marked by common sense deserve the full attention of the international legal community.

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Fiduciary Obligations, by P. D. Finn, Sydney, The Law Book Company Limited, 1977, xxxvii + 299 pages (including index) $24.50.

This book is unlike any other writing on fiduciary obligations. Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* (1975) covers much of the subject matter of Finn's work, but their objective is to analyse doctrines of equity generally, while Finn concentrates on those equitable obligations which judges have labelled "fiduciary". Consequently there are differences of content and organisation. In particular, Meagher, Gummow and Lehane's chapter on "the fiduciary relationship" deals only with the fiduciary obligation not to put interest in conflict with duty, and there are separate chapters on undue influence and confidential information; most of this material, and more, is covered in Part II of Finn's book and Part I deals with fiduciary powers, a topic not discussed systematically by Meagher, Gummow and Lehane. Some discussion of fiduciary obligations may be found in Goff and Jones' *Law of Restitution* (1966), where once again the topic arises in the course of a wider undertaking, and in some illuminating articles by Sealy,[1] which obviously influenced Finn.

Starting with the proposition that the definition of the fiduciary relationship changes, depending upon the specific obligation being considered, the author organises his work around a series of rules and subrules which particularise the various fiduciary obligations. Many of these rules are original formulations by the author. Judges have tended in this field to move directly from moralistic precepts to decisions on the facts. Therefore authors are forced to formulate the intermediate premises for themselves, and no criticism can be based on the fact that the rules produced in this fashion cannot be found stated in the cases. But one aspect of the organisation of Finn's book is open to question. This reviewer would have appreciated more explanation of the relationship of each rule to the others. For example, the so-called "purchasing rule", which limits a fiduciary with respect to the purchase of his beneficiary's property, is discussed in Chapter 20, and Chapter 21 deals with the rule which prevents a fiduciary from putting himself in a position in which interest and duty conflict. To the uninitiated, the former will look rather

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[1] "Fiduciary Relationships" [1962] *Camb. L.J.* 69; "Some Principles of Fiduciary Obligation" [1963] *Camb. L.J.* 119.

like an instance of the latter. Finn's response would probably be that only some of the people who are fiduciaries for the purposes of the rule about conflict of interest and duty are fiduciaries for the purposes of the purchasing rule, that the purchasing rule always relates to specific property, and that it is unnecessary to the application of the purchasing rule, once the relationship with respect to specific property has been proven, to show any further conflict of duty and interest. But these contrasts arise only by way of inference from the text, except for one highly distilled paragraph.[2] One could make a similar point about many of the sub-headings of Chapter 21. A little more explanation of these relationships would improve the utility of the book as a work of reference for practitioners, as well as helping the reader to come to grips with fairly sophisticated subject matter and ideas. However, this is not to deny the manifest utility of the book in its present form, or the clarity of its style and exposition.

Classifying the law is a risky activity. Finn has performed the task well, but one controversial issue which is obscured by his classification is the significance of *Lister* v. *Stubbs*.[3] That was a case about a secret commission, but it is regarded by some commentators[4] as authority with respect to some other breaches of the rule about conflict of interest and duty. Where it applies, it may deprive the beneficiary of any proprietary remedy.[5] Finn deals with the case under his heading "Bribes and Secret Commissions", as authority for the proposition that, where the bribe takes the form of a money payment or money gift, the fiduciary does not hold the money received as a trustee for his beneficiary.[6] But if the fiduciary benefits from a transaction in which his undertaking requires him to deal for his beneficiary, he holds the benefit on trust.[7] And if a person is given possession or control of property (but not title to it, so he cannot be an express trustee), with no right to use it for his own benefit, and that person misuses the property to make a profit for himself, the owner of the property may trace the profit.[8] Finn does not suggest that *Lister* v. *Stubbs* may be relevant to these last two propositions. It is true that the trend is to confine *Lister* v. *Stubbs* to its own facts,[9] and it may eventually be overruled, but for the time being it is misleading to ignore the controversy which surrounds its scope.

The central part of the book deals with the rule about confiict of duty and interest (Chapter 21) and its allies (Chapters 17, 18, 20, 22,

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[2] Finn, p. 223.

[3] (1890) 45 Ch. D. 1.

[4] For example, *Underhill's Law of Trusts and Trustees* (11th ed., 1959, by C. Montgomery White and M. M. Wells), pp. 214-5; *Lewin on Trusts* (16th ed., 1964, by W. J. Mowbray), p. 144.

[5] See the discussions in R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity Doctrines and Remedies* (1975), p. 126 ff; *Jacob's Law of Trusts in Australia* (4th ed., 1977, by R. P. Meagher and W. M. C. Gummow), p. 240 ff.

[6] Finn, p. 220.

[7] Finn, p. 241.

[8] Chapters 17 and 18, esp. p. 122 ff.

