



# Accounting for Profit for Breach of Contract

Theory and Practice

Katy Barnett



• HART •  
PUBLISHING

OXFORD AND PORTLAND, OREGON

2012

Published in the United Kingdom by Hart Publishing Ltd  
16C Worcester Place, Oxford, OX1 2JW  
Telephone: +44 (0)1865 517530  
Fax: +44 (0)1865 510710  
E-mail: [mail@hartpub.co.uk](mailto:mail@hartpub.co.uk)  
Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada) by  
Hart Publishing  
c/o International Specialized Book Services  
920 NE 58th Avenue, Suite 300  
Portland, OR 97213-3786  
USA  
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190  
Fax: +1 503 280 8832  
E-mail: [orders@isbs.com](mailto:orders@isbs.com)  
Website: <http://www.isbs.com>

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British Library Cataloguing in Publication Data  
Data Available

ISBN: 978-1-84946-251-8

Typeset by Hope Services, Abingdon  
Printed and bound in Great Britain by  
TJ International Ltd, Padstow, Cornwall



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## PREFACE

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This book is a revised, updated and expanded version of my PhD thesis which was completed at the University of Melbourne between 2007 and 2010. I am grateful that I was given an Australian Postgraduate Award by the Australian Government, without which I would not have been able to complete my PhD.

In this book, I advance an interpretive theory of the law which is intended to enhance our understanding of the existing law of disgorgement damages for breach of contract. Of course, such damages are not presently available in Australia, but I argue that the award of the remedy of an account of profits (or ‘disgorgement damages’) for breach of contract is justifiable in some circumstances, and that an award *can* be situated within orthodox contract law principle and cases. It is important to note that disgorgement damages will not be available for *all* breaches of contract under my scheme: the availability of disgorgement depends in part upon the nature of the claimant’s interest in performance of the contractual obligations and the availability of a substitute performance (either through an award of compensatory damages or through an award of specific relief).

Simply, I argue that disgorgement damages are available in two main categories of case: the ‘second sale’ cases, where the defendant breaches his contract with the claimant to make a more profitable contract with a third party; and the ‘agency problem’ cases, where the defendant promises the claimant he will not do a particular thing, and the claimant finds it difficult to supervise the performance.

I focus on the law of Australia and England and Wales, although there are references to material from all common law jurisdictions, including the recent US *Restatement (Third) of Restitution and Unjust Enrichment*. I have considered material available to me before 1 October 2011.

I am extremely grateful to my two PhD supervisors, Professor Michael Bryan and Professor Andrew Robertson at the University of Melbourne, who have given me encouragement, support, friendship and valuable suggestions as to how to improve my work. I have learned an immense amount from them, and I am very grateful for their guidance. In addition, I would like to thank my thesis examiners, Professor Graham Virgo and Professor Mitchell McInnes, for their insightful suggestions and timely, generous feedback on my thesis. Similarly, I found the suggestions and comments of Hart’s anonymous reviewer extremely useful.

The following friends and colleagues have been kind enough to discuss ideas with me over the past four years: Matthew Harding, Megan Richardson, Elise Bant, Ralph Cunnington, Rob Chambers, James Edelman, Ross Grantham, ‘Rip’ Verkerke, David Brennan, Jeannie Paterson, Helen Dale, Anna Thwaites and Nicole Rich.

I am also very grateful for the assistance of the Law Research Service at the Melbourne Law School Library, particularly Robin Gardner, Claire Kelly, Tom Kavanagh, Tom Andrews and Chris Lum. Thank you also to the team at Hart Publishing for their professionalism and support – a pleasure to deal with!

I would not have been able to finish either my PhD or this book without the support of my parents, parents-in-law, sister, grandparents and friends. My co-authors and those who comment at my blog, [www.skepticalawyer.com.au](http://www.skepticalawyer.com.au), have generally inspired me, supported me and opened my mind.

Finally, I would like to dedicate this book to my wonderful husband Scott and our children, Eloise and Joshua. Scott has held the fort at times when the thesis/book 'ate my life' and has been most understanding and supportive at times when it all just seemed too hard. Eloise, you'll be glad to hear that Mummy's book is *finally* finished!

*Melbourne, October 2011*

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