Book Review

The Duty to Account: Development and Principles by J A Watson (2016) Federation Press, 240 pp, ISBN 9781760020668

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I Introduction

This challenging and stimulating book deserves the attention of any serious scholar of private law. Its methodology is to use a detailed examination of legal history as the basis for the derivation of legal principle. It recounts the history of the circumstances, since the Norman Conquest, in which English law recognised duties to account, and places those duties in their context in legal and social history. As legal history, it includes many fascinating details. Yet it is no mere antiquarian exercise. It is of real practical use in the thesis it draws from that history: that there is a principled basis on which the law now can recognise some duties to account, and can develop.

> Dr Watson's thesis is that an obligation to account
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> arises whenever a person *obtains* or *deals* with *property* in circumstances where the entitlement to do so is *qualified* (or conditioned), namely, that it is not free to his, her or its own selfish use; but *ad opus*, to be dealt with to or for *the uses* of another.[1]

He contends that has been 'the common and constant theme of accountability from its origins at law, down to today'.[2] The limit on the right of the person who has received the property to deal with it for his or her own selfish use might come from matters of fact (such as that it was transferred to him or her on certain terms), or from law (such as that the property was transferred pursuant to a contract, the consideration for which has totally failed).[3] Account, he argues, need not be a remedy for breach of a duty, nor need it be based on any agreement — rather a duty to account arises irrespective of whether the person required to account (who I will refer to as the 'accounter') has committed a breach of any other legal duty. It is a duty that the law imposes, on the basis of the circumstances in which the accounter has received or dealt with property.

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1 J A Watson, *The Duty to Account: Development and Principles* (Federation Press, 2016) 155 [456] (emphasis in original).

2 Ibid 155 [457].

3 Ibid 8 [15].

This obligation to account can arise concerning land, chattels, money, and incorporeal property. It can require the accounter to account for both the property that was received or dealt with, and any profits or income derived from it.

A modern lawyer usually associates property being held 'to the use of' another with the Court of Chancery's enforcement of uses prior to the *Statute of Uses 1535*,[4] and the way in which in the 17th century, the use gave rise to the trust. But the notion that an item of property could be held 'to the use of' another, and that legal obligations to account arise because the property was held to the use of another, has been present in English law since the 11th century[5] — long before the Court of Chancery ('Chancery') existed, and even longer before there were bodies of legal theory like the law of contract, the law of trusts, or the law of restitution.

II The History

To sketch the history that Watson recounts in detail, the feudal system, where a lord granted the right to occupy land in exchange for the performance of services or provision of goods (or, later, money), created a practical necessity for a means of deciding who owed what to whom. A landowner thus appointed a bailiff or representative to ascertain and collect whatever was due to him, and to pay certain debts the landowner incurred. The sheriff often performed that function for the King. Other entities that accounted to the King were stewards, bailiffs, officers of the Crown, cities, and boroughs. All these 'held property or had power over property to the use of another'.[6]

Procedures for the taking of accounts of the King's revenues were developed in the Exchequer — some records date from the reign of Henry II.[7] A private writ of account then developed, from as early as 1163–1172,[8] under which people other than the King could seek accounts from bailiffs, guardians or receivers. The *Provisions of Westminster 1259*[9] recognised that when a landholder died leaving an heir who was a minor, the guardian in socage held the land to the use of the ward, and established a procedure, enforceable in the common law courts, for the guardian to account when the ward came of age. The *Statute of Westminster II 1285* made detailed provisions about the procedure used to enforce the obligations of 'Servants, Bailiffs, Chamberlains, and all Manner of Receivers, which are bound to yield Accompt'.[10]

Though the action of account was originally one between a landholder and his bailiff or estate manager, with time it became a commercial as well as a feudal

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4 27 Hen VIII, c 10.
5 Ibid 148 [436]–151 [444].
6 Above n 1, 19–20 [43]. Appointment to an office might not, by itself, give the officeholder any property, but property that the officeholder received by virtue of the office could be held to the use of the person who had appointed him.
7 Ibid 23–4 [53]–[57]. The reign of Henry II was 1154–89.
8 Ibid 61–2.
9 43 Hen III, c 17, re-enacted in the *Statute of Marlborough* (1267) 52 Hen III, c 17.
10 13 Edw 1, c 11.

