

## REMEDIES

### Reflections and Perspectives

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#### I. The evolving law of remedies

1 As Andrew Phang JA reminds us in his leading article in this special issue, the law of remedies has always been a subject of acute, perhaps pre-eminent, interest to counsel and clients engaged in private law disputes. It may be added that transactional lawyers are also only too aware of its significance in contract planning and drafting, as recent decisions on the doctrines of penalties by the highest courts in England and Australia attest.<sup>1</sup> However, its proper appreciation across legal practice has not always been reflected in the teaching and formal study of the subject. Thus, in 1955, C A Wright remarked:<sup>2</sup>

Much can be said about the law of remedies as a social institution. The most important thing to say is that there is no law of remedies.

By this, Wright did not mean to suggest that there was no *corpus* of authority on the subject, or that it did not offer a discrete field of enquiry. Rather, the statement reflected his regret that there were as at that time “no treatises and few articles” addressing its structure, principles and operation.

2 Thankfully, that no longer remains the case. There has been a burgeoning interest in the principles and operation of private law remedies across common law jurisdictions in the past few decades. Indeed, this special issue reflects the great wealth of diverse and rigorous remedies scholarship that characterises its current phase of development. A particular aim of mine, as guest editor of this special issue, was to celebrate the depth and breadth of expertise on the law of remedies currently found in the Asia-Pacific region. To that end, the issue brings together distinguished scholars working in Singapore, Hong Kong, Australia and New Zealand, all with international standing and connections to the world’s great law schools. Their work displays a

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1 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67; *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28.

2 Charles A Wright, “The Law of Remedies As a Social Institution” (1955) 18 U Det LJ 376.

correspondingly firm command of the law of remedies across multiple jurisdictions. Each of their contributions to this issue provides a unique and original perspective on its chosen topic. As a collective body of work, the essays provide a wonderful opportunity to reflect on the ongoing evolution of this important field as a matter of theory and, relatedly, in practice.

3 In this respect, Phang JA rightly emphasises in his opening article the critical importance for remedies scholars to employ comparative scholarship that directly engages in practical legal reasoning. As an experienced and eminent teacher, scholar and judge, Phang JA has particular authority to speak, as he does in this article, on the complex and evolving interplay between the academy and bench and the comparative utility in that context of different modes of scholarship. His Honour illustrates the persuasive power and value of practical and comparative remedies scholarship with particular reference to three important decisions of the Singapore Court of Appeal: *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd*,<sup>3</sup> *ACES System Development Pte Ltd v Yenty Lily*<sup>4</sup> (“Yenty Lily”) and *RBC Properties Pte Ltd v Defu Furniture Pte Ltd*<sup>5</sup> (“RBC Properties”). The decisions draw on a significant body of legal scholarship to address (among other issues and respectively) the law of remoteness in contract, competing compensatory and restitutionary conceptualisations of the principles governing user-damages, and the relationship between statutory relief under the Misrepresentation Act<sup>6</sup> and the ongoing evolution of general law remedies for fraudulent and negligent misstatement. As Phang JA observes, these are remedial issues of particular theoretical difficulty that also have profound practical significance.

4 In that context, it is a pleasure to see the power of his Honour’s thesis so ably further illustrated by the other contributions to this special issue. All engage with considerable comparative analysis, often not only across jurisdictions but also, as a matter of historical enquiry, across time. All demonstrate with clarity why, in practice, their thesis matters – what difference it makes at the coal face of legal practice and dispute resolution. If this selection is emblematic of the quality of broader remedies scholarship, the future of the discipline appears to be bright.

5 This embarrassment of riches provides an opportunity to reflect upon the possible reasons for the renaissance of remedies scholarship over recent decades. The following commentary identifies four key

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3 [2011] 1 SLR 150.

4 [2013] 4 SLR 1317.

5 [2015] 1 SLR 997.

6 Cap 390, 1994 Rev Ed.

factors or influences, all of which find expression in the contributions to this issue. The discussion is not meant to be exhaustive and, as we will see, the identified influences on the development of the field have a distinct capacity to overlap and reinforce one another in a manner that makes clear separation of their impact difficult. This interplay is also evident in the contributions which, although addressed in the following commentary in specific contexts, often span multiple categories of influence.

