

Reform of the existing law does take second place in the stated aims of the book. It unfortunately receives rather scant and perhaps unimaginative treatment. The suggestion is that with minor modifications, the Theft Act 1968 (U.K.) be adopted as the model for uniform State legislation. I suppose that with one's appetite whetted by the work done in the essential preliminary statement of the existing law, hopes are raised high. However, here fundamental questions are not directly raised. In passing, reference should be made to the rather radical and not uncontroversial proposals of the Canadian Law Reform Commissioners in their working paper on the law of theft.⁷

In sum, a very welcome book. No small measure of credit is due to the authors for venturing on the task that they set for themselves. Here they have succeeded, so well indeed that one is left as one should after reading a pioneering work, asking for more.

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Fiduciary Obligations, by P. D. FINN, B.A., LL.B. (QLD), LL.M. (LOND.), PH.D. (CANTAB.); Senior Lecturer in Law, The Australian National University. (The Law Book Company Limited, Sydney, 1977), pp. i-xxxvii, 1-299. Recommended retail price \$24.50. (ISBN 0 455 19589 7).

The term "fiduciary" has a large and increasing currency both among equity lawyers and those toiling in adjacent vineyards. Many use it as if it were an expression of fixed and recognised import whereas the truth is to the contrary. The disparity between the views of fundamental issues apparent in the High Court judgments in *Consul Developments Pty Ltd v. D.P.C. Estates Pty Ltd*¹ and the uninspired reasons delivered by the Judicial Committee of the Privy Council in *Queensland Mines Ltd v. Hudson*² are but two recent examples of the necessity for a confident guiding hand to bring order and clarity to this subject.

The appearance of Dr P. D. Finn's work will be welcomed by lawyers with an interest in equity and by all for whom the exigencies of practice necessitate an investigation of the intricate mysteries of fiduciary obligations. Despite a cloudy patch at page 11 (where the author confesses a "felt need") the light of reason shines throughout the balance of the book.

As the author truly observes, the term "fiduciary" is a relative latecomer to our law. It is not much more than a century old, having gained currency as an identification of those relationships to which

⁷ Canadian Law Reform Commission, *Working Paper No. 19—Criminal Law of Theft and Fraud* (1977).

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¹ (1975) 5 A.L.R. 231.

² (1978) 18 A.L.R. 1.

the exclusive jurisdiction of Chancery was attracted but which, whilst including the trust, went beyond it after the acceptance of the dogma that there could be no trust without property upon which that institution was impressed. That, of course, left "property" as a term of indeterminate reference; but clearly enough there were many relationships supervised in the exclusive jurisdiction which did not have as their gist a trustee holding a title to "property" for a beneficiary. Hence the fiduciary.

Dr Finn's thesis, set out in chapter 1, is that the term "fiduciary" now has two principal usages. To each of these he devotes a part of his text, the first carrying thirteen chapters and the second ten.

The first part is devoted to an examination of the fiduciary powers given by one person to be exercised for the benefit of another. Thus, the classical power of appointment in the traditional settlement and, in more recent times, the power of a trustee of a discretionary trust to select recipients of trust income, and the power of directors to issue shares. An exercise of these powers may be valid at law, because there is no absence of authority, no steps *ultra vires*, but still be impugned in equity for failure to meet standards equity requires for the exercise of legal powers. Dr Finn examines the nature and scope of such equitable intervention in chapters 2-14.

The second part of the work is concerned with that usage of "fiduciary" to identify those "acting for, or on behalf of, or in the interests of, or with the confidence of, another".³ Here too, equity is concerned with observance of its standards of probity and fidelity. The burden of Dr Finn's thesis is that the supervision of persons bound by these "fiduciary ties", whether they be solicitors, agents, company directors, has been reduced to eight separate and distinct equitable obligations—"or duties of good faith as they will be called".⁴ These duties, each of which is dealt with in a chapter in the book, involve the following:

- (1) the presumption of misuse of influence, the subject of what generally is called "undue influence";
- (2) the forfeiture of unauthorised benefits derived by misuse of property vested in the fiduciary or of which he has possession or control;
- (3) misuse of information received in confidence;
- (4) the necessity of fully informed consent if a fiduciary is to escape the automatic setting aside of a purchase by him of property dealt with by him previously in a fiduciary capacity;
- (5) the conflict of fiduciary duty and personal interest (the most notorious and perhaps most frequently invoked aspect of fiduciary obligations);

³ Finn, *Fiduciary Obligations* (1977) 2.

