BREACH OF TRUST EDITED BY PETER BIRKS AND ARIANNA PRETTO [Oxford: Hart Publishing, 2002. li + 405 pp (including index). Hardback: £50.00]

The first English text to focus on the subject of breach of trust, its stated objective is to modernize the learning on breach of trust. This exercise in modernization, according to the editors, is intended not so much to effect "profound substantive reform [as to provide a means of] escape from the obscurity of the language and patterns of an earlier age." The emphasis surely is on "profound" for although the authors do not suggest any drastic overhaul of the trust institution, some of the suggestions for future development cannot be described as anything other than substantial.

According to the editors, the principal foci of the book can be broadly divided into five. They are (1) the achievement of a better classification of breaches of trust; (2) the streamlining of the language of remedial rights arising from breaches; (3) the explanation of the behaviour of proprietary rights upon the misapplication of assets; (4) the overhaul of the law and language relating to the liability of third parties who deal with trustees in breach; and (5) the revision of the different mechanisms which curb or reduce the liability of trustees.

These foci are covered over 12 chapters, each written by a different specialist. Broadly, Chapters 1 to 3 ("Liability" by Chambers, "Duty of Care" by Getzler, "Conflicts" by Simpson) relate to the first two, the third is dealt with in Chapters 4 and 5 ("Overreaching" by Fox, "Transfers" by Smith), Chapters 6 and 7 ("Assistance" by Mitchell, "Receipt" by Birks) deal with the fourth and the remaining five Chapters ("Exemptions" by Penner, "Excuses" by Lowry and Edmunds, "Consent" by Payne, "Limitation" by Swadling, "Laches, Estoppel and Election" by Watt) cover the fifth, though there is a fair bit of overlap since none of the concerns are entirely separable. The concluding Chapter ("Overview" by Hayton) provides an overview and, together with the Preface by the editors, serve as nice bookends to the 12 chapters. Some of the material is altogether new and represent a rare modern treatment of a particular aspect of breach of trust (*eg*. Chambers' treatment of "Liability"). Others update and summarise existing literature on particular issues (*eg*. Birks' chapter "Receipt").

Although the book benefits from the wealth of knowledge of multiple authors, it does suffer from some of the drawbacks inevitably associated with such a work. Although much effort has clearly been put into organising the materials in a logical fashion and ensuring that readers can see the

relationship between chapters by appropriate cross-referencing, the book does sometimes read like a collection of essays. Certain themes are not developed in a uniform manner. For example, Lionel Smith stresses the dual proprietary and obligational aspects of the trust whereas Penner seems to treat the two aspects as being in competition. Another example is the difference in treatment by Penner, compared with Lowry and Edmunds, of Millett LJ's identification of loyalty as the core fiduciary duty of a trustee in *Armitage v Nurse* [1998] Ch 241. These differences in treatment are due perhaps to the demands of the particular context but it may be confusing and disconcerting to an unsuspecting reader.

Individually, every chapter is immaculately written and bears repeated reading. I found the treatment of historical developments particularly helpful since very often, confusion and misunderstanding arise from a failure to appreciate how the law developed to its present state. Without exception, each chapter clearly details the issues which bear examination and the analyses of those issues are uniformly enlightening. That is not to say that the analyses are uncontroversial and indisputably correct. For example, I remain unconvinced of Birks' analysis of tracing and "knowing receipt" liability in unjust enrichment terms. Despite his fair and incisive treatment of opposing analyses, there remain arguments which do not appear to have been raised in the academic literature which throws some doubt on Birks' unjust enrichment analyses.

For example, central to Birks' analyses of both tracing and "knowing receipt" in unjust enrichment terms is the need to firmly establish ignorance as an unjust factor. However, no court to date has explicitly accepted this controversial unjust factor, perhaps because of a number of unarticulated obstacles. Departing from the equitable focus of the book, the role of ignorance as an unjust factor at common law is extremely dubious. Where the enrichment occurs through the transfer of property, ignorance overlaps largely with the tort of conversion. Its role is largely residual and then only if Lord Goff's reasoning in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 is correct — viz that a plaintiff cannot, after a successful tracing exercise, sue the holder of the traceable proceeds for a wrong but can only do so in unjust enrichment.