action.[11] There developed an extended notion of who was a 'bailiff or receiver', so that Fitzherbert could say that 'if a Man receive[s] Money for my use, I shall have an Accompt against him as Receiver; or if a man do deliver money unto another to deliver over unto me, I shall have an accompt against him as my Receiver'.[12] Coke defined a receiver as 'one [who] receives money to the use of another to render an account'.[13]

As shown by this quotation from Fitzherbert, the person to whose use the property was received had a right to obtain the account. The right of this third party beneficiary to obtain the account was recognised before the modern action for breach of contract was developed and before there was any notion of a covenant being held on trust. The right arose regardless of whether there was any agreement that the third party would have rights concerning the property. There was no requirement that the property that the accounter had received remain separate and identifiable in the way that trust property is now required to be held separately to the trustee's own property.

The procedure in a common law action of account was first a decision by a judge that the defendant had a liability to account, followed by an actual taking of the account before auditors.[14] This was followed by a judgment for the transfer of any items that the auditors found should be transferred to the plaintiff, or judgment for the net amount of money that the auditors found was due.[15] That judgment was enforceable without more.[16] In other words, the obligation to account was a freestanding source of legal obligation.

The account was always to be taken '*ex aequo et bono*' ('according to justice and equity').[17] This 'equity' was not the body of principles that came to be applied by the Court of Chancery — the earliest examples that Watson quotes of this manner of taking accounts are from the 1320s, before there was anything like a recognisable law of equity that was separate to the common law. In taking accounts according to justice and equity, an accounter was given allowances for expenses incurred, or for trouble and effort, in connection with the property relating to which the account was sought.[18] An allowance could be made if the accounter established that the property in question had been lost in circumstances where the accounter did not breach any duty, such as the accounter having been robbed, or goods having been jettisoned during a storm at sea.[19] Though not a point that Watson makes explicitly, these

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11 Theodore F T Plucknett, *A Concise History of the Common Law* (Butterworth & Co, 5th ed, 1956) 28.

12 Anthony Fitzherbert, *La Novelle Natura Brevium* (c 1534) (Richard & Edward Atkins, 1704) 257, quoted in Watson, above n 1, 34 [84], 79 [213].

13 Edward Coke, *Institutes of the Laws of England; or, A Commentary upon Littleton* (c 1628) (E & R Brooke, 15th ed, 1794) vol I, 172a, quoted in Watson, above n 1, 79 [214].

14 After jury trial arose, the actual taking of the account continued to be before auditors appointed by the Court, not before the jury.

15 Watson, above n 1, 62–4 [168]–[172].

16 The action of account should be distinguished from the situation where the defendant has already accounted outside court to the plaintiff, or to auditors appointed by the plaintiff. In that situation, the plaintiff has no right to an action of account, but can sue for debt for the amount found to be due in the private accounting (an 'account stated'): Watson, above n 1, 75–6 [206]; see also *Baxter v Hozier* (1839) 5 Bing (NC) 288, 298, 132 ER 1115, 1119–20.

17 Watson, above n 1, 69–70 [188]–[191], 169 [501], 170 [504].

18 Ibid 67 [183], 169–70 [501]–[502].

19 Ibid 65 [177], 93 [270]–[271], 96 [276]–[277].

features of the common law action for account suggest that there is a need to reconsider the theory that the action for money had and received, based on the money having been received to the use of the plaintiff, arose from the common law importing concepts from equity.[20]

Early actions of account were begun by a writ in the *praecipe* form, which simply ordered the defendant to account, or come to court to explain why he had not done so. This had the effect that the types of relationship in which accounting could be required could be identified quite early in the history of the action. However, the common law action fell into disuse[21] from about the 17th century, because its multi-stage procedure was inconvenient, and because it could be tried by wager of law.[22]

Once the action of assumpsit had developed, some actions that had formerly been taken using the writ of account, such as against bailees, came to be taken using assumpsit. But assumpsit, as a species of trespass on the case, was begun by a writ in the *ostensus quare* form, the essential nature of which was that it (a) sought the recovery of damages, (b) for a wrong done. This development obscured the fact that the law had long recognised an obligation to account as arising even when there was no legal wrong.