⁴ *Id.*, 78.

- (6) the prohibition of service by one fiduciary to two masters in the one transaction (as occurs when one solicitor acts for vendor and purchaser) without the informed consent of both;
- (7) the two branches of the rule derived from *Keech v. Sandford*,⁵ the one dealing with renewal of leases and the other with purchases of reversions.

It may well be said that the rules as to undue influence and the emergent doctrine of confidential information have sufficient independent existence to carry them beyond the pale of fiduciary duties; further, the fourth topic already is dealt with in the standard works on trusts. But, undoubtedly, all these topics bear each upon the others to some extent and it would have been unwise, in the opinion of this reviewer, to treat less than all of them in a work of this kind. Again, much of what Dr Finn has to say is concerned with the position of company directors; no doubt, it is now true to speak of "company law" as a discrete subject but the judge-made law in this field is, as Lord Wilberforce has twice recently reminded us,⁶ essentially equitable in nature.

In the approach taken by Dr Finn to his task there are several causes of regret. He is on occasion too ready to treat his burden with a difficult or uncertain topic as discharged by marshalling the competing "views", that term so beloved of poorer law teachers, so detested by better students, so mystifying to practitioners. The treatment of *Protheroe v. Protheroe*⁷ is an example; so also is that of *Holder v. Holder*.⁸ Again, it simply will not do to cite *Lister and Co. v. Stubbs*⁹ as authority for the proposition that a fiduciary who takes money as a bribe is accountable to his beneficiary only by the personal not the proprietary remedies, and then to assert this is unsatisfactory.¹⁰ First, the treatment of this decision by Hutley J.A. in *D.P.C. Estates Pty Ltd v. Grey and Consul Developments Pty Ltd*¹¹ should be noticed, and secondly, the decision itself requires examination. It must be ascertained whether the case did in truth so decide the law (this reviewer believes that it did not) and then (if it did do so) the error of such a holding should be explained to the reader. English academic writing in property law has suffered and still suffers from an excessive genteelism, with a reverent hush greeting the most extraordinary pronouncements of the Court of Appeal. It is to be hoped that Dr Finn has suffered but a slight bout of this disease.

Another irritating aspect of modern academic writing is the pre-occupation with "commonsense" as the touchstone of legal scholarship, with the predisposition to a result in accordance with "commonsense" no

⁵ (1726) 2 Eq. Cas. Abr. 741; 25 E.R. 223.

⁶ *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] A.C. 821; *In re Westbourne Galleries* [1973] A.C. 360.

⁷ [1968] 1 W.L.R. 519. See Finn, note 3 *supra*, 264-265.

⁸ [1968] Ch. 353. See Finn, note 3 *supra*, 182-183.

⁹ (1890) 45 Ch.D. 1.

¹⁰ Finn, note 3 *supra*, 220-221.

¹¹ [1974] 1 N.S.W.L.R. 443, 470-471.

matter either the cost in principle, or the failure to produce a rule speaking beyond the instant facts. An example is Dr Finn's treatment of the use of Lord Cairns' Act as a basis for the award of "damages" for breach of a fiduciary duty. No doubt a loss arising from such a breach should attract a pecuniary remedy in the inherent and exclusive jurisdiction. That is what happened in *Nocton v. Lord Ashburton*.¹² But that is quite a different matter from treating the reference to "damages" in Lord Cairns' Act as absorbing this inherent jurisdiction into some statutory amalgam with common law concepts of damages in tort or contract. What is needed is a clear development of the inherent jurisdiction; that is what was not given by the Court of Appeal in *Seager v. Copydex Ltd (No. 2)*.¹³ And it is not to the point to say that the "commonsense" of the award in that case "cannot be gainsaid".¹⁴ Nor is it of the slightest assistance for the practitioner with a problem in this area to be told that it is "impractical—and perhaps unwise—to attempt to lay down hard and fast rules. . . . The facts of each case alone can be the master of the damages remedy given".¹⁵ The great judges who created the equity we so cherish found it both practical and wise to rise from the particular to the general and to expound principle. That was their genius. It is why we still refer to their decisions. If they had not had the confidence, a lack of which Dr Finn urges upon their successors as a virtue, there would have been no equity jurisprudence, merely a wilderness of single instances.