## II. The decline of juries

6 One indubitable influence on the development of the law of remedies arises (as so frequently seems to be the case in the development of the substantive common law)<sup>7</sup> from the evolution of civil procedure.<sup>8</sup> The decline of juries has had a profound impact on the development of remedies as a discrete, substantive field of study. In many jurisdictions, jury trials have increasingly been restricted to serious criminal offences and to specialist areas of the law, such as defamation. The obvious consequence of the decline is that judges have progressively assumed jury functions, such as determining the purpose, award and measure of common law damages. This in turn has resulted in a substantial increase in the quantity and quality of the raw materials available for examination by remedies scholars. No longer is it necessary to infer or distil legal principles from the accepted form of directions to the jury or the measure of their award.<sup>9</sup> In the hands of the judge, the reasons for relief must be made explicit, so becoming liable to review, appeal and, over time, systemisation to an extent previously considered to be impossible.

7 That said, as Katy Barnett's article<sup>10</sup> amply demonstrates, much work remains to be done. Even in the relatively settled sphere of compensatory damages for breach of contract, repeated confusion and inconsistency in the cases demonstrates the underdeveloped state of foundational principles. Barnett examines a range of important areas in which a better understanding of the rationale and operation of the principle of mitigation would promote a more coherent and just law of

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7 Sir Henry Maine, *Dissertations on Early Law and Custom* (London: John Murray, 1891 Spottiswoode & Co) at p 389; see also Frederic W Maitland, *The Forms of Action at Common Law* (1909) Lecture 1, reproduced in *The Forms of Action at Common Law: A Course of Lectures by F W Maitland* (Alfred H Chaytor & W J Whittaker) (Cambridge: Cambridge University Press, 1936).

8 See also Michael Bryan, "Injunctions and Damages: Taking *Shelfer* off the Shelf" (2016) 28 SAclJ 921, discussed at para 23 below.

9 Michael Tilbury, "Reconstructing Damages" (2003) 27 MULR 697 at 699–700.

10 Katy Barnett, "Substitutive Damages and Mitigation in Contract Law: Tension between Two Competing Norms" (2016) 28 SAclJ 795.

contractual compensation. In particular, she identifies two previously underappreciated features of the principle that have profound theoretical and practical consequences: first, that the mitigation requirement reflects the law's desire to encourage self-help on the part of plaintiffs and, secondly, that its application has profound distributive ramifications for the parties to a breach of contract claim. These features necessarily impact upon the extent to which any compensatory award for breach of contract can truly be said to be "substitutive" of the plaintiff's interest in, or right to, performance of the contract.

8 Outside the realm of compensatory damages, the opacity of jury reasoning continues to present an ongoing challenge to, as well as opportunities for, the development of a coherent and principled law of remedies. While juries were charged with administering remedies such as damages, the aims of those remedies could never really be known.<sup>11</sup> Certainly, a dominant concern in the case of damages was compensation for loss. Some commentators<sup>12</sup> and courts<sup>13</sup> went so far as to argue that compensation was, or should be, the sole aim of damages. Increasingly, however, it has come to be recognised<sup>14</sup> that jury awards probably reflected a variety of remedial aims such as punishment, deterrence, restitution or vindication. As juries have declined, a pressing issue has become to articulate the conditions for the principled award of non-compensatory damages.

9 A case in point involves "user-damages", such as wayleave awards and mesne profits, commonly ordered in cases of proprietary torts such as trespass and conversion. Juries did not articulate the aim of these awards. However, what is clear is that they were frequently made in circumstances where there was little or no obvious loss suffered by the plaintiff. This has provided a fertile ground for academic analysis<sup>15</sup> and, increasingly, curial consideration. Thus, as mentioned earlier, Phang JA observes in his article that the Singapore Court of Appeal

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11 Michael Tilbury, "Reconstructing Damages" (2003) 27 MULR 697 at 699–700.

12 Eg, Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 12th Ed, 1961) at p 1 and the following eight editions, all of which defined damages in terms of "pecuniary compensation".

13 *Rookes v Barnard* [1964] AC 1129; *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1086–1087, *per* Lord Reid.

14 See, for example, the most recent edition of Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014) at para 1-001 which simply defines damages as "an award in money for a civil wrong".

