Commercial Remedies: Current Issues and Problems EDITED BY ANDREW BURROWS AND EDWIN PEEL. [Oxford: Oxford University Press, 2003. xxxv + 304 pp. Hardcover: £65]

According to Lord Nicholls in the Foreword, "[t]his is a valuable book [and] should be compulsory reading for all lawyers concerned with business disputes." (at p. v). This is certainly high praise and while the book does raise many pertinent issues which all lawyers should familiarise themselves

with and the unique format providing both an academic and a practitioner-oriented perspective makes it even more valuable, this reviewer could not help but notice that a significant number of issues were not discussed in as much detail as they deserved. However, given the ambitious scope of the book and, reflecting the source of its contents, its comparatively small size, this could hardly be helped.

Commercial Remedies collects the papers presented at and reports on the proceedings of the sixth Oxford-Norton Rose colloquia. The structure of the book is intended to follow the structure of the proceedings: a paper written by a member of the Oxford Law Faculty is followed by a comment by a solicitor from Norton Rose which is in turn followed by a short review by the editors of the key issues discussed at the colloquium. Although that reflects the general structure of each topic, there are some differences in the manner in which individual topics are discussed within this loose structure, the most evident being that while most of the comments by the practitioners were very short pieces ranging from three to four pages, three of the comments took the form of full-length papers. Furthermore, the approaches taken in the practitioner comments range from direct critiques of the academic paper to the application of an entirely different perspective to the topic altogether. Even where it takes the form of a critique (whether in part or in its entirety), the comments rarely engage in a direct discussion of all the issues raised in the academic paper given the disparity in length between the academic papers and the practitioner comments.

One advantage of the format of the book, derived as it is from the structure in which the colloquium was planned, is that the reader is given the benefit of both an academic's as well as a practitioner's perspective. The editors of the book also deserve praise for eschewing a general introduction in favour of short reviews after each pair of papers. The benefit of having short reviews over a general introduction is that the reader is given an insight to the discussions at the colloquium. These short reviews often prove to be most enlightening, especially where the academic paper and practitioner comment take dramatically opposing views. However, the unavoidable result of their short length is that the positions of the participants are not infrequently merely recorded without any reasons being proffered in support, making assessment difficult and diminishing their value.

Following this three stage format, there are essentially eight topics grouped into three parts. Part A, focusing on compensation, consists of three parts on issues of assessment in compensatory damages, limitations on compensation and an extensive review of the *SAAMCO* case (referring to *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.* [1997] A.C. 191, also known as *South Australia Asset Management Corp. v. York Montague Ltd.*), each comprising three chapters (following the paper/comment/review structure). Part B, focusing on restitution and punishment, consists of two

parts and six chapters on restitution and punishment for wrongs as well as restitution for unjust enrichment. Part C comprises the rest of the topics discussed at the colloquia and comprises three unrelated topics written in nine chapters, on agreed remedies, the relationship between private law remedies and the Human Rights Act 1998, and the relationship between conflict of laws and commercial remedies.

The scope of each of the eight topics demonstrate an extremely diverse approach to the theme of the colloquium. Some of the topics are exceedingly focused. For example, Mr. Peel's chapter on "*SAAMCO* Revisited" and Mr. Butler's comment "*SAAMCO* in Practice" focus on the ramifications of *SAAMCO* and subsequent case law dealing with the issue raised therein. Others are rather more diverse. For example, Mr. McKendrick's chapter on "Breach of Contract, Restitution for Wrongs, and Punishment" and Mr. Eastwood's comment deal with developments in both the remedies of account of profit as well as punitive damages. Indeed, Prof. Birks in his chapter "Restitution of Unjust Enrichment" takes perhaps the greatest liberty by adopting a broad definition of "remedy" and taking the opportunity to discuss some aspects of unjust enrichment that most readers would not regard as remedial.

It is perhaps inevitable that the topics which focused on more than one issue, while raising greater awareness in terms of breadth, will likely prove less engaging to a reader. For example, Prof. Birks in his chapter discusses such disparate issues as the continued relevance of estoppel as a defence to a claim in unjust enrichment with the development of the change of position defence, the distinction between mistakes and mispredictions, the significance of the continued validity of a contract for a claim on the ground of failure of basis to the defence of passing on as well as many other issues. Whilst all the issues were interesting and the discussions, while short, scholarly, the paper suffered from a lack of focus.