As well, Chancery developed an action for account in its concurrent jurisdiction, to obtain an account in situations where the common law would formerly have recognised an obligation to account. The bill in Chancery for an account was also used concerning obligations that arose in Chancery's exclusive jurisdiction.

III Circumstances in Which the Theory Applies

Many different types of relationship in which one person holds property to the use of another are identified in Watson's book. They include: officers of the Crown holding property of the office to the use of the sovereign; employees holding business property to the use of the employer; bailees holding bailed property to the use of the bailor;[23] receivers and factors holding the money they received to the use of the intended recipient; partners, joint tenants and tenants in common holding the venture property to the use of each other; and agents holding property the subject of the agency to the use of the principal. The usurper of an office holds property collected by virtue of that office to the use of the person entitled to the office.

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20 Eg *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 548 [84], 554–5 [99]–[100] cf 589–90 [202]–[203]; *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 573–5 [12]–[13], 594 [69].

21 But it never fell into total disuse — actions of account at common law in the 19th century included *Baxter v Hozier* (1839) 5 Bing (NC) 288, 132 ER 1115; *Henderson v Eason* (1848) 12 QB 986, 116 ER 1140 reversed (1851) 17 QB 701, 117 ER 1451; *Beer v Beer* (1852) 12 CB 60, 138 ER 823. (Birks is wrong in saying that the last common law action for account was in 1770: Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 294.)

22 Wager of law was not abolished as a mode of trial in England until the *Civil Procedure Act 1833*, 3 & 4 Will 4, c 42, or in New South Wales until s 29 of the *Advancement of Justice Act 1841* (NSW) 5 Vic, No 9.

23 There is an historical as well as an etymological connection between bailees and bailiffs.

Someone who obtains gold or silver by mining holds the gold or silver to the use of the Crown. There are other examples of relationships giving rise to a duty to account.

Watson also identifies types of transactions where obligations to account arise. They include if someone had obtained property by a fraudulent misrepresentation,[24] or as a result of a mistake (even a mistake of law).[25] They include that if A paid money to B for a particular purpose, and that purpose was not achieved, A could recover not only the capital but also any profits that B had made.[26] This action of account was available notwithstanding that the money paid over could not be identified as a separate fund in B's hands. The basis upon which this happened was that, once the consideration had failed, the money was held to the use of A. The book provides a very useful quarry of authorities for these various circumstances in which property is held to the use of another.

Watson argues that this analysis of when an obligation to account arises can explain why the thief is obliged to account to the true owner of the stolen property — the thief obtained the property in circumstances where it would be impossible for him or her to say that it was for his or her own free use, and thus his or her possession of the property was always conditioned. Similarly, the volunteer who receives the stolen property or its traceable proceeds from the thief is subjected to an obligation to account, but only from the time the volunteer knows that the property is stolen, because only then does the volunteer hold the property conditionally. This explanation provides a basis for accountability that does not require there to be any trust or fiduciary relationship.

Watson suggests that the availability of an account of profits for the tort of passing off is explicable on the basis that the common law trademark is a species of property, the defendant is using property that is not theirs, and thus is accountable.[27] Similarly, the availability of an account of profits in equity for abuse of confidential information arises because the information is seen, for that purpose, as a species of property,[28] and the recipient of the information knows, from the circumstances in which he or she received it, that his or her ability to use it is restricted.[29]

Not all circumstances where a person has a qualified entitlement to deal with property give rise to an obligation to account. Practically all landowners hold their land in circumstances where their entitlement to deal with it is qualified by planning laws or by restrictive covenants. Subject to matters of public policy like the law of restraint of trade, it is possible for a chattel to be transferred on terms that restrict the manner in which the transferee will use it. Watson's thesis is that it is a *particular type* of qualification or condition to the holding or dealing with property that gave rise to the obligation to account, namely when the qualification or condition is such that the property is held to the use of another. Development

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24 Watson, above n 1, 101–2 [292]–[297].