[9] *D.P.C. Estates Pty. Ltd.* v. *Grey* [1974] 1 N.S.W.L.R. 443 at 470-1, *per* Hutley, J.A.; overruled by the High Court, but not on this point, (1975) 49 A.L.J.R. 74.

23, and 24). The long Chapter 21 repays careful study. As Finn sees it, the rule and its sub-rules apply to anyone who undertakes to act for or on behalf of another in some particular matter or matters. The undertaking may be general or specific, contractual or gratuitous. Such a person (a fiduciary for the purposes of this rule) must not place himself in a position in which his duty and interest may conflict. The cases fall into three broad categories — first, where the fiduciary obtains a financial benefit beyond his authorised remuneration, such as a bribe, director's fee in the case of a trustee-director, or discount; secondly, where in the same transaction the fiduciary acts both in that capacity on one side and as an undisclosed principal on the other, such as the agent to purchase who sells his own property to his beneficiary; thirdly, where the fiduciary within the scope of his undertaking takes a benefit on his own account to the exclusion of his beneficiary. In the third area, two important sub-rules operate: a fiduciary cannot, on his own account, derive any benefit which his undertaking authorises or requires him to pursue in his representative capacity; and a fiduciary, even though acting in a manner outside the scope of his undertaking to his beneficiary, cannot retain a private profit made, if it has been made only through some actual misuse of his representative position. One can see the distinction between these sub-rules in easy cases. To take an example of Finn's, suppose Blackacre and Whiteacre are adjacent properties, and Blackacre is a trust property. Provided that the purchase of Whiteacre is outside the scope of the trust, the trustees will not infringe the first sub-rule by purchasing Whiteacre even if they have learned something of it while acting as trustees of Blackacre. But if they commence negotiations for the purchase of Whiteacre by representing to the owner that they are acting for the trust, they are profiting through misuse of their position, and fall foul of the second sub-rule. However, the distinction does not help much in hard cases, such as those concerning company directors and other fiduciaries whose undertakings are general in character. Finn points out that there are additional complications in such cases. One is that the first sub-rule is narrowed here to require a specific duty or authority with respect to the benefit in question. A managing director, for example, may have a wide general authority to contract on behalf of his company, but he is not accountable to it for any profit made for himself simply because that general authority permitted him to act on the company's behalf in the transaction which generated the profit. He becomes accountable only by virtue of some more specific duty or authority related to the benefit which he derives. It is difficult to determine how specific the duty or authority must be before the first sub-rule is attracted, as *Industrial Development Consultants Ltd.* v. *Cooley*[10] shows. Another complication is that the fiduciary's obligation under the first sub-rule may extend to future conflicts of interest and duty. The solicitor in *Phipps* v. *Board-*

10 [1972] 1 W.L.R. 443.

man[11] might have been asked to advise his client-trustees on an application to the court to enable them to enter into the transaction which he in fact entered into on his own account. This remote possibility brought his profit-making transaction within the scope of his fiduciary undertaking. One wonders how far this reasoning can be pressed, and Finn is critical of it. Yet another complication relates to the second sub-rule: the fiduciary who uses his position to assist in obtaining a profit must account, but "the still uncertain question . . . is the degree of connection which must exist between the action taken in the fiduciary position, and the profit finally secured".[12] One suspects that the courts, in endeavouring to answer that question, will talk about conflicts or possible conflicts of interest and duty, and the scope of the fiduciary's undertaking, thereby blurring the distinction between the two sub-rules. Indeed, given that propensity of the courts, is it useful to maintain the separation of the sub-rules, as far as company directors are concerned?

The company law cases certainly raise special problems. Take the Privy Council's recent assertions in *Queensland Mines Limited* v. *Hudson*,[13] decided after Finn's treatise was completed. Hudson made disclosure to the board of directors of Queensland Mines. Thereafter, said the Privy Council, the position could be put in either of two ways: that the profit-making venture was outside the scope of the trust and agency created by the relationship of director and company; or that Queensland Mines had given its fully informed consent to Hudson to do what he wished on his own account; but in their Lordships' view, it did not matter how it was put. These observations make it clear that some careful reflection is needed on the interaction of the concepts of scope of agency, disclosure and actual and possible conflict, as they apply to company directors. Finn's work will sharpen our appreciation of the difficulties, but ultimately we may find company law going its own way, no longer merely an application of general fiduciary principles.

Part I of the book, dealing with fiduciary powers, seems to this reviewer to be less successful than Part II. Finn's task in Part I is to expound the duty to exercise fiduciary powers bona fide in the interests of the beneficiary. He looks behind this vague formula and finds eight more specific duties, all of which apply to the exercise of powers vested in the holder of a fiduciary office, which he defines. The first four (duties not to delegate discretions, not to act under dictation, not to place fetters on discretions, and to consider whether a discretion should be exercised) ensure that there will be no failure on the officer's part to exercise his powers. The rest (duties not to act for his own or any third person's benefit, to treat beneficiaries with equal rights equally, to treat beneficiaries with dissimilar rights fairly, and not to act capriciously or totally unreasonably) limit the actual exercise of his powers.

