

# The Impact of Equity and Restitution in Commerce

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OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

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First published in Great Britain 2019

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A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Devonshire, Peter, editor. | Havelock, Rohan, editor.

Title: The impact of equity and restitution in commerce / edited by Peter Devonshire and Rohan Havelock.

Description: Oxford, UK ; Portland, Oregon : Hart Publishing, 2019. | Includes index.

Identifiers: LCCN 2018031474 (print) | LCCN 2018032317 (ebook) | ISBN 9781509915668 (Epub) | ISBN 9781509915644 (hardback : alk. paper)

Subjects: LCSH: Commercial law—English-speaking countries—Congresses. | Equity—English-speaking countries—Congresses. | Restitution—English-speaking countries—Congresses.

Classification: LCC K1005 (ebook) | LCC K1005 .I48 2018 (print) | DDC 346/.152107—dc23

LC record available at <https://lccn.loc.gov/2018031474>

ISBN: HB: 978-1-50991-564-4

ePDF: 978-1-50991-565-1

ePub: 978-1-50991-566-8

Typeset by Compuscript Ltd, Shannon

Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

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## Introduction: The Macro Level

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PETER DEVONSHIRE AND ROHAN HAVELOCK

### I. Overview

It is trite that equity and the law of restitution have made a profound and lasting contribution to the development of the common law. In order to examine and assess their impact in commerce, it is logical to begin with their basic function in the scheme of private law. Any definition of this is necessarily general given that their development has been organic and, in the case of equity, has spanned many centuries. For present purposes, it may be observed that equity and the law of restitution share a basic and distinct function which is: (1) *corrective* of problems affecting certain relationships, transactions, and other events involving legal actors; and (2) largely but not exclusively, *supplementary* in the sense of addressing gaps in other areas of private law or enforcing particular normative constructs, such as the trust.

This function may be regarded as indispensable to the achievement of justice by the common law legal system having regard to its origins and development within evolving political, economic and social contexts. However, its effects have caused enduring difficulties in settling, and even simply defining, the precise relationships which equity and restitution have with the areas of private law they intersect, especially the law of contract and the law of property. Bearing on this high-level question are the disparate values and standards informing the application of the rules and principles of equity and the law of restitution.

If coherence and stability within commercial law are prized to ensure the effective operation of commerce, then these foundational questions must be carefully worked through. Chapters three to seven of this collection attempt to confront such macro level questions, raising issues of taxonomy, doctrine and policy. The positions taken on these questions will shape, and arguably should determine, the nature and extent of rights, obligations and remedies when equity and the law of restitution are invoked in particular cases. At this stage, the financial and practical outcomes are in view and it is possible to identify concrete consequences for commercial parties. Chapters eight to twelve of this collection are concerned with such micro level issues.

## II. An Analytical Framework and the Scope of Proprietary Relief

### A. The Boundaries of Contract, Equity and Unjust Enrichment

Chapter three, written by Sarah Worthington, aptly sets the stage for the entire collection. In a masterly and extensive analysis, Worthington examines some of the most prominent tensions and difficulties at the intersections of three core areas of private law: contract; property (in which she locates equity); and unjust enrichment. The familiar example of a mistaken payment is used to demonstrate that unjust enrichment and property law (via a trust<sup>1</sup>) might assist with the same problem yet deliver different responses with different justifications. As a means of reducing such boundary conflicts and making the core areas of private law work together coherently, Worthington carefully articulates four crucial points to assist analysis.

First, Worthington emphasises that property questions must necessarily be answered before liability questions. Thus, the location of legal title to assets and the location of any derivative interests (including trust interests) in those assets must be settled first, not least because legal entitlement and factual enjoyment may be in different people. Worthington further argues that when it comes to trust interests, the line between location and liability need not be fraught. By reference to the difficulties posed by *Re Rose*<sup>2</sup> and *Macmillan Inc v Bishopsgate Investment Trust plc*,<sup>3</sup> she demonstrates that identifying who is entitled to the economic benefit of assets is still a property location question which depends fundamentally on the intention and consent of the transferor. Absent such intention or content, the entitlement of the transferor persists despite the transfer of legal title. Although beyond the scope of the chapter, the fundamental question of the *normative* basis of this entitlement still demands to be settled.<sup>4</sup>

Second, turning to liability questions, Worthington observes that contract and tort law are concerned with *individuals*, with remedies designed to reinstate or restore the parties' positions. In contrast, unjust enrichment and trust law are concerned with *assets*, with remedies designed to deliver what was expected from the assets assuming their proper handling and management.<sup>5</sup> This observation is powerful in its simplicity and clarity, although it needs to be construed in a purely

<sup>1</sup> As recognised in the controversial judgment in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105.