25 Ibid 103–4 [298]–[303] (cases from the late 16th and early 17th century).

26 Ibid 98–101 [282]–[291].

27 Ibid 118–9 [362]–[365].

28 Ibid 141–2 [419].

29 I add that this could explain why the eavesdropper or the finder of the mislaid document containing confidential information can be required to account, because he or she knows that he or she should not have the information at all.

occurred by incremental extension of what counted as property, and what counted as being held to the use of another.

Watson does not claim that the basis for account that he identifies will solve all problems about when a remedy of account should be available.[30] Though he does not give details of this limitation of his thesis, he is right to recognise that it exists. A trustee's obligation to account arose at a time when trust property was usually settled land, concerning which the person to whose use the land was held at any one time was identifiable. However, as trusts became more complex equity developed a different justification for the trustee's obligation to account. Now, an action for account does not lie against a trustee who holds property that the trustee must pay to a particular beneficiary — it is only once the trustee has acknowledged that he holds a particular sum to the use of the beneficiary that the trustee no longer holds that sum as trustee, but instead holds it for the beneficiary's use.[31] The potential object of a power of appointment in a discretionary trust is owed a duty to account, in the restricted sense[32] that he or she has standing to require records to be kept, and sometimes (but not always)[33] has the right to information about the nature and extent of the trust property, and dealings with the trust property[34] even though it could not be said that the trust property is held 'to the use of' that person. Similarly, a person with a merely contingent interest in a trust fund has a right to information about the state of investment of the fund.[35] The obligation of the trustee of a private trust to pay money or transfer property, after the taking of an account, is often to pay or transfer it to the trust fund, not to the person who has the standing to require the account, because the particular trusts are such that the fund is not held (at least solely) to the use of that person. The trustee of a charitable trust can be required, at the suit of the Attorney-General, to account for the trust property in the sense of explaining what has become of it, even if there is no allegation of any breach of duty,[36] and can also be required to account for it in the sense of restoring any property wrongly removed from the trust.[37] This is so even though there is no person

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30 Watson, above n 1, 162–3 [480].

31 *Edwards v Lowndes* (1852) 1 E & B 81, 118 ER 367, 370, quoted in Watson, above n 1, 170–71 [505], and affirmed in *Fischer v Nemeske* (2016) 257 CLR 615.

32 The expression 'duty to account' concerning an item or fund can have several different meanings. It can mean an obligation to keep records concerning the property; a duty to provide information about the administration of the property; or a duty to pay money or transfer property to whoever is entitled to it: *Byrnes v Kendle* (2011) 243 CLR 253, 270 [42].

33 *SAS Trustee Corp v Cox* (2011) 285 ALR 623, 653–4 [148]–[149]; *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431, 456 [130].

34 *Randall v Lubrano* (Supreme Court of New South Wales, Holland J, 31 October 1975) published as an annexure to *McDonald v Ellis* (2007) 72 NSWLR 605, 622 [4]; *Spellson v George* (1987) 11 NSWLR 300, 316; *Spellson v Janango Pty Ltd* (Unreported, Supreme Court of New South Wales, Hodgson J, 8 December 1987); *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98, 110 [17]; *Kennon v Spry* (2008) 238 CLR 366, 386–7 [47]–[49], 407–8 [125].

35 *In Re Tillott* [1892] 1 Ch 86; *Re Dartnall* [1895] 1 Ch 474.

36 *Attorney-General v Cocke* [1988] 1 Ch 414, 420. Though sometimes the court will limit how far back in time the accounts must go: Jean Warburton and Debra Morris, *Tudor on Charities* (Sweet & Maxwell, 8th ed, 1995) 367–9; Arthur Robert Ingpen, Frederick Turner Bloxam and Henry G Garrett, *Seton's Judgments and Orders* (Stevens & Sons, 7th ed, 1912) 1290.

37 *Ex parte Greenhouse* (1815) 1 Madd 92, 109, 56 ER 36, 42; *Smith v Kerr* [1902] 1 Ch 774.

whatsoever who is the beneficiary of the charitable trust[38] — and, thus, the trust property is not held 'to or for the uses of another'.

