BOOK REVIEWS

Equity and Commercial Relationships edited by P. D. Finn (Law Book Company, Sydney, 1987) pages i-xxviii, 1–320. Price $54.00 ISBN 0 455 20725 9.

This is a remarkably and pleasingly informative book in two different although necessarily related ways. The first, to which I return in a moment, is the effortless guidance it supplies to the up-to-the-minute action in a number of areas of commercial law which have been developing with speed, and often ingenuity, in recent times. The second is the fascinating insight it gives into the increasing influence of equitable ideas in commercial law. Not that they would always be called strictly equitable ideas. Much of the influence wears the intriguing appearance of being called equity only because it does not look conceptually like what used to be called, before the Judicature Acts, law.

The opening chapter, by the Honourable Mr Justice G. A. Kennedy of the Supreme Court of Western Australia, pursues this general theme. He points also to the part played by ever-increasing legislative intervention and to the particular effect of income tax legislation in encouraging interest in the revenue and commercial potential of the trust concept. The trust is indeed a workhorse of abiding stamina. It ventured beyond its native haunts in the law of property in the 18th century to help keep the idea of non-statutory incorporation alive in the century-long shadow cast by the South Sea Bubble. Now here it is, all over again, flourishing away in the form of the trading trust, most illuminatingly dealt with by my former colleagues, Professor H. A. J. Ford and Dr I. J. Hardingham, in chapter 3. The trust's potential in this area is wryly acknowledged by the Companies and Securities Industry Codes through the adoption of the distinctly unspecific terms 'prescribed interest' and 'participation interest' in an effort to cover all the available commercial ground. The success of the effort remains to be seen.

From trading trusts we proceed to the enforcement of partnership agreements, articles of association and shareholders agreements in chapter 4, by Dr L. S. Sealy. The discussion here of the long, and on the whole tiresome, debate about the contractual character of company constituent documents has had to cope with the disadvantage that with effect from 31 March 1986 the current wording of the Companies Code section 78 not only removes the basis of the controversy but also, even more importantly, evinces an unmistakeable legislative intention that the constituent documents of a company create three distinct contracts with the effect of contracts under seal: between the company and each member, between the company and each officer and between a member and each other member. The commentator, Frank Callaway Q.C., contributes among other points an interesting reference to the possible significance of Companies Code section 574 as an injunctive remedy which goes well together with section 320 in further diminishing what little is left of the rule in *Foss v. Harbottle* (1843) 2 Hare 461, 67 E.R. 189. He also, to the satisfaction of the present reviewer, expresses doubt about the correctness of *Kinsela v. Russell Kinsela Pty Ltd* (1986) 4 A.C.L.C. 215, 10 A.C.L.R. 395 in holding that a director's duty towards his company can encompass the interests of its creditors beyond the scope of specific creditor remedies.

A wider consideration of the present state of directors' duties to their companies by J. D. Heydon follows in chapter 5 and brings out well the internal inconsistencies of the concept as the law stands at present; at all events if everything which has been said on the subject in judicial circles is to be taken literally. The commentator is Ian Renard of Arthur Robinson and Hedderwicks, who makes the timely point that the context in which the concept of directors' duties has to be applied is itself modifying so swiftly that it is unwise to seek to confine its capacity for development within any single tidy principle.

Professor R. P. Austin of Sydney continues the fiduciary inquiry in chapter 6 with particular reference to the American corporate opportunity doctrine. This has been developed in an effort to deal with the situation where officers with a fiduciary duty towards their company exploit to their own advantage a commercial opportunity which ought properly to be seen as an opportunity for the

company rather than its officers. The principle that no fiduciary ought to do this sort of thing is easy enough to formulate. As one might expect however, the difficulties arise when trying to formulate a practical means of recognising when a commercial situation is properly characterised as a corporate opportunity for the purpose in hand. Professor Austin is concerned, and rightly so, to explore in some detail the conditions which may exist for developing such a doctrine in Australian law.

