

BOOK REVIEWS

FIDUCIARY OBLIGATIONS, by *P. D. Finn* (Law Book Company, 1977), pp. i-xxxvii, 1-299.

This is an extremely stimulating book which deserves close study by all who are really interested in the problems of fiduciaries and their duties, and which will also repay study by those anxious to find an intelligible way through a subject at first sight baffling and diffuse. The stimulation comes from it being a new presentation of the subject, the reliability from the author not claiming for it more than its due.

The title is "Fiduciary Obligations", and not "The Fiduciary Relation", and it is important to appreciate why. The premise is that the term "fiduciary" is descriptive of situations and means nothing in itself either in definition or in consequence. We should not therefore seek to analyse fiduciary relations in the hope of discovering magic formulae with which to explain them, but rather examine the range of duties imposed on persons in particular situations to have regard to the interests of others and from the sum of such duties determine the extent of any particular fiduciary relationship that will have resulted. It is a matter more of quantum than of quality. The book does not, however, merely restate fiduciary duties in this way. Despite the fragmented approach, the author believes it is possible to discern principles within which the present law can be contained (p.5). Such principles may not always reflect the historical evolution of the law, but can legitimately be seen as its outcome. The whole law can not be subsumed under them, but they will be valid and useful so far as they go. To demonstrate this he discusses in Part I situations in which powers have to be exercised in a fiduciary manner, and in Part II situations in which persons have to behave more generally with regard to others' interests.

A power is fiduciary when it must be exercised with the interests of others in mind. But generally those others have no right to control its exercise by agreement or otherwise and the person exercising the power is alone responsible for deciding how to do so. It is the role of the fiduciary obligation to limit the freedom of action of the person exercising the power and to provide criteria for review of his actions by the courts. The extent of the fiduciary obligation is determined by looking at both the power itself and the position, or office, of the person exercising it. The main (not exclusive) examples of fiduciaries are given as directors, trustees, liquidators, personal representatives, trustees in bankruptcy, tenants for life, and court-appointed receivers and managers; and eight duties are suggested as embracing the range of responsibilities laid upon them in varying degree when exercising their powers. Four of these duties require the fiduciary to exercise his powers himself—he must not delegate, must not act under another's dictation, must not fetter his discretion, and must consider whether to exercise his powers. Four identify his duty to the beneficiaries—he must act for their benefit and not for his own or for others', must treat beneficiaries equally when their rights are equal, must treat beneficiaries with unequal rights fairly, and must not act capriciously or totally unreasonably. Such duties are general rather than specific injunctions but can nevertheless provide grounds for a court to investigate a particular exercise of a power.

In Part II eight duties are also suggested as providing a broad, and again not exhaustive, picture of equity's supervisory jurisdiction over those bound by existing fiduciary ties. The duties here are more disparate: not to influence others unduly, not to misuse property, not to misuse information given in confidence, not to purchase property dealt with in confidence, not to allow conflicts of duty and interest, not to allow conflicts between duties, plus two specific duties concerning leases and management of businesses. The term "constructive trust" is not employed, and trusteeship "de son tort" not considered.

I have considerable sympathy with the author's general approach, and a very great regard for his scholarship and technique. He ranges widely but always skilfully. There is real value in building up the content of a particular fiduciary relationship from rules contained in decisions, without anticipating the result by reliance on over-worn terminology. There is real value too in looking at the varying duties of fiduciaries as part of a more general picture, to see where resemblances and differences lie: the contrast to bailment comes out very clearly in this way (p.9). It is interesting, for example, to see *Tate v. Williamson* ((1866) 2 Ch. App. 55) in the context of improper purchases (ch.20 on this topic is very wide-ranging but usefully so), and often very revealing to see cases on trustees and on company directors put together. Consideration of a number of fiduciary offices together makes *Percival v. Wright* ([1902] 2 Ch. 421) seem odder than ever, and so does *Butt v. Kelson* ([1952] Ch. 197) when set against *Re Brockbank* ([1948] Ch. 206). Both the law of trusts and company law seek to set an outer limit on activity not ordinarily controlled by the courts, and it is interesting to see where company law diverges in method. Generally it is the discussions of company law that stimulate the most, as in chapter 13 on the duty to treat beneficiaries of different classes fairly. "By approaching review of a fiduciary's actions through these duties, the courts have been relieved of the impossible task of defining exhaustively what is meant by the 'interests of the beneficiaries' in any particular case—though as will be seen in the case of companies, the courts, goaded on by the text writers, have descended into this morass and with dubious benefits to company law" (p.16).

There is, of course, a danger of over-stating analogies, but this is admirably safeguarded against throughout the book. The tenant for life under the Settled Land Acts seems the most troublesome character and perhaps provides only a poor analogy to other fiduciaries. Cases are cited fairly and not twisted to support propositions for which they are not really authority. On the trusts side, however, resort has quite frequently to be had to general statements of law rather than binding decisions.

