THE DUTY TO ACCOUNT – DEVELOPMENT AND PRINCIPLES

The Duty to Account – Development and Principles, by J A Watson, Federation Press, 2016, 240 pages: ISBN 9781760020668. Hardcover $99.00.

We are accustomed to thinking of account as an equitable remedy, usually pressed into service to retrieve undeserved profits from delinquent fiduciaries or those who infringe intellectual property rights. Most who deal regularly with trusts and trustees would also be familiar with the notion of the trust as an accounting entity, for which equity developed sophisticated mechanisms designed to hold trustees, literally, to account and to afford beneficiaries procedures by which they might test for due administration.[1] Account does not commonly feature in the modern legal landscape beyond those circumstances; it appears, as the author of this book states, to have been "somewhat relegated in modern law, sometimes described as a minor remedy, or of little practical utility" (p 6).

But, as with so many things taken for granted in modern Australian law, examination of legal history can illuminate previously unfamiliar crevices. In this very impressive monograph, based on his doctoral thesis,[2] Watson conducts an almost archaeological excavation of the historical antecedents in pursuit of answers to the critical questions of who is an accounting party and what principles establish accountability.

The author demonstrates not only that account and accountability predate equity (noting that a form of private law writ of account was already in place in the common law courts as early as 1162: p 26) but that they may arise in a wide range of circumstances beyond fiduciary relationships. As a general proposition, a duty to account can exist, either at common law or in equity, whenever a person deals with property belonging to another under an obligation to keep it and use it only according to conditions of permitted and proper use. Trust, agency, partnership and other status-based fiduciary relationships arouse this duty quite naturally – indeed the author observes that "[a]ll fiduciaries are accounting parties" (p 136) – but he reminds us that accounting parties need not be in one of those relationships, or even in a pre-existing relationship at all. As John Sheahan QC observes in his enlightening Foreword, the duty to account cuts across traditional notions of common law and equity and operates independently of tort, contract and fiduciary law – even though it can operate within and through them.[3] Of particular interest is the role of account in the development of the law of restitution generally and, more specifically, of unjust enrichment.

A significant proportion of the book is dedicated to a detailed exposition of relevant history, and not only legal history. It picks up where others have left off[4] and delves deeply into the very origins of the doctrine, taking as its starting point the Norman Conquest. But this is no dry and dour historiography. The story of account is told in an entertaining and fascinating manner, animated by

[1] See, eg the excellent treatments in M Conaglen, "Equitable compensation for breach of trust: off Target" (2016) 40 MULR 126; J Penner, "Distinguishing fiduciary, trust and accounting relationships" (2014) 8 J Eq 202.

[2] The book earned the author finalist status in the 2015 Holt Prize, which is awarded every two years to an unpublished manuscript that is the author's first published book. Named in honour of the late Christopher Holt, co-founder of The Federation Press, the award aims to foster emerging authors and in doing so continue the legacy of a man who gave many notable academic authors their first publishing opportunity.

[3] There is a detailed discussion (pp 181-188) of the famous, and somewhat controversial, House of Lords decision in *Attorney-General v Blake* [2001] AC 268 where is was held that an account of profits may even be available for a breach of contract in exceptional circumstances (see also J Edelman, "Fiduciaries and profit disgorgement for breach of contract" (2012) 6 J Eq 115 – somewhat mysteriously not cited by Watson).

[4] See, eg JD Heydon, MJ Leeming and PG Turner, *Meagher Gummow & Lehane's Equity Doctrines and Remedies* (5th ed, LexisNexis, 2015), Ch 26 (Accounts); PW Young, C Croft and ML Smith, *On Equity* (Lawbook Co, 2009) 1118-35.

anecdotes and contextual revelations, beginning with bailiffs, sheriffs and receivers and the development of the Exchequer, the workings of the early common law courts (and their inherent jurisdiction to appoint auditors, who were officers of the court, to take accounts guided by "equity and good faith" rather than "rigour of the law") and the various struggles over power and treasure between monarch and barons, manifested most famously by the *Magna Carta* (and its various versions), the Statute of Marlborough and the Statues of Westminster. Watson briefly examines the evolution of the chancery courts and their adoption of account and other common law concepts (including wilful default), as well as the central role played by the doctrine in the development of the trust itself, so that "accountability became a foundational duty of all trustees" (p 134). An entire chapter is devoted to the action for money had and received, which is said to be both legal and equitable in nature.

Academics and legal historians will delight in the frequent citation of sources in the original Latin (with translations) and extensive reference to the writings of Blackstone, Bracton, Glanville, Pollock, Maitland and other stars in the English legal firmament, as well as many latter day writers. The book is richly footnoted and contains a detailed bibliography, demonstrating a remarkable breadth and depth of research, and offering a sumptuous feast of possibilities to those who wish to conduct their own investigations into this and related fields.

In Ch 8 (Principles of the Duty to Account) Watson brings the strands together into a series of propositions that circumscribe the territorial metes and bounds of this versatile doctrine and in his concluding chapter he identifies the unifying thread of the various limbs of the doctrine, stating that "accountability was, and still is, premised on a dealing with property the subject of a condition (howsoever arising), namely, that it be to the use of the plaintiff" (p 189). He notes that the doctrine has not always been expressly or overtly identified as such in seemingly unrelated developments over the centuries, and that the categories of accounting parties are not closed. He closes with an expression of hope that the exposure of the historical context will provide a coherent explanation of the circumstances in which the law expects and will extract accountability, and may assist in resolving ongoing controversies and in the further development of duties and remedies generally.

No one who reads this book could come away from the experience disagreeing with that hope or deeming it forlorn. While this book cannot be described as (and clearly was not intended to be) a practice guide it is, as Sheahan concludes, a work of real practical significance. It would add depth and dimension to any lawyer's understanding of this fascinating doctrine and its wider place in the family of remedies. Perhaps most importantly of all, it is a very satisfying read.

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