

**Mohammad Jaamae Hafeez-Baig (JH):** Thanks you all for coming. It means a lot to us and we both really appreciate it.

President Bell, who kindly wrote the forward, has kindly agreed to share some words of wisdom with us. I think he can hear. Yes, you are up on the screen. Take it away. Thank you.

**President Andrew Bell (AB):** All right. Well, can I begin with a declaration of envy that I am not with you in person in Brisbane, enjoying your company and hospitality and like everyone else there drinking the anticipatory royalties before they have been earned. I have poured myself a glass of red wine as an act of solidarity, as well as self-pity as I am, in Sydney.

Now, as the second dimension in my opening declaration of envy, I am also envious one of the co-authors of the book we launch tonight. Jordan English, is in Oxford enjoying all that the city of the dreaming spires has to offer, which is a great deal.

It was in Oxford more than thirty years ago that I met a young Canadian scholar, who had just finished his LLM at Cambridge, LLM of course standing for "long, lazy moments" and seeking academic rigour he had come to Oxford to write his DPhil. His name was Lionel Smith and his doctorate became the seminal work on the law of tracing. Lionel was supervised by the late Professor Peter Burke, who in the early 1990s was in his full pomp and had almost godlike status in Oxford. The Imperial march of the restitution brigade had claimed the law of tracing as part of its territory. Lionel Smith though was his own man and turned his doctoral thesis into a brilliant monograph in 1997 entitled 'The Law of Tracing'.

Lionel's work has frequently been cited, including by the House of Lords in *Foskett v McEwen*, by the Supreme Court of Canada in a series of cases, by the Queensland Court of Appeal in *Hanson v Gooboorian Transport*, special leave refused by Justice Keane and my namesake, and also by the New South Wales Court of Appeal.

So now in 2021, almost 25 years after Lionel Smith's path breaking work, we have an outstanding companion work, also called 'The Law of Tracing'. It is authored by Jaamae and Jordan, both shocking overachievers I should say, and I hope not forever lost to England's green and pleasant lands. It was a great pleasure to have been asked by the authors to write the foreword for their book and it is a great pleasure to say a few words tonight.

Now, the first thing I would say to you all is that you should all buy the book. It is a first-rate text on an important and difficult topic. It could not have been written by other than first-rate lawyers. The second thing that I would say to you as having bought the book, you should

actually read it. You will learn a great deal. It is terrifically well written and very user friendly. It very skilfully makes a very complex subject easy to understand and follow.

As I assigned the foreword to the book, tracing does not fit comfortably into the law school syllabus, or at least the undergraduate syllabus. It might be dealt with in passing in courses on equity and trusts, property, restitution, banking, insolvency or remedies, but it is too complicated a topic to be dealt with in any depth in any of these courses. It is often not dealt with at all. This means that many lawyers will encounter the law of tracing for the first time in practice. That is one of the reasons why this book is so valuable.

Much of the work of the law of tracing is directed to the ever inventive and always interesting exploits of fraudsters, as lawyers and accountants attempt to follow the money or the assets to what will invariably be a diminished pool for the creditors. Ponzi schemes are a case in point. It was in that context that the New South Wales Court of Appeal gave a lengthy judgement last year in *Caron v Jahani No.2*, which the authors are kind enough to have quoted from extensively in their book and I should add that to have done so with apparent approval. It will be obvious that I am very happy to reciprocate that approval tonight.

To author such a detailed, clear and comprehensive book as the one launched tonight at any stage of someone's career would be a very significant achievement. But the two authors to have done it at such an early stage of their respective careers is even more impressive.

This is the second book in recent years to have been co-authored by two former High Court Associates who are in practice. The other is Perry Herzfeld and Tom Prince's book 'Interpretation', which is also an outstanding work routinely cited and which should be on every practitioner's shelf dealing as it does with principles of interpretation, as they relate both to statutes, contracts and deeds. I think that this book, for practitioners, particularly commercial practitioners, should be essential reading and an essential book to have on a practitioner's bookshelf.

In the modern online world, good textbooks are increasingly important. In that online world, there is of course no longer any such thing as an unreported decision. 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, all on the click of a mouse. That is at once a boon and a burden. On the one hand, having such ready and rapid access to judicial decisions from around the globe means that the store of knowledge is vast. On the other hand, the volume of case law is such that its comprehension and absorption by busy practitioners will often be impossible. This makes it all the more important for an 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. The Law of Tracing is just such a text.

Legal texts by practitioners, in my view, are especially important as the blending of deep thinking with practical experience and close knowledge of the case law makes for informed scholarship. The many works by my friend and colleague Justice Leeming exemplify that, as did the works of the late, great Justice Bruce McPherson of the Supreme Court of Queensland.

I sincerely hope that as Jaamae and Jordan's careers progress they can produce further works of such excellence as The Law of Tracing. It is my great pleasure to congratulate them both and wish them well in their future careers, whether in academe, or at the Bar, or as I would hope in both spheres. Many thanks.

