Equity, Trusts and Commerce BY PAUL S **DAVIES** AND JAMES **PENNER**, eds [Oxford and Portland, Oregon: Hart Publishing, 2017. x + 368 pp. Hardcover: US$170.00]

Equity, *Trusts and Commerce* is a collection of 14 essays that were first presented at a conference of the same name held at the National University of Singapore, Faculty of Law in April 2016. All 14 contributors are leading experts. All 14 papers are focused on the interplay and interaction of equitable doctrines with commerce. This is undoubtedly a very timely and important contribution to the debates on modern equity. Recent cases from the highest courts of various common law jurisdictions demonstrate a clear need for judges, practitioners and academics to directly grapple with the influence of the commercial context on the development of equitable principles and doctrines. Locally, in Singapore where this pre-eminent conference was held, the establishment of the Singapore International Commercial Court could hasten the maturing of the discourse on the interaction between equity and commercial law.

As the editors, Davies and Penner, acknowledge, "[t]he topics encompassed by 'equity', 'trusts' and 'commerce' are, to say the least, many and varied, as this collection attests" (at p v). The essays indeed span a wide spectrum of commercial topics, including company law, agency, performance bonds, sale of goods, intermediated securities, mergers and acquisitions, *etc*—in sum brewing a richness that will leave readers in deep contemplation. Crucially, the width of the spectrum reminds the readers that the reference to the "commercial context" in case law and literature should not be read as a singular context. The commercial world in practice is multifarious, comprising the corporate context, the sale of goods context, the professional services context, the financial markets context, *etc*. Whilst these different types of commercial settings undoubtedly share some common features, it is meaningful, as the quality of the essays demonstrates, to investigate each specific context for new insights. Indeed, each essay provides a crystalline explanation of the relevant commercial context and highlights significant connections and patterns that are not immediately apparent.

Although the essays are not formally divided into sections, the editors have discussed them in informal groupings, organised along themes. The exception was in respect of the first three essays of the collection—they were individually introduced in the Preface. The first essay, "Equity, Shareholders and Company Law" by Tan Cheng-Han and Wee Meng-Seng, analyses the basis of equity's intervention in company law "to ameliorate the position of minority shareholders against majority rule"

(at p 5). They argue that there is a common thread running through the areas of equitable intervention: the scope of constraint is dependent on what is considered to be "within the reasonable contemplation of shareholders in the type of company in question" (at p 28). Peter Watts contributed the second essay, "Some Aspects of the Intersection of the Law of Agency with the Law of Trusts". The essay critically examines the interplay between the law of agency and the law of trusts in two aspects: trustees' delegation which involves the intrusion of agency principles into trust law; and the stitching of trusts into an agency relationship which is concerned with the converse intrusion. Remarkably, Watts attempts to differentiate the scenarios in which agency principles ought to apply and the scenarios in which trust principles ought to apply, a division that the courts do not consistently draw in case law. The third essay, by Tang Hang Wu, "Equity in the Marketplace: Reviewing the Use of Unconscionability to Restrain Calls on Performance Bonds", considers the application of the "unconscionability" ground—a departure from English law—to restrain calls on performance bonds in Singapore. What is refreshing is that Tang's methodology incorporates an empirical angle comprising (1) a comprehensive review of Singapore decisions; and (2) a survey of Singapore-based construction practitioners. Relying on the results of his empirical analysis, Tang offers tentative conclusions on the problems with the exception and the impact on practice in this area of the law.

Although these first three essays seem to cover very different grounds and vary in methodologies, they may be unified by the broad theme of equity's role in restraining abuse. The theme evidently lies at the heart of the essays by Tan and Wee as well as Tang. The theme also arises indirectly in Watts' essay which discusses, for example, the interplay and distinction between lack of authority (agency) and breach of trust; the stitching of trust duties to agency relationships to ensure the principals' monies are safeguarded.

The next group of essays is focused on the fundamental issues of intention and identification of property. Michael Bridge's essay, "Certainty, Identification and Intention in Personal Property Law", explores intention and identification of property from the general perspective of establishing the existence of a property right. Bridge brilliantly analyses the complex distinction between certainty of an identified source of property rights and certainty of intention to create a type of property right, injecting clarity to a subject that has rarely received in-depth treatment notwithstanding its practical significance. In "Floating Trusts", Robert Stevens considers intention and identification of property from the narrower perspective of trust creation and the issues are examined in the context of the Lehman Regulation and Administration of Safe Custody and Global Settlement ("RASCALS") decisions: *Re Lehman Brothers International (Europe) (in administration)* [2010] EWHC 2914 (Ch); [2011] EWCA Civ 1544. He highlights the difficulties arising in the context of intermediated securities and more specifically, the context of the RASCALS procedure. The last paper in this group is James Penner's contribution, "'Sort of' Backwards Tracing". Penner says that the logic of Conaglen's objection to backwards tracing is not without limits, and the point can be readily illustrated if one were to turn to the sale of goods context. He points out that what is often missed is that where goods are delivered under a sale contract either prior to the payment of contract price or after, the delivered goods are not the traceable proceeds of the money used to discharge the debt (contract price), but the traceable proceeds of the vendor's executory promise to deliver them. His

illuminating analysis of the case law dealing with backwards tracing (distinguishing between direct and indirect claims) and the comparison with subrogation direct readers' attention to new connections and distinctions. Penner's chapter is not "merely a first step", as the author so modestly claims, in the direction of deeper understanding; it is a confident stride in the right direction.

