BOOK REVIEW

DIMENSIONS OF PRIVATE LAW. By Stephen Waddams [Cambridge, CUP, 2003. Paperback (with index) 247pp].

At conferences and seminars one of the usual ice-breakers in conversation over dinner, coffee or drinks is "[w]hat is your field?" Among private lawyers the answer may well be "Contract", "Tort", "Restitution", or "Property". This collection of essays tells us that these are inadequate responses. In fact even "Private Law" could prove to be an inadequate answer to the question. The main theme of this collection, apparently a reflection upon a lifetime's work, is that categories and conceptualisation, for all their utility, also have their limitations. There are echoes of Dawn Oliver's work on the Public/Private Law divide in this thesis. Categories are not attacked as such and their value as tools of analysis is acknowledged. The principal problem with them is that they cannot always be reconciled with the authorities and the historical evidence. Not all cases are exclusively "Contract", "Tort", "Restitution" or "Property"; or even exclusively "Public" or "Private". One often needs to be able to appreciate how a case encompasses elements of more than one category, sometimes extremely subtly, before the court's reasoning can be understood. Sometimes claims made about certain concepts in the law do not entirely withstand analysis when it is sought to reconcile them with the precedents. Professor Waddams makes extensive use of historical approaches to his analysis. Sometimes this is just pointing out how other authorities suggest there may be more to the issues than first meets the eye. Sometimes the factual background to a case is examined to demonstrate that the designation of the case as belonging to one exclusive category is over-simplified. No attempt is made to de-construct the subject matter. In many respects this is a formalistic attack on the limits of formalism and one which reveals a huge breadth of scholarship and awareness of the canopy of Private Law.

Although this may make the review on the long side there seems no better way than to go through the essays one by one and show what Waddams was attempting to do. Chapter 1 on the "Mapping of legal concepts" sets out the general theme discussed in the previous paragraph. Chapter 2, "Johanna Wagner and the rival opera houses" would be fascinating to students of opera in the nineteenth century as well as lawyers. This essay, previously presented as a paper to the SPTL conference at University College London in 2000 and more fully presented at (2001) 117 Law Quarterly Review 431, involves the closest examination of factual background. It examines the frequently desperate lengths to which Benjamin Lumley, manager of Her Majesty's Theatre, Haymarket, and Frederick Gye, manager of the Royal Italian Opera, Covent Garden, were prepared to go to secure the services of the celebrated soprano, Johanna Wagner, for the 1852 opera season. Lumley first signed Miss Wagner but then Gye made her a better offer. *Lumley* v

Wagner[1] is known to Contract lawyers as the exceptional case where a prohibitory injunction was granted to prevent a contracting party from working for someone else. As a means of circumventing the settled rule of practice that specific performance would not be granted of a contract of employment Lumley was granted an injunction prohibiting Miss Wagner from working for anyone else. That left her with the choice between working for Lumley or not working at all. Waddams points out that this case cannot be fully appreciated without an understanding of its unjust enrichment element. The party who would have been unjustly enriched had this injunction been refused would have been Gye, a non-party. He had indemnified Miss Wagner against any damages she would have had to pay to Lumley if she breached her contract with him, and had calculated that this would still leave him with a handsome profit. This was how Lumley was able to show that damages against Miss Wagner would be an inadequate remedy. The subsequent case brought by Lumley against Gye himself, the case first recognising the tort of inducing a breach of contract,[2] needs to be understood in this light. It was essentially an attempt to prevent Gye from gaining at the expense of Lumley by luring Miss Wagner away from her contractual commitment to Lumley. Lumley lost at trial[3] because he could not show that Gye had intentionally induced Miss Wagner to breach her contract. The evidence apparently established that Gye believed that Miss Wagner had a legitimate get out clause in her contract with Lumley. Waddams discusses the intriguing possibility that had this fact been known at the earlier demurrer proceedings the court might have cast the test for inducing a breach of contract more in terms of negligence than intention.

