BOOK REVIEW

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Equity and Trusts Commentary and Materials, by G E Dal Pont (Thomson Reuters, 5th ed, 2011) ISBN 9780455229065, 1272 pages, $148.00.

This is the fifth edition of this title[1] and the release of this edition is timely in that it accompanies the release of its textbook counterpart, *Equity and Trusts in Australia*, also by Professor Dal Pont. The preface identifies that the new edition is necessary to address the numerous cases since the publication of the fourth edition in 2007. It cannot be disputed that, since the release of the previous edition, there have been a significant number of High Court cases of interest, all of which have been included in the new edition.[2] The book also includes reference to two pertinent statutory initiatives; namely the *Competition and Consumer Act 2010* (Cth) and the *Personal Property Securities Act 2009* (Cth). However, the extent to which these latter materials are expounded is relatively low compared with the detail afforded to the new cases incorporated into the text.

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1 Noticeably the sole author of this edition is G E Dal Pont, whereas the prior edition listed GE Dal Pont, D R C Chalmers and J K Maxton as the authors. However, the fourth edition noted that with the exception of Chapter 28, the research, writing and editing was Dal Pont's sole work so the change in authorship in this edition merely reflects the reality of the previous edition.

2 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; *Aid/Watch Inc v Federal Commissioner of* Taxation (2010) 85 AJLR 154; *Kennon v Spry* (2008) 238 CLR 366; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 and *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57. Other High Court decisions that are not set out as extracts but are referred to in the commentary are *Friend v Brooker* (2009) 239 CLR 129; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 and *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1.

The new edition follows very closely the inherent structure of the previous work. The layout, number of chapters and chapter titles remain the same. The only evident alteration to the structure concerns Chapter Seven, entitled 'Undue Influence', which is now listed under 'Part III. Unconscionable Conduct' rather than 'Part II. Relationships of Trust'. Save for this minor adjustment, many of the paragraph numbers are unchanged. This consistency will please those familiar with the layout of the previous text as they will be able to find the information sought with ease but will be content to find that the book embraces both new materials and additional commentary. Helpfully, the chapter names and numbers mirror those of its textbook counterpart so that students can readily cross-refer between the content of the two books. An oddity, however, is that Chapter Seven of the text book called 'Undue Influence', remains under 'Part II. Relationships of Trust' rather than 'Part III. Unconscionable Conduct'. Although this Chapter's place in the order of topics is unaltered, the difference in classifying the doctrine within Part II or III may cause a little confusion where the two books are used simultaneously.

One of the significant additions to the text is found in Chapter 23, entitled 'Powers and Rights of Trustees', which now includes extracts from the recent case of *Macedonia Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 as well as a detailed 'Notes & Questions' section dedicated to addressing points raised by this case. This case concerned proceedings alleging breach of trust commenced against an incorporated association holding property for charitable purposes. The association sought the Court's advice[3] as to whether it should defend the action and, if it did, whether it was entitled to an indemnity for legal costs reasonably incurred in pursuing that course of action. Dal Pont successfully navigates the reader through the complicated background and complex issues arising out of this case by requiring the reader to consider pertinent questions and critical commentary in view of segments of the judgment specifically addressing those issues. Helpfully, Dal Pont also refers to academic commentary on this case so that the reader may use the commentary and questions as a springboard for further critical analysis in this area, which is traditionally a 'dry' area of a trusts subject. For lecturers and students alike, such a scaffolded approach is a useful learning tool.

