

Equity, Trusts and Commerce

Edited by
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PREFACE

In the first line of his judgment in *AIB Group (UK) Plc v Mark Redler & Co*,¹ Lord Toulson said: ‘140 years after the Judicature Act 1873, the stitching together of equity and the common law continues to cause problems at the seams’. In many ways, the essays in this collection work at these ‘seams’, investigating the way in which doctrines derived from the equitable jurisdiction interact with and shape areas of the law, such as company, commercial law and agency law, which reflect not only common law doctrines of long standing, but significant statutory innovation. The topics encompassed by ‘equity’, ‘trusts’ and ‘commerce’ are, to say the least, many and varied, as this collection attests.

Our first essay by Tan Cheng-Han and Wee Meng-Seng, ‘Equity, Shareholders and Company Law’, explores from a historical perspective the influence of equitable doctrine on the relationships of shareholders. The authors consider this issue through the prism of the ‘just and equitable winding-up doctrine’, examining the way in which it constrained the power of majority shareholders and its relation to the modern concept of unfair prejudice. In ‘Some Aspects of the Intersection of the Law of Agency with the Law of Trusts’, Peter Watts considers the case of agents who are also trustees, and deftly raises a host of questions concerning how the authority of agents interacts with the authority of trustees. Tang Hang Wu examines a different aspect of the way that equity may impinge upon commercial transactions in ‘Equity in the Marketplace: Reviewing the Use of Unconscionability to Restrain Calls on Performance Bonds’. Tang investigates the Singaporean departure from the orthodox rule as applied in England, namely that there is no room for considerations of unconscionability when commercial parties initiate calls on performance bonds; restraints are only allowed on the very limited basis of fraud. Tang argues that the exceptional Singapore experience represents a conscious policy choice of the courts which, on the basis of local imperatives, will act to restrain calls that they regard as abusive.

Our next three essays revolve around the issue of intention and ‘certainty of subject matter’ for the purposes of identifying trust assets in the commercial context. Michael Bridge’s essay, ‘Certainty, Identification and Intention in Personal Property Law’, explores the difficulties the law has encountered in identifying specific personal property interests, ranging over future property, property in sales of goods cases, trust interests in the commercial context, and in the law of charges.

¹ *AIB Group (UK) Plc v Mark Redler & Co* [2014] UKSC 58, [2015] AC 1503 [1].

Robert Stevens's focus in 'Floating Trusts' is narrower, interrogating in detail the finding of trust interests in mixed funds in the complex 'repo' securities transactions examined by the courts following the collapse of Lehman Brothers. James Penner's essay, "'Sort of" Backwards Tracing' raises issues about intention and the subject matter of a trust in a different way. In the Privy Council decision in *Brazil v Durant International*² a Commonwealth court explicitly recognised for the first time the claimant's entitlement to an asset on the basis of 'backwards' tracing, but Penner convincingly argues that a host of questions remain to be resolved before the impact of that decision can properly be assessed.

Our next three essays take us back to more traditional issues in trusts, all of which concern the special relationship that trusts as a legal device have with the courts. Richard Nolan, in 'Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures', shows that, whilst modern trusts often include a wide range of trustee discretions, the traditional, well-established power of the courts to ensure that a trustee complies with the trust terms can be adapted flexibly and sensibly to modern trust structures, in particular in cases of breach of trust. In 'Trusts, Objectivity and Rectification', Simon Douglas explores in detail the relationship between a settlor's intention in creating a trust and the power of a court to intervene by rectifying the trust instruments. Douglas argues that, despite some cases in which the court appeared to base its decision to rectify on the settlor's 'subjective' intention, the true and correct rule is that primacy is given to the objective meaning of the settlor's declaration of trust. Raising the issue of the court's special relationship to the administration of trusts from a very different angle in 'The Arbitrability of Trust Instruments: Why Not?', Elaine Chew weighs the various arguments in favour of—and against—the law allowing settlors to require trustee–beneficiary disputes to be determined by arbitration, rather than only through invocation of the court process.

Our last five essays all concern the best way in which to understand the remedies available in cases of fiduciary or trustee wrongdoing. In 'Bribery', Paul Davies points out that whilst much attention has been paid to the liability of the recipient of a bribe, the liability of the person making the bribe has been insufficiently explored, and in this essay he makes up for that deficiency. Deborah DeMott, in 'Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach', compares American and English approaches towards accessory liability. In the US, both breach of fiduciary duty and culpably assisting in the fiduciary's breach are characterised as tortious, and such characterisation is important when determining the elements of accessory liability. Jamie Glister's 'Equitable

² *Brazil v Durant International* [2015] UKPC 35.

Liability of Corporate Accessories' explores two models for understanding the liability of a corporate entity that assists in the misapplication of another's funds: on the first, the wrongdoing fiduciary and the corporate accessory are so close, that the two are treated as the same actor for the purposes of liability; on the second, the corporate entity is regarded as a distinct 'third-party' accessory. In 'The Nature of "Knowing Receipt"', William Swadling examines one by one the different justifications for the liability of the recipient. Swadling concludes that the only viable explanation is a liability occasioned by the defendant's equitable wrong, and argues that the fault requirement should be pitched high in terms of the defendant's knowledge, given the availability of a strict liability proprietary claim against him as well as a strict liability personal claim against the defaulting trustees. Sarah Worthington, in 'Exposing Third-Party Liability in Equity: Lessons from the Limitation Rules', takes as her starting point the treatment of recipients and accessories by the UK Supreme Court in *Williams v Central Bank of Nigeria*, which involved the application of the Limitation Act 1980 to cases of breach of trust.³ Worthington's central claim is that anyone who, for whatever reason, has property-holding and/or property-managing duties with respect to the property of another is a true trustee, and so the need to resort to 'constructive' trusteeship formulations in this area of doctrine obscures the real issues at stake, not least for the law of limitations.

These essays were all first presented at the National University of Singapore on 12 and 13 April 2016. Each essay was presented by another contributor, and discussed for up to an hour. The debate was lively, and we are very grateful to all the authors for making the workshop so enjoyable and for providing such thoughtful comments on all the essays. We conclude by expressing our immense gratitude to the National University of Singapore Centre for Law & Business and the Faculty of Law, University of Oxford, for their generous support of that event without which this publication would not have been possible. We are also very grateful to Jia Wei Lee for his assistance in preparing the manuscript for publication, and to Bill Asquith and the team at Hart Publishing for supporting this project so enthusiastically. Finally, we would like to thank Tan Cheng-Han who came up with the idea of a conference in the first place, and without whose persistent encouragement this book would never have been produced.

Paul S Davies and James Penner
September 2016

³ *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] AC 1189 (SC).