

Launch of  
“Equitable Compensation and Disgorgement of Profit”  
edited by Simone Degeling and Jason Varuhas

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The title of this excellent book nicely captures its theme and its importance. The book is about pecuniary orders in equity. These are immensely important – yet there is evidence to suggest that 21<sup>st</sup> century lawyers struggle to deploy them with any precision, let alone to identify their conceptual complexity.

I shall try to demonstrate the importance of the topic with a simple example. Suppose a trustee misappropriates trust funds, invests them successfully in a property development, makes a profit and repays the amount taken with interest. The phenomenon recurs. Some 55 years ago, *Scott v Scott* was such a case.<sup>2</sup> And you will recall that George Palmer (then a junior) won a 2 day appeal almost 35 years ago before Moffitt P, Hutley and Mahoney JJA, in *Paul A Davies (Australia) Pty Ltd (in liq) v Davies* on substantially those facts.<sup>3</sup>

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<sup>1</sup> Judge of Appeal, Supreme Court of New South Wales.

<sup>2</sup> (1963) 109 CLR 649.

<sup>3</sup> [1983] 1 NSWLR 440.

Earlier this year, substantially the same facts also gave rise to Lord Millett's judgment for the Hong Kong Court of Final Appeal in *Tang v Tang*,<sup>4</sup> which has already been the subject of thoughtful notes in the Australian Bar Review and the Cambridge Law Journal.<sup>5</sup> A trustee borrowed HK\$11m from a trust estate in order to pay almost half of the price of an investment property. The trustee repaid the trust estate some six months later, and with interest. The property appreciated in value. The beneficiaries discovered the breach of trust years later, and sued. Lord Millett pointed to how the intermediate appellate court (and the parties who had appeared before it) had made "heavy weather" of a simple case which did not turn on causation.<sup>6</sup>

For there is a world of difference between a profit derived by a fiduciary's covert exploitation of a corporate opportunity in breach of duty, as in *Warman International Ltd v Dwyer*,<sup>7</sup> and the return of the traceable proceeds of property which at all times was owned beneficially by the plaintiff. That was the point made at the outset of Lord Browne-Wilkinson's judgment in *Foskett v McKeown* observing that the beneficiaries' claim was nothing other than their "assertion of their equitable proprietary interest in identified property" (in that case, the proceeds of an insurance policy paid out following the suicide of the insured who had used trust property to pay some of the policy premiums).<sup>8</sup> His Lordship and Lord Millett who both wrote for the House of Lords were critical of the "restitutionary remedy" to which a majority of the Court of Appeal had confined the beneficiaries. The Court of Appeal had proceeded on the basis that not only were the

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<sup>4</sup> [2017] HKCFA 3; [2017] 2 HKC 502.

<sup>5</sup> See Devonshire, "The Recovery of Gains from a Fiduciary's Misuse of Trust Funds" [2017] *CLJ* 236 and Farinha, "Causation and fiduciary misconduct in Hong Kong and beyond" (2017) 44 *Aust Bar Rev* 221.

<sup>6</sup> *Tang* at [14].

<sup>7</sup> (1995) 182 CLR 544.

<sup>8</sup> [2001] 1 AC 102 at 108.

beneficiaries entitled “to have the trust funds reinstated with interest” (as they undoubtedly were), but also that that was the full extent of their rights.<sup>9</sup> The House of Lords allowed the appeal.

Seventeen years later in *Tang v Tang*, Lord Millett reiterated substantially the same point in another ultimate appellate court, this time in Hong Kong. The simplest path for the beneficiaries was, once again, to claim the traceable proceeds of the property taken by their trustee in breach of trust, his Lordship relying on (amongst other decisions) the Australian High Court’s decision in *Scott v Scott*.<sup>10</sup>

Why do these errors occur at all? Perhaps one influence may be exposed by asking a more basic question: what is equitable compensation and what is an “account of profits” in the first place? One rather simplistic approach holds that “equitable compensation” is merely equity’s remedy for damages, and is commonly seen at the end of a pleading which alleges causes of action at law and in equity in a rolled up prayer of “Damages and/or equitable compensation”. But a rather better approach is to focus on a defendant as an accounting party. The premise of an equitable claim is that there is some basis grounded in equitable principle which requires the defendant to account to the plaintiff in respect of a fund, or in respect of a particular piece of property, or confidential information, or whatever. Equitable compensation in respect of a particular breach, such as a director diverting an opportunity which should properly have been that of his or her company, may best be seen as an abbreviated accounting, focussing merely on the inflows and outflows associated with that breach. That point is a somewhat removed from what is ordinarily

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<sup>9</sup> See for example *Foskett v McKeown* [1998] Ch 265 at 283 (“the restitutionary remedy of a charge over the proceeds of the policy in order to recover such of their money as can be traced into the premiums, with interest thereon”) (Sir Richard Scott VC) and at 291 (“they are entitled to have the trust funds reinstated with interest. This is the nature of their right against an innocent third party and it does not extend any further”) (Hobhouse LJ).

