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Book Review: Account of Profits, by Peter Devonshire

Book Review

ACCOUNT OF PROFITS, by Peter Devonshire¹

KRISH MAHARAJ²

PETER DEVONSHIRE'S WORK PROVIDES, for the first time, a much-needed, sustained examination of the remedy and procedure of accounting for profits and the mechanics underlying the duty to account. Multijurisdictional in scope, and thus not always authoritative for any particular jurisdiction, Devonshire's work is well worth consideration, not least because of its systematic and thorough analysis of the subject. By this I mean that the book not only considers the decided cases to describe what the law is, but goes further to discuss why the law is as it is, or why it should be otherwise, and if so, how.

After a brief introduction, the book begins with an account of the historical origins of the remedy going back to courts of common law in the thirteenth century. From there it sets out the development of the account of profits (Account) from its medieval roots through to its adoption by the Court of Chancery and then to its modern application as a remedy granted chiefly in respect of equitable wrongs.³ Readers familiar with the remedy and the historical interplay of common law and equity will already know some, if not much, of this tale. For those unfamiliar with this aspect of English legal history, the retelling is useful and does much to demystify what can at first appear to be an arcane subject. The term "account of profits" alone requires some explanation in light of the fact that it sounds nothing like a remedy and, as Devonshire explains, actually results from a centuries-long conflation of the name of a procedure and a cause of action with the outcome sought.⁴

Having given this background, Devonshire then elaborates on the essential elements of the Account and its functions.⁵ Here the book begins to connect the

1. (Wellington: Thompson Reuters, 2013) 178 pages.

2. Barrister and Solicitor.

3. Devonshire, *supra* note 1 at 3-8.

4. *Ibid* at 3.

5. *Ibid*.

theoretical with the practical. Devonshire devotes attention, for instance, to a plaintiff's need to elect between receiving an Account or damages as the remedy for a particular wrong.⁶ Given that the election of an Account is theoretically tantamount to ratification of the defendant's wrong, it is obvious that the plaintiff cannot pursue damages as well.⁷ The process is similar to that in waiver of tort, which results in a similar election of remedies and whose name makes this choice aspect clearer.

Chapters three through seven are devoted to exploring the application of the Account as a remedial response to different causes of action. Four causes of action, or types of wrong, are considered: breach of fiduciary duty, breach of confidence, infringement of intellectual property, and common law wrongs. Each action or wrong presents its own set of controversies and theoretical challenges that influence the application and formulation of the Account in those circumstances. A significant portion of each chapter focuses on these specifics. This approach has its merits and the author ties these differentiating aspects in well with the theme of the work overall.

The third and fourth chapters focus on breach of fiduciary duty and allowances for breaching fiduciaries, respectively. A reader might initially assume that this section of the text would be fairly prosaic because of how supposedly well settled it is across all jurisdictions that a fiduciary found in breach of his or her fiduciary duties is liable to account to the principal. Interestingly, this could not be further from the truth.

What enlivens these chapters and makes for a much more engaging discussion is Devonshire's consideration of the modern contours of duty and breach, which have been the subject of much forceful and vigorous debate for decades. This debate has obviously had a significant effect on the potential availability of the Account as a remedy, and the potential quantum of any award if a fiduciary is found in breach. Cases like *Warman International Pty Ltd v Dwyer* and *Murad v Al-Saraj* demonstrate practical instances where these changing attitudes have resulted in significant changes to the calculation of an Account, either through the court's quantification of profit, or its decision to grant allowances.⁸ In that connection, it is obviously important to understand the forces driving this debate and the consequent calls for change to the fiduciary paradigm. Devonshire usefully devotes a significant portion of the text to canvassing these issues.

6. *Ibid* at 8-13.

7. *Ibid* at 13-17.

8. *Warman International Ltd v Dwyer*, (1995) 182 CLR 544, 69 ALJR 362; *Murad v Al-Saraj*, [2005] EWCA Civ 959, All ER 503.

The fifth and sixth chapters of the book branch out from the general consideration of fiduciary duties to a consideration of the other two areas in which the Account has a well-established home: breach of confidence and intellectual property infringement. Interestingly, although the jurisdiction to award an Account in respect of these wrongs is well established, there is in some places a lack of awareness that an Account is an option in these circumstances. As a result, the book's thorough treatment of the causes of action and the factors influencing the availability and the calculation of an Account when either cause is proven is likely to be helpful to the uninformed or even the somewhat mystified. The fact that a separate equitable duty of confidence can still be found to exist despite the existence of a contractual duty of confidence, for instance, is likely to be of great interest to those faced with a contractual breach of confidence causing only nominal damage to the plaintiff, but bringing significant gain to the defendant—*Attorney General v Blake* notwithstanding.⁹

The final chapter of the book tackles the perplexing issues of when, how, and whether the Account ought to be available in respect of common law wrongs. The genesis of the debate surrounding these issues goes back to *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* and common law cases dealing with actions for interference with property rights.¹⁰ The first part of the chapter focuses on these cases but as Devonshire explains, what these cases actually deal with is a remedy that is more closely related to common law damages as a result of its means of assessment, which is reminiscent of the basic assessment of damages in tort.¹¹ Going to the heart of the matter, Devonshire explains that the “gains” referred to in these actions are purely notional and act only as a proxy for the hypothetical loss arising from an involuntary subtraction from the owner’s “dominium.”¹² In