The next group of essays deals with contemporary issues in trust enforcement. In "Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures", Richard Nolan discusses the standing of objects of a dispositive fiduciary power, the objects of a mere power and a protector to invoke the inherent administrative jurisdiction of the court to enforce a trustee's duty to replenish the trust fund. Nolan stresses that the approach of the law in this regard is pragmatic, evidencing the influence of practice on judicial law-making. Building on the principle that the court's inherent jurisdiction is the enforcement mechanism available to one member of the group for the enforcement of obligations owed to the entire group, Nolan adeptly turns to recent English developments on equitable compensation for breach of trust and argues that these decisions are perfectly consistent with equitable accounting. Simon Douglas's essay, "Trusts, Objectivity and Rectification", speaks to the theme of trust enforcement indirectly, as rectification is concerned with giving effect to the settlor's actual intentions, and thus enables the enforcement of the intended trust. He makes a formidable argument that the authorities support an objective model of rectification and stresses that many of the cases that seemingly support a subjective model should be regarded as cases of rescission instead. The third paper in this group is Elaine Chew's contribution, "The Arbitrability of Trust Instruments: Why Not?". It examines the advantages and risks of resolving trust disputes through arbitration and concludes generally in favour of arbitration of trust disputes. There is also an interesting link between Chew's essay and Nolan's essay, as Chew's essay discusses the issue of the transfer of the court's inherent administrative jurisdiction to a non-judicial dispute resolution mechanism.

The last five essays are focused on the remedies available to a principal against his/her errant fiduciary and the third parties who participated in the fiduciary's breach of duty. All five essays seek to shed light on what is the best way to understand the nature of the equitable liability that is being imposed. The conclusions in the five essays are clearly shaped by the contexts which the contributors have picked to develop their theses and therefore do not necessarily agree. For this reason alone, this last group of essays makes a compelling read. Paul S Davies' "Bribery" offers readers a comprehensive legal picture on remedies for bribery, against both the fiduciary and the briber, by considering the criminal offence and ensuing penalties, as well as how criminal law interacts with civil law and informs the availability of a personal remedy in equity. Within the space of a book chapter, the essay masterfully discusses a very broad range of remedies and intricate legal issues, without compromising on the depth of analysis. This essay answers many questions arising on both doctrinal and practical levels. Taking on a comparative approach, Deborah A DeMott, in "Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach", argues that the differences in taxonomic organisation of accessory liability under United States law (situated in tort generally) and English law (depending on the primary wrong) account for the differences in doctrinal requirements to establish liability. To illustrate the contrasts, her essay details the

application of the United States' accessory doctrine to investment banks who are in the roles of both financing purchasers as well as advising target companies' boards in the mergers and acquisitions context. The third essay in this group, "Equitable Liability of Corporate Accessories", is contributed by Jamie Glister. It scrutinises equitable accessory liability in the context where the accessory is a corporate body. Glister argues that there are two models of analysis—the "same actor" model and the "separate actor" model—and the choice of the applicable model would lead to differences at the remedial stage. Glister's essay echoes the theme underlining the recent Australian decision of *Great Investments Ltd v Warner* [2016] FCAFC 85: we need to rethink if principles developed in the trust context can be transplanted wholesale into the corporate context. William Swadling's essay, "The Nature of 'Knowing Receipt"', provides a fresh angle of analysis to the long-running debate on the nature of knowing receipt liability. On his account, receipt is not the gist of "knowing receipt", and this strand of equitable liability should be properly analysed as part of the wider equitable wrong of "inconsistent dealing". In his words, "[s]uch wrong is committed when the recipient deals with the right in a way which he knows is inconsistent with the terms of the trust on which they were originally held, or to which fact he deliberately closes his eyes" (at p 330). The last essay, but certainly not the least in terms of quality, is contributed by Sarah Worthington. In "Exposing Third-Party Liability in Equity: Lessons from the Limitation Rules", Worthington proposes understanding the nature of liability for knowing receipt and dishonest assistance by considering them within the limitations context, having regard especially to the Supreme Court decision in *Williams v Central Bank of Nigeria* [2014] AC 1189 (SC). Differing from Swadling's views, Worthington's conclusions are that dishonest assisters are fiduciaries; and recipients are trustees on innocent receipt of the misapplied property but they become fiduciaries on acquiring the requisite degree of knowledge.

In the past, lawyers spoke in the language of equity's *intrusion* into or *intervention* in commercial law (see *eg*, observations in Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 LQR 238; PJ Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214). We are now clearly in a new phase of understanding. The law has developed. Our inquiries are different. It is becoming increasingly clear that equitable doctrines do not operate or develop in isolation from the context. *Equity, Trusts and Commerce* profoundly advances our understanding of the various commercial contexts and its interplay with equitable principles. Judges, scholars and practitioners working in the areas of equity and commercial law shall find the collection enlightening and enriching. It is hard to imagine that any law library, public or private, will not have a copy in its collection.

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