<sup>10</sup> (1963) 109 CLR 649 (*Tang* at [23]).

connoted by “compensation”.

This theme recurs throughout this book, which contains 14 substantial chapters by 10 Professors (Australia, the United Kingdom, Hong Kong, Singapore and the United States of America), 2 judges and 2 distinguished academics who have not as yet attained a chair. Both of the judges have been elevated since their papers were presented: one is now Chief Judge in Equity as well as being a Judge of Appeal within the Supreme Court of New South Wales, the other is now a Justice of the High Court of Australia. The academics who presently lack professorial chairs, Jessica Hudson and Peter Turner, are, if I may say so, names to watch out for. I began to count their recent publications, but gave up: both have published double digit number of articles, on black letter law topics, in the leading journals in the area in the last 5 years, in addition to their various other academic responsibilities.

An important choice has to be made in launching a book such as this. There are three possibilities. One is to summarise each of the chapters as meaningfully as one can in 3 or 4 minutes. That would mean that the length of this launch would significantly try your patience, something I am not prepared to risk (and in any event, there is the very useful introductory chapter by Professors Degeling and Varuhas). Another is to try to give a snippet of the flavour of each in 10 or 20 seconds, without for a moment doing justice to any of the chapters. That seems to have all of the disadvantages of speed-dating (or so I am told). The third way is to be highly selective, inevitably with the consequence that nothing will be said about most chapters. That is the course I shall risk.

Now I adhere to Sir Robert Megarry's attitude to the published work of a living judge:

“words in a book written or subscribed to by an author who is or becomes a judge have the

same value as words written by any other reputable author, neither more nor less.<sup>11</sup> Even so, I will single out for comment Justice Edelman's paper: in part because it is as insightful as any in a book which is full of insight, in part because it resonates with what I have already said, and in part because I am conscious that there are those present today (I do not exclude myself) whose work product may be reviewed by his Honour.

Justice Edelman addresses the basal problem with equitable compensation by reference to the decline of separate hearings on liability and quantum after the Judicature reforms. He says that that in turn led to parties' focussing predominantly on liability, with a corresponding neglect of pecuniary remedies (hence the rolled-up prayer I have mentioned), and in turn the loss in clarity between three forms of accounting in equity: an account of administration in common form, an account on the basis of wilful default, and an account of profits.

Then he makes an observation close to my heart, quite familiar to any mathematician. The *name* given to any abstract property is vitally important. The label carries with it connotations which cannot but help shape the listener's or reader's understanding. Much of the success of what Richard Dawkins would call the "meme" that is a "fusion fallacy" is its well chosen, alliterative and catchy name. Similarly, many people, even those who have not studied competition law, know of the cellophane fallacy, even if they are not quite sure what it is.<sup>12</sup> The point is made elegantly in Lord Hoffmann's swansong in the House of Lords:<sup>13</sup>

"The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely

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<sup>11</sup> *Cordell v Second Clanfield Properties Ltd* [1968] 3 All ER 746 at 751.

<sup>12</sup> *United States v E I Dupont* 351 U.S. 377 (1956).

<sup>13</sup> *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101; [2009] UKHL 38 at [17].

stated in the definition.”

Justice Edelman makes the important point that “equitable compensation” is a poor term to use to describe pecuniary orders in equity. That is because compensation is associated with loss, and the classic three forms of accounting did not turn on loss. The theme of his chapter is that “attempts to shoehorn three different remedies into a single undifferentiated notion of 'compensation' would cause problems”.<sup>14</sup> Sometimes a defendant owes a sum of money in equity to the plaintiff. Before 1875, one would have no difficulty reaching that conclusion following the completion of an account. But as Justice Edelman observes, “A debt is a claim for a payment which is due. It is not compensation for loss.”

Justice Edelman identifies the problem in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* as being the parties' focus on equitable compensation for breach, rather than whether a debt arose upon the breach by the solicitors.<sup>15</sup> However, this chapter is explicitly prospective. It concludes by asking whether Australian courts should travel down the same path taken in England, which he regards as a rejection of “long established orthodoxy in equity” and claims that, consistently with *Youyang Pty Ltd v Minter Ellison Morris Fletcher*, there is room for cautious optimism that that shall not occur.<sup>16</sup>

I should conclude by making explicit what you will have inferred from the above. There is always time to think carefully and critically about remedies, and not least equitable remedies, and it may be time for there to be a fundamental rethinking of pecuniary orders in equity. This is a thoughtful book, of considerable significance to how we think about

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<sup>14</sup> at 93.

<sup>15</sup> [2015] AC 1503; [2014] UKSC 58.

<sup>16</sup> (2003) 212 CLR 484; [2003] HCA 15. See also M Conaglen, “Equitable Compensation for Breach of Trust: Off Target” (2016) 40(1) *Melbourne University Law Review* 126.

pecuniary orders in equity, contributed to by leading scholars and judges. Your presence here tonight suggests that you may have already reached that view tentatively; if so, I confirm it. *Equitable Compensation and Disgorgement of Profit* is well worth the modest investment of time spent reading it. I am delighted to launch it.

Mark Leeming