<sup>2</sup> *Re Rose* [1952] Ch 499 (CA).

<sup>3</sup> *Macmillan Inc v Bishopsgate Investment Trust plc* [1995] 1 WLR 978 (Ch).

<sup>4</sup> The two main accounts lie in corrective justice theory, and in a 'property-based' explanation. See further RA Havelock, 'Justifying Unjust Enrichment' [2017] LMCLQ 566.

<sup>5</sup> See ch 3, section VI.

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## Introduction: The Micro Level

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### I. Overview

In the preceding chapter it was observed that positions taken on macro level questions can, and arguably should, influence the nature and extent of particular rights and remedies in equity and restitution. These questions broadly revolve around: (1) taxonomic enquiry as to their relationship with other areas of private law; and (2) the foundational values and standards that inform equity and restitution. For example, if it is claimed that both trust law and unjust enrichment concern entitlement to the economic benefit of assets, it may follow that proprietary remedies should, in principle, be available to vindicate the rights protected.<sup>1</sup>

From the perspective of commercial parties, it is at this ground or micro level that the impact of equity and restitution is most tangible. Provided the stakes are high enough for litigation and a claim is sufficiently meritorious, extant rights, liabilities and available remedies, will necessarily translate (through judgment or settlement) into a financial or practical benefit for one party and a corresponding detriment to the other. Proprietary relief in particular will have unsettling, and, in some cases, punitive effects.

But this observation understates the extent of the impact which equity and restitution may have. That impact is manifested *ex ante* in that the very existence of particular rights, liabilities and available remedies, and the judicial approach taken to these, will regulate, or at least influence, the conduct of commercial actors (especially those well-advised) prior to any dispute arising. For example, if an overly paternalistic approach is taken to the imposition of fiduciary obligations in the context of commercial joint ventures, this is likely to induce parties to consider adopting particular contractual and other legal structures at the outset in order to ward off the prospect of equitable intervention if the relationship fails and a dispute arises.

<sup>1</sup> See the argument by Worthington in ch 3, section IV.

Chapters eight to twelve in this collection delve into particular rights, liabilities and remedies within equity and restitution, and their associated impacts on commerce. These chapters span two main areas: fiduciary obligations and remedies (predominantly restitutionary in effect); and third-party liability.

## II. Fiduciary Law in Commerce

It has been observed that fiduciary doctrine has been ‘the spearhead of equity’s incursions into the area of commerce’.<sup>2</sup> Fiduciary obligations have become a feature of a wide variety of commercial relationships. They regulate not only relationships between clients and professionals (notably, agents, solicitors, certain financial advisers and, in some jurisdictions, medical practitioners), but those in commerce more generally, including directors, partners, joint venturers and (potentially) even parties in abortive negotiations.<sup>3</sup> Nevertheless, particularly in relation to the category of joint venturers, equity’s entry in this arena has to some extent been regarded as objectionable trespass rather than a welcome arrival.<sup>4</sup> As the case law and academic scholarship testify, this is a subject beset by profound disagreement and controversy.

### A. The Bounds of Fiduciary Doctrine

Commencing the second half of this collection is an illuminating survey by Stephen Gageler of fiduciary law in Australia as applied to commercial relationships. Gageler structures this by means of five key questions, taken in two stages: (1) ‘what’ (ie the scope of fiduciary obligations) and ‘so what’ (ie available remedies); and (2) ‘who’, ‘when’, and ‘in what respect’ (ie the definition of a fiduciary, and the criteria used to determine the existence of a fiduciary relationship).

Questions within both stages present difficulties, but those associated with the second stage are particularly formidable. The fiduciary concept has proved recalcitrant in the face of attempts to formulate criteria by which to determine whether a particular relationship, or particular obligations within it,<sup>5</sup> should be

<sup>2</sup> A Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 LQR 238, 245.

<sup>3</sup> See, eg *Fraser Edmiston v AGT (Qld) Pty Ltd* [1988] 2 QD R 1 (QSC). Contrast *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, (1989) 61 DLR (4th) 14.

<sup>4</sup> See the judicial disfavour expressed in *Barnes v Addy* (1874) LR 9 Ch App 244 (CA) 251; *New Zealand and Australian Land Co v Watson* (1881) 7 QBD 374 (CA) 382; *Manchester Trust Ltd v Furness* [1895] 2 QB 539 (CA); *Re Wait* [1927] 1 Ch 606 (CA) 625, 635–36; *Scandinavian Trading Tanker Co AB v Flot Petrolera Ecuatoriana* [1983] QB 529 (CA) 540–41.

<sup>5</sup> While this determination is usually made in respect of the entire relationship, in limited cases certain aspects of a relationship may attract fiduciary obligations while the relationship is otherwise