By way of contrast, Mr. Briggs' chapter on "Conflict of Laws and Commercial Remedies" proved to be more engaging as a result of its narrower focus. This reviewer found his argument that remedies should, like substantive issues, be governed by the relevant *lex causae* rather than the *lex fori* (this old rule being premised on the footing that remedies were procedural and therefore fell within the rule that procedural issues were governed by the *lex fori*) to be most convincing. It demonstrates a trend that the traditional dogmatic approach to choice of law rules is giving way to a more rational and well-thought system. It is this reviewer's opinion that the rule that procedural issues are governed by the *lex fori* as it has traditionally been applied has always been overextended. In a limited field, the rule is eminently sensible. A litigant, for example, could not expect a Singapore court to conduct a jury trial simply because the subject-matter of the dispute is a contract governed by Californian law. The forum simply cannot be

expected to adapt its procedures to that of another jurisdiction every time a claim is governed by a foreign law. This practical reason, taken together with the consideration that whereas issues of substantive law are concerned with determining the parties' respective rights, matters of procedure often merely reflect differing methods of striking a balance between the parties in litigation insofar as they relate to the enforcement of those rights and are therefore a subsidiary concern, the rule is clearly a sensible one. However, a dogmatic application leads to absurdity. For example, rules on limitation that had to be pleaded were regarded as procedural and therefore called for an application of the *lex fori*. This extension was clearly wrong in that limitation rules, whatever their form directly affect the litigants' rights rather than the manner of their enforcement. Furthermore, their application would not cause undue difficulty to the forum unlike a truly procedural rule such as a right to a jury trial. The same can be said of many remedial rules.

Quite apart from the fascinating reading resulting from the different perspectives reflected in the academic papers as compared to the practitioner comments, perhaps one of the most significant comments, dealing specifically with the law of restitution, made in the course of the discourse between academics and practitioners is that made by Mr. Calnan in his chapter on "Proprietary Remedies for Unjust Enrichment". According to him:

> One of the problems with the way in which the law of restitution has developed over the last twenty-five years has been that there have not only been rapid developments in the law, but also wholesale changes to the vocabulary by which the underlying concepts are described. Indeed, a practitioner could be forgiven for thinking that the academic developments in this area have spawned the creation of a new language produced by academics for academics, which many practitioners have not had the time to assimilate.

It is perhaps ironic that his comment on Prof. Birks' chapter demonstrates precisely such lack of understanding. The primary focus of his chapter lies in the issue of proprietary claims for unjust enrichment and his principal disagreement with Prof. Birks' analysis lies in his insistence that the law of property has a role to play in determining if and when a claim in unjust enrichment triggered a proprietary response. It is perhaps most unfortunate that, like many, including Lord Millett in *Foskett v. McKeown* [2001] 1 AC 102 (at p. 127), Mr. Calnan seems to have misunderstood Prof. Birks' taxonomy of private law—in particular, his distinction between causative events and legal responses. Mr. Calnan's discussion demonstrates an instinct to associate otherwise new concepts with familiar ones. Hence, he appears to regard Prof. Birks' reference to property as a reference to the law of property and his reference to consent as a reference to the law of contract. In so doing, he lays a charge on Prof. Birks (that he has failed to consider the

significance of the law of property) that cannot be sustained. Although the language (property) is familiar, Prof. Birks is not using it in the traditional sense of referring to the law of property, which is a study of both the content of property rights as well as the causative events that trigger such rights or result in their transference or extinction. Therefore, in Prof. Birks' schema, the consideration of if and when unjust enrichment triggers a proprietary response, would be as much a consideration of the law of property in the traditional sense as a consideration of when a gift of property (being an incident of consent) is effective to transfer title.

It is perhaps also this same instinct that have led to such great resistance to some of Prof. Birks' propositions amongst many academics who view the rise of unjust enrichment as some form of territorial challenge. Similar overlaps in other entrenched and well-recognised areas of law do not seem to trigger the same kinds of response. For example, academics specialising in land law do not begrudge their tort counterparts from espousing their views on the tort of trespass to land and vice versa. Indeed, such discourses will likely prove beneficial to the development of the law.

It is not evident how this problem can be resolved. It would be a retrograde step to suggest that we abandon the new language that has been developed in favour of the old (money had and received for example is remarkably opaque). The most that can be expected will likely be that care be exercised. Writers should take care to ensure that new concepts they espouse are not confused with similar or even different but familiar ones. Readers must not be too ready to associate familiar words with familiar concepts when the words are capable of bearing, and do indeed bear, a different meaning. A new edition of his classic text, *An Introduction to the Law of Restitution* (1989), would do much to ease the confusion that some readers have with Prof. Birks' many writings since few would have kept pace with his prodigious wealth of articles and notes.

Whilst on the topic of desired publications, this reviewer eagerly awaits the publication of some of the unpublished Oxford D. Phil. theses referred to in the course of the book. In particular, Dr. Steven Elliott's thesis considering the relationship between the ascendant remedy of equitable compensation and the historical and much-ignored remedy of account (not being the remedy of an account of profit) and Dr. Yeo Tiong Min's thesis on equitable choice of law rules should shed light on some very obscure issues.

It remains to be said that *Commercial Remedies* should certainly be of interest to any lawyer interested in commercial law. It raises a host of important issues, both old and new, that no commercial lawyer should be ignorant of and even where an issue is not discussed exhaustively, it provides a good starting point for both research and reflection.

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