Despite this structured approach, issues arising out of this decision

[3] Pursuant to s 63(1) of the *Trustee Act 1925* (NSW).

could have been addressed in further detail. The majority made eight points in relation to s 63 of the *Trustee Act 1925* (NSW), including that, in circumstances such as those faced by the association, trustees should 'take no step in defence of the suit without first obtaining judicial advice about whether it is proper to defend the proceedings'.[4] This is not explored in great depth by the author, who draws the reader's attention to this aspect of the Court's discussion by asking whether the Court was 'seeking to encourage applications for advice and directions more generally? If so, why?'[5] Dal Pont also questions whether the Court was endeavouring to 'exercise greater superintendence over trusts, and "nip in the bud" potential breaches of trust'.[6] The reader is referred to an article for further exploration of this area[7] but what this paragraph does not address is whether there may be any practical consequences of such an approach, such as a 'flooding of the Supreme Court with actions for judicial advice.'[8] Further, the commentary does not elaborate upon whether failure to seek advice in such circumstances might prevent the trustees obtaining indemnity for costs incurred in litigation or, at the very least, decrease the likelihood of obtaining an indemnity.[9] Nevertheless this section includes a well developed discussion about an area that does not receive frequent attention.

A welcome addition to the text is found in Chapter 29, 'Charitable Trusts'. The High Court decision of *Aid/Watch Inc v Commissioner for Taxation* (2010) 241 CLR 539 is important for bodies that have as an objective influencing 'public sentiment'[10] but seek to take advantage of the numerous benefits of charitable status. This case concerned whether an organisation should have charitable status when it engaged in researching, monitoring and campaigning about aid provided overseas. The Full Federal Court had denied such status on the basis that the

4 *Macedonia Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 [74].

5 G E Dal Pont, *Equity and Trusts Commentary and Materials* (Lawbook Co Thomson Reuters, 5th ed, 2011) 715.

6 Ibid.

7 See V J Vann, 'The High Court Gives Some Advice to Trustees: The Macedonian Church Case' (2009) 32 *Australian Bar Review* 123.

8 David K L Raphael, 'Seeking Judicial Advice and s 63 of the Trustee Act' (2008) 82 *Australian Law Journal* 832, 837

9 Ibid.

10 C W Pincus, '"Charitable Institution" for Tax Purposes (2011) 85 *Australian Law Journal* 17, 21.

campaigning had political connotations and therefore could not be charitable.[11] The High Court disagreed, noting that a court administering a charitable purpose trust that involves 'agitation' for legislative and political changes 'is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction'.[12] Further, as the institution was advocating for an increase in foreign aid, the institution sought to advance the law within the boundaries of the 'relief of poverty',[13] which is one of the four purposes recognised as charitable in *Commissioners for Special Purposes for Income Tax v Pemsel*.[14] The Court left open the question as to whether a body would be categorised as charitable when it is not an advocate for any of the charitable purposes recognised in *Pemsel*. This issue is specifically addressed by Dal Point in the commentary and questions section. This is a contemporary area of trusts law that students are likely to be able to contextualise and view as being more than just a list of principles to learn. Given that organisations such as Amnesty International are likely to be known to students[15] and recent debate concerning whether a charity commission should be created and what form such a commission should take,[16] there are plenty of opportunities for students to engage in critical analysis of this area of the law. Dal Pont clearly recognises this and uses this recent case, which is a demarcation from the English approach,[17]

11 *Federal Commissioner for Taxation v Aid/Watch Incorporated* (2009) 178 FCR 423 [37], [41].

12 *Aid/Watch Inc v Commissioner for Taxation* (2010) 241 CLR 539, [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ) ('*Aid/Watch*').

13 Pincus, above n 10.

14 [1891] AC 531 ('*Pemsel*').

15 In *McGovern v Attorney-General* Amnesty International was denied charitable status in England and Wales, see *McGovern v Attorney-General* [1982] Ch 321, 336-337, 430 and 347.

16 The *Final Report of the Scoping Study for a National Not-For-Profit* (NFP) Regulator was released by the Treasury on 4 July 2011 and is available at <http://treasury.gov.au/contentitem.asp?NavId=002&ContentID=2054>. For discussion in the media, see for example 'Senate Inquiry recommends Charity Commission' Pro Bono News (online) 8 September 2010 <http://www.probonoaustralia.com.au/news/2010/09/senate-inquiry-recommends-charity-commission>. There is also a facebook page campaigning for a charity commission called 'We want an Australian charity commission', see < http://www.facebook.com/pages/We-want-an-Australian-charity-commission/190937757625740>.

