2. Especially G. Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 *Law Q. Rev.* 463; P.D. Finn, "Confidentiality and the 'Public Interest' " (1984) 58 *A.L.J.* 497.
3. A.L.R.C. 22, *Privacy* (1983) 1, paras 827-862; Law Commission, England, Report No. 110, *Breach of Confidence* Cmnd 8388 (1981).
4. 17 & 18 Vict. c.125 (Eng.).
5. See *Astor Electronics Pty Ltd* v. *Japan Electron Optics Laboratory Co. Ltd* [1966] 2 N.S.W.R. 419, 424-5.
6. Consider *Robb* v. *Green* [1895] 2 Q.B. 315. And see *Doherty* v. *Allman* (1878) 3 App. Cas. 719, 720 *per* Lord Cairns L.C.
7. See H. McGregor, *McGregor on Damages* (14th ed. 1980) para. 293.
8. See G.H. Treitel, *The Law of Contract* (6th ed. 1983) 783.
9. A property analysis would also add nothing in the remedies area: Gurry, p.364 note 5.
10. [1967] 1 W.L.R. 923.
11. *Infra.*
12. [1965] 1 W.L.R. 1.
13. (1938) 5 *Legal Decisions Affecting Bankers* 163.
14. J.G. Fleming, *The Law of Torts* (6th ed. 1983).
15. [1975] A.C. 396.
16. P.15 line 27, omission of 'of' after 'Organization'; p.114, omission of quotation marks before footnote 17; p.124 line 2, 'drawn' for 'draw'; p.155 line 28, 'information'; p.157 line 22, 'be' for 'he'; p.170 line .3, 'to'; p.210, lines 24-5 'employer'; p.213, full stop before footnote 85; p.242 line 24, 'is' for 'in'; p.338 line 19, 'misled'; p.357 line 30, 'it' for 'if'; p.397 line 23, 'statement'; p.431 line 22, 'the' for 'this'; p.441 line 31, 'contemplated'; p.446 note 9 line 3, omission of 'be'.
17. Note 2 *supra.*
18. *Norwich Pharmacal Co.* v. *Customs and Excise Comrs* [1974] A.C. 133, 140.
19. *Lion Laboratories Ltd* v. *Evans* [1984] 2 All E.R. 417.
20. Gurry, Ch. 5.
21. Note 10 *supra.*
22. *Ibid.*
23. [1978] 1 W.L.R. 93, 111.
24. Note 10 *supra.*
25. Accord: Finn, note 1 *supra*, 163 note 43.
26. See Meagher, Gummow and Lehane, note 1 *supra*, paras 220-222.
27. *Id.*, *passim* and especially Ch. 2.
28. See especially *United Scientific Holdings Ltd* v. *Burnley Borough Council* [1978] A.C. 904, 924 *per* Lord Diplock. *Cf.* Meagher, Gummow and Lehane, note 1 *supra*, xi.
29. Note 10 *supra.*

The Law of Fiduciaries, by J.C. SHEPHERD, LL.B.(Osgood) LL.M.(Toronto), Barrister at Law (Ontario), (Carswell, Toronto, 1981), pp.i-xxix, 1-386, with Table of Cases and Index. Recommended retail price $51. (ISBN 0 459 34300 9).

This is not, in the ordinary sense, a treatise on the law of fiduciaries. Mr Shepherd is not concerned so much to state the law as he finds it as to propound, explain and defend a general theory of fiduciary obligation, built upon the case law (particularly the Canadian and American case law) but, if it were to be adopted by the courts, requiring considerable modification of the principles which the courts have developed in a number of the specific areas of law which the theory seeks to embrace. This is a bold undertaking: Mr Shepherd has set out to do that which a number of respected commentators[1] have said cannot be done, and which none has previously attempted. And, even if it were shown that the task is possible, it still needs to be demonstrated — for it is by no means self-evident — that it is a worthwhile undertaking, and that the theory which results is one which, if adopted, would improve upon the law as it stands.