Chapter 3 is entitled "Liability for economic harms". Much of this relates to third party rights under contract. To give an idea how this essay fits into the general theme of the collection the case of *Beswick* v *Beswick*[4] may be considered. The widow's suit for specific performance of the son's promise to Peter Beswick exhibited unjust enrichment features as well as contractual. Had she been required to settle for nominal damages (as administratrix the estate had suffered no loss) the son would have been unjustly enriched because he acquired his father's business at a lower price than would have been demanded absent the obligation to pay his mother the annuity. Chapter 4 on "Reliance" argues that the protection of reliance losses is largely a *sui generis* creation of the common law system because the principal categories (Contract, Tort, Restitution) cannot explain it. Contract is insufficient because there is no bargain and expectation is not the extent of protection. No tort is committed and there is no unjust enrichment. But many reliance cases combine some or all of these elements in part, albeit insufficient to categorise the case as belonging to one category exclusively. The Australian High Court decision in Waltons *Stores (Interstate) Ltd* v *Maher*[5] may illustrate this phenomenon. There was no contract because the parties intended to reduce their agreement to writing but there had been an inchoate

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1 (1852) 1 De G M & G 604.
2 *Lumley* v *Gye* (1853) 2 El & BL 216. (The contract Gye allegedly induced the breach of was Miss Wagner's contract with Lumley).
3 (1854) 18 Jur 468n.
4 [1968] AC 58.
5 (1987) 164 CLR 387.

promise. There was no tort but the representations which induced Mahon to act to his detriment were certainly analogous acts of wrongdoing. The new building Maher commenced constructing for Waltons to lease was not an enrichment because the deal was abandoned long before completion but some vague enrichment aspect was present. Chapter 5, "Liability for physical harms", shows that tort liability does not always depend on fault. Examples given include road traffic accidents where compulsory insurance has at least been partly eroded fault as a significant factor in the allocation of responsibility for most loss and damage. Another is nuisance, although this argument is contestable in the sense that the use of property in ways that cause foreseeable damage may fairly be regarded as "fault".

Waddams describes chapter 6, "Profits derived from wrongs", as "a kind of test case for classification in private law". Some writers, like Goff and Jones and Maddaugh and McCamus, treat this as falling within Restitution but others, like Birks, regard the absence of any subtraction from the claimant as negativing any restitutionary element. In the typical case of the fiduciary profiting from office without either stripping anything from the claimant or intercepting a benefit which ought to go to the claimant there are obvious problems about identifying what is "restitutionary" about requiring the fiduciary to account for it. What is being "restored" to the claimant? What is the fiduciary being required to "make restitution of"? At the same time this does not look like a tort because there is no compensatory element to the order of the court. Contract is capable of explaining many of these cases because the fiduciary has a contractual relationship with the claimant but this is not always so.[6] Property may also be a satisfactory categorisation in many cases but not in all. Once again this is an area where the fiduciary's obligations depend on a mixture of all the mentioned categories. The same theme is discussed in chapter 8, "Interrelation of obligations", where Waddams contrasts the inclusive approach of Goff and Jones (everything resting at least partly on unjust enrichment) with that of others who exclude topics not resting entirely on unjust enrichment, such as maritime salvage. Another area like this is "Domestic obligations", the subject of chapter 7. In the family property/cohabitants' cases a mixture of contract, reliance, unjust enrichment, wrongdoing, property, and public policy feed into the judicial solutions adopted.

Chapter 9, "Property and obligation", covers one of the most important questions in Private Law, especially in the context of insolvency. Is the claimant's interest proprietary or merely an obligation the defendant cannot fulfil if insolvent? The remedial constructive trust makes an expected appearance here, Waddams pointing out that whatever may be thought of this device some decisions can only be rationalised on the footing that the court awarded the claimant proprietary relief. Waddams similarly questions whether tracing is merely a process when on occasions the court has imposed proprietary consequences after tracing.[7] The overall conclusion reached in this chapter, reflecting the historical and evidence based approach of the book, is summed up in the following passage (from page 189):-

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[6] One example is where the fiduciary obligation is an equitable duty of confidence.
[7] *E.g. Chase Manhattan Bank* v *British Israel Bank (London) Ltd* [1981] Ch 105.

> "The two points of view (that equitable property rights are, and are not, discretionary) are sharply contradictory on the surface, but they can be largely reconciled for, from a historical perspective, each captures a different aspect of the relations between law and equity. Elements of both views could be combined in the following proposition: where there is a close connexion between a personal claim and particular property held by the defendant, and where the claimant has no adequate money remedy, the courts have sometimes imposed a trust or lien on the property, but they have not defined precisely the circumstances in which they will do so, and have withheld such declarations where they have been likely to operate unfairly against the defendant or against third parties."

Chapter 10, "Public interest and private right", considers the role of public policy and formal principle in the development of the law. Chapter 11, the conclusion, sums up the author's views on the value and limits of formalism and categories.

The above summary of the contents of this book cannot possibly do justice to the breadth and depth of the scholarship contained within it. It merely gives a brief indication of the subject matter for the author's analysis of the interplay between different categories in Private Law and how academic theory often struggles to reconcile precedents which do not fit the theory. This is a collection which would repay repeated study every time a reader had to consider any of the issues raised within it.

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