objective of protecting against abuses of trust.[12] Devonshire traverses the approaches taken in different jurisdictions, helpfully distilling the practical consequences of the doctrine.[13]

Chapter four addresses the contentious question of whether allowances should be granted to defaulting fiduciaries. This covers a range of discrete issues including legitimate deductions from gross receipts,[14] allowances for skill and effort[15] and profit sharing arrangements.[16]

It is widely accepted that account of profits is concerned with restoring profits rather than gross receipts. However, the extent of legitimate deductions can prove a complicated question. The question becomes even more difficult when dealing with a genuine allowance for industry, enterprise and skill. The traditional view is that to grant an allowance to a defaulting fiduciary would undermine the no profit rule.[17]

This approach was applied strictly in *Guinness Plc v Saunders*,[18] which considered the contrary authority of *Boardman v Phipps* — where the Court granted the defendant an allowance despite his breach of trust.[19] In attempting to reconcile the differing views, Devonshire separates the case

7 At 10.
8 At 15.
9 At 20–44.
10 At 27–30.
11 At 63–71.
12 At 64.
13 At 57–58.
14 At 74.
15 At 75.
16 At 83.
17 At 75.
18 *Guinness plc v Saunders* [1990] 2 AC 663 (HL).
19 *Boardman v Phipps* [1967] 2 AC 46 (HL).

law into several classes.[20] In misuse of trust property cases, he suggests the fundamental question is whether the trust property was exposed to risk. By contrast, where there is an increase in the value of trust assets or in the context of rescission, the approach may be more flexible in order to recognise the enterprise, skill and effort of the errant fiduciary.

Similar considerations arise when dealing with the apportionment of profits or with allocating interests in mixed funds.[21] There is a strict rule that the trustee must bear the onus of demonstrating that the property can be separated. However, there are a number of cases where the question of tracing is more complicated. To illustrate his point, Devonshire draws on *Foskett v McKeown*, where trust funds were contributed to a life insurance policy which the beneficiaries later claimed was held on constructive trust for them.[22]

IV BREACH OF CONFIDENCE AND INTELLECTUAL PROPERTY

Having completed this survey of the remedy in its native application, Devonshire then addresses the two other main claims that may result in disgorgement: breach of confidence[23] and misuse of intellectual property.[24]

First, Devonshire sets out the standard case of a personal breach of confidence.[25] He then discusses the effect of third-party involvement and when the communication will maintain its confidentiality.[26] Against this background, Devonshire explains how an account of profits strips any benefit a defendant has gained from the confidential information.[27]

Devonshire considers proposed limitations to the remedy in the commercial setting: namely, to restrict it to cases where there is a strong interest in the defendant's obligation, where disgorgement is necessary to protect property rights, or where a genuine breach of trust exists.[28] But he suggests that this approach should not be followed. The scope of the remedy has expanded outside its origins in fiduciary duty to incorporate other relationships. As such, the specific nature of the relationship does not change the underlying treatment of a breach of trust. This analysis necessitates that the remedy be available in the commercial sphere.[29]

At the end of the chapter Devonshire discusses the appropriate measurement of profits. He focusses on two main issues. The first is the

20 Devonshire, above n 2, at 77–83.
21 At 83 and 86.
22 *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102.
23 Devonshire, above n 2, at ch 5.
24 At ch 6.
25 At 97–98.
26 At 111–114.
27 At 120.
28 At 123.
29 At 123–124.

approach a court will take when the profit is attributable to multiple sources, only some of which are wrongful.[30] This situation involves a simple application of the principles of apportionment. The second is where the information would inevitably become public but where the defendant has gained some advantage from having it made to become so early. This situation raises the so-called "springboard doctrine" which acts to deprive the wrongdoer of the profits only for a fixed period of time.[31]

Next, the analysis turns to misuse of intellectual property.[32] While it is clear that profits can be difficult to quantify in an intellectual property setting, Devonshire points out there are nonetheless cases in which the remedy has been awarded.[33]

This chapter also considers the possibility of differential profits. Differential profits are based on a comparison between the position the defendant would have been in but for the breach, and the defendant's actual profits, with the defendant being liable for the difference. This approach is necessarily speculative, which may prove fatal to the claim.[34] The Canadian courts have preferred this approach.[35]

It is common for the courts to apportion profits in an attempt to do justice as between the parties.[36] In this context, Devonshire raises the possibility of claiming "negative gains"; that is, where a wrongdoer has incurred a loss, but the loss was reduced because of the infringement. In this case, an account of profits could restore the difference to the claimant.[37]

It is noted that the mere fact that an infringing defendant could have made the same profit by non-infringing means will not prevent a successful claim.[38] As was observed in *Celanese International Corp v BP Chemicals Ltd*, "[i]t should not matter that similar profits could have been made in another, non-infringing way."[39] This restricts the potential ambit of differential profits, and potentially removes the possibility entirely.