15 The first specialist monograph on the subject was James Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Oxford University Press, 2002). Edelman acknowledges in the preface that the impetus for undertaking the thesis on which the monograph is based came from a striking speech given by Birks. We return to consider Birks' influence on the law of remedies below.

recently favoured a restitutionary over compensatory analysis of such awards in *Yenty Lily*. Courts in Australia have vacillated between the two.<sup>16</sup>

10 Kelvin Low seeks to challenge that alternative characterisation in his article.<sup>17</sup> He posits that the relevant case law and commentary addressing the issue proceed on an overly narrow conception of loss (and thus the ambit of compensation). Stepping outside the treatment of user damages in the authorities, Low examines the wider usage of loss and compensation across common law and equity to show that compensable losses are conceived of very broadly, certainly extending well beyond purely pecuniary loss. Once the similarities between user damages and other awards in contract, tort and trust are appreciated, Low concludes that “the allure of the compensatory perspective is irresistible”.<sup>18</sup> On this analysis, while a restitutionary counter-analysis may remain theoretically possible, in practice it is rendered largely redundant. In reaching this conclusion, Low notably diverges from the preferred view of the Court of Appeal. Both analyses, however, bear testament to the profound intellectual debt owed by those working in, or subject to, this area of the law, to the late Peter Birks, to whom we now turn.

### III. The Birks legacy

#### A. Defining the field

11 It is unlikely that one could ever truly say that an entire field of legal discourse is attributable to the influence of one key commentator. However, there is also no doubt that a second reason for increased interest in the field of remedies rests with the most vehement (and, many would say, articulate) opponent of the term. Birks powerfully criticised the ambiguity of “remedies”, arguing that this “slippery”<sup>19</sup> term harboured a suite of different and sometimes contradictory meanings. On his analysis, the label was not merely unhelpful but also actively undermined the rationality and transparency

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16 *Eg, Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1991) 31 NSWLR 175 at 182–183 and 188, *per* Giles J; *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342; (2011) 82 NSWLR 420 at [173]–[186], *per* Allsop P, MacFarlan JA concurring, and [193]–[205], *per* Giles JA; and *Hampton v BHP Billiton Minerals Pty Ltd (No 2)* [2012] WASC 286 at [335]–[359], *per* Edelman J.

17 Kelvin Low, “The User Principle: *Rashomon* Effect or Much Ado about Nothing” (2016) 28 SAclJ 984.

18 Kelvin Low, “The User Principle: *Rashomon* Effect or Much Ado about Nothing” (2016) 28 SAclJ 984 at 1012.

19 Peter Birks, “Three Kinds of Objection to Discretionary Remedialism” (2000) 29 UWAL Rev 1.

of the law. By way of counteracting that danger, Birks proposed that remedies, properly understood, were “right[s] contemplated from the other end”;<sup>20</sup> the law’s predetermined and coherent mirror-response to the rights of the plaintiff. On this approach, the concepts of remedy and right equate. This strongly “monist”<sup>21</sup> conception of remedies severely reduced, if not entirely eliminated, any role for judicial discretion in the award of remedies.

12 Birks’ observation that the language of remedies is fluid is supported by the selection and treatment of topics in this issue. For example, in his article examining the place of the *vindicatio* at common law,<sup>22</sup> Nicholas McBride uses the language of remedy (in a manner recognised by Birks)<sup>23</sup> to identify “the medicine for the pain that brings the plaintiff to the law”.<sup>24</sup> On this approach, “remedy” is not used in contradistinction to right but as indicating the means provided by the law by which that right is supported. McBride is concerned here to address the existence of a type of non-wrongful category of claim by the plaintiff, namely that the defendant is in possession of the plaintiff’s goods. On McBride’s analysis, the remedy is therefore not the form of order made by the court: a successful pursuit of the *vindicatio* may result in the plaintiff recovering the goods *in specie* or their value. Rather, while the ultimate form of the remedy may vary, its core elements and function remain constant. McBride argues that common law jurisdictions never offered a *vindicatio* remedy in this sense, except in very limited circumstances involving public bodies that have come into the possession of the plaintiff’s goods. In general, his analysis confirms that property rights in goods are (as Birks had also argued)<sup>25</sup> protected through the law of wrongs. However, McBride identifies reasons of practicality and principle favouring the recognition of the *vindicatio*. Not only, as a practical matter, would it enable courts directly to address the core question of who is entitled to disputed assets. It would also clear the way to removing the unprincipled strict liability element of conversion, a form of liability McBride shows to be itself attributable to the want of a *vindicatio*. Conversion and the *vindicatio* would then constitute complementary remedies that respond to unauthorised receipt and dealing with the plaintiff’s goods.