Further, a fiduciary who holds no property at all (not even, relevantly, confidential information), and has no legal right like a power of appointment, can be subject to a duty to account — as happens if a fiduciary whose sole role is to advise, like a solicitor or stockbroker, makes a secret profit from his or her fiduciary position.[39] For such a person, an alternative explanation has been found for why the duty to account exists; namely, that the duty is a consequence of the solicitor or adviser owing a duty of undivided loyalty. Such a duty of undivided loyalty can equally explain the duty to account owed by fiduciaries who *do* hold property, like the fiduciary agent or the trustee. But it is not a significant problem for Watson's thesis that it cannot explain all the situations when a duty to account arises. Its value lies in providing a principled justification for why a duty to account could be recognised in some situations, including some where such a duty is not currently recognised. Nor is it a significant problem for Watson's thesis that an explanation, other than his, can sometimes be given for why a duty to account exists in a particular type of situation: there is no reason to believe that, when a person in a particular fact situation has an obligation to act in a particular way, the law requires that there be only one reason why that obligation exists.

Watson's thesis about when obligations to account can arise has the significant advantage that it depends on a concept that judges have used to explain the outcome of cases — that property is held to the use of another — rather than the conceptual apparatus of their own devising that some restitution scholars use to explain the outcome of cases. It is one that is independent of the familiar taxonomic divisions of private law into tort, contract, equity and restitution. It accepts that a particular relationship could be both one where there was an obligation to account, and also obligations arising from trust or contract or tort. But, just as obligations in trust and contract can coexist,[40] and contractual obligations can coexist with fiduciary obligations,[41] there is no reason why obligations to account cannot coexist with obligations deriving from other sources in the law.

A particular consequence of an obligation to account being conceptually separate to obligations arising from other sources in the law is Watson's contention that it is wrong to ask whether an account of profits is available *as a remedy* for a tort, or for a breach of contract. Indeed, his historical account of the different types of writs from which arose the old action for account, and the modern actions of tort and contract, shows the inevitability of a conclusion that the only remedy for torts and contracts is damages — actions for tort and contract each sprang from *ostensus quare* writs, the whole point of which was to recover damages. Rather, Watson

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38 *Attorney-General v Cocke* [1988] 1 Ch 414, 419–20.

39 Similarly, it sounds fairly odd to say that a company director holds his or her office, or any of his or her powers as a director, to the use of the company, yet the director is clearly accountable for profits made from abuse of his or her position. And a company promoter might not hold any property at all that could be said to be held to the use of the company, yet is accountable for profits made by abuse of his or her position.

40 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, 581–2.

41 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 97.

suggests, one should ask whether a particular fact situation in which there *has been* a breach of contract, or a tort, is *also* one where an obligation to account has arisen.

That suggestion will provide a potentially very fruitful basis for analysis and development of the law. Already the law conforms quite closely to his contention concerning remedies available when there has been the type of trespass to land where the defendant has severed and removed minerals from the plaintiff's land without any right to do so. In such an action, an account is ordered of the amount of minerals obtained, and of its value, calculated after giving the defendant an allowance for its costs in bringing the ore to the surface, but no allowance for the expenses of getting it.[42] This award of damages ascertained through an account of profits is made on the basis that 'the Defendant being a trespasser, and having converted into a chattel that which was part of the freehold, the freeholder or reversioner was entitled to the chattel so converted at the moment it became a chattel'.[43] Such an action has been held to be not in substance an action *in* tort, but rather an action of account to recover the benefit that the tortfeasor had received through the tort.[44] Even at a time when tort actions did not survive the death of the tortfeasor, such an action could be brought against the estate of the tortfeasor if 'property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or monies'.[45]

Another type of tort where Watson's thesis could arguably provide a basis for an account of profits is the type of trespass to goods or land where the defendant has completely taken over the plaintiff's property (which is fairly closely analogous to theft). His analysis avoids the need for the conceptual awkwardness that is involved in assessing the plaintiff's damages for trespass as the fee that the defendant would have paid to acquire consensually the right to which it has helped itself.[46] It could possibly apply where there had been deceit, if it was of a type whereby the defendant obtained some property of the plaintiff, and the plaintiff elected to rescind the transfer on the basis of misrepresentation. It might even extend to injurious falsehood, if the result was that the defendant obtained the benefit of the entire goodwill of the plaintiff.