V GAIN-BASED REMEDIES FOR COMMON LAW WRONGS

The last chapter in the book — which drew the particular attention of the Honourable Michael Kirby in his foreword[40] — addresses gain-based remedies for common law wrongs. This section examines two situations where such gain-based remedies have been recognised.

30 At 126.
31 At 128.
32 At ch 6.
33 At 132.
34 At 138.
35 See for example *Monsanto Canada Inc v Schmeiser* 2004 SCC 34, [2004] 1 SCR 902.
36 Devonshire, above n 2, at 139.
37 At 140.
38 At 140.
39 *Celanese International Corp v BP Chemicals Ltd* [1999] RPC 203 (Ch) at [39].
40 At viii.

The first remedy is found in the form of the user principle. This common law rule holds that a person, who has used property unlawfully, but without causing loss to its rightful owner, may nonetheless be required to make some payment to the owner for the use.[41] This approach reflects the common law intention to repay the trespass, not to strip the defendant of his or her illicit gains.[42]

The second situation relates to *Wrotham Park* damages.[43] In *Wrotham Park* the defendant had breached a restrictive covenant without causing specific detriment to the plaintiff.[44] The Court nevertheless granted the plaintiff a share of the profits that would have reasonably been required for the plaintiff to grant a release from the covenant. This controversial decision highlights that there are situations where a court will be willing to order an account of profits for a common law wrong.[45]

Despite the apparent gain-based nature of these remedies, the courts have described them as restitutionary, indicating that they do not depart from the existing approach to damages.[46] This claim is contentious, but may provide a theoretical basis for these remedies that does not require abandoning the orthodox position.

The final issue that Devonshire addresses in the book is the availability of account of profits for breach of contract.[47] This discussion focuses on the decision of the House of Lords in *Attorney-General v Blake*.[48] In this case the Court required Blake, a former Secret Intelligence Service member, to disgorge the profits from his autobiography, which was found to be in breach of his confidentiality agreement. This approach has been distinguished or justified on restitutionary grounds in subsequent cases but remains largely exceptional. In recent cases, the courts have awarded a share of profits on a basis that has more in common with the user principle than with a strict application of *Blake*.[49]

This chapter recognises that despite its theoretical commitment to the principle of restitution, the common law has also used creative remedial responses predicated on profit, to prevent parties from benefiting from their wrongdoing.

41 At 152.
42 At 153.
43 At 154.
44 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch).
45 Devonshire, above n 2, at 155.
46 At 165.
47 At 169.
48 *Attorney General v Blake* [2000] UKHL 45, [2001] 1 AC 268.
49 Devonshire, above n 2, at 172.

VI SUMMARY

Peter Devonshire's *Account of Profits* is an authoritative resource for those who need to understand the entire claim to which the remedy attaches. Practitioners, academics and students will benefit from the depth of analysis and the clear distinctions that Devonshire draws between important cases.

Account of Profits deals with a challenging area of law in a clear and balanced manner. It addresses the crucial theoretical questions while still providing practical comments for practitioners for whom the question of remedy is most applicable. To echo the sentiments of the Honourable Michael Kirby in his foreword, it is hoped that this book will provide a foundation for the development the law in this area and expand the availability of an important and valuable remedy.

Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere

Janet McLean

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I INTRODUCTION

The discourse surrounding British constitutional statehood has traditionally suffered from a "denial complex", with the perceived non-existence of the administrative state deeply embedded in the fabric of legal consciousness. In spite of this background, Janet McLean's *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* attempts to construct a conception of the British state.[1] This is an ambitious enterprise in a complex field. McLean traces a narrow and elusive thread of conceptual theory through historical fact, political and juristic theory, and positive law. The coverage is comprehensive: formally beginning with the Reform Act 1832 (UK)[2] and ending in 2010 with the Human Rights Act 1998 (UK) (HRA), although the theoretical roots begin far earlier and the practical analysis extends right up to the time of publication. However, *Searching for the State* is not intended as a historical catalogue of political and juristic theory; it merely "adopts Maitland's historical method in order to glean what we can from the past that may be helpful to the present".[3]

Divided into nine chapters, the book follows "three different chronologies: 'real time', 'no time' and 'law time'".[4] "Real time" concerns the historical development of the British state apparatus and movements in British political thought. The book also follows developments in analytical jurisprudence, which is purportedly ahistoric and abstracted — hence "no time". "Law time" refers to the legal reactions to political ideas and theories of the state, existing in its own "bubble", distinct from the other two chronologies.