20 Peter Birks, “The Law of Restitution at the End of an Epoch” (1999) 28 UWAL Rev 13 at 54–55.

21 Grant Hammond, “Rethinking Remedies: The Changing Nature of the Conception of the Relationship between Legal and Equitable Remedies” in *Remedies: Issues and Perspectives* (Jeffrey Berryman ed) (Carswell, 1991) ch 4.

22 Nicholas McBride, “*Vindicatio*: The Missing Remedy?” (2016) 28 SAclJ 1052.

23 Peter Birks, “Rights, Wrongs, and Remedies” (2000) 20 OxJLS 1 at 25.

24 Peter Birks, “Rights, Wrongs, and Remedies” (2000) 20 OxJLS 1 at 10.

25 Peter Birks, “Personal Property: Proprietary Rights and Remedies” (2000) 11 KCLJ 1.

13 In contrast to McBride, many contributors to this issue deliberately use the term to embrace a form of legal reasoning criticised by Birks.<sup>26</sup> On this “dualist”<sup>27</sup> approach, the concept of a remedy is uncoupled from that of the right enforced: on this approach remedies constitute court orders crafted by judges which often (and properly) reflect a more or less structured judicial discretion. One example is Alvin See’s analysis of unauthorised fiduciary gains and the constructive trust.<sup>28</sup> See distinguishes between four different forms of gain: categories 1 and 2 involve gains derived from misappropriation of the principal’s property, or gains the fiduciary was obliged to obtain for her principal. In both cases, a trust arises at the outset. Each reflects equity’s view that the gains always belonged to the principal. The court orders in such cases “replicate”<sup>29</sup> pre-existing proprietary rights. The trust rights generated are defeasible only at the hands of the *bona fide* purchaser of the legal estate for value without notice. It follows that these categories of case leave little room for the operation of judicial discretion. By contrast, claims involving category 3 gains “obtained at the principal’s expense”<sup>30</sup> reflect a foundation in unjust enrichment. It follows that category 3 cases should be subject to the change of position defence and involve a weaker form of proprietary remedy and, possibly, a greater potential for the exercise of judicial discretion. It is nonetheless true that, as with categories 1 and 2, the order is replicative of the pre-existing right rather than creating a new right.<sup>31</sup> Finally, category 4 gains are seen in cases such as those involving bribes, where the amount of the gain is not reflected, for example, in any corresponding loss to the principal’s assets and thus any remedy is by way of pure disgorgement. Here, See argues that a greater number of considerations, such as third party interests and the defendant’s solvency, may legitimately operate to defeat any claim by the plaintiff for a constructive trust. See accepts that this remedial template, which he models on the Australian remedial constructive trust, increases the risk of uncertainty and involves the court creating new rights. However, as he notes, this resultant uncertainty can be offset by the development of more concrete factors that may better guide the exercise of judicial discretion.

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26 Peter Birks, “Three Kinds of Objection to Discretionary Remedialism” (2000) 29 UWAL Rev 1 at 5.

27 Grant Hammond, “Rethinking Remedies: The Changing Nature of the Conception of the Relationship between Legal and Equitable Remedies” in *Remedies: Issues and Perspectives* (Jeffrey Berryman ed) (Carswell, 1991) ch 4.

28 Alvin See, “Unauthorised Fiduciary Gains and the Constructive Trust” (2016) 28 SAclJ 1014.

29 Rafal Zakrzewski, *Remedies Reclassified* (Oxford: Oxford University Press, 2005) at pp 78–79.

30 Alvin See, “Unauthorised Fiduciary Gains and the Constructive Trust” (2016) 28 SAclJ 1014 at 1043.

31 A “transformative” remedy, in Zakrzewski’s terminology: Rafal Zakrzewski, *Remedies Reclassified* (Oxford: Oxford University Press, 2005) at pp 78–80.