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42 *Jegon v Vivian* (No 2) (1871) LR 6 Ch App 742, 760–62; *Phillips v Homfray* (1871) Lr Ch App 770, 775–6 gives the full text of such an order.

43 *Jegon v Vivian* (No 2) (1871) LR 6 Ch App 742, 760.

44 *Phillips v Homfray* (No 2) [1892] 1 Ch 465, 470, 473.

45 *Phillips v Homfray* (1883) 24 Ch D 439, 454 (Bowen and Cotton LJJ). In *Phillips v Homfray*, inquiries had been ordered during the lifetime of the tortfeasor of the value the tortfeasor had received through using underground passages and airways through the plaintiffs' land for the benefit of his own adjoining mine: *Phillips v Homfray* (1871) LR Ch App 770, 776. However, those inquiries were not permitted to continue after the death of the tortfeasor: they were held to be in substance to ascertain compensation for tort concerning which an action of account was not available, because the defendants had not actually received any property of the plaintiffs: *Phillips v Homfray* (1883) 24 Ch D 439, 455, 458, 463.

46 See, eg, *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490; *Gaba Formwork Contractors Pty Ltd v Turner Corporation Ltd* (1991) 32 NSWLR 175. There is a query whether it would apply concerning conversion. The nub of conversion is that the defendant has converted the goods in question to *his or her own* use, so how could the plaintiff consistently allege that they were held to his or her (the plaintiff's) use?

One situation where there has been a breach of contract and Watson's theory could justify an account of profits is where the plaintiff has transferred property under the terms of the contract and the contract has been validly terminated. In *Foran v Wight*,[47] a contract for the sale of land was validly terminated, and the purchasers were entitled to recover their deposit not as damages, but on the basis that it was money paid for a consideration that had totally failed.[48] In that situation, if the deposit had earned interest, or otherwise been put to profitable use, there is some intuitive attraction in the plaintiff being entitled to recover those profits, subject to just allowances, as well as the capital amount.[49] Another situation may be where the plaintiff has granted the defendant a contractual licence to use some of the property of the plaintiff, in particular ways, and the defendant has made profits by using the property in some other way.

The theory could also find application in equity's exclusive jurisdiction. For example, say X received particular property subject to an equitable personal obligation about how that property will be used. If X not only failed to perform the obligation, but used the property contrary to the obligation and in a way that resulted in a profit that could not have been earned if the obligation had been performed, it seems right, in principle, that there should be an account of profits. But not all unperformed equitable personal obligations would give rise to an account of profits. There would be no occasion for an account if X received $Y subject to an equitable personal obligation to confer some benefit on P where there was no obligation to use that particular amount of $Y to confer the benefit.

Any counsel attempting to use Watson's theory in litigation to justify an account of profits when there had been a tort, breach of contract or breach of a non-fiduciary equitable obligation would need to take into account any previous case law that had not awarded an account of profits in a comparable situation. Often it would be necessary to pay close attention to how such cases had been argued, to demonstrate that they could be distinguished on the basis that the argument that there was a freestanding right to an account had not been put. But this book provides a substantial basis for believing that there will be some occasions when the attempt will succeed.

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47 (1989) 168 CLR 385.

48 Ibid 432 (Brennan J), 438 (Deane J), 455 (Dawson J), 459 (Gaudron J).

49 There is analogical support in *Powell v Powell* (No 3) (1875) LR 9 Eq 422, 425 in which a purchaser under an invalid contract was entitled to the proceeds of the investment of a deposit 'not in the shape of interest, but on the ground that it is his own money, and that he is entitled to whatever it has produced'. See also *In Re Thomas* [1911] 2 Ch 389, 397 in which a purchaser was entitled to interest earned on a deposit he had paid when a condition precedent to the contract failed.