

## Foreword to “The Law of Tracing”

By Jordan English and Jaamae Hafeez-Baig

Federation Press, 2021

There is a vitality about this excellent new text on the law of tracing that reflects the authors’ relative youth: one is a junior barrister in practice in Queensland; the other is a stipendiary lecturer in law at Oxford University. In 2020 and 2019 respectively, both graduated with distinction in that most rigorous and demanding of postgraduate law degrees – the Oxford BCL. That distinction continues with the publication of *The Law of Tracing*. It is engaging, thorough, scholarly and extremely well written.

Tracing is a most important topic in commercial law. It is also extremely complex (perhaps unnecessarily so) and not as well understood as it should be. This is partly because it does not fit comfortably within the modern legal syllabus. Tracing is, as the authors accept, neither a claim nor cause of action nor a remedy. It is widely understood to differ as between common law and equity (although the authors argue that, properly understood, there should only be tracing in equity). As a topic, tracing may be touched upon in courses in equity: *Meagher, Gummow & Lehane* treats the subject but briefly and in passing whilst *Jacobs’ Law of Trusts* confines its consideration to trust property. Professor Birks laid claim to it, describing the exercise of “identifying the surviving enrichment” as tracing in his *Introduction to the Law of Restitution* and, to similar effect, Justice Edelman and Professor Bant argue in *Unjust Enrichment* that tracing forms part of that subject. Aspects of the law of tracing may be taught in or touched upon in specialised courses on banking and insolvency. Tracing is never taught, however, as part of the law of evidence although that is the “realm” in which Lord Steyn in *Foskett v McKeown* said that it belonged. If it belongs anywhere, it is probably in an extended course on the law of property (and there is little doubt that the present authors would share that view) but the complexity of the topic means that it is unlikely to feature prominently in any undergraduate course on that subject.

Another reason why tracing is not as well understood as it should be is that, until Lionel Smith's pathbreaking work – also entitled *The Law of Tracing* – was published less than 25 years ago, very little had been written on the subject and certainly no specialist monograph seeking to understand and explain tracing in a coherent manner. Smith's explanation, viz. that the law of tracing did not involve the tracing of things but, rather, value, was embraced by the House of Lords in *Foskett*. His scholarship and the renewed appreciation of the significance of the subject has also stimulated much secondary literature including three recent texts in addition to this book: Aruna Nair's *Claims to Traceable Proceeds* (OUP, 2018), Magda Raczynska, *The Law of Tracing in Commercial Transactions* (OUP 2018) and the eponymous *Ong on Tracing*, also published by Federation Press in 2019.

The ambition of the present work is clearly stated. Whilst acknowledging the intellectual significance of Professor Smith's analysis and its influence throughout the common law world, the authors claim that the subject is still under-theorised and in doctrinal disarray, arguing that until there is a persuasive account of what tracing is and why tracing is permitted, "we will continue to struggle with our analysis of the subject and its relation to other parts of the law". The costs of this are identified as continuing uncertainty and the risk of falling into error in novel cases. With a masterful grasp of the case law, the authors engage with all the leading cases and are not afraid to criticise what they see as doctrinal confusion in particular areas. Part of their thesis is that tracing is only available in equity and *Taylor v Plumer* is explained as in truth a case about tracing in equity. The authors explain how, in certain circumstances, equitable tracing can be used in support of actions for money had and received, with liability being retention-based rather than receipt-based. Although arguing strongly against the case for tracing at common law, the authors recognise that the distinction continues to exist at least in England and thus the book supplies in a clear way the "rules" in relation to tracing both at common law and in equity. The broad thesis of the book is that tracing is about the unauthorised use of rights (the original rights) to acquire or create new rights (the substitute rights) in circumstances that, generally speaking, must amount to a substitution. This is not said to be a response to unjust enrichment.

This book may be read both as a monograph on an important subject in commercial law as well as serving as an invaluable text for practitioners, offering specialist guidance through the thickets of commercial complexity in which tracing problems invariably arise. These are often as a result of fraudulent misappropriation which generates claims and disputes as to such property as may survive and be able to be identified. Apart from an account of the rules of tracing at common law, the book also includes chapters on “Pre-requisites to Tracing in Equity” (including a valuable discussion of the differences between duties of stewardship and fiduciary duties in the strict sense), “Equitable Tracing Rules”, “Hard Cases” and “Bars to Tracing”. The chapter on “Equitable Tracing Rules” contains a logical division of the possible cases (no mixing; mixing between wrongdoer and innocent claimant; mixing between innocent claimants) and examines the different potential issues arising in relation to them (evidential uncertainties; allocating rights; attributing rights in bank accounts). As illustrated by the New South Wales Court of Appeal’s decision in *Caron v Jahani (No 2)* which is discussed in a section dealing with tracing into mixed funds and the lowest intermediate balance rule, ponzi schemes supply a fertile field for tracing analysis. The chapter concerning what the authors describe as “hard cases” includes tracing into improvements to land or chattels; tracing into insurance proceeds; tracing into the payment of a debt; and so-called “backwards tracing” more generally. The discussion of this last topic and of the Privy Council’s decision in *Durant International* is clear and useful.

Readers are assisted by clear sub-headings throughout and the work is replete with reference to recent decisions, principally but not exclusively from Australia and England, together with much of the recent secondary literature. The authors also write with great clarity and the exposition is assisted by the regular use of examples.

Finally, something should be said about the importance of good textbooks in a legal practitioner’s library in the modern “online” world. In that world, there is, of course, no such thing as an unreported decision and practitioners have instant and frequently free access not only to all decisions of superior courts in their own jurisdictions but also in many, many other jurisdictions, both within Australia and throughout the common law world. That is at once a boon and a burden. On the one hand, ready and rapid access to judicial decisions from around the globe means that the store of knowledge is vast

but, on the other hand, the volume of case law is such that its comprehension and absorption by the busy practitioner will often be impossible. This makes it all the more imperative for practitioners to build professional libraries of well written texts so as to be able to draw upon the clear and up to date distillation of principle and authority. Federation Press has been at the forefront of publishing such texts of which *The Law of Tracing* is an outstanding example.

This work will be invaluable to commercial practitioners (and judges) throughout the common law world. It is a work of great substance and its authors are to be congratulated on both their initiative and the impressive depth of their scholarship.

Andrew Bell  
President  
New South Wales Court of Appeal  
21 June 2021