14 Another article that conceptualises right and remedy as distinct concepts and explicitly endorses a wide-ranging role for judicial discretion in the award of relief is “Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty”.<sup>32</sup> In this article, Yip Man and Goh Yihan examine the fundamental tenets of the fiduciary doctrine as well as case law developments across multiple jurisdictions to identify commonalities between the two categories of relief. They argue that, in both cases, considerations such as the scope of the duty that has been breached, the degree of culpability of the defendant, deterrence, proportionality and good faith should mould the award and measure of relief. The authors further consider that the choice and prioritisation of factors may vary depending on particular jurisdictional prerogatives. On this view, orders of compensation and disgorgement necessarily involve a considerable application of judicial discretion. However, on their analysis, the discretion is not at large: the range of relevant considerations that bind the judge are capable of being distilled from the cases. The judge’s discretion is a circumscribed one of balancing the competing considerations and determining the extent to which relief can be moulded to support the plaintiff’s rights.

15 Simone Degeling’s article<sup>33</sup> also seeks to address the underdeveloped law of equitable compensation, this time through the prism of the comparative treatment of loss of chance at common law and in equity. Degeling demonstrates that courts sometimes draw on probabilistic reasoning, similar to that employed at common law, to render certain the value of past hypothetical lost chances suffered by the plaintiff as a result of a breach of fiduciary duty. This parallel analysis, in which judges at common law and in equity exercise a similar discretion, reflects the necessity of rendering certain the plaintiff’s losses when awarding common law or equitable reparative compensation. However, Degeling warns against an overly simplistic application of the common law form of reasoning to the realms of breach of fiduciary duty. As with Yip and Goh, Degeling draws particular insights for the award of equitable compensation from account of profits. Both remedies are premised on and must reflect equity’s strict obligation of fiduciary loyalty. On this analysis, just as equity ignores any argument made by a breaching fiduciary that her unauthorised gain, which must be disgorged, was one which the principal was unwilling, unlikely or unable to make, so too Degeling reasons that equitable compensation for the value of a lost opportunity should not be discounted for the risk

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32 Goh Yihan & Yip Man, “Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty” (2016) 28 SAclJ 884.

33 Simone Degeling, “Loss of a Chance and Breach of Fiduciary Duty: The Requirement of Certainty of Loss” (2016) 28 SAclJ 825.



that the opportunity would have been foregone by the principal. Moreover, issues of certainty in reparative equitable compensation need not solely be addressed by using probabilistic reasoning analogous to that employed at common law. In particular, Degeling considers that courts may exercise their peculiarly equitable discretion to address uncertainty created by fiduciary breaches by valuing any hypothetical loss against an assumed state of affairs consistent with the performance of the fiduciary's duty. Equity's particular willingness to mould relief to reflect that which ought to have been done is a remedial theme that also informs other articles in this special issue and to which we return below.<sup>34</sup>

16 It can be seen that Birks' aim of clarifying the nature of remedies by defining them in terms of the rights to which they respond, so as to severely limit judicial leeways of choice, has not proven fully persuasive to scholars following his work. However, his ground-breaking analysis was wholly successful in inspiring a wave of fresh scholarship on the structure and nature of remedies. One strand of that scholarship considers the ramifications of remedies conceived of as court orders that are normatively distinct from, albeit related to, both the plaintiff's right and the defendant's obligations or liabilities.<sup>35</sup> James Penner and KarLuis Quek engage with that scholarship in their examination of remedies conceived as court orders that respond to defendants' breaches of primary duties.<sup>36</sup> Penner and Quek powerfully argue that any understanding of the nature of remedial norms is conditional on appreciating the trilateral structure of litigation in which court, plaintiff and defendant are connected through a series of rights, obligations, powers and liabilities. Their analysis supports the view that, prior to the court order, the defendant is under no legal (or "secondary") duty to pay damages arising out of a breach of a primary duty. Rather, the defendant is subject to a liability to be ordered by the court to do or refrain from doing some act. The court's power to make that order is in turn itself contingent on the plaintiff commencing and establishing her cause of action. However, the authors argue that the defendant is under a moral (as opposed to legal) duty to repair the normative breach with the plaintiff prior to the making of the court order, compliance with which is promoted by the rules governing costs and settlement. This in turn helps explain why it is that court orders are not mere exercises of naked power by the State but, rather, are morally justified. The defendant's moral duty to repair is reflected in, if not actually replicated by, the

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34 See discussion of Ho and Palmer at paras 19 and 20 below.

35 See in particular Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51 and Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727.

36 James Penner & KarLuis Quek, "The Law's Remedial Norms" (2016) 28 SAclJ 768.

court order to pay damages. This theoretical analysis has a number of practical implications which the authors also address.