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[11] [1967] 2 A.C. 46.
[12] Finn, p. 248.
[13] [1978] C.C.H. A.C.L.C. 29, 773, at 29, 779.

This reviewer has a number of reservations about Finn's analysis. First, there is a general assumption that the eight duties apply, and apply with equal force, to all holders of fiduciary office, except where the text makes an express qualification (as it does, for example, with respect to the application of the seventh duty to company directors). But is this so? For instance, was it relevant to the decision in *Thorby* v. *Goldberg*,[14] which allowed company directors to bind themselves by contract on certain circumstances as to the future exercise of discretions, that the fiduciaries were in a commercial position and therefore quite unlike trustees? How can the problem of dictation by the beneficiary apply to company directors? When a general meeting by simple majority purports to instruct the board of directors to exercise the board's powers in a certain way, the problem is not one about a beneficiary dictating to his fiduciary;[15] it raises for consideration the distribution of power between two company organs. Is there a duty to consider the exercise of all discretions vested in the fiduciary, or is the duty limited to dispositive and similar discretions?[16] Specifically, what could it mean to say that trustees have a duty to consider the exercise of a power of leasing when the trust fund is invested in mortgages, or that company directors have a duty to consider the exercise of power to issue new shares, when the occasion for doing so has never arisen?

Secondly, are the eight duties all aspects of the fiduciary obligation? The first four duties, and the eighth, seem to apply to persons who are not holders of fiduciary office, on Finn's definition. For example, an agent (excluded on Finn's definition) has a duty not to delegate discretions; presumably he cannot act under dictation, except from his principal, or place fetters on his discretions (unless his agency permits him to do so); if he is a managing agent, he must surely consider from time to time his power of management, subject once again to any contrary provision in his agency contract. These duties may be particularly significant for fiduciaries, but they do not appear to be fiduciary duties.

Thirdly, Finn has for the most part excluded from his analysis any discussion of proceedings, consequences and remedies. But it may be that such considerations significantly affect the content of the duties. For example, the grounds for judicial intervention in the exercise by a trustee of a discretion appear to be expanded by the making of an administration order.[17] Further, some of the eight duties lead to remedies which depend on the invalidity of the fiduciary's action, while others lead to remedies in the nature of compensation. For example, the trustee who improperly delegates the exercise of a discretion is accountable for breach of trust, this remedy being compensatory. The validity of the action of his delegate depends on principles of agency, which involve much more than the non-

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14 (1964) 112 C.L.R. 597.

15 *Cf.* Finn, p. 22.

16 The qualification on pp. 34-5 does not meet the present point.

17 *Craig* v. *National Trustees Company of Australasia Ltd.* [1920] V.L.R. 569 (Cussen, J.).

delegation rule. If a trustee exercises a discretion capriciously, his decision is invalid, but his liability to account for breach of trust depends on different issues, namely whether his invalid decision depletes the trust fund and whether he has failed to exercise reasonable care. In view of these important differences between the duties, it is misleading to omit a discussion of the consequences and remedies in respect of each duty.

Finally, some comment must be made about the duties not to act for his own benefit, and to act equally and fairly, which are the central fiduciary duties in Finn's list. This reviewer prefers the analysis of Professor Cullity,[18] though Cullity's work is confined to trustees and attempts a synthesis of the fiduciary duty to act bona fide in the interests of the beneficiary and the doctrine of fraud on a power. In Cullity's analysis the duty not to act for the trustee's own or any third person's benefit becomes part of the doctrine of fraud on a power, which requires the trustee, broadly, to exercise his powers for proper purposes. This seems sensible and consistent with case law. The duties to act equally and fairly (or, compendiously, the "even-handed" principle) come to be seen as depending to a large extent on the scope of the discretion conferred on the trustee, upon its proper construction. The very fact that a decision is placed within the trustee's discretion may allow him within limits to prefer one class of beneficiaries to another (or, negatively, the court will not intervene to substitute its opinion for his). While a trustee who has no discretion to exercise must act even-handedly, there is no absolute rule that a court will intervene to ensure the even-handed exercise of discretionary powers — much depends on the particularity of the terms in which the discretion has been granted.

The above comments concentrate on the structure of the book. The author makes many useful contributions to particular judicial and academic controversies. Lack of space precludes further discussion here. This book is a scholarly contribution to legal literature. Undoubtedly, it merits careful attention from all lawyers interested in the doctrines of equity and company law.

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Review of Administrative Action, by H. Whitmore and M. Aronson, Australia, The Law Book Company Ltd., 1978, xlv and 519 pp. (inc. index). $28.50 (cloth), $24.50 (limp).

It is fitting that this book — the first detailed treatise on the subject of review of administrative action published in Australia — should appear at a time when a comprehensive and coherent system of administrative

[18] "Judicial Control of Trustees' Discretions" (1975) 25 *Univ. of Toronto L.J.* 99.

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