II REVIEW

Chapter one begins the story with an introduction to statehood as it is recognised in theories explaining the nature of the Crown. It traverses

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1 Janet McLean *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press, Cambridge, 2012).

2 Reform Act 1832 (UK) 2 & 3 Will IV (also known as Representation of the People Act 1832 (UK) 2 Will IV c 45).

3 McLean, above n 1, at 12.

4 At 11.

key theorists (such as Sir William Blackstone, Jeremy Bentham and Ernst Kantorowicz) and briefly notes the key ideas that feed into the remainder of the book: issues surrounding the separation of King and Crown as a special moral and legal person; the Crown as a *personne morale*; and the Crown representing different things in different areas of law. The Crown is, however, only part of the story of the public sphere, and the remainder of the chapter gives a detailed outline of how the rest of the book will examine that sphere. A close reading of this section provides a clear understanding of the direction of the narrative to come.

Chapter two begins the historical account by outlining the changing conception of authority in England during the 19th century. What began at the turn of the century as a "localized, particularistic and dispersed system of authority" was transformed into a central, bureaucratic and increasingly national system of governance.[5] The driving concern for this development was "the common good": "it was to be *bureaucracy* and its processes which would somehow better represent the public".[6] McLean is swift to connect this theoretical justification to John Austin's utilitarianism, the prevailing political view of the time. She also notes that this idea — that bureaucracy better represented the public — was "a general public policy preference which was to become a motif of British administrative law for much of the twentieth century".[7]

Chapter three continues this historical narrative through to the middle of the 20th century. It begins by assessing how the two key theories of the late 19th century (those of Austin and the British Idealists) conceptualised the State. McLean identifies several key defects in Austin's theory, before describing its resounding success in the context of British colonial enterprise and the approach of legal science — one of many passing references to the theme of historical contingency. The focus then shifts to the 20th century, and legal positivism as expressed by HLA Hart. Chapter three concludes by noting that, following Austin and Hart, "issues to do with the legal personality of the state ... would be reduced to the lowly status of parochial legal doctrine".[8] However, McLean argues that theoretical issues do indeed remain unsolved. The remainder of the book is a testament to this contention.

Chapter four turns to legal doctrine, with an analysis of the legal understandings of the relationship between state and civil society: "where does the state end and civil society begin?"[9] It traverses the same timeframe as chapters two and three, detailing the increasing centralisation and bureaucratisation that characterised the period: beginning with the Poor Law Amendment Act 1834,[10] described as "narrow, punitive, selective"[11] and

5 At 23.

6 At 34, (emphasis in original).

7 At 34.

8 At 55.

9 At 91.

10 Poor Law Amendment Act 1834 (UK) 4 & 5 Will IV c 76.

11 McLean, above n 1, at 114.

leading to the establishment of the British welfare state with the introduction of the National Insurance[12] and National Health Service Acts of 1946.[13] The trend is one of centralised involvement in social issues, motivated by "empiricism and functionalism rather than any particular theories about the state".[14] The conclusion is that, unlike today, there was no conception of "'public' as opposed to 'private' functions"; where state and civil society began and ended did not matter.[15] This discussion of the relationship between the state and civil society is continued in chapters eight and nine.

Chapters five and six revisit this period in order to further detail the understanding of the Crown. By this stage, the period has been well-traversed however, each visit has a different purpose and assesses each period from a different angle, or with differing emphasis. Chapter five engages in a hypothetical analysis of "what might have been", pinpointing historical moments where, had theoretical and juridical analysis so developed, the Crown could have come to represent the entire sphere of public activity — subject to a unified and distinct model of "public law". In each instance, matters of circumstance and context operated to discourage and prevent such development. The value of this hypothetical contemplation is its emphasis on the connection between the historical context ("real time") and the development of "ahistorical" analytical jurisprudence ("no time").

Chapter six is dedicated to an analysis of "law time", in the development of the new discipline of administrative law through the 19th and 20th centuries. It tracks the development of a judicial supervisory role over the administrative state. It is here we see the changing conception of a "public" legal morality "distinct from and contrasted with private law norms".[16]

Chapter seven concerns the responsibilities of the state to its citizens at common law, outside of administrative law and human rights instruments. The focus is on the theoretical and juristic justifications for the position that individuals cannot claim rights directly against the state for wrong-doing, either in tort or public law.