### **B. *A taxonomy of remedies***

17 Birks' monist approach to remedies, in which any role for judicial discretion was tightly constrained, was consistent with his broader search for definition, certainty and, ultimately, coherence in the private law as a whole. In this broader sphere, Birks' imprint on legal scholarship in the field of remedies remains spectacularly clear and significant. Birks' celebrated taxonomies of the private law, which were designed to explicate but also to influence its future development, proposed a functional approach to understanding the law of remedies.<sup>37</sup> Collated and categorised by the "goal" or purpose of the law's responses (compensation, "perfection", restitution, disgorgement, punishment and so on) to categories of causative events (consent, wrongs, unjust enrichment and other), Birks' taxonomies conceptualised remedies entirely without regard to jurisdictional genesis. This revolutionary approach enabled Birks to challenge the "false monopoly of compensation",<sup>38</sup> a fiction that had led to what Birks considered to be the unjustified restriction of gain-based remedies to equity. Birks engaged in a wide-ranging re-evaluation of "damages" awards at common law alongside gain-based relief in equity to argue for the broader recognition and award of gain-based relief as an integral and important component in the law's armoury.

18 While, as we have already seen from Low's paper on the nature of user damages, many continue to challenge the conclusions Birks drew from his taxonomies of the law, or else redraw their divisions,<sup>39</sup> their impact on the developing field of remedies was immediate and ongoing.

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37 See, eg, Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) ch 2; Peter Birks, "Definition and Division: A Meditation on Institutes 3.12" in *The Classifications of Obligations* (Peter Birks ed) (Oxford: Clarendon Press, 1997) ch 1; and Peter Birks, "The Law of Restitution at the End of an Epoch" (1999) 28 UWAL Rev 13 at 17. See also the first and following editions of Andrew Burrows, *Remedies for Torts and Breach of Contract* (London: Butterworths, 1987) and Michael J Tilbury, *Principles of Civil Remedies* (Sydney: Butterworths, 1990). Wright perhaps was the original source of this approach when he identified a similar, functional analysis of the "dynamic principles" inherent in the law of remedies in Charles A Wright, "The Law of Remedies As a Social Institution" (1955) 18 U Det LJ 376.

38 Peter Birks, "The Law of Restitution at the End of an Epoch" (1999) 28 UWAL Rev 13 at 52. See also Peter Birks, *Restitution - The Future* (Armidale: Federation Press, 1992) ch 1.

39 Eg, Rafal Zakrzewski, *Remedies Reclassified* (Oxford: Oxford University Press, 2005) ch 3, whose published monograph examining the taxonomy of remedies was supervised by Birks and is dedicated to his memory.

Arguably, they have become as much a foundational analytical construct for the law of remedies as Austin's classification of primary and secondary rights.<sup>40</sup> Their influence certainly permeates the contributions to this issue.

19 Lusina Ho is another contributor who builds on Birks' intellectual architecture in developing a distinct taxonomy of equitable account and compensation. In her article<sup>41</sup> Ho engages in an historical analysis of the equitable remedy of account and charts the relatively recent rise of the concept of equitable compensation. Her examination, which roams freely across common law and equitable principles of account, debt and compensation, identifies a distinct remedial principle of equity at work in equitable accounting. This principle of deemed performance is distinct in form and effect from the contract<sup>42</sup> and tort<sup>43</sup> compensatory principles. Ho explains that the unique guiding principle that a trustee should be treated as having done that which ought to be done governs both the falsification and surcharging processes. The two forms of account combine with the constructive trust to provide the best possible remedy to the beneficiary in all circumstances of breach. Ho argues that this suite of remedies allows the beneficiary to trust the trustees by assuring the beneficiary that the trust undertaking will always be observed, whether by the trustee's due performance or by way of remedial orders. Equity's remedial principle of "deemed performance" should also, in her view, inform the developing modern law of equitable compensation. This is required not only to ensure consistent treatment of like remedies at common law and in equity, but also to preserve the distinctive integrity of the trust relationship.

20 In contrast to Low and Ho, Jessica Palmer draws on Birks' taxonomy of the law to investigate the category of event that triggers the award of non-contractual proprietary subrogation.<sup>44</sup> Palmer uses the recent UK Supreme Court decision of *Bank of Cyprus v Menelaou*<sup>45</sup> to illustrate the critical point that a plaintiff does not need to establish any pre-existing proprietary interest in the property received by the defendant in order to justify proprietary subrogation. She further observes that a plaintiff's interest created on subrogation can, but does not necessarily have to, mirror the original secured interest. It follows that the concept of a plaintiff being "subrogated" to an existing

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40 John Austin, *Lectures on Jurisprudence: Vol II* (Robert Campbell ed) (John Murray, 5th Ed, 1885) at p 763.