**JH:** Thank you, President Bell, for those very kind words.

Thank you to all of you for coming and supporting the launch of The Law of Tracing. We won't keep you from your drinks too long. We thought we would say a few things about the origin of the book, how Jordan and I went about writing the book and a little bit about the content of the book. I am going to try to work in a few jokes but I have realised recently that in four years of working on this book, we have not come up with a single decent joke about the law of tracing, make of that what you will. Roger Traves has asked me a few times for a reading of the book. You will be happy to know I am not going to put you through the misery of that. But there are copies sitting around if you would like to have a look.

Now, we have got Jordan up on the screen.

**Jordan English (JE):** This book started its life in 2017. I was working at King & Wood Mallesons and Jaamae was working as an associate for Justice Bond. We had both been involved in cases where tracing issues had arisen and we noticed that there was a distinct lack of text to bring a practitioner or anyone trying to understand tracing up to speed, particularly on the Australian law of tracing. There was a Lionel Smith's text 'The Law of Tracing' which as President Bell mentioned is an excellent text and a foundational text and something which we have learned huge amounts from. But it was written in 1997 and it was focusing largely on the law in England and Canada. There were some cursory treatments of tracing and texts on equity and trust. But again, for lawyers seeking to understand the law of tracing, there was very little to go on. So we had the bright idea of approaching The Federation Press with a book proposal.

Unfortunately, in the beginning, we also had the not so bright idea of our proposing that we would finish the book and complete the manuscript within twelve months. That quickly turned

out to be extreme over optimism on our part. Within a few weeks it became apparent, or I should in frankness say, it was pointed out to us, that twelve months would not be nearly enough time to produce anything worth buying, let alone reading on the law of tracing. So our twelve month project which began in 2017 turned into an almost four year long one.

**JH:** It has been a long, four years. There have been a lot of ups, a lot of downs. But one of the things that make Jordan and I work so well together is that we have quite a similar writing style so we have largely, there are exceptions, largely avoided the problem of constantly rewriting each other's prose.

One of the other things we had going for us is that because we are very good friends we can be very flexible about when and how often to discuss aspects of the book. Our conversations often ran late into the night, especially when one of us was halfway around the world and it was only mid-morning.

But I would be lying to you if I were to tell you it was all rainbows and sunshine. One disadvantage of working with someone you know very well is that when you disagree any sense of civility goes right out the window. We have had plenty of shouting matches both in person and over the phone and plenty of what I am choosing to remember as "vigorous disagreement". The happy ending to that is that on every proposition in the book where we disagreed, we were eventually able to come to some sort of compromise. We have been lucky not to be in the position to have to say anywhere in the book that Jaamae's view is this, Jordan's view is that, you the reader should decide. Funnily enough, we often find that the compromise that we reach tends to be a more compelling proposition either of us start with.

**JE:** Now, we have written this book with practitioners, judges and academics in mind. I was very glad to hear President Bell's comments reflect that. At least I hope that we have actually achieved that aim. Catering to these different audiences did require particular balance at times. It was important to us to ensure that we address the law of tracing from the practical, doctrinal and theoretical angles. We do believe that ultimately each aspect of this ultimately complements the other. In this respect, we benefited greatly from presenting ideas in a number of different formats. I know that we have given a number of CPD days in Brisbane. In fact, I suspect some of you will have attended at least some of them. We fielded many questions from practitioners. A good example of the benefit this gave to us was last year we were doing a CPD to the Queensland Bar Association and we were given an anonymous question from the audience about the mixing rules and the so-called ability to cherry pick between the rule in *Re Oatway* and *Re Hallett's Estate*. Now that very question caused us to radically rethink part of our explanation of the mixing rules and to then consequently rewrite that chapter. So what I wanted to say is, if that author happens to be out there tonight, the author of that question, thank you, because you helped us a lot.

Likewise, we have been grilled on some of the more theoretical aspects of our book when we presented it to the obligations discussion group in Oxford. We were particularly lucky there to have some esteemed guests such as Lord Burrows and Lionel Smith who were both attending that presentation and criticising, or critiquing one might say, parts of our work as it then stood. Again, we have benefited greatly from that.

**JH:** Let me say a little bit about the content of the book. The first two chapters are the most conceptual chapters. Chapter one deals with three fundamental questions. What is tracing? What, if anything, do we trace? And what is the nature of equitable proprietary rights? That last bit in particular has much broader application than just tracing but it was something we had to really grapple with in order to work out how tracing worked.

The second chapter deals with what is the single biggest theoretical question in the law of tracing which is, what is it that justifies the ability to trace and the rights which tracing generates? Here some of you will be happy to know that the answer we give is decidedly not unjust enrichment. Others may be less happy about that.

The third and fourth chapters are directed at common law tracing. In chapter three, we argue that as a matter of history, as a matter of principle, and as a matter of authority it is not possible to trace a common law in Australian law and it should not be possible in English law. This was one of the first big ideas we had when working on this project. If any of you had any exposure to us in 2017, or 2018, I suspect you will have heard about it. I distinctly remember with some embarrassment that we went on a bit of a tour around Brisbane giving CPDs on the law of tracing. We thought it was a good idea to have a slide on common law tracing and superimposed over the top of it, the myth busted signed from MythBusters.