But while I agree with the general approach, and over and over again with the way in which individual areas of law are discussed, issues presented, and controversies dealt with, I am less sure of the extent of the author's whole contentions and what exactly he has shown. I wish he had provided more guidance on the meaning of certain of the words he uses in stating his contentions. Equity may very well have "evolved a series of self-contained obligations" linked by some generality of "principle", and furthered by certain "duties", but what does it mean to assert that equity "has established and formalized a new and coherent head of law" (p.2)? Fiduciary obligations are becoming clearer to understand, and we are certainly in the author's debt for enlarging the area of coherence. But I am not sure what precisely beyond this has been

demonstrated. There is something instructive too in comparing the two parts of the book. Part I is the shorter, but though the end-product in terms of rules may be somewhat thin, it does in 68 pages demonstrate how, for the exercise of fiduciary powers, there could be coherent rules. There is a core to this part of the book which seems lacking in the 191 pages of Part II. The duties of fidelity and the materials that illustrate them are still disparate despite the author's very interesting "groupings" of them (p.78). It is less rewarding to see them exposed to the same technique; though this may just be the author being more far-sighted than the reviewer, to whom Part II, much more than Part I, gives the impression of valuable discussions of some separate areas of liability linked by common factors and techniques, but not by more. The basic contention that a person is not a fiduciary until a particular duty (or duties) is laid upon him and is then a fiduciary only for the purposes of that duty (or duties) is, of course, as true in Part II as in Part I, but serves less well to unify the chapters or to provide a base for conclusions. It is not so much the novelty of some of the material (as in the interesting ch. 24 on harming an "employer's" business) as the bulk of the materials in proportion to their "common threads". The author must also have had some problems, not only of what topics to omit or to consign to an appendix (as is the account of special powers of appointment), but how much to say on topics that had to be mentioned. Overall, it may be that as much gain derives from the emphasis the author rightly places in Part II on Lord Upjohn's views on "quantum" of duty under a fiduciary obligation in preference to the "necessary consequence" views of some other members of the House of Lords (ch. 21). Certainly, it is well brought out that the subject contains many issues of fact masquerading as issues of law; e.g., p.233 on the extent of a fiduciary's undertaking in a conflict of duty and interest situation—an aspect much too often under-emphasized and sometimes ignored.

I do not want my reservations on what is proved overall to detract from my welcome for the book. Discussion throughout is of the highest standard, and interesting suggestions abound. I only hope that the unusual assembly of the chapters does not cause the many useful accounts of particular areas to be less widely read than they deserve—an inevitable problem in a book with a dominant new theme. One can perhaps single out some relatively unfamiliar topics which have been excellently researched; the account of the time at which a discretion should be exercised (p.27), of whether an action for damages will lie against a fiduciary personally when a contract he has entered into as fiduciary will not be enforced against trust assets (p.31), of measure of profits (ch.18), of bribes (p.214), and of purchases of reversions (p.264).

There are, of course, a number of points on which issue could be taken. In so controversial an area as this it would be disappointing if it were not so; and moot points are nowhere dodged, though the author's own views are more frequent on technical than on more general policy aspects. I am doubtful, however, about the implications of *Holder v. Holder* ([1968] Ch. 353) as discussed at p.184. Obtaining consents is important, but so is the notion of when a breach of duty has occurred; when it has not occurred, consents are no longer the critical factor. Again, the right solution to review of fiduciaries' discretions that seem, without explanation, capricious may be the development of a procedural possibility, along the lines of that in *Wallersteiner v. Moir* ([1975] Q.B. 343), whereby in excessively odd

cases fiduciaries could be made to disclose reasons in confidence—more perhaps could be made of this topic (see p.42 and the rather brief ch. 14). I would not wish a plaintiff in an action based upon breach of confidence to be able to elect his remedy (*cf.* the *Peter Pan* case ([1963] 3 All E.R. 402) on this). The final decision on the form of remedy should be with the court as in *Seager v. Copydex* ([1967] 1 W.L.R. 923, [1969] 1 W.L.R. 809), and I would agree that in some cases damages for loss will be appropriate despite the attempt of Professor Jones (see (1970) 86 *L.Q.R.* 490-491) to exclude damages from what he would prefer to see as a purely restitutionary action, an unnecessarily restrictive course which the author rightly avoids. His suggestion that the difficulty in principle in awarding damages for breach of a purely equitable obligation can be overcome through *Norton v. Ashburton* ([1914] A.C. 932) scarcely helps however, as the implications of that case are far too uncertain.