41 Lusina Ho, "An Account of Accounts" (2016) 28 SAclJ 849.

42 *Robinson v Harman* (1848) 1 Ex 850 at 855; (1848) 154 ER 363 at 365.

43 *Livingston v Rawyards Coal Co* (1880) 5 App Cas 25 at 39.

44 Jessica Palmer, "Unjust Enrichment, Proprietary Subrogation and Unsatisfactory Explanations" (2016) 28 SAclJ 955.

45 [2015] UKSC 66.

proprietary interest is a fiction that masks equity's creation of a new security interest. On this account, equitable subrogation cannot be considered to "vindicate" an existing proprietary right. However, Palmer also considers that unjust enrichment provides no more adequate explanation of the award of proprietary, as opposed to personal, relief. Given that the plaintiff's claim need not arise from any wrongdoing on the part of the defendant, Palmer reasons that the most likely explanation for the creation of a new proprietary interest in favour of the plaintiff lies in intention (what Birks called "consent"). However, importantly, Palmer argues that equity does not merely respond to the actual or expressed intention of the owner of the asset. Rather, equitable subrogation also gives effect to the "deemed intention" of the owner of the asset to grant a security in favour of the plaintiff. Intention here is adjudged objectively by reference to what the owner expressed or in good conscience ought to have expressed. In this respect, Palmer's analysis echoes Ho's conception of the foundations of equitable account. In both spheres, equity treats the defendant as having done that which ought to have been done, reflecting a remedial approach by which the defendant's obligations (and in this sense, her objective conscience) are perfected.

#### IV. This age of statutes<sup>46</sup>

21 A third and powerful factor in the development of the field of remedies has been the introduction and expansion of statutory remedies across broad swathes of the private law. From the perspective of an Australian remedies scholar, it is striking that virtually no transaction is untouched by the Australian Consumer Law and its related legislation. These regimes introduce "remedial smorgasbords"<sup>47</sup> that respond to contravention of statutory prohibitions on unfair commercial behaviour such as misleading and unconscionable conduct. Structurally and in substance, these remedial schemes are strongly "dualist" in nature, clearly separating the issue of contravention from the question of the proper choice of order required to redress that contravention. In that jurisdiction, the pervasive nature of the statutory schemes and their influence on judicial modes of reasoning make adherence to any monist conception of remedies highly problematic.

22 The growing influence of these statutory schemes has put their relationship with neighbouring general law principles squarely in the

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46 Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982) at p 1.

47 *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 366, *per* Mason P.

spotlight.<sup>48</sup> The pressing need to understand the nature of that interaction is not restricted to the position in Australia. In Phang JA's chapter outlined earlier, his Honour notes the complex and subtle interaction explored in *RBC Properties* between common law and statutory principles in relation to the remedies available under the Misrepresentation Act. That interplay is further explored in Jeannie Paterson's article on consumer law in Singapore. Paterson powerfully demonstrates that the operation of statutes such as Singapore's Consumer Protection (Fair Trading) Act<sup>49</sup> ("CPFTA") will necessarily be informed by general law principles drawn from contract, tort, restitution and equity. In outlining the types of remedial orders that a court may make in response to an unfair practice the CPFTA expressly invokes general law doctrines.<sup>50</sup> Here the challenge is to identify what adjustments should be made to those general doctrines to ensure that their application is consistent with the overriding purposes of the legislation. Drawing on the Australian experience by way of comparison, Paterson explores how the remedial provisions of the CPFTA invite the integration of general law principles into the statutory scheme by characterising the statutory orders that can be made in terms of common law doctrine. Moreover, even outside the remedial provisions, an understanding of the scope of the rights granted to consumers can be assisted by general law analogies, along with insights from the experience of courts in dealing with consumer protection legislation in other comparable jurisdictions.