The author undertakes these labours with enthusiasm, and does not hesitate to castigate, in passing, those commentators and judges who, however sound their "visceral" understanding of principle may be, have not displayed the analytical skill necessary to avoid the manifold analytical traps that beset the traveller on the path to an understanding of fiduciary obligations. It is difficult, in a short review, to summarise, so as to do justice to, nearly four hundred pages of vigorous argument, but it must be attempted. Mr Shepherd's basic proposition is that there is one principle by reference to which it is possible to ascertain whether, in any given circumstances, there exists a fiduciary relationship and a concomitant duty of loyalty. It is stated and developed in Chapter 6: it is that "A fiduciary relationship exists whenever any person acquires a power of any type on condition that he also receive with it a duty to exercise that power in the best interests of another, and the recipient of the power exercises that power" — as the author describes it, the theory of encumbered power. "Power", for these purposes, is not necessarily a "legal" power (such as a power of appointment or a trustee's power of sale) but any practical or *de facto* power; and, justifying the availability of restitutionary remedies, the power is to be regarded not merely as analogous to, but actually as, property of which the transferee, or recipient, is the legal owner and the "transferor" the beneficial owner. Courts should then apply a rebuttable presumption that the duty of loyalty with which the power is encumbered in favour of the beneficial owner is co-extensive, in its scope, with the power itself: in certain circumstances (where as a matter of policy self-reliance should be encouraged) the presumption will be rebutted, and the court will hold that the power cannot effectively be

encumbered as to its full scope (or possibly, presumably, at all).

This theory is capable of application, the author argues, to virtually all the apparently disparate categories of case where the term "fiduciary" has been used, and some others: to the cases traditionally described as involving the principles about conflict of interest and duty, including the "corporate opportunity" cases, to the cases where a fiduciary has sold to, bought from or otherwise dealt with this principal, to the "bribe" cases, to cases usually classified under the rubrics of undue influence and unconscionable bargain and even to cases of negligent misrepresentation. The law of confidential information, though analogous, is separate: there it is information, rather than a power, of which the recipient is the legal, and the communicator the beneficial, owner.

Having ascertained the existence of a duty, how does one determine whether it has been breached? Here, too, there is an all-embracing theory, stated as follows:

> In order to determine whether a fiduciary duty of loyalty has been breached, it is necessary in many cases to use presumptions, reverse onus provisions, special burdens of proof, and the requirement that certain facts be proved, in order to assist claimants in proving their claims. These evidentiary or procedural rules are required where the scope of a power's misuse, and the extent to which a fiduciary has the capacity to hide a breach, put a beneficiary at a disadvantage in litigating the issue (p. 126).

The theories for ascertaining whether a duty exists and whether a breach has occurred lead to a seven-step procedure to be followed by a court faced with the task of deciding an actual case, and the court is further guided in that task by a series of evidentiary rules to be applied in particular types of case; ten of these are summarised in Chapter 5 and developed in later chapters of the book.

That summary, incomplete as it is, will give some impression of what the author is about, and it also throws into relief some of the problems which the theory faces.

First, the author's proposed principles are at many points considerably distant from the law as it has developed (at least in England and Australia), and some of them are fundamental. For instance:

(a) Recent Australian cases on such disparate areas as corporate opportunity, undue influence and unconscionable bargains show no disposition to treat them as governed by a single set of overriding principles.[2]

(b) Certainly no court in Britain or Australia has ever attempted to follow anything like the detailed "methodology" suggested by the author for the decision of fiduciary cases. Nor, it is

suggested, is any likely to do so: the suggested process of reasoning (from page 137) just does not resemble what the courts are accustomed to do. One is tempted to repeat adages about logic being neither the life, nor the sole inspiration, of our system of law.

(c) More specifically, the proposition that a practical or *de facto* power is property, capable of being the subject of legal and beneficial ownership in the same way as a parcel of land, a chattel or a debt, which is fundamental to the theory, is, whatever one may be able to say about it as a matter of logic, quite opposed to received notions about those rights which are proprietary and those which are not.[3]

(d) Yet more particularly, the treatment of the effect of informed consent on what would otherwise be a breach of duty illustrates the difficulty — this reviewer would say impossibility — of successfully propounding a universal theory of any particularity. Obviously, "informed consent" does not, by itself, remove the taint of undue influence: the transaction must be proved (usually by evidence of independent advice) to be the result of the free exercise of an independent will. But, if the question is simply can a fiduciary, in that capacity, enter into a transaction in which he is personally interested, the answer is plainly "yes", if the person to whom the duty is owed, having been put in possession of all relevant information which the fiduciary has, and being *sui juris*, agrees; unless, quite apart from the mere relationship giving rise to the duty — *e.g.* trustee-beneficiary or director-company — there was as well, in the traditional sense, undue influence or other unconscionable means used to obtain the consent; certainly mere inequality of bargaining power does not vitiate such a consent. The attempt (at pages 104 to 108 especially) to impose the general theory here throws this well-established law into confusion. It also leads the author to overlook the important distinction[4] between a provision, for example, in a trust deed which permits a trustee to enter into a transaction, in that capacity, in which he is interested (the effectiveness of which there is usually no reason to doubt) and one which purports to permit the trustee to enter into such a transaction if he thinks his own interests justify it, however detrimental any reasonable trustee must consider it to the interests of his beneficiaries (which, because it contradicts a fundamental element of trusteeship, should never be effective).