But if there be in Dr Finn's work some elements to give one pause, there is, as indicated at the outset in this review, much to praise. Careful and thorough citation of authorities from Australia, New Zealand and Canada, as well as from the United Kingdom, makes the book a valuable guide to all desiring to teach, learn or practise in this field in any of those jurisdictions. But there is on display much more than diligence. The more celebrated cases—*Boardman v. Phipps*¹⁶ is a good example—are treated to a degree which clearly they require but which pressures of space, if no other cause, prevent in a text encompassing equity as a whole. And there is sustained treatment of topics scarcely touched in other books but of great doctrinal and practical importance.

Chapter 22, titled "Conflict of Duty and Duty", deals thoroughly with the dilemma of the fiduciary with concurrent engagements to different parties. Chapter 7 explores the rule, so easy in formulation, so difficult in application, that a fiduciary cannot effectively bind himself as to the manner in which he will exercise a discretion; it is particularly pleasing here to see its proper place given to the otherwise neglected judgment of Sir Frank Kitto in *Thorby v. Goldberg*.¹⁷

¹² [1914] A.C. 932.

¹³ [1969] 1 W.L.R. 809.

¹⁴ Finn, note 3 *supra*, 167.

¹⁵ *Id.*, 167-168.

¹⁶ [1967] 2 A.C. 46.

¹⁷ (1964) 112 C.L.R. 597.

As the interlocutory appeal in *Winthrop Investments Ltd v. Winns Ltd*¹⁸ illustrates, it remains clearly to be decided whether there are limits to the power of corporation in general meeting to absolve abuses of power by directors. Dr Finn urges, to this reviewer correctly, that where ratification by a majority of shareholders is given with the same intent as moved the directors, there may be a failure by the majority to act *bona fide* in the interests of the company as a whole.¹⁹ And, one may ask, was not the ratification in *Cook v. G.S. Deeks*²⁰ by the majority of shareholders (being the errant directors and their friends in another guise) treated by Lord Buckmaster as defective for this reason? This is what his Lordship appears to hold in the crucial passage.²¹

Somewhat more radical is the thoughtful and penetrating review of the conventional wisdom that directors have no fiduciary obligation to shareholders as distinct from the company itself.²² The powers to issue new shares, to register transfers and to direct forfeiture of shares operate directly upon actual or prospective proprietary rights of shareholders, yet directors are not accountable directly to the shareholders affected for any fraud on those powers. The truth is that the nineteenth century lawyers who fashioned from equitable materials modern "company law" were not really equal to the task; we continue to pay the price for it, with as the only panacea a deluge of legislation which is often ill-conceived and poorly drafted.

The appearance of short works by Professor Sheridan on fraud in equity²³ and by Professor Waters on the constructive trust²⁴ augured well for the development of specialist monographs on areas of equity the difficulty and importance of which dictated treatment more detailed and critical than that in the standard texts and less discursive than in the occasional article. This promise seemed not to have been fulfilled. Professor Sheridan's book has not gone into a second edition and the learning of Professor Waters now is absorbed in his tome on Canadian trusts. It is thus particularly pleasing to welcome Dr Finn's book, not only for its abundant virtues, but also for what one hopes will be a renewed impetus given to equity scholarship.

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¹⁸ [1975] 2 N.S.W.L.R. 666.

¹⁹ Finn, note 3 *supra*, 72-73.

²⁰ [1916] 1 A.C. 554.

²¹ *Id.*, 564.

²² Finn, note 3 *supra*, 64 ff. See now *Coleman v. Myers* [1977] 2 N.Z.L.R. 225.

²³ *Fraud in Equity* (1957).

²⁴ *The Constructive Trust: The Case for a New Approach in English Law* (1964).

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