While chapter nine returns to this discussion of rights against the state, with a contemporary assessment of constitutional rights protection and the HRA, chapter eight diverts to a philosophical and doctrinal assessment of the privatisation and deregulation of the British state in the 1980s. Readers are expressly directed to read chapters seven and nine together.

The value of chapter eight lies in its continuation of the historical narrative of attitudes regarding the state. The late 1970s onwards saw a reconceptualisation of the state as "the source of problems rather than of the common good"; the role of the law was to constrain the state and

12 National Insurance Act 1946 (UK) 9 & 10 Geo VI c 67.

13 National Health Service Act 1946 (UK) 9 & 10 Geo VI c 81.

14 McLean, above n 1, at 131.

15 At 114.

16 At 197–198.

comity between branches of government was rejected.[17] McLean evokes this emotion with an introductory quote from Jerry L Mashaw: "a world of greed and chaos, of private self-interest and public incoherence".[18] This sentiment is particularly relevant when chapter eight follows the development of administrative law, detailing the increased willingness of the courts to use the common law as the source of ideological resistance to the effects of privatisation and liberalisation.[19] The chapter also evaluates the role of the law in both accommodating and repelling the changes of the privatisation and deregulation, particularly the importance of various historic conceptions of the state in enabling such radical institutional change to occur. There is emphasis on the notion that conceptions of state can have important practical relevance. This is seen in the New Zealand context with the effect of section 9 of the State Owned Enterprises Act 1986.[20]

As described above, chapter nine examines constitutional rights protection against the state. McLean points out that this is in contrast to the situation described in chapter seven: "this newly limited constitutionalized state can now 'do wrong' to individuals".[21] The chapter focuses on the extent to which the domestication of the European Convention on Human Rights[22] (ECHR) in the HRA represents continuity and change to British constitutionalism, and how the HRA requires the legal identification of the state itself for the purposes of applying its protections and constraints.

III CONCLUSION

Despite its foreign context, New Zealand readers will find many points of relevance in *Searching for the State*. This country continues to experience controversy surrounding the definition of the appropriate boundaries of state power.[23] The historical and theoretical narrative details a shared juristic and conceptual constitutional history. Contemporary discussions have similar relevance: in chapter nine, McLean notes that the HRA brings into conflict the ECHR's conception of the state with its premise "that the state is the problem" and the United Kingdom Common Law's position that "the King can do no wrong". This is mirrored in the conflict between the conceptions of state of New Zealand and the United Nations in the introduction of the

17 At 240.

18 Jerry L Mashaw *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale University Press, New Haven (CT) 1997) at 4.

19 At 276.

20 State Owned Enterprises Act 1986, s 9. Section 9 (imposing an obligation not to act "in a manner that is inconsistent with the principles of the Treaty of Waitangi") is a legal redefinition of the boundaries of state action, a modified conception of the state as subject to particular principles; see *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

21 At 278.

22 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

23 See *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA); see also Local Government Act 2002 Amendment Act 2012.

New Zealand Bill of Rights Act 1990, a concept still being grappled with today.[24]

Searching for the State fulfils its ambition of identifying and tracking a constantly evolving definition of the state. It also succeeds in highlighting the central practical importance of this theoretical definition of the structure, status and continued development of public law. Carol Harlow and Richard Rawlings note that "[b]ehind every theory of administrative law there lies a theory of the state".[25] *Searching for the State*, in its linking of administrative law to a legal conception of the state, demonstrates the truth of this observation and goes one step further: behind every theory of the state lies a conception of philosophical and political theory.

In discussing this theory, McLean assumes a certain level of background knowledge and familiarity with both the people and the concepts. This is understandable, the purpose being to avoid creating an historical or theoretical catalogue, but readers may find it necessary to seek external introduction and clarification.

The historical method is the product of detailed research into the actual facts: it illuminates interesting paradoxes, contradictions and comparisons between theory and fact, and legal history scholars will find it valuable.

Indeed, it appears that one such lesson to be learned from the past is the risk of arbitrary results when formalist reasoning is applied. Previous understandings of the scope of the public sphere and formalistic understandings of public and private law are both so historically contingent, such that recourse to the past is inherently arbitrary, leading to the repetition of old controversies and arguments. This book stresses that the jurisprudential and legal search for the state must be identified in "real time", the here and now, in the civil society that presently exists.

24 See *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [211] per Gault J.

25 C Harlow and R Rawlings *Law and Administration* (3rd edition, Cambridge University Press, Cambridge, 2009) at 1.