In chapter three, we look at all the Australian authorities dealing with common law tracing. We argue that as a matter of precedent, it is still open to hold that it does not exist. In England the position is different, but we say they have taken a wrong turn. We also explain why as a matter of principle, it makes no sense to allow common law tracing. But then, both to hedge your bets, and just in case some of you have not drunk the Kool Aid quite as much as we have, as we go on to explain the rules of common law tracing on the assumption that we are wrong, and it does actually exist.

**JE:** That is chapter four. Then chapters 5-8 are devoted to the equitable tracing rules. Now, on any account on the law of tracing the equitable tracing rules form the core of the subject. And so, chapter five addresses the prerequisites of tracing in equity, and in particular, whether or not a fiduciary obligation is a prerequisite to the ability to trace an equity. Now, here we argue that much of the debate around this question has been confused because authors and

courts often do not make clear in which sense they are using the language of fiduciary obligation. Sometimes the language of fiduciary obligation is used to refer to an obligation of an undivided obligation of loyalty. Now examples, that being the no conflict, no profit rule. But other times we use the word, the label, the language of fiduciary obligation to refer simply to an obligation not to exceed the limits of one's authority when dealing with a particular asset. We only happened upon this distinction from what in hindsight was a funny conversation or an argument. At some point last year, we were both in Oxford, we were both in lockdown in our respective apartments. I suspect because of the lockdown our patience was running rather thin. I remember being on the phone one day, loudly yelling at Jaamae accusing him of being things, that he is not an idiot, a fool, and misunderstanding, fiduciary obligations. Then he was yelling the same things back at me. It was only after this went back and forth for maybe three or four phone calls that it occurred to us that we were both talking past each other because we were using fiduciary obligations in a different sense to discuss this very question of what are the prerequisites to tracing. Once we reached that point, we realised this distinction, realised that courts and commentators were doing the same thing. This time then formed the bedrock of chapter five.

Chapter six then deals with the core equitable tracing rules, including the rules in relation to mixing. Here we go with some familiar territory such as the rules in *Re Hallett's Estate* and the rules in *Re Oatway*. But we explained that these rules which are often seen as conflicting are not actually rules at all but rather they are different manifestations of a single principle, what we call a subordination principle. We also deal in depth the situation where an innocent claimant's funds are mixed with those of another innocent claimant, and this section has been heavily influenced as President Bell mentioned by a decision in the New South Wales Court of Appeal in *Caron v Jahani*. I say this being conscious that President Bell did deliver the leading judgment in that case. However, I would say this even if he were not here, which is that we consider *Caron v Jahani No.2* to be the most important decision in the law of tracing in Australia in the last 20 years.

**JH:** That leads us to chapter seven. In chapter seven we deal with what we call the hard cases. We have four, we have tracing into improvements to land or chattels, tracing into insurance proceeds, tracing in the payment of a debt, and backward tracing. In fact, backward tracing was one of the most difficult topics we had to tackle, but we think we have come up with an elegant solution to that problem.

Then finally, in chapter eight we deal with the bars to tracing.

Just before we wrap up, we would like to thank a few people. First, we would like to thank all the people who have helped us and supported us in this journey over the last four years. There are far too many to list here but in particular I would like to thank my parents and my siblings,

some of whom are here tonight. Jordan would like to thank his wife, Madison, who in addition to putting up with him for the last four years has put up with him writing the book for the last four years.

Second, we would like to thank President Bell who very kindly wrote us an excellent foreword and has been very generous with his time here tonight.

Thirdly, to Level Twenty Seven Chambers, and in particular Tamara who has worked tirelessly organising and hosting this event. We are very grateful.

Fourth, we would like to thank the whole team at The Federation Press, who have put up with a lot from us, including far too many late changes, and a rather pointed dispute about em-dashes and en-dashes.

Finally, before I sit down, I should tell you how you can actually get your hands on the book. It is available for order on the website and it ships next week. Now, it is not shipping yet and to be honest with you we have been talking about this for so long that I am sure some people are starting to think that we are running some sort of Ponzi scheme ourselves. To disabuse you of that notion, there should be some mock-up copies floating around if you want to have a look at what the final product looks like. There are some flyers on the tables with discount codes for attendees of tonight's event.

**JE:** Thank you all for coming tonight. It really does mean a lot to us.

The last thing I did want to mention before we wrap up is that tonight's event also has a dual purpose. In addition to celebrating the launch of our book, The Law of Tracing, Level Twenty Seven Chambers will soon be farewelling Jaamae because next week, unfortunately for the Queensland Bar, Jaamae is leaving to come over to London to join his friend over here, to commence pupillage at Brick Court Chambers. While I know the Queensland Bar will be very sad to see you go Jaamae, I for one am going to be very glad to have my friend back on the same time zone.

Thank you all for coming and enjoy the rest of the evening. Thank you.

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