It is also significant that there has been a gap in the analysis of ignorance as an unjust factor since there is little consideration of the case where the enrichment is the result of the performance of a service. Where this overlaps with an established tort such as trespass, there is little difficulty with suggesting an alternative analysis using unjust enrichment. However, if ignorance is to be an independent cause of action, then it must be capable of existing apart from any wrong. Unfortunately, this is precisely where ignorance begins to flounder. Should a football fan who watches his favourite team play from the balcony of his flat be liable in unjust enrichment? There will be little question of his liability if he had sneaked into the stadium secretly without paying for a ticket since he will be a trespasser. But surely it cannot be correct to find him liable for watching the

match from his own home. If ignorance is an unjust factor and the football fan is not to be liable, then surely an explanation is in order and for the present, none exists.

Addressing more specifically Birks' formulation of tracing (or substitution, to use the updated language favoured by the author) in unjust enrichment terms, a further difficulty arises. Take the following example. X steals Y's car and sells it to Z for $100,000. Although it is tempting to suggest that X has been enriched at Y's expense since X would not have obtained the $100,000 without selling Y's car, closer examination will reveal some difficulty with this analysis. The difficulty lies in a basic rule in the law of property: *nemo dat quod non habet*. Since X cannot give good title to Z, Z will have a claim against X for failure of consideration to the extent of $100,000. Since the latter claim is a clearly established claim in unjust enrichment, it seems illogical to suggest that X has been enriched to the extent of $100,000 at the expense of both Y and Z. On the other hand, Birks' rejection of Swadling's analysis of substitution in Birks ed *English Private Law* (OUP Oxford 2000) 4.477-483 as falling within the category of miscellaneous events is well-reasoned. Unlike other events in the miscellaneous category such as accession and mixture, substitution does not call out for the law's intervention. Perhaps the right answer to this neat little problem is the most radical one: substitution should not trigger any legal response. Civilian jurisdictions have survived without a similar rule; why can't the common law?

Even if one does not agree with all the views expressed in the book, the various chapters remain engaging and instructive. It is perhaps unfair to single out any particular chapter for praise but I found Charles Mitchell's chapter on "Assistance" to be most engaging and relevant. The number of issues which he manages to address expertly in the short amount of space is nothing short of amazing. The only flaw in the chapter is the absence of any discussion of *Twinsectra v Yardley* [2002] 2 AC 164. However, as the book was published before the House of Lords delivered their judgment, the author surely cannot be blamed for failing to be prescient.

Whilst excellently written, I felt that Jennifer Payne's treatment of "Consent" might have benefited from a comparison to consent in the law of tort. Chambers' chapter on "Liability" was exceptional but I felt that it deserved more elaboration, especially as so little has been written about the interaction between the trustee's liability to account and the remedy of equitable compensation. Indeed, given the paucity of modern material on the remedy of account, it would have been nice to have a more detailed account of the remedy (either as a separate chapter or as part of Chambers' chapter on "Liability") and how it operates. For the sake of completeness, a chapter on contribution between trustees could also have been included in the book.

Given the objective of the book, it is not surprising that the editors openly acknowledge that the process of modernization cannot be achieved overnight, nor by the book itself. This is surely correct and it is hoped that

other scholars will rise to the occasion and challenge some of the ideas put forward in the book. These are exciting times indeed for the law of trusts and the book serves as a welcome addition to the literature. Perhaps a little too daunting for a law student unfamiliar with the law of trusts, almost everyone else interested in trust law will benefit from the scholarly discussions in the book. The book is required reading for any serious practitioner or scholar of trust law and any library without a copy cannot seriously suggest that its collection on trusts is complete.

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