Remedies are in fact not the book's strongest point. There are a number of passages on this aspect (*e.g.*, p.235) which could be developed. However, the author can be forgiven for not wanting to get involved in the endless problems of the remedial consequences of fiduciary obligations. Dispositions to third parties following undue influence may not, however, be as straightforward as pp. 7-8 suggest, though there is a fuller account of third party problems in breaches of confidence. Again, the question whether a beneficiary can recover from a fiduciary who has made a saving to himself through a breach of confidence is excellently discussed, but the links to other areas where analogous problems arise are only sketched in (*e.g.*, p.128 on waiver of tort). Argument could, of course, be carried on *ad infinitum* about *Regal (Hastings) Ltd. v. Gulliver* ([1942] 1 All E.R. 378); the author rightly keeps the abuse (or misuse) issue as distinct as it can be from the possibility of conflict issue and is critical of *Phipps v. Boardman* ([1967] 2 A.C. 46). But if in the latter case Lord Cohen has to be added to Lord Hodson and Lord Guest to discover the *ratio decidendi* (see Megarry J. in *Hounslow L.B.C. v. Twickenham Garden Developments* [1971] Ch. 233, 254), the *ratio* of the case may be very narrow indeed. The decision was certainly not allowed to stand in the Privy Council's way in the recent case of *Queensland Mines v. Hudson* (1978). *Peso Silver Mines v. Cropper* ((1966) 58 D.L.R. 1) is rather shortly treated, and we may be getting one of our comparatively rare glimpses of the author's views on general policy aspects in his statement that the propriety of the decision in *Industrial Development Consultants v. Cooley* ([1973] 1 W.L.R. 433) is impossible to dispute. We are told (p.240) to pay more regard to the extent of the specific duty undertaken by the defendant to the plaintiff, but in that case it included no term expressly forbidding the defendant to engage in similar commercial activities after ceasing employment with the plaintiff. If the defendant had told the plaintiff straightforwardly that he was going to resign in breach of contract, would the plaintiff have got more than the damages it could prove it had lost as a result? And if that is right, is the decision just in making the defendant disgorge his entire profit? It is perhaps not right to consider liabilities without remedies in this area, where the line between breach of contract and breach of fiduciary duty can become very thin.

The book deals primarily with English cases and does not range far into American or Canadian materials, but there is wholly adequate citation of Australian authorities. It is an excellent and imaginative account of a difficult area and can not do other than influence the law for good. The

printers have done a first-rate job also; indices are good and few misprints were noticed, mainly in footnotes.

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TRADE PRACTICES LAW, Vol. I INTRODUCTION AND RESTRICTIVE TRADE PRACTICES, by *B. G. Donald and J. D. Heydon* (Law Book Company, 1978), pp. i-lix, 1-508.

The *Trade Practices Act, 1974-1977* (Cth.), is, as the authors of this work state in the Preface, "a complex and little understood body of law. . .". It is a body of law which operates over a wide range of situations. The Act is not just a law for "big business". It applies at all levels of commercial transactions and to many transactions which would not be widely regarded as commercial. It has a complex interaction with state law. Many situations previously regulated mainly by common law and state statute law come within its scope.

For reasons such as these the Act is one with which the legal profession as a whole should be familiar. It is not a specialist's statute, although in many cases specialist advice will be required. The barrister or solicitor in general practice who is unaware of its general scope and effect runs a real risk of giving poor advice. Many members of the profession would not have studied trade practices law in their student days. For many of those who did, what they studied is now outdated. For all these reasons it is important that good quality texts be available to the profession.

This work is to be in two volumes, the second of which has not yet been published. Volume I deals with the origins of the Act, procedures under the Act, constitutional questions raised by it, and Part IV (restrictive trade practices). Volume II is to deal with Part V (deceptive practices and consumer practices), Part X (shipping provisions), and remedies.

On the basis of Volume I the work has a number of features which should make it attractive to a wide range of buyers. It is up to date (taking account of developments to September 1977). In an area of law developing as rapidly as this one it is important that there be available to the profession texts which assimilate recent developments.

It contains a helpful consideration of constitutional issues. With a statute such as this constitutional matters must be considered at all times. The Act is based on several different constitutional powers and its proper understanding requires some awareness of the scope and limits of those powers. While the detailed exploration of those matters may be a matter for the specialist, lawyers in general practice will need to be aware of them.

The book grapples with the economic theory underlying the Act. Chapter 3 contains a general discussion of the economist's concept of "competition" and "market". These concepts underlie much of what the Act does. In the following chapters dealing with particular provisions of the Act the law is related to the relevant economic theory and facts. This is not to say that the book attempts to be a work of law *and* economic theory. Rather, it attempts to relate the law to the relevant economic theory. There are obvious dangers in doing so, but by and large the authors appear

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to have achieved a desirable balance. Certainly it is helpful to see the legal framework related to the economic framework.