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9. [2000] UKHL 45, [2001] 1 AC 268 [*Blake*]; The Law Lords in *Blake* essentially decided to grant an account of profits in respect of a purely contractual non-disclosure agreement in the complete absence of any case for an equitable action for breach of confidence. In that connection it is possible to cite *Blake* as authority for the proposition that a purely contractual duty of non-disclosure can sound in the award of an Account. There is little chance however, of any court accepting this argument, as few courts have been willing to award Accounts in respect of contractual breaches in the decade since *Blake* was handed down. The better view would be to accept that cases like *Blake* are somewhat extraordinary and that a contractual duty of confidence will not attract the remedy of Account, and that an Account will only be granted when there is a co-existing equitable duty of confidence that has not been excluded by the terms of the parties' contract, or been rendered otherwise unavailable as a result of a change in circumstances. Devonshire, *supra* note 1 at 124-26.
 10. [1974] 1 WLR 798, 2 All ER 321 [*Wrotham Park*].
 11. Devonshire, *supra* note 1 at 164-65.
 12. *Ibid* at 168.

other words, the assessment of these remedies is still focused on the identification of something that a plaintiff-owner has lost, even if the loss exists only in theory.

This difference obviously distinguishes these remedies from true gain-based remedies on the basis that there need not actually be a realized gain before the remedy can be awarded. In fact, what has to be shown is that the wrongdoer has done something for which the owner might have been able to charge (*e.g.*, crossing an owner's land). The wrongdoer may not have reaped any actual gain as a result of his or her act by saving either time or money, but the owner will nonetheless be entitled to an award equivalent to what the charge would have been at market rates. The notional basis for awarding this type of remedy is what is often called the "user principle." As the name suggests, the remedy is really only a charge for a hypothetical benefit conveyed, not the disgorgement of an actual benefit received. *Wrotham Park* is not premised on the exact same fiction, but relies on similar logic by equating the correct measure of damages with the hypothetical sum that the parties would have agreed to in exchange for the plaintiff agreeing to relax its strict contractual rights. With this explanation in mind, the comparison between the remedies in these cases and ordinary common law damages appears to be quite apt. The explanation thus lends a great deal of credibility to this remedial approach, and may give great assistance to practitioners faced with an appropriate set of facts.

Leaving aside *Wrotham Park* and the cases involving the user principle, Devonshire continues chapter seven by turning to the real catalyst for the discussion of gain-based remedies as a response to common law wrongs: the House of Lords' controversial decision in *Blake*.¹³ The controversy of *Blake* is due in no small part to the fact that it potentially signified an upending of the established order in contractual remedies. That said, the decision has not turned out to be that significant, not least because of its limited practical effect. As Devonshire points out, few courts have subsequently trodden the same path as the Law Lords in *Blake*.¹⁴ The likely reason for this, as Devonshire's discussion suggests, is that many courts have simply not perceived the interests at stake in breach of contract cases as being in need of protection by such a remedy.

In his foreword, the Honourable Michael Kirby expresses the view that the book is timely.¹⁵ In one sense this is no doubt true. The significance of the book's contribution to the field of remedies could not be clearer than when it is viewed

13. *Supra* note 9.

14. Devonshire, *supra* note 1 at 124-25.

15. *Ibid* at viii.

against the juristic and academic background of our time.¹⁶ In the long view, however, it is startling that the Account has only now received this kind of attention and sustained critique. By contrast, monographs on Equity's two other great remedial innovations have been with us since at least 1858 and 1867.¹⁷

Much like these earlier works, though, the book is pioneering in its drive to bring clarity and coherence to a corpus grown increasingly thick with contradictory cases and contrasting points of view. Indeed, it excels in marrying both theory and practice to explain both the principles that underlie the Account and their application, and to suggest reconciliation where the two diverge. Its insights in the latter regard are piercing, and its prescriptions are likely to spur on much academic and juristic development and debate in the years to come.

The unifying theme in Devonshire's book is that remedial decisions are driven and shaped by the cause of action for which they are awarded, which in turn reflect the interests and rights those causes of action are intended to protect. While this may sound trite, it is highly important for scholars and practitioners alike to remember that a remedy is a response to a wrong. As such, in much the same way that contractual damages are supposed to be the doppelgänger of the primary obligation they replace, the Account too must be shaped by the interest or interests that it is supposed to replace or preserve. This book's focus on the nature of the actions for which the Account is available, as much as on the Account itself, is apposite for the purpose of demonstrating not only what the Account does, but also what it ought to do.

16. See James Edelman, *Gain-Based Damages: Contract, Tort, Equity, and Intellectual Property* (Oxford: Hart, 2002). See also Francesco Giglio, *The Foundations of Restitution for Wrongs* (Oxford: Hart, 2007); *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43, 2 SCR 601.

17. See Sir Edward Fry, *A Treatise on The Specific Performance of Contracts: Including Those of Public Companies, With A Preliminary Chapter on The Provisions of The Chancery Amendment Act* (London: Butterworths, 1858). See also William W Kerr, *A Treatise on The Law and Practice of Injunctions in Equity* (London: W Maxwell & Sons, 1867).