(e) The treatment of negligent misrepresentation as falling within

> the ambit of the fiduciary theory adds further confusion, this time between principles of equity and the common law of negligence, and necessarily involves misreading, or disregarding, the speech of Lord Haldane in *Nocton* v. *Lord Ashburton*.[5] In this context, there may be mentioned the statements, in relation to sales by fiduciaries to their principals, that "as with the case of the purchase rule, the beneficiaries can also sue for damages" and that "these damages may be contractual in nature, but are more probably based on the idea that the breach of the duty of loyalty is a species of tort" (page 183).

And so one could continue. But, secondly and perhaps more importantly, there is the question whether any assistance is to be gained in understanding, rationalising or developing the law, from an exercise such as this. The author claims (page 88) that the answer is "yes", on two grounds. One is that, as philosophers (we are not, incidentally, given any reference to the philosophical debate) prefer an ethical system based on a single unified principle, so should we prefer such a principle in the law of fiduciaries because "by giving any broad area of human thought or of a particular discipline a particular label, we are intuitively stating that that area of thought or that discipline is an integrated whole" (page 90). (But is the proposition really self-evident? And, in any event, it is certainly possible to see very general notions of equity underlying the area of law with which the author deals: but not, it is suggested, any principles of a particularity comparable to those which the author propounds.) The second is that, if we categorise the cases into groups governed by different rules, we assume that "the entire law of fiduciaries is already on the table" (page 91, note 147) and thus stultify the future development of the law. But plainly that is not so, as a glance at the recent cases referred to above will illustrate. Indeed, the truth may well be that the development of the law is more likely to be both constricted and distorted if an attempt is made to gather the diverse areas of fiduciary obligation into one universal theory. Certainly, the law of fiduciaries has not been the easiest or most coherent part of equity; but this reviewer remains entirely unconvinced that the more cautious approach of commentators such as Sealy and Finn

is not a great deal more fruitful, in the end, than the interventionism of Mr Shepherd.

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FOOTNOTES

1. *E.g.* L.S. Sealy, "Fiduciary Obligations" [1962] *Cambridge L.J.* 69; P.D. Finn, *Fiduciary Obligations* (1977) 1.
2. *Commercial Bank of Australia Ltd* v. *Amadio* (1983) 46 A.L.R. 402; *Union Fidelity Trustee Co.* v. *Gibson* [1971] V.R. 573; *United States Surgical Corporation* v. *Hospital Products International Pty Ltd* [1983] 2 N.S.W.L.R. 157; see also, incidentally, the observations of Davey J.A. in *Morrison* v. *Coast Finance Ltd* (1965) 55 D.L.R. (2d) 710, 713.
3. See the discussion in R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane, *Equity — Doctrines and Remedies* (2nd ed. 1984) ch. 4.
4. See Maurice Cullity, "Judicial Control of Trustees' Discretions" (1975) 25 *U. Toronto L.J.* 99, 115-117.
5. [1914] A.C. 932, 958.

The Law of Intellectual Property, by STANIFORTH RICKETSON, B.A., LL.B. (Melb.), LL.M. (Lond.), Senior Lecturer in Law, University of Melbourne (Law Book Company Limited, Sydney, 1984), pp. i-clxxv, 1-1149, with Table of Cases and Indices. Cloth recommended retail price $95.00 (ISBN 0 455 204179), limp recommended retail price $69.50 (ISBN 0 455 20553 1).

The author's stated purpose is to bring together, within the space of one volume, all the Australian law relating to the protection of intellectual property. It is high time this was attempted. The statute law in this country now differs in many respects quite markedly from that in the United Kingdom on such subjects as patents, designs and trade marks; and judicial interpretation continues to reveal divergencies where one might not have expected them, as indicated, for example, by the treatment of "trafficking" in trade marks by Aickin J. in *Pioneer Kabushki Kaisha* v. *Registrar of Trade Marks*[1] and by the House