In their treatment of the substantive provisions of the Act the authors, as one would expect in a work of this size, embark upon a detailed and critical analysis of the Act. They grapple with possible future developments in its interpretation and application. This is the real meat of the work. Only time (and judicial comment) will determine the value and reliability of this material, and it would be presumptuous to attempt to judge a work of this complexity in a review. It should be said, however, that the legal analysis appears to be comprehensive, thorough and thought provoking. The work is likely to be of great assistance to specialists and teachers in the field.

One minor criticism which might be made of this part of the work is the absence of an opening outline or closing summary in the separate chapters dealing with restrictive trade practices. Such an outline or summary would assist the general practitioner. It would also help in following the thread of the authors' argument as they deal with the frequently intricate provisions of the Act.

One other slight criticism of this part of the work: it is inevitable that a text dealing with an Act as complex as this be itself complex. However, at times the treatment of specific sections of the Act was a little confusing. After reading the text, one was well aware of the problems lurking within a section, but was sometimes left without a clear picture of the basic application of the section. Again, this is a limitation more from the point of view of the general practitioner than that of the specialist or teacher. There are, of course, texts readily available which contain a "Cook's Tour" of the Act, and the authors might fairly say that it was not their aim to provide such material.

A good feature, and one which is possible only in works of some size, is the inclusion of analysis (sometimes quite detailed) of decided cases. The authors deal with cases from a number of jurisdictions both to illustrate their reasoning and as part of the exposition of the law. The work provides, in this way, a most helpful guide to the case law. The authors also make use of factual examples to develop and illustrate their arguments. This again is something which is helpful in as complex an area of law as this.

The book contains an adequate index, a very detailed table of contents, tables of cases and statutes and a bibliography. Footnote material is incorporated in the text—which results in a tidier page lay-out but results in the text containing material which some may find distracting.

It is not a beginner's book by any means, but any practitioner who wishes to be in a position to identify a trade practices issue and assess the need for specialist advice will find it of value. Taking all things into account this is a work which should be of value to the general practitioner, the specialist, the teacher and many others. In this rapidly developing area of law any text runs the risk of becoming outdated early in its life. This work is one which, because of the depth of treatment of the subject, is less prone than others to that risk. At the current price of \$34.50 for a hard bound volume it represents good value.

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HANDBOOK OF BIBLIOGRAPHIES ON THE LAWS OF DEVELOPING COUNTRIES, by *Ralph Lansky* (Overseas Documentation of the German Overseas Institute Foundation, Preliminary Edition, Hamburg, 1977), pp.i-x1, 1-469.

This publication is the second preliminary edition of Dr. Lansky's annotated list of some 743 bibliographies relating to the legal literatures of developing countries. Copies may be purchased at a price of D.M.30 (about \$A13) from: Uebersee-Dokumentation im Verband der Stiftung Deutsches Uebersee-Institut, Neuer Jungfernstieg 21, D-2000, Hamburg, West Germany.

Researchers wishing to gain access to the legal literature of developed countries have at their disposal well-known and readily available bibliographies such as the invaluable Index to Legal Periodicals. The well-known works by Szladits are a further source of information should this be needed. It is perhaps not generally appreciated that many useful bibliographies exist which can serve as guides to the legal literature of developing countries. Although many of these used to be inaccessible, modern means of communication have greatly alleviated that difficulty. Most of them are still not well-known and would be overlooked, but for Dr. Lansky's valuable handbook. The book covers the states and territories of Africa, Asia (excluding Japan and the Communist states), Oceania and Latin-America. It lists, with useful annotations, 122 bibliographies covering several regions and 621 bibliographies relating to the legal systems of individual jurisdictions. Coverage is comprehensive (even mimeographed bibliographies have been included), although bibliographies published before 1920 and those of less than three pages in length have been excluded.

Explanatory introductions in German and English set out the method of arrangement and the scheme of annotations. Although the actual annotations are in German, many of the entries themselves are in the original English and so are many explanations of the contents of bibliographies. The German annotations follow a simple, standard pattern and should present Australian and New Zealand law librarians and researchers with no difficulties of understanding. Bibliographies of particular significance, which should be acquired by all law libraries holding comparative materials, are marked with asterisks. A symbol at the foot of each entry refers the reader to one of 38 libraries where the particular bibliography is available.

This book is such an important and useful research tool that no Australasian law library of any size can afford not to acquire it.

The publication of this work has been arranged by the German Overseas Institute Foundation in co-operation with the Working Group on Foreign Law of the Association for Law Librarianship and Documentation in German-speaking Countries. A final, further improved edition is planned

for 1980. In the meantime, Dr. Lansky would be grateful for any comments and suggestions for supplementation or other improvement. His address is as follows:

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