23 In that context, Michael Bryan's article<sup>51</sup> serves as a pertinent reminder that it is not only recent statutory developments in consumer law that pose challenges to our understanding of the operation and limits on remedies and their informing considerations. Bryan's purpose is to consider the much-applied but poorly understood jurisdiction conferred by the Chancery Amendment Act 1858<sup>52</sup> ("Lord Cairns' Act"), particularly as revealed through the recent *Lawrence v Fen Tigers Ltd*<sup>53</sup> litigation. Bryan unpacks the scope of operation of the Act to reveal that courts' frequent reliance on the statute is unnecessary in light of subsequent reforms to civil procedure. However, the Act has continued to be applied due, in large part, to a failure on the part of courts to rid

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48 See the impressive list of recent publications on the area, collated in Jeannie Paterson, "Consumer Protection in Singapore: Statute and the Ongoing Influence of the General Law" (2016) 28 SAclJ 1079 at 1084, fn 33.

49 Cap 52A, 2009 Rev Ed.

50 See Wee Ling Loo & Soen Yin Erin Goh-Low, "Awards of Damages under the Singapore Consumer Protection (Fair Trading) Act" (2007) 9 Austl J Asian L 66.

51 Michael Bryan, "Injunctions and Damages: Taking *Shelfer* off the Shelf" (2016) 28 SAclJ 921.

52 c 27 (UK).

53 [2014] AC 822; [2014] UKSC 13.

themselves of the intellectual legacy of the jurisdictional divisions between common law and equitable remedies and to embrace the full suite of remedial options authorised under s 49(2) of the Senior Courts Act 1981.<sup>54</sup> Bryan further argues that, in applying Lord Cairns' Act, courts have used its broadly expressed criteria to mask or justify policy-based reasoning, often by reference to ill-defined and speculative appeals to the public interest. In all of this, courts have yet to determine how to place a monetary value on specific or injunctive relief, or to develop a principled approach to the award of non-compensatory damages.

## V. Remedies as a “capstone” subject

24 The final reason identified in this brief introduction for the renewed interest in the law of remedies as a discrete and valuable legal subject comes from its pedagogical value as a “capstone” subject in law schools. A significant number of law schools throughout the common law world have adopted the view that the study of remedies requires students to integrate and categorise their understanding of private law in a way strongly conducive to preparation for legal practice. Many in Australia, for example,<sup>55</sup> have made the subject a compulsory unit in the degree for admission to legal practice and expressly identify the subject as serving the “capstone” aims of integrating theoretical and practical learning outcomes. We have seen earlier that modern remedies scholarship, reflecting but not limited to Birks' influence, tends to draw freely from principles and concepts across common law, equity and statute, seeking to articulate and define the relationships between these legal sources so as to develop a coherent taxonomy of the law. This difficult and critical work is arguably part of the essential tool kit of every practising lawyer.

25 There seems little doubt that the value of remedies scholarship to preparing students for practice, and the importance of the law of remedies in litigation and transaction practice, will prompt further interest in the field which in turn will further influence counsels' arguments and courts' decisions. This reflection brings us back full circle to Phang JA's opening insights into the relation between remedies scholarship and legal practice, with which this issue opens.

26 In concluding this discussion, it should be acknowledged that, while accepting its limitations, this issue “tips its hat” to Birks'

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54 c 54.

55 See, eg, the courses leading to admission to legal practice offered at La Trobe University, University of Melbourne, UNSW Australia, University of Tasmania and The University of Western Australia.

taxonomical work through the arrangement of each chapter. Phang JA's article is followed by the article by Penner and Quek which, as noted previously, examines the normative and structural nature of remedies conceived of as court orders. The articles are then arranged functionally, by reference to the topic remedy's chief remedial aim (compensation, perfection, restitution, disgorgement or vindication). This arrangement arguably presents interesting insights into the value and limitations of Birks' system of classification. The issue concludes with Paterson's analysis of the CPFTA. In concluding in this way, it should be not thought that the issue endorses Birks' tendency to allocate statutory rights and remedies to the "other" miscellaneous category in his taxonomies of the law. Rather, it reflects the view that such statutes enable courts to award a variety of functionally diverse remedies, drawing on cognate common law and equitable remedial principles, in order to promote the purpose of the particular legislation. On this approach, statute overlays Birks' taxonomical scheme as if it were a transparency over a map. Each statutory regime then becomes liable to the same, taxonomical enquiry as common law and equitable remedies. On this approach, these statutory schemes present an invaluable opportunity for the future incorporation of common law, equitable and statutory principles of remedies into a broader and integrated system of private law.

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