In chapter 7 the Honourable Mr Justice J. B. Kearney of the Supreme Court of New South Wales follows with a consideration of the present basis of accounting for a fiduciary's gains in commercial contexts. He has some interesting points to make about the constant, and in this reviewer's opinion undesirable, tendency to introduce the idea of the constructive trust into such situations. As a general proposition it can be argued to be unwise to convert a fiduciary, virtually by operation of law, into a trustee, many of whose duties and responsibilities are highly specific to the trust framework and not necessarily of much relevance or assistance in a more flexible commercial context.

In chapter 8, entitled 'The Romalpa Clause and the Quistclose Trust' (a somewhat less than arresting title for the uninitiated), the Honourable Mr Justice L. J. Priestley of the New South Wales Court of Appeal starts his contribution with the wry observation that many lawyers concerned with equitable doctrine have 'a fundamentalist faith in the eternal distinction between that doctrine and common law principles'. Whilst granting his point that such an attitude is little help if it leads traditionalists to deny the obvious, the fact remains that to preserve in our modes of thought and analysis an understanding of the different characters of equity and traditional common law is still a great aid to clarity of thought.

The names Romalpa and Quistclose of course, like much other legal shorthand, take their names from the cases in which the phenomena concerned were first referred to or made generally known. Probably the best known feature of the Romalpa clause is that it succeeds in retaining title in goods sold in the vendor, as long as they remain in their original form, until the vendor has received full payment of the purchase price. Insofar as this is all it does, such a clause does not create a registrable charge, although on the face of things one might have supposed that that was a distinctly possible result. Insofar however as the clause then proceeds to elaborate its intended effect by providing for the legal consequences of changing the goods from their original form into a new object, it has been held on several occasions that these additional precautions do create a charge which, if unregistered, is necessarily ineffective against creditors other than the original vendor.

Mr Justice Priestley's analysis of the original Romalpa clause and what has happened to it through judicial interpretation since is clear, cogent and helpful. His basic point of view, that nothing particularly complicated has in fact happened, is well borne out by his analysis. He also points to the oddity that the whole development is based upon a translation into English of a clause originally designed by the contracting parties for a system of civil law, Dutch law being the system in mind; yet in the Romalpa case itself Dutch law was not prayed in aid. Curious indeed are some of the sources of law.

The Quistclose trust, as Mr Justice Priestley disarmingly concedes, takes its name from a case which was by no means the first of its kind, its antecedents going back for over 150 years, but stands as a House of Lords decision which is simply accepted as the relevant authority. Such a trust is an arrangement whereby if a third party has some reason for wanting to ensure that someone else's unpaid creditors are paid out, and the someone else is unable to do so, perhaps being an insolvent company, the third party can create a fund for the purpose and impress it with a fiduciary or trust character in favour of the creditors concerned or, should that fail, resulting to himself. It is obviously a good thing that the law (including equity) sees no objection to this, for it is an arrangement which does no harm either to the debtor or to other creditors of that debtor. It is false logic to argue that it prejudices other creditors by not being made part of the generally available assets of the debtor. It is false logic because it was never the intention to benefit the other creditors. If it were not possible to pay out a selection of creditors in this way, the debtor and the other creditors would be no better off but the creditors in whom the third party is interested would be worse off.

In the penultimate chapter 9 Mr W. J. Gough, whose standard text on company charges is a publication for the existence of which all company lawyers are constantly grateful, brings us up to date with that most satisfactory accommodation between legal logic and commercial necessity, the floating charge. He remarks in passing that it is 'not too fanciful to suggest that the floating charge is one of the great legal success stories of Victorian times'. This is certainly true, as indeed also is his

immediately following observation that its development ran largely parallel with the emergence and growth of the limited liability company itself, an even greater success story. This chapter includes not only a very handy review of the current Companies Code priority system for registrable charges but also some interesting suggestions as to where the floating charge goes next, particularly in relation to selective crystallization and probable future development.

This excellent book, with its very happy combination of concept and practice, concludes with a chapter on modern portfolio theory and the investment of pension funds by W. A. Lee of the University of Queensland. The editor and his collaborators are to be warmly congratulated and this product of their labours to be widely recommended.

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