17 See for example *Bowman v Secular Society* [1917] AC 406 and *McGovern v Attorney-General* [1982] Ch 321

as a platform to facilitate analysis. Many of the secondary sources to which students are referred in the 'Notes & Questions' section pre-date the *Aid/Watch* case but they are undoubtedly valuable in terms of their discussion of policy and debate in this area. It is, however, a shame that the case extract and 'Notes & Questions' section do not refer to the dissenting judgments of both Heydon and Kiefel JJ, which are rich with comments about whether the association's objectives fell within one of the four charitable purposes[18] and the significance of political objectives in relation to the public benefit test.[19]

Although the High Court decision of *Kennon v Spry* (2008) 238 CLR 366 has perhaps received less attention than other recent High Court cases because of its family law context,[20] it is pleasing to see its inclusion in the book given that, in the context of discretionary trusts, this case leaves many consequential questions unanswered.[21] In this case, the Court had to determine whether an 'interest' of a potential beneficiary in a discretionary trust fell within 'property of the parties to the marriage or either of them' under s 79 of the *Family Law Act 1975* (Cth). Traditionally, the view was that the right of an object in a discretionary trust was merely a chose to see due administration of the trust and that the object did not have a proprietary interest in the property. *Kennon v Spry* appears to contradict this underlying premise but does so within the context of the Court's jurisdiction to distribute matrimonial assets upon relationship breakdown. Dal Pont seizes the occasion to pose the question as to whether this indicates that the law should adopt a flexible approach to the concept of 'property'. Dal Pont extends commentary on this even further by questioning whether an 'interest' of a beneficiary under a discretionary trust might fall within bankruptcy assets under s 116(1) of the *Bankruptcy Act 1966* (Cth). This incremental approach towards the issue of proprietary interests is

18 *Aid/Watch Inc v Commissioner for Taxation* (2010) 241 CLR 539 [60-63] per Heydon J.

19 Ibid [69-71] per Kiefel J.

20 It has been suggested that it should be confined to its narrow family law context and should not be taken to represent the nature of the beneficiary's interest generally. See for example, Nicola Peart 'Intervention to Prevent the Abuse of Trust Structures' (2010) *New Zealand Law Review* 567, 591

21 See for example Aitken's extensive analysis of this decision in the context of discretionary trusts: Lee Aitken, 'Muddying the waters further – *Kennon v Spry*; "ownership", "control" and the discretionary trust' (2009) *Australian Bar Review* 26.

likely to assist students in their understanding of the potential practical scope of such decisions.

When one considers the 39 chapters and 1198 pages contained in the new edition, it is apparent that the percentage of content of those chapters and pages that is new is not substantial. As a consequence, in some cases the purchaser may feel that spending money on the new edition is perhaps unnecessary because a scan of the book reveals a similar layout, look and feel to the previous edition. This would be a mistake, given the numerous decisions incorporated into the text or, at the very least, discussed in the 'Notes & Questions' section to prompt further research and analysis. Whilst it is not in doubt that there have been numerous appellate decisions in the interval between the two editions, the differences between the fourth and fifth edition primarily relate to trusts rather than equity. Given that many of the new materials are cases concerning trusts, those who are not focused on the development of jurisprudence in relation to trusts may feel that they cannot warrant the expenditure on a new edition.

However, those who purchase this new edition will not be disappointed. The commentary accompanying the core materials has always been easy to read and digest and this edition remains true to that aim. This book provides a snapshot of crucial materials in the discipline area that students can utilise as a springboard for furthering their understanding of the area and for the discussion of their ideas. It adopts a framework that is accessible and provides a scaffolded approach towards theoretical and practical issues arising out of the materials. It therefore encourages debate and critical analysis but does not deny the importance of reference to the actual primary and secondary sources altogether. In light of the increasing internationalisation of law, it is also encouraging to see that this book covers a number of cases from New Zealand, Canada and the UK. In conclusion, this book is comprehensive and informative and should be seen as an important additional resource for law students.